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PERFORMERS RIGHTS IN INDIA:

A CRITICAL ANALYSIS OF PERFORMERS AND PERFORMANCE UNDER THE INDIAN COPYRIGHT ACT 1957

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Abstract

The laws relating to intellectual property rights in India have seen many reforms over the years. These have been mainly due to the increase in awareness of such rights along with recognizing the importance and significance of a well-developed regime for protection. Such regimes are an amalgamation of the changing jurisprudence when it comes to intellectual property rights and legal policymaking by keeping the interest of a vast, diverse group of people. India has witnessed several amendments to the Copyright Act. However, even after having large stakes in developing strong performer protection laws due to its gigantic entertainment industry, there is much left to be desired. This essay aims to critically examine the level of protection afforded to performers in India under the Copyright Act and to identify the lacunas in the existing legal framework. While tracing the evolution in the India Copyright Act and its amendments, reference shall be made to the US copyright law and the protection provided to performers therein in order to draw a parallel between the kind of protection afforded in both India and the US. Further, the essay will analyze whether certain provisions could be incorporated in India to fill in the lacunas within India's existing framework.

Keywords: Performers, Performers Rights, Indian Copyright Act, 1994 Amendment, 2012 Amendment, Personality Rights, Right of Publicity Doctrine and *Sui Generis* Protection.

I. Introduction

Performers across the field are considered a vital part of our society. The amount of skill and labour invested in performances undoubtedly merits legal protection. However, it was not until recently that performers rights in India finally began to be recognised under the Indian Copyright Act, 1957 (hereinafter

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referred to as "**the Act**"). Before the 1994 amendment of the Act,[1] the law did not grant recognition or protection to performers. However, after the 1994 Amendment to the Act, by incorporating Section 38 to the Act, performers' rights were finally recognized. Furthermore, post the 2012 amendment[2] that inserted Sections 38A and 38B, performers were given the right to get royalties in contrast to their earlier negative right that prohibited fixation of live performances.[3] The 2012 Amendment also recognised the existence of moral rights for performers that protected their work from being distorted or altered. Although these changes were welcomed and seen as a step towards greater protection for performers in India, much is left to be desired. In the following essay, we will analyse the scope of the protection afforded to performers in India while making comparisons to other jurisdictions such as the United States. We will examine the Doctrine of Publicity and draw comparisons to publicity or celebrity rights that find a place in India through judicial precedents. The essay concludes by arguing for certain changes to be brought in India pertaining to the protection offered to performers through legislating the right to publicity and providing *sui generis* protection to performers as the existing laws do not provide sufficient protection nor do they cover the wide ambit of performers in India.

II. Performers Rights in India: History and Scope

India has come a long way since the ruling in the Supreme Court case of *Fortune Films International v Dev Anand* case [4] in terms of performer protection. This case was one of the first cases in Indian legal history that brought the question of performers rights to the forefront. In this case, a contention was raised that the copyright cine artiste's performance did not fall under the ambit of 'work' in the Copyright Act. This stood even if there was a specific provision in the agreement between the artiste and the producers that vested copyright in the motion picture in the former. In settling the controversy at hand, the Court looked into two issues:

1) Whether the performance of a cine artiste would be a 'work' protected by the Copyright Act, specifically a dramatic work.

[1] The Copyright (Amendment) Act, 1994 (Act 38 of 1994), s. 38
[2] The Copyright (Amendment) Act, 2012 (Act 27 of 2012), ss. 38A, 38B
[3] 'Delusion Over Indian Performance Rights Society Being A Part Of Copyright Society – Selvam & Selvam' (*Selvams.com*, 2017) https://selvams.com/blog/delusion-indian-performance-rights-society-part-copyright-society/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration accessed 14 May 2021.

[4] AIR 1979 Bom 17

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2) If not, whether the said performance would fall within the definition of 'cinematograph film'.

The Supreme Court answered the first question in the negative. The Court opined that only choreographic work, a piece for recitation, entertainment in a 'dumb' show, or if the scenic arrangement or acting form of these were fixed in writing would fall under the purview of dramatic work and would find protection under the Act. The Court refused to clarify whether stage or drama performances would also fall under 'dramatic work'. It went on to give a negative conclusion to the second question as well, stating that the definition offered protection that was limited to the film and the soundtrack which was married to 'film proper', also called the visual sequence. The Court found itself unable to fathom that there could be the cinematograph film could belong to one person but "different owners of portions thereof in the sense of performers who have collectively played roles in the motion picture". The analysis of this judgement highlights how the issue of performers rights was non-existent in the law and that the Court did not find it necessary to extend the scope of protection under the Act to protect performers.

