

**Actors and Accolades:
Examining the Rights of Actors in Films in India from a
Copyright Perspective**

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Abstract

Recognition and protection of cinematograph film under the Indian Copyright Act, 1957 (hereinafter “The Act”) does not address the concerns of Actors. The practical collaboration in a film of producers, directors, scriptwriters, actors, music composers and others stands undermined in the case of actors. This is so as the current copyright regime in India emphasises only on the rights of producers and neglects the rights of others, specially actors. The inclusion of actors in the definition of performers does not confer rights related to copyright as these rights of copyright and related rights (including performers rights) are related but different. Though introduced in 1994, the rights of performers were limited in scope. With the intention of strengthening the Rights of Performers, Amendments were made in the Act in 2012. However, all the amendments were not applicable to the actors in films as they retained the earlier provision relating to performances in films, which stated “that once a performer (actor) has, by written agreement, consented to the incorporation of her performance in a cinematograph film she shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer’s right in the same film.” The rights of the actors were hence retained with and transferred to the producer. Solace is found in the proviso to section 38A (2) of The Act which states that “notwithstanding anything contained in this subsection, the performer shall be entitled for royalties in case of making of the performances for commercial use.” This is unexplored in the Indian Courts and thereby, the current provisions do not seem to offer much assistance to actors working in films.

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There are also the serious allegations of exploitation of actors, especially those who are not famous. As the largest movie industry in the world, performers in the Indian movie industry receive accolades the world over, however, they continue to work without adequate statutory protection. Limited scholarly work in this area has propelled the need to address all the concerns that actors of films in India face vis-à-vis copyright law in this paper. The paper will include comparative studies with the rights of actors of films in three jurisdictions, France, UK and USA. Accordingly, suggestions will be provided to strengthen the rights of actors of films in India.

Keywords- *Cinematograph, Rights of Action in films, Performer's Right, Indian legal framework*

I. Introduction

Cinematograph film is one of the subject matters recognised and protected under the Indian Copyright Act, 1957 (The Act). A film is a work of collaboration wherein producers, directors, scriptwriters, actors, music composers and others contribute to create. However, the current copyright regime in India emphasises only on the rights of producers and neglects the rights of others, specially actors, who are as involved in the film making process. Even though actors of cinematograph films comes within the definition of Performers provided under The Act the rights granted to actors are related to copyright, but different.

The rights of performers were for the first time introduced in the Indian legislation in 1994. However, the rights were very limited in scope. With the intention of strengthening the rights of performers, certain important amendments were made in 2012. However, the amendment did not make changes that applicable to the actors as the earlier provision relating to performances in films was retained, which stated that once a performer (actor) has, "by written agreement, consented to the incorporation of his performance in a cinematograph film he/ she shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film." As a result, this provision transfers all the rights of the actor to the producer. The only ray of light perhaps was the new provision in the form of proviso to section 38A (2) which stated that "notwithstanding

anything contained in this sub-section, the performer shall be entitled for royalties in case of making of the performances for commercial use.” In spite of the aforementioned provision, there are reports which state that the current provisions do not seem to offer much assistance to actors working in films.³ There are serious allegations of exploitation of actors, especially those who are not have enough bargaining power as they are have not achieved stardom.

This paper will be an attempt to address all the concerns that actors of films in India face vis-à-vis copyright law. The paper will include comparative studies with the rights of actors of films in three jurisdictions, ie, France, UK and USA. Accordingly, suggestions will be provided to strengthen the rights of actors of films in India.

II. International Conventions and Treaties on Actor’s Rights (Fixed in Audio Visual Work)

A. Rome Convention, 1961

The first international convention to address the rights of performers (including actors) was the Rome Convention of 1961 (The Convention). Article 3 (a) of The Convention defines performers as “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.” The rights granted to the performers, under Article 7 is for minimum protection of performers including preventing parties without consent the “(i) broadcasting and the communication to the public their performances (an exception is when the performance is broadcast or communicated to the public that is already a broadcast performance or is made from a fixation) (ii) fixation of their unfixed performance (iii) reproduction of the fixation of their performance if the original fixation was without their permission; or the purpose for which it was made was entirely different from which the consent was taken or if the original fixation was for fair use and

³ Copyright Amendments, 2012: A Fair Balance?, Conference Report, NUJS-CUSAT Conference, NUJS, Kolkata, November 27-28 2012) p. 10, is <https://nujs.edu/downloads/nujs-cusat-conference-2012.pdf>

permitted use as given under Article 15 of The Convention, but subsequently reproduced for other purposes.”⁴

However, Article 19 of The Convention comes as a huge disappointment for actors of audio-visual works as it states that irrespective of what The Convention states, if the performer consents to the inclusion of their performance in a visual or audio-visual fixation, then the rights given under Article 7 will have no application.⁵

B. WIPO Performers and Phonograms Treaty, 1996

After 1961, the next convention that addressed performers rights is the WIPO Performers and Phonograms Treaty, 1996 (WPPT). WPPT deals with some important provisions, such as Article 5 that addresses the moral rights of performers. These moral rights so granted are right to paternity and right to integrity. However, Article 5 does not mention audio visual performances, rather it talks about live aural performances or performances fixed in phonograms.

