

Digital Technology and Copyright Protection the Challenges of Indian Performers Rights Society

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Abstract: Indian music is ever-green. Every restaurant, pub, Airports, stadium, television etc plays them making them world famous. India has 465 FM Radio stations which constantly play Indian Bollywood music. Though the song becomes well known the singer who sang the song is not recognized nor does he or she receive sufficient compensation for the song. The artist in India is the one who works so hard but ends up getting nothing. The 'Indian Copyright law was amended in 2012' to acknowledge the rights of performers. The singers were recognized as performers. The law provided for royalty to be paid to the singers. In reality this royalty never reached the singers. The problem for the singer was identifying the user playing his song and the problem for a genuine user was identifying the location of the singer to pay the royalty directly to him. Therefore, there was a need for an independent body to administer the copyright and collect royalty. ISRA is the bridge between the singer and the user which helps in collecting royalty. This article discusses the issues faced by the singers and the need to develop a smother collective administration of copyright.

Keywords: ISRA, Collective Administration, Performer

INTRODUCTION

A song is made up of both music and text. While the 'lyrics' are protected as a 'literary work, the melody' is protected as a musical composition. When a music company approaches a song writer. The song writer is excited about the new opportunity of making the album and releasing the album. The singer is promised a huge compensation if the song becomes famous after the release of the film. At this stage the singer loves to sing, loves to perform and is not bothered about the legal issues surrounding that song.

In India the artist receives a huge amount of praise for the song. Recently the song '*Kacha Badam*' sung by Bhuvan Badyakar became a huge hit and went viral on social media.¹ Nazmu Reachat recreated the song and gave his own twist. His song has over 10 lakh streams on spotify with millions doing the '*Kacha Badam*' challenge on Instagram Reels. The challenge was popular in many countries like Tanzania, Korea. Everyone all over the world was crooning to this song. Though the song was written and sung by Bhuvan Badyakar he did not make any money out of the song. It was only when Godhulibela Music decided to make a remake of the song and paid him Rs. 3 lakhs did he benefit financially.²

In India the music companies would pay royalties to musicians but the singer of the film was just a vocal instrument in a recording, therefore no royalty was paid to the singer. In the early 1950s Lata Mangeshkar became the first Indian singer to demand for royalties from the film producers. This was an extremely challenging situation for the young Lata Mangeshkar as in those days women who worked in cinema were considered insignificant. Making demands from male counterparts could result in losing a job. Lata Mangeshkar was persistent in her demands and ultimately, she was granted royalty. A little before Lata Mangeshkar passed away, she earned 40 lakhs a month as royalty for her songs.³

The India system of paying royalties is very negligible. The artist who works so hard does not get anything. There are times when the artists face crises situation he/she cannot bank on the work they had done in the past in order to make a living. On the other hand, foreign singers like Michael Jackson, Elvis Presley, Elton John have received royalty and get huge amounts for their songs. This royalty sees them throughout their lives.

¹ <https://www.socialketchup.in/viral-trend-kacha-badam-story-behind/> visited on 2nd May, 2022

² <https://www.news18.com/news/buzz/kacha-badam-singer-receives-rs-3-lakh-from-company-which-first-remixed-his-song-4786745.html> visited on 2nd May, 2022

³ Legend Lata Mangeshkar Owned a Buick, a Chrysler, and a Mercedes. Here's Her Net Worth, News 18 <https://www.news18.com/news/movies/legend-lata-mangeshkar-owned-a-buick-a-chrysler-and-a-mercedes-heres-her-net-worth-4745933.html> visited on 2nd May, 2022

Every artist and a song has a time line. Today if the song is the most played song in some time, it is no longer played and loses its charm. During the time the song is preferred the artist must make the best of it. After some time, it is only natural some other artist will replace the song. For years great injustice has been caused to the singers. As they have not been granted any rights nor royalty. There is a need of a regulatory system to ensure that the singers must not be victimized. This article discusses the performers rights and the need to administer them effectively.