Although the 1994 amendment to the Act finally recognized performers' rights, the protection therein was still very limited. The Act was amended to include Sections 2 (q) and (qq), 38 and others to protect performers' rights. Section 2 (qq) included actor, singer, musician, dancer, etc., including 'any other person who makes a performance' rendering the section quite open-ended. In the case of *Neha Bhasin,*[5] the Court had the opportunity to elaborate on the meaning of Section 2 (q) and the expression 'presentation made live'. The Court held that every performance had to be live in the first instance, irrespective of whether it was done in a studio or in front of an audience. The Court further held that if the performance was recorded and exploited without the permission of the performer, then the performer's right was infringed.

A drawback of the rights available to a performer under the 1994 amendment was that they were negative rights. Under Section 38 (3)[6] and (4)[7], certain acts such as making an audio/visual recording without the performer's consent or using it for a different purpose with or without consent was prohibited. Along with this, the level of economic protection given to performers was very limited and the concept of moral rights

[5] (32) PTC 779 (Del)
[6] *See Supra* Note 1, s.38 (3)
[7] *Id*., s.38 (4)

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was non-existent. Hence, performers had no rights over their performances if they did script fixed works.[8] Despite the 1994 Amendment being a step in the right direction, there were several other lacunae's that needed to be filled in terms of communication, reproduction and broadcasting. Moreover, due to the lack of litigation, it was unclear whether performers could exercise their rights over these aspects of their performances and how performers could protect their interests. The biggest flaw primarily was the emphasis placed on fixation in the form of sound recordings and video recordings which meant that performers' rights could only be violated if they were fixated or distributed etc. without his/her consent. These issues were somewhat answered by the 2012 amendment wherein the Act aligned itself with several Articles of the WPPT, and significantly broadened performers' rights. With the insertion of Section 38A, the Act introduced exclusive rights to performers, while Section 38B gave them moral rights. These rights filled several gaps in the law while recognizing the basic rights of performers to benefit from their work.

III. Problems with The Current Law in India

The 2012 Amendment is evidence of the leap in performers rights in India, especially when it comes to previously archaic decisions such as in the case of *Dev Anand case* (supra). However, the ambit of protection provided is still not as wide as it ought to be. For instance, Section 38A (2)[9] restricts a performer's right to receive royalties from the commercial use of performance. A basic comparison of the two sections shows that the moral rights under section 38B[10] available to performers are not at par with those available to authors.[11] But, the more pressing concern is the limited way performers, and their performances are looked at. Though the definition of 'performers' is open-ended as analyzed above, it is still unclear who falls within its ambit. For example, under Section 2(q) of the Act, performance is described as "any visual or acoustic presentation made live by one or more performers". Although the *Neha Bhasin case* (supra), expanded the meaning of live performance, this is still not enough. The issue here is that the definition of performers cannot be expanded until the definition of performance is. The fact that performers' rights fall within the Act in itself is also

[8]Sanhita Ambast, 'Protecting Performers' Rights: Does India Need Law Reform?' (2008) 13 http://nopr.niscair.res.in/handle/123456789/2432 accessed 14 May 2021.

[9] *See Supra* Note 2, s. 38A (2)

[10] *Id.*, s.38B

[11] S. Sivakumar & Lisa Lukose "Copyright Amendment Act, 2012, A Revisit" (2013) 55 Journal of the Indian Law Institute.