Other provisions of WPPT include economic rights granted to the performers for their performances fixed in phonograms and includes right of reproduction, right of reproduction, right of distribution, right of rental and right of making available. Regrettably, it is stated clearly in the provisions that these rights are limited to performances fixed in phonograms and does not extend to audio-visual fixations such as movies.⁶

⁴ For more details, see, Summary of the Rome Convention for the Protection of Performer, Producers of Phonograms and Broadcasting Organization, 1961, is https://www.wipo.int/treaties/en/ip/rome/summary_rome.html#:~:text=Resources,Summary%20of%20the%20Rome%20Convention%20for%20the%20Protection%20of%20Performers,in%20broadcasts%20for%20broadcasting%20organizations.

⁵ Full text of the Rome Convention, 1961 (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on October 26, 1961), (Mar. 19, 2021) <https://www.wipo.int/treaties/en/ip/rome/>

⁶ Full text of the WIPO Performers and Phonograms Treaty, 1996, is <https://www.wipo.int/treaties/en/ip/wppt/>, And Summary of the WIPO Performers and Phonograms Treaty, 1996, https://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html

C. Beijing Treaty on Audio-Visual Performances, 2012

The importance of the Beijing Treaty on Audio-Visual Performances, 2012 (The Beijing Treaty) is perhaps the inclusion of a provision that address the moral rights of a performer of a live performance or performance in audio visual, wherein they shall retain their moral right to paternity in the work, and against distortion even after transfer of their economic rights. There are quite a few rights granted to the performer of audio visual works from Article 7 to Article 11 under The Beijing Treaty, which includes reproduction, distribution and rental rights, right of making available, broadcasting and communication rights.⁷

Article 12, however, dilutes the rights of the performer to an extent by stating that a member state may include a provision in their law whereby if a performer consents to fix their performance in an audio visual work, the rights from Articles 7 to 11 could be transferred to the producer of the audio-visual work. The saving grace is that The Beijing Treaty states that such transfer has to be in the form of a contract by both parties or by their authorized representatives.

Article 12(3) of The Beijing Treaty redeems the rights of performers by stating that irrespective of such transfer of rights under Article 12,⁸ “the national law or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance,” including right of making available, broadcasting and communication rights of their performance.

⁷ Full Text Of The Beijing Treaty On Audio-visual Performances, 2012, (Mar. 19, 2021) <https://www.wipo.int/treaties/en/ip/beijing/>

⁸ Article 12 (1) states that: “A contracting party may provide in its national law that once a performer has consented to fixation of his or her performance in an audio-visual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this treaty shall be owned or exercised by or transferred to the producer of such audio-visual fixation subject to any contract to the contrary between the performer and the producer of the audio-visual fixation as determined by the national law. (2) a contracting party may require with respect to audio-visual fixations produced under its national law that such consent or contract be in writing and signed by both parties to the contract or by their duly authorized representatives. (3) independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this treaty including as regards Articles 10 and 11.”

III. Treatment of Performers and their Rights: National treatment in USA, UK and France

Actors and the producer's legal relationship varies as per different legal systems. In countries which follows the copyright system, it is the producer who has the rights. However, in countries that follows the author's rights system, it is the actor as the creator of his work, who gets the right. Authors right system are followed mostly in civil law countries. The main belief of the authors right system is that since creations can emanate only from the human mind, hence only a natural person can be a copyright author as opposed to copyright system which was followed mainly in common law countries which believes that anyone who can invest for the created works can be copyright author including legal persons other than natural persons.⁹ It is a natural corollary that authors rights system supports moral rights whereas copyright system frowns upon moral rights. In many countries today, a hybrid system is followed which is a blend of authors rights as well copyright system. These countries give copyright ownership to legal persons as well provides for moral rights to copyright authors. However, it is important to note that the contract is the most important document to determine the relationship between actor and producers irrespective of the legal system they follow.¹⁰ Keeping in mind the aforesaid legal positions, the countries that are looked into in this paper are United State of America (USA) which follows the system of work for hire, France (author's rights) and United Kingdom (hybrid system).

A. The American Position

Sections 1101 and 114 of the Copyright Act, 1976 are the provisions that deals with performers' creative rights in US. Section 1101 allows performers engaged in a live musical performance to ask for remedies for copyright infringement against any person who, without their consent, "(1) makes an aural or audio-visual recording of the performance, (2) communicates to the public the sounds, or sounds and images, of the performance, or (3) traffics in

⁹ LIONEL BENTLY AND BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 32 (Oup, New York: 2009).

¹⁰ Katherine Sand, *Managing Performer's Rights: The Role of Contracts*, WIPO MAGAZINE (August 2012), (Mar. 19, 2021), https://www.wipo.int/wipo_magazine/en/2012/04/article_0002.html.

unauthorized recordings of the performance.” This provision does not exactly deal with actors whose work is included in audio-visual works. Section 114 addresses statutory license for digital music transmissions that is linked to sound recordings, and establishes a limited right to public performance royalties for sound recording artists, again not related to actors.

Except these two provisions, the copyright law does not deal with the rights of performers. Hence, for the protection of rights contracts are indispensable.¹¹ However, in most cases the actors are at a lower bargaining position, beyond the collective bargaining agreement’s provisions and are barely able to get anything more than the minimums guaranteed by collective bargaining agreements.¹² If the actors are not part of such groups, the minimum protection is also not available.¹³

USA has signed The Beijing Convention on audio-visual performances. The Beijing Convention mandates moral rights to audio-visual performers and royalty rights even after transfer of economic rights. These rights, unlike other rights of audio visual performers cannot be transferred to producers. Till date, however, US laws have not complied with the provisions and it will be interesting to keep track of USA’s future course of action.