Issues Faced by Singers in India

The music companies often prepare lengthy agreements and make the singers sign them. The singers often blindly sign the agreements without bothering as to what is written in such agreements. The agreements are valid for three years and normally assigns a royalty of 6%. On the reverse side these agreements bind the singer for three long years to the music company. Many music companies follow a practise of renewing the agreements at the end of three years for a further period of three years. The singers often fail to understand that the artist/singer is vulnerable and fails to understand the legal issues and copyright ownership issues which they would be likely to face.

Who is a Performer?

The Copyright Act, 1957 had no provisions for rights of performers. The Supreme Court held in *Fortune Films v. Dev Anand*⁴ that a film actor has little control over his performance. The producer had complete control over how the actors used their work, and they were paid for it. It was felt after this ruling that the "copyright laws ought to incorporate the performer's right." Sections 38, 39, and 39A were added to the statute in 1994 to respect the rights of performers. The term "performer is defined in Section 2(qq), which includes an actor, a dancer, a musician, a singer, an acrobat, a conjurer, a snake charmer, a juggler, a lecturer, or any other performer." A sportsman cannot be called a performer as sports person must play according to the rules of the game and hence there is no scope for creativity of the individual. Only a performer right can be claimed by a singer in a song. Performers right is only a moral right.

A "performance ", means "any live visual or acoustic performance by one or more performers Every performance, whether in front of an audience or in a studio, must be live in the first instance. "⁵ If this performance is recorded and then used without the performer's consent, that is a violation of their rights. In *Neha Bhasin v. Anand Raj Anand*, the court decided that a performance is deemed live in the first place regardless of whether it is recorded in front of an audience or in a studio. The performer's rights are deemed to be violated if a performance is used without the performer's permission. Copyright and performers' rights were distinguished by the Delhi High Court in *Super Cassettes Industries v. Bathla Cassette*, "The judge held that when a song is re-recorded, the original singer's prior authorization is essential."

Being granted rights by the legal system was not enough. The practical aspect was missing the law was not enforced effectively. The artists were not getting royalty. This was a huge challenge. There was a need for collective administration of copyright. If a singer would want to collect royalty they had to find out where the song was being played. Whether it was played in India or abroad this was a herculean task, The singer had to contact the owner of the premises playing the song and then negotiate with the owner playing the song and demand for royalties. No restaurant or pub would ever pay the singer such royalties. There was a law but the real practical usage was missing.

An honest user if he wanted to pay the artist his royalty. He to would be faced with difficulties. He had to find out where the artist is living and then negotiate with the singer the amount to be fixed as royalty. Only then a license would be issued. This would be a difficult task.

⁴ AIR 1979 Bom 17

⁵ S.2(q)

Performer's Rights in India

The Performers' Rights are valid for 50 years from the performance date. Section 38A was enacted, which grants performers economic rights. These are exclusive rights to perform or authorise the performance of a variety of acts. For example, record the performance in audio or video. Recreate the performance in any kind of media, including by recording it on a computer or another device. Make copies of the performance that aren't in circulation available to the public. Tell the audience what the presentation is about. Offer any copy of the recording for sale or for commercial rental, or sell or give the performance for commercial rental. Unless the performance is private, broadcast or convey the performance to the public.

Composers/Songwriters, Producers, and Music Companies are also entitled to financial compensation for commercial usage of their work. Unless there is a contract to the contrary, once a Performer has accepted in writing to his performance being included in a Film, the Performer cannot object to the Producer of the Film enjoying the Performers' Rights in the same Film.

Moral Rights

Performers have Moral Rights Unless the performer consents to having their name removed from the title, they have the right, as stated in Section 38 B, to request to be identified as the performer of their performance. In addition, if the performer's performance is altered in any way that would damage his reputation, he may file a claim for damages. Removing a portion of a performance to edit the tape into a shorter duration, or making any other necessary technical changes, will not be considered damaging to the reputation of the Performer.

Right to Assign Copyright

The Performer may transfer or assign his copyright, but he or she cannot do so or give up the right to income for any use of the performance other than publicising it alongside the movie in a theatre. The Performer may designate a Copyright Society to handle the collecting and distribution of royalties, or he may transfer the right to his heir apparent. Any contract that states otherwise is null and invalid.