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extremely limiting and raises issues of its own. The effect of performers rights being protected under the Act limits the protection to only those performers who recognized under the Act while leaving most out of its protection. This lack of protection leads to the underproduction of creativity[12]- why create something new when it will not be recognized as deserving of protection at all? To name a few, the current definition of 'performers' does not specifically recognize synchronized swimmers, figure skaters, theatre artists, with recognizable styles. Performers are not seen as authors, but as conveyers of an author's work. All these instances convey the message that their rights are not seen as equal to that of others. However, the idea that performers' rights should fall outside the purview of the Act is not new to India. In *Cassettes Industries* v *Bathla Cassette Industries,*[13] the Court established that performers' rights were indeed different from copyright. The 2012 amendment did away with the need for this distinction. This, however, does not change the need for a broadened scope of performers' rights. Although performances of performers mentioned above, do not fall under Section 2 (q) as in, they have rights if someone records them and, not if someone copies them, their routine or their style. This is true to a certain extent however, a recent development in the India Copyright law is the willingness of the Courts to recognise distinct personality traits of performers. For example, Shahrukh Khan has a distinctive way of spreading his arms, which is constantly imitated in reality shows and tv soaps. This can be extended to Billy Bowden's recognizable style of umpiring or Navjot Singh Siddhu's style of commentary. This can be categorised as a step in the right direction but, such recognition by the Courts raises a few inevitable concerns. One of the biggest concerns is the fact that these rights exist only by way of judicial precedent and that the issue has not been legislated yet. The only way to claim such a right is under Articles 19 and 21. Thus, the threshold to successfully claim a violation of your personality right is very high. Moreover, due to the lack of explanation provided by the Courts as to who can claim these rights, there remains uncertainty as to what requirements need to be satisfied to claim personality rights.

The issues with the existing performer protection have been identified above. In order to fully understand the extent of this protection, other jurisdictions need to be analysed to determine where the existing framework lacks in performer protection.

[12]Seemantani Sharma "A Copyright Incentive for Promoting Aesthetic Sports in India" (2019) 17 (1) The Entertainment and Sports Law Journal.

[13] 107 (2003) DLT 91

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IV. Performers Rights in the USA

No specific legislation governs performer protection in the United States. Tort law is primarily used for protection while economic rights are protected in similar ways as in India. In the United States, up until 1972, the US federal government did not recognize the rights of performers and record labels over their recorded performances. However, this changed with the Sound Recording Act, 1971 which granted protection to recorded performances. However, only those performances which were recorded after 15.02.1972 were granted protection. Although the new law recognized the rights of the performers and record labels over the reproduction and distribution of their performances, no rights given to them in the public performances of their recordings. Simply put, the performers could sue entities for selling and making copies of a performance, but the performer would not be entitled to get royalties when their performance was played for example at radio stations etc., This caveat was narrowed down in the year 1978 when the US government granted performers a right of public performance in digitally transmitted recordings through radio, downloads through the internet etc.,[14] In 2018, the US government passed the Music Modernization Act, 2018 which is one of the most advanced updates given to the existing copyright law. The act has a retrospective effect on distributing royalties to music professionals and allows using unclaimed royalties to provide for a consistent legal process to receive them provides for new music licensing process for music streamed online and makes it easier for the right holders to get paid.[15]

There is additional protection provided to individuals under the Doctrine of Publicity or Right of Publicity in the US which essentially includes the right to keep one's image, identity, likeliness etc., from being commercially exploited. There is another aspect to this protection that stems from the right to privacy, allowing individuals the right to be left alone and not have a part of their personality from being displayed publicly without consent. Though there is no legislation to this effect, the Right of Publicity is deeply ingrained within the jurisprudence of the US through judicial precedents. The premise of the Doctrine is based

[14] Steven Seidenberg, 'US Courts Recognise New Performers' Rights - Intellectual Property Watch' (*Intellectual Property Watch*, 2014) https://www.ip-watch.org/2014/11/24/us-courts-recognise-new-performers-rights/#:~:text=In%20the%20United%20States%2C%20things,Act%20of%201971%20took%20effect accessed 14 May 2021.

[15] Dani Deahl "The Music Modernization Act Has Been Signed Into Law" (*The Verge*, 2018) https://www.theverge.com/2018/10/11/17963804/music-modernization-act-mma-copyright-law-bill-labels-congress accessed 14 May 2021.