B. Position in United Kingdom

The Copyright, Designs and Patents Act, 1988 (CDPA) in the UK included rights of performers as mentioned in the Rome Convention, 1967. Since the Rome Convention did not include performances relating to audio-visual works, CDPA also did not recognise works of audio-visual performers. Subsequently, UK signed The Beijing Convention and hence is under an obligation to recognise the rights of actors in audio-visual works that should in effect lead to the amendment of the definition of performer and ensure moral rights of paternity and against distortion, if not the other economic rights for audio-visual performances (refer to the discussion of the Beijing Treaty included in Part I).

¹¹ *Id.*

¹² Mary La France, *Are we Serious about Performer’s Rights?*, 5(1) SCHOLARLY WORKS 1180 (2015).

¹³ *Id.*

CDPA lists out rights of performers in the form of proprietary, non-proprietary and moral rights to the performers. Proprietary rights are fully transferable, while non-proprietary¹⁴/quasi proprietary¹⁵ rights are not. Also, two moral rights, ie, right to be identified as a performer and right to object to derogatory treatment of the work are included in the CDPA. These moral rights though nonassignable,¹⁶ can be waived.¹⁷

The property rights under CDPA can be broadly divided into four, reproduction right (section 182A), distribution right (section 182B), rental right and lending right (section 182C) and making available right (section 182CA). Section 182A states that anyone who makes a copy of a recording which includes the performance of the performer without his/ her consent is infringing the rights of the performer. Section 182B makes issuing copies of the recording of the performance without consent an infringing act. Section 182C provides that if anyone rents or lends to the public any copies of the recording of the performance, then will be considered to be an infringement. Under section 182 CDPA, the right of making available is infringed if a person without the consent of the performer makes available to the public a recording of the

¹⁴ Initially performers' rights could not be assigned and were not granted property status. See, generally, Jayadevan S. Nair, *Performer's Rights in India: A Study with Special Reference to the Audiovisual Industry*, (2005), <https://shodhganga.inflibnet.ac.in/handle/10603/68019>

¹⁵ WILLIAM CORNISH, DAVID LLEWELYN AND TANYA APLIN, *INTELLECTUAL PROPERTY* 586 (Sweet & Maxwell, London: 2010).

¹⁶ 205 L CDPA states as follows: "Moral rights not assignable the rights conferred by this chapter are not assignable."

¹⁷ 205 J CDPA states as follows: "Consent and waiver of rights (1) it is not an infringement of the rights conferred by this chapter to do any act to which consent has been given by or on behalf of the person entitled to the right. (2) any of those rights may be waived by instrument in writing signed by or on behalf of the person giving up the right. (3) a waiver— (a) may relate to a specific performance, to performances of a specified description or to performances generally, and may relate to existing or future performances, and (b) may be conditional or unconditional and may be expressed to be subject to revocation, and if made in favour of the owner or prospective owner of a performer's property rights in the performance or performances to which it relates, it shall be presumed to extend to his licensees and successors in title unless a contrary intention is expressed. (4) nothing in this chapter shall be construed as excluding the operation of the general law of contract or estoppel in relation to an informal waiver or other transaction in relation to either of the rights conferred by this chapter."

performance of the performer who may access the recording from any place or time chosen by them.

The non-proprietary rights are right of fixation and broadcast of a live performance, public performance and broadcasting by means of recording made without consent and dealing in illicit recording. Section 182, CDPA states that if without the consent of the performer, anyone makes a whole or substantial recording of a live performance, or do a live broadcast or makes a whole or substantial recording of the broadcast of the live performance, it will be held to be infringement of the performer's rights. Under section 183, CDPA, if any recording is made of a performance of a performer without his/ her consent and the same is shown or played in the public or communicated to the public, it becomes an infringement. Under section 184, CDPA, it is considered to be an infringement if a person imports into UK any performance which was an illicit recording. It is also applicable in cases if someone sells, gives on hire, offers for sale or hire any such illicit recording.

Section 191 F, CDPA, provides for rental rights of performers. There is presumption of transfer of the rental right where there is a film production agreement, unless there is an agreement to the contrary. However, the next provision, that is, section 191 G, CDPA, provides that in case a performer transfers "his/ her rental right concerning a sound recording or a film to the producer of the sound recording or film, he/ she still retains the right of equitable remuneration for the rental rights." This right is unassignable except to a collecting society for the purpose of enabling it to enforce the right on his/ her behalf.

Moral Rights of Actors

The CDPA recognises two moral rights, the first one is right to be identified as an author (right of paternity). Section 205C, CDPA, states that "whenever a person (a) produces or puts on a qualifying performance that is given in public, (b) broadcasts live a qualifying performance, (c) communicates to the public a sound recording of a qualifying performance, or (d) issues to the public copies of such a recording, the performer has the right to be identified as such. So, clauses (a) and (b) clearly states that it is performance in public and (c) and (d)

are related to sound recording.” Hence moral right to paternity is not extended to performers in films, that is, actors.¹⁸

The second moral right included in the CDPA is the right to integrity. It is only granted to a performance that is live broadcast or performed in public or communicated to the public by means of a sound recording,¹⁹ again this moral right is not granted to actors.

