

PERFORMER'S RIGHTS

Problems and issues regarding recording of live concerts

Introduction:

In recent years classical musicians in India have faced several problems arising from the unauthorized recording and sales of their live performances. In sharp contrast to musicians working within the film industry or outside the country, classical musicians in the country are unprotected by unionised bargaining power, and are left to negotiate professional terms and conditions on their own, without the help of agents, managers, music producers and lawyers. They are as a consequence, vulnerable and open to exploitation of their rights by all and sundry. Lack of awareness with respect to their rights and the absence of any collective handling of problems make them prime targets for exploitation from different sources.

This preliminary study therefore aims at articulating such problems, issues and sources of exploitation, and examining them with reference to the rights of performers as stated in the Copyright Act, 1957 as amended by the Copyright (Amendment) Act, 1999. This study has not in any way been undertaken as an aggressive and vicious witch-hunt, but with a view to clearing the air of conflict, strife, mistrust and ignorance regarding rights, and is thereby directed with the purpose of making Performers aware of their rights.

Structured in the manner of an informative and interactive question-answer session, the information included herein has been sourced, researched, and collated from different sources. Expert legal opinions have been taken from Mr. Hardeep Singh Anand (Advocate, Supreme Court, and a specialist in intellectual property law), Ms. Dahlia Sen Oberoi (Advocate, Delhi High Court, with special expertise in intellectual property matters) and Mr. Chander M. Lall (Advocate, Delhi High Court, specializing in intellectual property law). In addition, valuable information has been generously provided in informal discussions and conversation by fellow musicians, and other people working in the music industry. Their names are not being acknowledged presently, as formal permission for the same has not been obtained from them in writing. It is noteworthy that while all the three legal experts who have been consulted in this project are currently representing recording companies and broadcasting networks, they have also actively advocated Performer's rights and have given generously of their time and skills with the specific intention of creating awareness among performers. The invaluable comments and suggestions made by Dr. Ashok Da Ranade who patiently went through the initial draft submitted to him are acknowledged with deep gratitude. Since this study has been initiated and conducted by me, a performer of North Indian vocal music, my sympathy for performers may be misconstrued as being biased and prejudiced in favour of artistes. Yet my work with leading recording companies and publishers of Indian music both as a consultant and a performer has provided me with an opportunity to view both sides of the coin. It is also necessary to point out that this study was conducted by an individual and is therefore limited by

personal constraints, and is by no means conclusive. However, collective investigation into the issue under discussion will reveal far greater information.

What the Indian Copyright Act says about:

- 1. Performer:** Chapter 1 (qq) of the Copyright Act gives the following definition of the term:
“Performer” includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance;
- 2. Performance:** Chapter 1 (q) of the Copyright Act has the following definition:
“performance”, in relation to performer’s rights means any visual or acoustic presentation made live by one or more performers;
- 3. Performer’s right:** Chapter VIII, Section 38 of the Copyright Act:
 - i. Where any performer appears or engages in any performance, he shall have a special right to be known as the “performer’s right” in relation to such performance.
 - ii. The performer’s right shall subsist until fifty years from the beginning of the calendar year next following the year in which the performance is made.
 - iii. During the continuance of the performer’s right in relation to any performance, any person who, without the consent of the performer, does any of the following acts in respect of the performance or any substantial part thereof, namely:-

- (a) makes a sound recording or visual recording of the performance; or
- (b) reproduces a sound recording or visual recording of the performance, which sound recording or visual recording was-
 - I. made without the performer's consent; or
 - II. made for purposes different from those for which the performer gave his consent;
 - III. made for purposes different from those referred to in section 39 from a sound recording or visual recording which was made in accordance with Section 39; or
- (c) broadcasts the performance except where the broadcast is made from a sound recording or visual recording other than one made in accordance with section 39, or is a re-broadcast by the same broadcasting organisation of an earlier broadcast which did not infringe the performer's right; or
- (d) communicates the performance to the public otherwise than by broadcast, except where such a communication to the public is made from a sound recording or a visual recording or a broadcast,

shall subject to the provisions of section 39, be deemed to have infringed on the performer's right. Once a performer has consented to the incorporation of his performance in a cinematographic film, the provisions of sub-sections (1), (2) and (3) shall have no further application to such performance.)

4. Acts not infringing performer's right: Chapter VIII, Section 39 of the Copyright Act: No broadcast reproduction right or performer's right shall be deemed to be infringed by-

- (a) the making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of *bona fide* teaching or research; or
- (b) the use, consistent with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for *bona fide* review, teaching or research; or
- (c) such other acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under section 52.

Frequently asked Questions:

The questions in this session have been based on personal experience as well as personal undocumented discussions with performers, and are answered by the legal experts named earlier.