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on the individual right of a person to protect, to own and to profit from the commercial value of his or her name, identity, likeliness etc., [16] A performer has commercial value in their name and persona which is attached to them by their performance. If others profit from it, the original owner has the right to control the same.[17] In its infancy stages, the Doctrine was narrow in its application, only protecting the name and likeliness of celebrities and performers. Later, the courts began to interpret the Doctrine broadly, using what is now known as the *identification test.* As per the test, a performer can be identified by some trait that is distinctive in nature such as the voice, likeliness or mannerism or even the name of the performer. Thus, this Doctrine protects performers from other individuals who may gain commercially from an aspect of the performer's personality. The US courts in the case of *Midler v. Ford Motor Co.*[18] and *Bert Lahr v. Adell Chemical Co. Inc.*[19] gave performers protection against imitations of their singing voices. The defendants in both cases had used the singing style of the plaintiffs to sell their products. In *Lahr* (supra), comedian and actor Bert Lahr sued Lestoil commercial for mimicking Lahr. He argued this was unfair competition and defamation under the Doctrine of Publicity amongst other things. After the trial court dismissed his case, the Appellate Court found his argument to be plausible and held that the actor's delivery of vocals was distinctive in pitch, accent, inflexion and sounds and therefore, the commercial infringed his rights.[20] In the *Midler case* (supra), the court recognized the right of publicity in voice and awarded damages of $400,000. After Midler had refused to do commercials, the defendants had hired one of Midler's backup singers to sing like her. The court found that Midler's voice was hers to control and was an aspect of her personality and, that the defendants had misappropriated Midler's voice, preying on her singing and could not make use of it without authorization. In another case involving the NFL[21] and the use of its athletes in a documentary, the players wanted to claim compensation for the use of their name, traits and personality in the documentary. Before answering the question of whether compensation could be given to the players, the Court had to determine whether such use was commercial or non-commercial in nature. The Court held that such use of the players'

[16]Prakash Sharma and Devesh Tripathi, 'Celebrities' Agony: Locating The Publicity Rights In The Existing IPR Framework' [2019] SSRN Electronic Journal https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3430422 accessed 14 May 2021.

[17]Sanhita Ambast, 'Protecting Performers' Rights: Does India Need Law Reform?' (2008) 13 http://nopr.niscair.res.in/handle/123456789/2432 accessed 14 May 2021.

[18]849 F.2d 460 1988, *appeal after remand*

[19]300 F.2d 256 (1st Cir. 1962)

[20]Russell A. Stamets, "Ain't Nothin' Like the Real Thing Baby: The Right of Publicity and the Singing Voice" (1994) 46 Federal Communications Law Journal.

[21] 55 F.Supp. 3d 1181 (2014)

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personality was not for any pecuniary gain and thus, the players were not entitled to receive any compensation.

A question that naturally arises from these precedents is that under the Right of Publicity, are only celebrities in the traditional sense protected? As discussed in the preceding paragraphs, the protection of personality traits is granted to individuals and hence, it can be inferred that there is no requirement as such for an individual to be a traditional celebrity like a movie star or a singer per se in order to fall within the purview of protection. This inference was later cemented through the case of *Martin Luther King Jr., Center for Social Change v. American Heritage Products, Inc.*[22] wherein the US Courts had the opportunity to define who is a celebrity. The Court gave a very broad interpretation to the word celebrity to be inclusive of more than just the traditional categories of individuals such as pop stars, singers, athletes, movie stars etc., This case also established the direct commercial exploitation of identity test which enabled an individual to establish that the defendant made unauthorized use of the plaintiff's identity, which is direct in nature and is commercially motivated.[23] Through this, the Doctrine of Right of Publicity in the US allows an individual whose identity has been misappropriated to fall within the definition of a celebrity.[24] From this, it is evident that even the Right of Publicity has various complex layers and how sophisticated the Doctrine truly can be. In terms of characterization of Publicity Rights in either copyright law, trademarks or a right to privacy, the Right of Publicity is generally considered to be distinct from the other laws although such a right finds its roots in these bodies.[25] Therefore, the Right of Publicity may have grown from these laws however, it is no longer related to, or based completely on them.

V. Future of Intellectual Property Laws in India

One of the most significant concerns with the protection given to performers within the Indian framework is that the protection is under the Act, is incapable of protecting various types of performers and their rights. The Act provides for very narrow protection to creative and original expressions of an idea.

[22] 694 F.2d 674 11th Cir. 1983

[23] *Ibid.*

[24] Souvanik Mullick and Swati Narnaulia, 'Protecting Celebrity Rights Through Intellectual Property Conceptions' (2008) 1 NUJS L. Rev http://nujslawreview.org/2016/12/03/protecting-celebrity-rights-through-intellectual-property-conceptions/ accessed 14 May 2021.