Copyright Societies and Other Collective Bodies for Performers in the United Kingdom

Collective bodies play an important part in strengthening the rights of the performers in the UK. The trade union for actors in the UK is titled Equity. Equity, initially, was a union for stage actors before incorporating other actors, singers, dancers, stunt performers, circus artist etc. Equity formulates minimum terms of employment in the form of collective bargaining agreements which the producer has to include in the contract that they enter into with the actors. These agreements try to lay down certain provisions to regulate the working relationship between producers on one hand, and the actor and performers on the other hand.

Copyright societies for actors in the UK, the British Equity Collecting Society (BECS) was established in 1988 and is the only collective management organisation for performers in audio-visual works in the UK. The important task of BECS is to collect remuneration as per the Memorandum and Articles of Association of the society on behalf of its members. This entails collection of any income or remuneration payable to the performer for any rental of a sound

¹⁸ Jayadevan S. Nair, *Supra* note 12 at 67. See also, Squire Sanders, *Performance Rights*, 2012,

https://www.squirepattonboggs.com/~media/files/insights/publications/2012/10/performance_rights/files/performance-rights-practice-note/fileattachment/performance-rights-practice-note.pdf.

¹⁹ 205 F, CDPA states as follows: “Right to object to derogatory treatment of performance (1) the performer of a qualifying performance has a right which is infringed if— (a) the performance is broadcast live, or (b) by means of a sound recording the performance is played in public or communicated to the public, with any distortion, mutilation or other modification that is prejudicial to the reputation of the performer. (2) this section has effect subject to Section 205G (exceptions to right).”

recording or film by way of exercise of rental rights or right to equitable remuneration for the rental rights. Internationally, the main right types BECS collects are rental²⁰ and lending rights,²¹ public performance rights,²² right to make available,²³ private copying²⁴ and cable re-transmission rights.²⁵

C. Position in France

The Copyright Law in France is based on natural law wherein a person's creation is an extension of his/ her personality. In France, the Intellectual Property Code (IP Code- (*Code de la propriété intellectuelle*, 1985) deals with rights of actors and considers actors as an employee and ensures that their rights do not stand in the way of exploitation of the any rights owned by others.

The peculiarity of the protection under French laws is that it not only the IP Law (Copyright) that entails protection of the actor and performer for his/her work but also the labour code and contract. This provides comprehensive protection to the actor. This also entails the protection granted to every contributor to a work, including an actor and performer. A combination of these laws make the French system of protection the most progressive of protection accorded to performers, however glitches remain in terms of treatment of extras, etc.

²⁰ This can be explained as something similar to lending, with the user renting the fixation paying a fee to the rental entity.

²¹ Lending rights allow payments to be received from the government to compensate for the free loan of their copyrighted works. This can be an educational establishments, libraries or archives.

²² When audio-visual works are used in public places, it comes within the category of public performance.

²³ This right is an exclusive right for performers to authorise or prohibit the dissemination of their work through interactive networks such as the internet. For more details, See, British Equity Collecting Society Limited, <https://becs.org.uk/payments/>

²⁴ This levy is a form of reimbursement for private use (through, for example, TV) of an original lawful version of a work from the general public, and has to be paid by the sector that imports, manufactures and sells products that are then used for private copying. See, British Equity Collecting Society Limited, <https://becs.org.uk/payments/>

²⁵ Cable re-transmission means simultaneous, unaltered re-transmission of a primary broadcast intended for reception by the public in a closed cable network system by a party other than the primary broadcasting organisation.

Moving on to the statutes, the copyright law, the French Author's Rights Law, 1985 contributes to regulation of performers' rights in audiovisual productions. This law enables extensive rights to performers that would authorize them to use the audio-visual works that contain their performance. Further, the IP Code regulates actors and performers rights. This IP Code protects the performers who are defined under Article L. 212-1, as persons who "act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts by related rights." The IP Code under Article L. 311-7 states that the division for remuneration is "50% to authors, 25% to performers and 25 % to phonogram producers" when it came to private copying in the audio sector, and for videograms it is equal distribution between the three parties.²⁶ This division should be used as inspiration to other regimes that struggle to come up with an equitable distribution of remuneration for performers. This is also included under Article L.762-1 of the Labor Code. The Labor Code provides actors and performers with exclusive rights, with performers considered as employees. This means that they are treated as salaried persons.

Articles L. 762-1 and 762-2 of the Labor Code subject to Article L. 216-6 of the Labor Code compliment authorization and remuneration of performer by stating that:

"[t]he performer's written authorization shall be required for fixation of his performance, its reproduction and communication to the public as also for any separate use of the sounds or images of his performance where both the sounds and images have been fixed."²⁷

The nature of protection under Article L.762-1 of the Labor Code also needs to be in the written form. Also, when there are several artists employed for the same performance, protection can be accorded through a single contract. Other

²⁶ Law on The Intellectual Property Code (No. 92-597 of July 1, 1992 as last amended by laws 94-361 of May 10, 1994 and 95-4 Of January 3, 1995), https://internet-law.ru/law/int/nation_cleo/france/fr003en.pdf. This article states as follows: the remuneration for private copying of phonograms shall belong in half to the authors within the meaning of this code, in quarter to the performers and in quarter to the producers. the remuneration for private copying of videograms shall belong in equal parts to the authors within the meaning of this code, the performers and the producers.

²⁷Article L. 212-3.

than as an employee, there is also the flexibility of actors to work as independent contractors. Commentators reveal that such a practice is nevertheless rare, if not non-existent.²⁸

Performance Rights Recognised in Two Stages

The rights of the performers in France is based on two stages, one is during the performance of the work and the second stage begins after the performance of the work. Article L212-3 of the IP Code of France states that the “performer’s written authorization shall be required for fixation of his/ her performance, its reproduction and communication to the public as also for any separate use of the sounds or images of his/ her performance where both the sounds and images have been fixed.” Oral agreement is not accepted. Such extensive rights is not seen in any other regime.