Right to Receive Royalty

Nowadays, when performers produce shows for profit and those shows are used for anything other than introducing the audience to the performance in connection with a movie in a theatre, the performers are entitled to royalties. The national government of India has registered four copyright societies. Music composers can avail royalty from the music and composers' society the IPRS. For the music companies the society is Recording Music Performance Limited (RMPL). The society for reprography rights is the Indian Reprography Rights Organization (RRO). For singers the royalty is collected by Indian Singers Rights Association (ISRA). ISRA is a bridge between the user and the singer. ISRA has a uniform tariff system and a distribution scheme for collecting royalty.

ISRA

On May 3, 2013, ISRA (Indian Singers' Rights Association) was established as a Company Limited by Guarantee under the Companies Act, 1956. ISRA is a legally recognised copyright organisation. After the 2012 revisions to the Copyright Act, it is the first Copyright Society⁶ to be registered by the Central Government. ISRA is a cooperative management organisation. It was established to establish tariff standards as well as collect and pay royalties to performers. Its members make up the majority of commercial performers in the Indian cinema and music industries. It currently has 732 members. ISRA has the authority to file a copyright lawsuit on their behalf. Anyone using a performance for commercial purposes must get an ISRA "Performer's Rights Clearance Certificate" and pay royalties. Once the funds have been gathered, it is dispersed to members according on whatever songs are being used. The song list is provided while making payment. Till Date ISRA distributed royalties to singers only once.

⁶ As per Section 33 of the Copyright Act and received its Certificate of Registration from the Central Government on 14th June, 2013.
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Commercial Utilisation of a Performance

A commercial performance may include a live performance of a song by the artist at a restaurant. Commercial event or over the internet. It may also include the playing of recorded music in all commercial establishments and online portals.

In India the most successful commercial event is the IPL. ISRA got the first royalty payment in an IPR tournament in 2014. Rediff.com was playing Lata Mangeshkar's famous song '*lag ja gale*' a number of times during the match. The ISRA issued them a legal notice to pay royalty which they did pay.

If a stadium plays a song, the stadium must pay royalty or licence fees at the rate of one rupee per seat, computed on a total capacity basis. Hence if the seating capacity of 85,000 seats the organizers of the event using the song will pay Rs. 85,000. ISRA has created a list of tariff charges. The fees apply to all forms of public performances, including those at public events, restaurants, clubs, malls, stores, dancing schools, and even on commercial vehicles like buses and taxis.

Restaurants that play music are required to pay royalties to the Performer. It must get a No-Objection Certificate from ISRA and pay each artist whose song it plays the price of "the least expensive drink on the menu card" every day. The eatery is playing an artist's song, and a cold drink in the eatery costs Rs.20 on the menu card. Then the eatery must pay Rs. 7300 to ISRA. The Producer, Composer, and Performer must all be compensated with royalties.

The Broadcasting organization must pay a royalty of Rs, 25,000 to use the artist's songs in a reality show or a musical program. The same rate must be paid even if part of the song is used. The same rate must also be paid when the music is used in a serial. A music station must pay a royalty of Rs. 5000 per hour or 5% of the channel's overall income for that television, whichever is higher. All mediums like the Radio, the internet, hotels, commercial businesses, commercial vehicles, and public events all have an obligation to pay royalties for the music played.

Judicial Intervention

Even after tariff rates being assigned the biggest problem for the singers is collecting royalty from the broadcasters. Many commercial establishments continue to play music without paying royalty to ISRA. In *ISRA v. Chapter 25 Bar & Restaurant*⁷ and *ISRA v. Night Fever Club & Lounge*⁸ the Delhi High Court ruled that money earned from commercial use of the musical work be given to ISRA.

It is a common practise during Christmas and New Year, restaurants indulge in playing popular music to appeal to customer tastes. Many hotels and restaurants invite live bands to perform for their customers. These issues came up before the Madras and Bombay High Court.