[25] Vaishali Mittal, 'Right Of Publicity In India | Lexology' (*Lexology.com*, 2019) <https://www.lexology.com/library/detail.aspx?g=c2428891-d91a-4fbc-b5a4-a6e0cb9e3913> accessed 14 May 2021.

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However, the ideas themselves are available and easily accessible for anyone to use. The rationale for this finds its roots in balancing competing interests and encouraging creativity.[26] When it comes to the Right of Publicity in the US, the protection is not just afforded to celebrities but rather, over the decades, has been recognised as a right belonging to every individual provided that the above-mentioned identification test is satisfied. Thus, the test as under the US Doctrine is not dependent on whether or not the aggrieved person is a celebrity but rather, the pre-requisite is that the plaintiff's identity has commercial value.[27] The American law recognises the individual contributions of a person, be it in the form of their voice or any other part of their personality and ensures that the protection is afforded to the performer who created it thereby recognising the 'original' and 'creative' part of a person's personality.

Recently, India has tried to incorporate a similar standard as in the case of the US which has received a fair bit of attention over the years. Simply put, India recognised the right of the individual to control the commercial use of their identity as the image of a celebrity has value both, economically and persuasively.[28] For instance, the Madras High Court granted an injunction on the release of a film named '*Mai Hoon Rajnikant'* as it violated the reputation and goodwill of the actor.[29] The effect of this decision was that it recognized the right to publicity or celebrity rights in India, thus preventing people from exploiting a person's name, likeness, image etc for commercial gain. In another case decided by the Delhi High Court, it was recognised that a person's popularity adds to their commercial value and therefore, such individuals need to be protected from unauthorised use of their personality.[30] Furthermore, the Court held that such a right emanates from the right of privacy (like in the case of the US) and can exist in personality traits such as voice, signature, name etc., Such a right vests only with the individual and only he can benefit from it. Hence, these rights originate from Article 21 of the Constitution and are a product of the right to privacy.[31] [32] Although there have been some High Court judgements on the issue, there is neither an authoritative judgement nor a statute

[26] Jatindra Kumar Das, *Law Of Copyright* (1st edn, PHI Learning Pvt Ltd 2015).

[27] 891 F. Supp. 381, 386 (W.D. Ky. 1995)

[28] M. Sai Krupa, 'Personality Rights In Indian Scenario - Intellectual Property - India' (*Mondaq.com*, 2018) https://www.mondaq.com/india/trademark/677226/personality-rights-in-indian-scenario?signup=true accessed 14 May 2021.

[29] 2015 (62) PTC 351 (Madras)

[30] 2003 (26) PTC 245 (India)

[31] "Publicity Rights and its Scope in Intellectual Property Laws" *Lexorbis* (*Lexorbis.com*, 2020) https://www.lexorbis.com/publicity-rights-and-its-scope-in-intellectual-property-laws/ accessed 14 May 2021.

[32] This approach does not treat publicity rights as a commercial property.

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covering publicity rights. A lack of written statute poses issues of its own as recognised in the US Doctrine. The adjudication on cases relating to publicity rights has largely been left to the discretion of the courts as there is no binding precedent and a lack of guidance in the form of legislation affects the rights of the performers inevitably as there is no set standard. Although such a step in recognition of performers' rights is welcomed for obvious reason, the lack of formalisation of the law means different protection is afforded to different performers and in different states of India. Moreover, the standard of achieving protection under the Publicity Doctrine in India appears to be very high as it is an expansion of Article 21, and not founded on the protection of performers' rights per se.