After the performance is done, the performing artist may still receive remuneration or royalties, under Article L212-3, paragraph 2 of the IP Code of France which states that any authorisation to use the performance, and the resultant remuneration resulting from the performance shall be governed by Articles L762-1 and L762-2 of the Labour Code, subject to Article L212-6 of the IP Code. Article L762-1 of the French Labour Code provides that “all contracts made with an entertainment artist for artistic production that are remunerated are considered to be an employment contract.” This gives the performers the status of an employee. Article L762-2 of the French Labour Code clearly provides that “the remuneration due to the performing artist as a result of the sale or the exploitation of the recording of his/ her interpretation, execution or presentation by the employer, or any other user, is not considered as a salary if the presence of the entertainment artist is no longer needed to exploit the said recordings,” in the case of post-performance exploitation.²⁹ This Article reflects the fact that remuneration is based on the sale or exploitation of reproductions of the performing artist’s interpretation rather

²⁸ Memorandum of the *Syndicat Français Des Artistes-Interprètes*, February 2003, as cited in Ms. Marjut Salokanne, *Ad Hoc Informal Meeting On The Protection Of Audiovisual Performances*, Geneva, November 6 And 7, 2003, Study on Audiovisual Performers’ Contracts and Remuneration Practices in France and Germany, WIPO, https://www.wipo.int/edocs/mdocs/copyright/en/avp_im_03/avp_im_03_1_rev_1.pdf

²⁹ Tony A. Kenneybrew, *Employing The Performing Artist In France*, 13(2) TULSA JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 249 (2006).

than on the salary received for work. Contrary to the belief that since remuneration after performance will not be considered salary, the performing artist still has a host of rights (employee, royalty, and moral) post-performance. When the performing artist's contract includes royalties,³⁰ a portion of the sales of the recordings is deemed equal to a salary, which results into payment toward the entertainment artist's retirement, health benefits, and employment benefits. There is a lot of scope of negotiation between employer and performer as to royalty rights and performer can even relinquish it under the law.³¹

Article L212-3, paragraph 2 of the French IP Code provides that the remuneration for the performance shall be given under the Labour Code but will be subject to Article L212-6 of the IP Code. Article L212-6 of the IP Code provides that Article L762-2 of the Labour Code shall only “apply to that part of the remuneration paid in accordance with the contract that exceeds the bases laid down in the collective agreement or specific agreement.”

A combination of reading of IP Code and Labour code entails the conclusion that in case of assignment of the rights of the performer also, there is surety that performer receives fair compensation for all further uses of his/ her fixed performance. This means that a separate remuneration for each mode of exploitation of the work needs mention in the contract between the performer and the producer with individual (contract) or in collectively (agreement). Protection is nevertheless guaranteed even in the absence of a contract or an agreement with remuneration being then being based on the existing tariff structure of the sector specific agreements between organizations (employees and employers). It is important to note here that these collective bargaining agreements related to performers right in film production and television has been made mandatory by the Ministry of Culture. These collective bargaining administrative agreements come in two forms, the collective bargaining agreements negotiated by performers’ and producers’ trade unions, and collective administration of certain rights and remunerations by performers’ collecting societies.

³⁰ In such situation, it might be stated that Article L212-3 of the French IP Code contradicts Articles L762-2 of the French Labour Code by stating that a percentage of the royalties is considered a salary.

³¹ Tony A. Kenneybrew, *Supra* Note 29, *Id.*

On the practical side of law, the French system ensures that each performing artist concludes a written contract with the producer, in which remuneration for each mode of exploitation is stipulated, and can be done by reference to applicable collective bargaining agreements. This is irrespective of whether the performers are permanent or freelancer - the collective bargaining agreement is obligatory and they also apply to performers who are not parties to the agreements. These agreements contain provisions for remuneration with an initial minimum amount of salary. This remuneration is regarded as a supplement to salary and thus gives rise to social security benefits for performers. The agreement has extended application and covers thus the whole sector, regardless of whether the individual performers or producers are represented by the contracting parties. It is here that the role of collecting societies like ADAMI (Collective management organization for the rights of performers)³² are involved. The most recent application form for Author-Composer mentions a category of “Split of Public Performance Rights and Mechanical Reproduction Rights” that also mentions that “ In cases where there are multiple rights holders within one or more category (author, composer, adapter, arranger, publisher) with the option being available from 1st January 2019 and shall apply to works registered after that date and exclusively to them.”³³ There is the added issue of whether or not the remuneration received post performance is part of the wage or has to be listed otherwise. The law and the societies are clear on this point too in the event that three conditions are met and includes the following: “there must a recording of a performer’s performance; the remuneration must be paid relative to the sale or exploitation of the recording, and the physical presence of the performer is not required for the exploitation of the recording.”³⁴ The provisions, contracts and assessments of France and the under the French law provide an understanding that a complete protection of the performer in terms of remuneration and exploitation of his/ her work in multiple forms resulting in generation of revenue should also be traced back to and enrich the performer in monetary form. The

³² Website of ADAMI, available at: <https://www.adami.fr/en/> . (Mar. 19, 2021)

³³ Document (Mar. 19, 2021) <https://createurs-editeurs.sacem.fr/en/brochures-documents/membership-application-publisher-split-contributions>

³⁴ P. GAVALDA AND N. PIKOWSKI (eds.), *DROIT DE L'AUDIO-VISUEL* (LAMY, 1995).

remuneration is inalienable, and cannot be assigned to another party by virtue of a contract.