The Madras High Court granted interim injunctions prohibiting hotels/pubs/event organisers from playing any of the copyrighted works on Christmas/New Year parties in *Phonographic Performance Ltd. v. the Accord Metropolitan and Ors*⁹. and the Bombay High Court in *Phonographic Performance Ltd. v. Hotel Hilton & Ors*¹⁰ and 5 other similar matters¹¹.

Royalty from Online Streaming Websites

A music lover has switched to the online platform. With a click the user gets to hear his or her favourite song even before it is played on the television. The advantage of the internet and online streaming of music is that

⁷ CS (OS) 2068/2015 & IA No. 14261/2015

⁸ CS (OS) 3958/2014

⁹ Original Appeal No. 1116 & 1117 of 2019 in Commercial Suit No. 975/2017

¹⁰ Commercial Suit No. 306 Of 2019

¹¹ *Phonographic Performance Ltd v. Orbis The Passion Hotels & Ors.* (Commercial Suit No. 304 Of 2019), *Phonographic Performance Ltd v. Hotel Madhuban & Ors.* (Commercial Suit No. 292 Of 2019), *Phonographic Performance Ltd v. Balaji Agora Mall & Ors.* (Commercial Suit No. 145 Of 2019), *Phonographic Performance Ltd v. Welcom Hotel Rama International (ITC) & Ors.* (Commercial Suit No. 123 Of 2019) and *Phonographic Performance Ltd v. The Vision Group (The Crown) & Ors.* (Commercial Suit No. 914 Of 2018).

the music can be heard at one's convenience and for multiple times. Online streaming has rendered the old methods of listening to music redundant.

Online streaming platforms do pay a royalty to singers. This starts a conflict between the user right to hear latest music and the singers right to receive royalty for the music. The user's right seems to be the core issue since the demand for the song is higher when the song is newly released. The demand may diminish as the song becomes older and a new song takes its place. The broadcasters require to obtain a license in order to stream the musical work. Therefore, it implies in the case of service provider of an internet portal the service provider must obtain a license.

The amount of royalty paid is determined by whether the portal is an interactive or non-interactive streaming app, as well as if the service is free or paid. The royalty per song is Rs.0.50 per song if the website does not charge the user, and Rs.1 per song if the user has to pay for the services. The Bombay High Court upheld the question of internet streaming online music in *Tips v. Wynk* the Bombay High Court held;

'Statutory licencing does not apply to internet broadcasting; hence internet streaming is governed by separate rules.'

Today with online portals like youtube, google, spotify, Disney, Hotstar, Facebook, Triller, Roposo & Takatak etc are all infringing the Singers Right to Receive Royalty. Millions of songs are uploaded, shared, streamed and downloaded. These portals receive huge amount of revenue through advertisements. While the singer receives nothing. This has created enormous challenges for the singers. Sonu Nigam, Kavita Krishnamurthy, and Pankaj Udhas were among the musicians who visited with Union Information and Broadcasting Minister Arun Jaitley to request his involvement. They requested the government to issue a directive to particular stations to "stop violating the Performer's Right."¹²

Challenges

The biggest issue is the determination of actual amount of earning that the commercial users may make by exploiting the musical works. The courts have held that when there is a commercial use the money earned from such a use must be paid to ISRA. This creates hurdles as the parameters for the said amount have not been fixed. The question is how would the singers know that there was profit derived from the use of the musical work. Another issue is that the users are not aware of the rightful body from which the license for the use of the work has to be obtained. There are separate bodies for performer, lyricist, composer, and the producer. This creates a huge problem for a small user of a restaurant to obtain a license from everybody individually.

CONCLUSION

ISRA is a member of SCAPR. World Federation of 52 country societies. In June 2014 International Bilateral Trade Agreement with Ireland RAAP. Irish singers' songs will be protected in India and Indian songs in Ireland. India will collect royalties for Ireland and send it to them. India has 16 trade agreements. ISRA has made substantial contribution and benefit the singers the singers in India. Yet ISRA has to reinvent itself keeping in mind the changing technological developments in the music industry. It needs to made the system of collecting royalty more accessible and user friendly.

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¹²<https://www.prokerala.com/news/photos/new-delhi-arun-jaitley-with-the-representatives-of-the-indian-singers-72002.html>
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