In terms of the definition of a celebrity, there is a lack of understanding and uncertainty as to who can be considered as a celebrity and thus claim protection under the Doctrine. Under the Act, two categories of persons are considered to have the potential to be celebrities and can claim the protection of their work or creation under the Act. These persons are authors[33] and performers.[34] However, we cannot say authoritatively as to who will be a celebrity or who will not be a celebrity because the Courts have been silent on this issue. A single glance at other jurisdictions such as the US is sufficient to show how important it is to give the widest possible meaning to the word celebrity. For example, in the State of Indiana, under the Right of Publicity,[35] a person's name, voice, signature, image, likeliness, appearance, gesture and mannerisms are all protected.[36] Similarly, even in India, although we may not have defined the term celebrity, the Courts must be mindful of the consequences of giving a narrow interpretation to the word while excluding other similarly placed people such as a YouTuber, Instagram influencer, a classical dancer, stage artist etc., from protection under the Doctrine.[37] Therefore, in today's day and age, these rights need to be protected as they form a fundamental aspect of a performer's personality. Moreover, in the current digital era and the influence of celebrities in our daily aspects of life, it is the need of the hour to formulate new laws relating to publicity rights. A specific legislation dedicated to these rights will ensure uniform application of protection and consistency in the decision making process by the Courts.

The issues with protecting performers under the Copyright Act (supra) has been identified throughout the essay. A way to tackle this issue and improve the level of protection under the Act for performers is to

[33] The Copyright Act 1957 (Act 14 of 1957), s. 2(d)
[34] The Copyright Act 1957 (Act 14 of 1957), s. 2(qq)
[35] Indiana Code Title 32. Property § 32-36-1-1
[36] *Id.*, s. 3
[37] Kiran George "Right of Publicity in India – An Unfinished Story" *SpicyIP* (*SpicyIP*.com, 2016) https://spicyip.com/2016/01/right-of-publicity-in-india-an-unfinished-story.html accessed 14 May 2021.

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provide *sui generis* protection. The debate regarding this type of protection has been ongoing, with many scholars being in favour of this for the simple reason that copyright laws do not provide sufficient protection to various performers.[38] Therefore, recognising performers as an independent group might be the way forward. The main outcome of this recognition is all forms of exploitation of performances that are in the public domain will be prevented. However, the authors understand that providing a broad range of protection to performers requires a clear display of benefits. A simple response to this issue is that intellectual property laws were enacted to protect the interests of creators from these kinds of exploitations. A mechanism of providing *sui generis* protection to performers prevents an overlap between performer rights and copyright law thereby allowing protection of work that may be non-tangible and/or non-commercial/economic.

As argued above, the foundation of performer protection is based is the right of an individual over his personality and that an individual's creative property should not be infringed by another person. It is not the aim of this essay to argue for unfettered protection to performers but rather, providing adequate protection to performers and how they *uniquely* and *distinctively* contribute to a work. The arguments in favour of protecting performers are not just limited to an economic detriment or some form of commercial disadvantage to the performer. It also constitutes an interest of the performer in his/her work as each performer may contribute a part of his/her personality in a particular work.

Furthermore, with advancements in technology and how easy it can be to profit from another person's creativity, the laws need to evolve as well along with remembering the reason for enacting welfare legislations such as the ones covering intellectual property laws.

VI. Conclusion

While performers' rights have grown a fair amount in the last two decades, there is still lacunae in the current law. We are used to seeing singers and dancers as performers that we forget that this category is much wider and diverse and deserves extensive protection. A reason why a number of performers and performances are left out from the protection of the law is because of the "commercialization" and "royalties." They do not earn enough to require the protection of the law. This is a flawed point of view. Royalties and commercialization should find protection in the law, but originality and creativity should not be left unprotected due to the lack of the former. That being said, commerciality does matter. Where commerciality

[38] Aashita Khandelwal "Performers Rights in India" (2019) 2 Fast Forward Justice Law Journal.

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exists, it needs to be given due protection as well. The need for personality laws also forms a vital reason for the expansion of performers' rights. The United States has set a clear example as to how it is possible to recognize performers' rights outside the ambit of copyright law. The way the current Indian Copyright Act is framed makes it impossible to grant protection to performers beyond its limited framework. While it is unlikely that separate legislation will be developed anytime soon solely for performers' rights, there is no doubt that they need to be expanded. This also does not mean that the codification of performers' rights is not needed. When Indian High Courts chose to recognize performers' rights, they saw the lacunae for what it was. Their decisions in favour of performers mean that it is likely that more cases regarding similar issues are going start to come up in front of the court. Rather than waiting for different courts to reach different outcomes on similar issues, it would be wise to codify performers' rights in India, either through an expansion of Indian copyright law or as is our recommendation, through a separate legislation governing performers' rights.