The French societies also look at other ways that the performers talent can be exploited as in the case of cable re-transmission of a work. This results in performers being compensated for cable re-transmission of their performances under collective bargaining agreements as a percentage of the revenues from its exploitation.

IV. Position in India: India Copyright Act, 1957 and Amendments in 1994 and 2012

India became a signatory to the Rome Convention way back in 1961, but included rights of performers only by an amendment in 1994. The position on performer's rights was made clear in 1977 in the decision of *Dev Anand v. Fortune Films*,³⁵ with the court holding that an actor in a film has no rights over his performance in the film, a position taken before the 1994 amendments.³⁶ The Bombay High Court further said that as per the law, the performer is not an author. However, what makes the case interesting is the contractual terms between the performer and the producer. Dev Anand, a superstar of his times, had good bargaining power and hence secured his rights as a performer through a contract with the producer. The contract stated that “..that your [Dev Anand] work in our above picture on completion will belong to you [Dev Anand] absolutely and the copyright therein shall vest in you [Dev Anand] and we will not be entitled to exhibit the said picture until full payments as per clause 6 above are secured to you by way of annuity policies of LIC..”³⁷ However, this case opened the loophole in the law. The court held

³⁵ AIR 1979 Bom 17.

³⁶ Banana IP Reporter, *Performer's Rights under Indian Copyright Law*, 9th November, 2015, <https://www.bananaip.com/ip-news-center/performers-rights-under-indian-copyright-law-part-ii/>

³⁷ *Supra* note 33 at para 7.

that performance of a performer was not copyrighted work, but this case showed that there was a need for separate rights of a performer.³⁸

A. 1994 Amendments to the Copyright Act, 1957

In 1994, India, complying the mandate under the Rome Convention, the amendments in The Act for the first time granted rights to the performers. Section 38 was incorporated to grant performer's rights for fifty years. The economic rights granted to the performer was that during the subsistence of the performer's rights, without the consent of the performer, a few acts would be considered infringement. These acts are found under Section 38 A and included:

- (i) "making a sound or visual recording of the performance;
- (ii) reproducing the sound or visual recording:
 - (a) without the consent of the performer,
 - (b) for purposes different from which the performer gave his consent, or
 - (c) reproduction made for a purposes different from those which fell under the exception/ fair use under section 39;
- (iii) broadcasting the performance. The exceptions to such use was when the broadcast falls under fair use or exceptions under section 39 or is a re-broadcast of the broadcast which did not infringe the performer's rights
- (iv) Communication to the public other than by broadcast, except where the communication to the public is made from a sound recording or a visual recording or a broadcast."

B. Performance included in Cinematograph Films

Aligning The Copyright Act, 1948 to the Rome Convention, 1961 resulted in no obligation on the part of India to bring in extensive provisions for the rights of actors in films. Therefore, although performers rights were included in the Act, section 38(4) reiterated article 19 of the Rome Convention by stating that

³⁸ Jagdish Sagar, *Entertainment Media and IP Rights: An Indian Perspective*, in S. K. Verma and Raman Mittal, *INTELLECTUAL PROPERTY RIGHTS: A GLOBAL VISION* 210 (INDIAN LAW INSTITUTE, NEW DELHI: 2004).

in cases of performances by a performer included in films, the rights shall not be granted to the performer. Hence the performer's rights in India too did not give adequate protection to actors.

C. 2012 Amendments to the Copyright Act, 1948

After 1994, the next legislative change with regard to performer was brought about through the Copyright Amendment Act, 2012. The substantial changes that has been made to performer's rights were through an amendment in Section 38 of the Act. The economic rights previously included in Section 38 were transferred, with changes, into the new Section 38A. Section 38B was another new provision added to the Act.

The legislators inserted certain new rights in Section 38A, not previously part of section 38, which included rental rights for the performers³⁹ and issuance of copies that are not already in circulation. The other rights which were retained includes authorising the making of sound recording or a visual recording of the performance, reproduction of the sound or visual recording in any material form including the storing of it in any medium by electronic or any other means; communication of it to the public; to broadcast or communicate the performance to the public except where the performance is already broadcast.

D. Rights of Performers in Cinematograph Films

Definition of performer changed

The existing definition of performer (post 2012) "includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance." The 2012 amendment changed the definition of performer by stating that 'extras' in films, *i.e.*, persons whose performance is casual or incidental in nature and is not given acknowledgment in the credits of the film will not be performer. However, such 'extras' will have one right, *i.e.*, to restrain or claim damage in respect of any

³⁹ Section 38(1) states that "without prejudice to the rights conferred on authors, the performer's right which is an exclusive right subject to the provisions of this act to do or authorise for doing any of the following acts in respect of the performance or any substantial part thereof, namely:— (a) to make a sound recording or a visual recording of the performance, including— (iv) selling or giving it on commercial rental or offer for sale or for commercial rental any copy of the recording."

distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

Changes in the economic rights of performers in films

The new amendments of 2012 were again a disappointment for the performers in films except one proviso which gave the right to retain royalty. Section 38A (2) stated that “once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer’s right in the same film.”

The proviso to section 38A (2) however gives some relief to such performers by stating that the performer in films “shall be entitled for royalties in case of making of the performances for commercial use.”

Moral Rights of performers

Section 38B recognised two moral rights of the performer, the right to paternity⁴⁰ and the right against distortion.⁴¹ However, it was clarified that removing any portion for editing or to fit the recording within a limited duration, or any other modification which is required entirely for technical purposes shall not be considered derogatory to the reputation of the performer.

The Indian legal position on actor’s rights still remains uncertain with no judicial precedent. Our discussion in this part hence will centre around the case of *Manisha Koirala v. Shashilal Nair*⁴² decided in 2003 much before the moral rights provisions were inserted in the Act. We shall examine if the decision would have been different in the post 2012 scenario, considering that more rights are available to the performer. As mentioned earlier, the *Dev Anand* case was the first ever case which discussed an actor’s (performer) rights in India.

⁴⁰ Section 38 B states that “to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance.”

⁴¹ “(B) to restrain or claim damage in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.”

⁴² 2003 (2) Bom. CR 136 (India).

However, as stated earlier, the court did not provide any relief as the provision on performer's rights was enacted then in 1979.

In the *Manisha Koirala* case, in which the Bombay High Court examined the conflict that arose between the plaintiff, Manisha Koirala, a renowned Bollywood actress and the defendant, Shahilal Nair, who was the producer of a movie in which she played the lead role. Four scenes of four minutes that used a body double for her was not agreeable by Koirala. She was skeptical that even though a body double was used (with the knowledge of Koirala) that these scenes would portray her in a bad light among audiences. She had also not taken remuneration for the movie and was doing it for free. She argued that she had a right to portrayal on screen and it can be exercised with her unconditional consent only. She further argued that the present rendition was an act of violation of her privacy as it would land her in embarrassing position in her peer group and will cause damage to her reputation, that can never be compensated monetarily. In his defence, Nair argued that the Indian Censor Board have given a "A" Certificate without any cuts to the film which suggests that there are no such objectionable scenes as claimed by Koirala. Nair further mentioned that Koirala had always known that there will be provocative scenes as they were part of the storyline of the film. Nair highlighted that when Koirala declined to perform the scenes, with her consent a body double was arranged for those scenes. Nair even contemplated dropping Koirala from the film, however, it was Koirala who insisted on the body double and asked Nair to continue the shooting.

The court observed that there is no material to hold that as per the term of the contract, she had imposed certain conditions, which had been agreed to. This would mean that there was no proof of an agreement between Koirala and Nair to put alternate shots in place of the body double. The court accordingly held that Koirala has failed to discharge that burden for the Court to arrive at a conclusion that there was a contract and that Nair had breached the said contract. Further the case of Nair was that the four shots which were objected have been replaced by the alternates as requested by Koirala and hence the court did not grant the relief as pleaded by Koirala. It is important to note that the court while giving the decision made the following observations, "once the plaintiff [Koirala] had agreed to act in the film it is not possible thereafter to contend that certain scenes filmed are defamatory to the plaintiff's [Koirala's]

character and reputation...once the scenes are integral it must be assumed that the plaintiff [Koirala] was aware that this would form part of the film.” These observations need to be re-examined after the 2012 amendments to the Indian Copyright Act. Post 2012, with more rights available to the performer, this case could not have been decided especially in light of absence of proving the contract and the right of acquiescence. However, with the insertion of the provision of moral rights of actors, specifically right to integrity in section 38B(b),⁴³ this case could have taken a turn with the actress arguing (in case) that she would be attaching moral rights on a performance that she was not pleased with, even in the absence of a contract and as a result of her bringing the case before the court and that the changes brought about by the producer and director duo are a “distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.”

The 2012 amendments specifically inserted section 38B titled Moral Rights of Performer. The actor did not speak anything offensive against any religion during her performance, neither did she conscientiously decided to be a part of a project which was aimed to hurt the religious sentiments of a particular religion. Her work was distorted, modified with *mala fide* motive and ‘it was prejudicial to the reputation’ of the actor. Hence, post 2012 amendments, under similar circumstances, relief should be granted to the actor.

V. Possible Solutions

In spite of the amendments that have been inserted in the Copyright Act, 1957, the rights of the actors are still vulnerable, especially for the ones who do not fall in the superstar or top category of actors. There are limited rights accorded to these actors. In order to strengthen their position, a few areas have to be emphasised upon.

The weak provisions for the protection of the rights of the actor in India can be remedied by the use of contracts regulating the relationship between performer and producer. More so as the actors are not paid the sum promised.⁴⁴ In many regimes, the collective bodies or association emphasize on payment based on

⁴³ “To restrain or claim damage in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.”

⁴⁴ Jayadevan S. Nair, *Supra* note 12 at 510.

instalments for better protection, so that actors can enjoy any economic or social security.

A. Remuneration

Usually in countries where collective agreements of unions and guilds exists, that organization negotiates a minimum fee. Over and above that, individual negotiations by performers or their representatives determine the fee. Over the years, other provisions have emerged including additional fees for extra services such as for extra work beyond specified hours, compensation for time to travel to locations, appearances, costume fittings, etc.

B. Contract as a means of Transferring Rights

In a report of WIPO,⁴⁵ it was stated that contracts for transferring the rights of the actors is essential irrespective of the country concerned. In countries where there is no presumption of transfer of rights of actors to producers, it is very important that there should be a clear contract. Even in systems where there is a presumption that the rights will be transferred to, such transfers can be made by a written contract. India, which has a presumptive system as stated in section 38A. Contracts are also necessary in a situation in which there is an agreement between the performer's guild or union and the producer. In practice, this kind of agreement requires the producer to refer back to the union in a case where new rights are created. Also, it is important to have contracts in countries where performers do not have neighbouring or related rights but are employees or independent contractors.

C. Secondary uses of Actor's Performance and Compensation

Secondary uses can include reuse of the performance in new works. It includes subsequent productions/ advertisements for products other than for the audio-visual work itself. Secondary fees are known as residuals, royalties or simply secondary fees and is different from payments collected from rights of remuneration or compulsory collective license. This fees are arranged and calculated in different ways in different countries. The secondary payments are derived at times from the transfer of exclusive rights or sometimes as a result of labour negotiations or sometimes from a combination of the two systems. In other countries, secondary payments are derived from labour agreement and

⁴⁵ Katherine Sand, *Supra* note 8, Id.

they form part of the salary of the actor.⁴⁶ This system also has its advantages for securing social security benefits which neighbouring rights does not fetch.

The compensation for secondary use and fees are at times derived directly from producers, sometimes through the unions or guilds and, in other cases, it is derived through a collective society.⁴⁷ The percentage and conditions differ accordingly.

There is a need to scrutinize the payments to be made for secondary and later uses of the performances. This can be achieved through arbitration mechanisms and making the future payments obligatory are also important provisions of the contract. Many a times the associations and guilds try to have agreements with distributors, producers and other future owners for ensuring that they fulfil their responsibilities, make proper payments and also to scrutinize and audit the payment and the distribution process.

D. Credits

Credit is the recognition or inclusion of one's name in connection with the role that the performer portrays. Placement of credit also looks into its placement (for example, at the start of the film or the end of the film, the order of names in credits, etc.)

In India, name of performers that do not appear in the credits do not have any rights,⁴⁸ with only partial moral rights guaranteed under the law.⁴⁹ Hence, a key contractual provision is the inclusion of the names in the credit list.

E. Moral Rights

Although the Beijing Convention made it obligatory to its member states to grant moral rights to performers in audio visual works, some countries have still not ratified it. Nevertheless, inclusion of moral rights by virtue of a contract is a good route forward for adequate protection of performers.

⁴⁶ *Id.*, 17.

⁴⁷ *Id.*

⁴⁸ Proviso to S. 2(1) (Qq).

⁴⁹ Section 38B (B).

F. Other Provisions

Although unrelated to copyright, some other provisions which should be a part of the actor's contract including health and other safety measures, working conditions and insurance for protecting performers during employment. In India, these basic rights are also not available to actors. For instance, an actor from Kerala, Jayan died during the shooting of his film Kollilakkaml. Unfortunately he was not covered under any insurance.⁵⁰

VI. Conclusion: Incorporation of Collective Bargaining in India

The importance of the contractual terms to more or less decides the rights of the performer is stressed on as most actors have weak bargaining power *vis-à-vis* the producers. It lands the actors with bare minimum rights that are a result of the collective bargaining agreements.

Remuneration has been one of the big problems for actors. This initial fee is generally negotiated by the actors themselves and in situations where a collective organisation or guild collective agreement exists, it is the collective body that negotiates the minimum fee. Depending on the stature, performers including actors can negotiate a higher fee than that. As seen earlier, additional compensation for additional services and requirements are also results of the collective bargaining. Hence, it is generally considered as a wise decision for actors to be affiliated to the collective bodies.

The secondary fees, that is, residual rights or royalty rights are also results of collective bargaining process.⁵¹ Moreover, there are other allegations that the producers exploits their employees and the female employees, are specially at the receiving end without provided with basic amenities during their shootings, such as minimum basic facilities, like, drinking water, food and proper toilets.⁵² Collective bodies have in many cases fought for such amenities to actors.

⁵⁰Cris, Remembering Malayalam Superstar Jaya, 40 Years After his Death, <https://www.thenewsminute.com/article/remembering-malayalam-superstar-jayan-40-years-after-his-death-137720>.

⁵¹ For example, In USA, residual payments are the result of collective bargaining agreements, some of those contractual rights, such as the right to receive residual payments, arise from collective bargaining agreements in the case of unionized performers.

⁵² Vipul Shah Case, *infra* note 52.

There are countries where collective bargaining is prohibited or it may not exist, in those countries there are guidelines that have been adopted on rules of best practices. They are helpful in assisting the actors to negotiate the terms of contract. Also, these collective bodies can be important for settling disputes. It is definitely not easy for actors to get legal recourse and it may end up in long legal disputes. In such situations these bodies can be effective in providing legal recourse.

Hence, in India, it is important that the collective bodies need to be more proactive and work for their collective welfare. The CCI decision in the case of *Vipul A. Shah v. All India Film Company Federation (Vipul Shah case)*⁵³ is positive in this front. In the instant case, the informant, producer cum director of Film Industry in Mumbai (Bollywood) brought a complaint of anti-competitive agreement against 28 collective bodies (25 of whose members' work in different capacities in the film industry and 3 were producer's associations before the Competition Commission of India (CCI). One of the allegation was that the collective bodies made unreasonable demand including unreasonable monetary demand. The CCI noted that increment and wages being conditions of employment/ labour fall within the domain of collective bodies, along with words of caution regarding its over-reach.

⁵³ Competition Commission of India, Case No. 19 Of 2014.