1. *At almost every music festival, concert, private concert or mehfil, live performances are recorded by organisers/ collectors/ personnel handling sound systems/ and members of the audience without the permission of the artistes. Letters of invitation sent by organisers to musicians only state terms and conditions for the performance. Audio and video recordings are not mentioned in the correspondence exchanged between the two parties, and yet concerts are recorded. In this situation do artistes have the right to refuse to let their performance be recorded?*

Hardeep Singh Anand: “The answeris a categorical ‘Yes’. An artiste definitely has the right to refuse his/ her performance be recorded. Not only has the ‘Performer’ the right to refuse his/ her performance being recorded, but even when the performer consents to the performance being recorded, the Performer can stipulate the purpose for which the consent for recording is being given, e.g. for non-commercial private use only. This consent is in fact a licensing of his/ her Performer’s Right by the Performer to record his/ her performance on stipulated terms, and has to be given in writing by the Performer.”

Dahlia Sen Oberoi: “Yes. The artiste has the right to refuse recording of his/ her performance. Any performer engaging in a performance has a special right, the performer’s right that subsists for twenty-five years from the beginning of the next calendar year. (Section 38)

“However if a recording is made for purposes that can be termed “fair dealing” under the Act or an act that is not infringing then no action can lie against the person who makes the recording. (Section 39)

1.for private use for sole purposes of bona fide teaching and research.
2.for reporting current events, review, criticism”

Chander M. Lall: “Yes, the performer would have the right to refuse video or audio recording of the performance. Under the provisions of the Copyright Act where a performer appears or engages in any performance he or she shall have a special right

known as “performer’s right’ in relation to the performance. This right is valid for fifty years and includes actors, singers, musicians, dancers, acrobats, jugglers, conjurers, snake charmers, a person delivering a lecture, to name only a few. The copyright Act further provides that no sound or visual recording of the performance can be made without the consent of the performer. Not only will the organiser have to obtain the permission of the performer to make the recording, but will also require further permission to make further copies of the recording for sale or otherwise. Furthermore, if the performer gives his or her consent for making the recording for a particular purpose (say for archival purposes) but is used by the organiser for a different purpose (say for sale or for lending or for use in a film), such an act would also violate the Copyright Act. The performer would be entitled to stop the organiser from continuing with the violation of his rights and also claim damages or accounts for profits.”

Conclusion: *The information provided above makes it apparent that every participating performer in an ensemble rendering Indian classical music has the right to give permission for recording of a live performance or withhold it. This right is bestowed by the statute on both main artistes as well as accompanying artistes, including tanpura players. It is equally evident that **recording of live performances is illegal unless consent for the same is obtained in writing from each of the performers in the ensemble.** Thus an infringement of performer’s rights is committed by the following when they record live performances without written consent:*

- (a) **Music circles/ organisers and private collectors** who use professional/ semi-professional equipment to record live performances. While documentary proof is currently unavailable, it has been discovered in private conversation that some music circles/ organisers charge a fee from private collectors to give them permission to record concerts hosted by them. Such a transaction would in the eyes of the law be deemed illegal and infringing on performer's rights, and is therefore liable for civil and criminal action.
- (b) **Soloists/ main artistes** who record their own performances without taking the consent of accompanying artistes. Several main artistes are in the habit of recording their concerts which in itself may not be considered a blatant act of infringement as it may have been done with a view to documenting and reviewing for self analysis. However, the consent of accompanying artistes is required even if the intention is to record for private use, especially given the fact that many such recordings have subsequently been sold to and published by recording companies. While no litigation has as yet arisen as a result of such acts of infringement, there is deep discontent among accompanying musicians for such misappropriation of their work without due payments or assignments.
- (c) **Television networks and other media personnel** who do not even bother to take verbal permissions from musicians before recording entire concerts with complete disregards for performer's rights. While section 39 of the Act states that

excerpts of a performance may be recorded and broadcast in reporting of current events, recording of entire concerts is certainly not permitted. If investigations were to be carried out, it may be discovered that television channels indulging in such infringing acts do not hesitate to sell footage of music concerts in their possession to other channels, thereby commercially exploiting footage that was to be used, consistent with fair dealing, only to report current events. Premier Government organisations such as the Sangeet Natak Akademi also provide video footage to television channels for a fee (albeit a subsidised one) from their archives. Whether archival material can be disbursed in this manner without the consent of the performers remains a debatable question.

- (d) **Music lovers and members of the audience** who are in the habit of recording live performances without permission from the performers. Recordings made surreptitiously are 'bootlegged' and also infringe on the rights of the performer.*

- (e) **Sound engineers manning the amplification systems** who have been known to surreptitiously record live performances and then provide copies for a fee.*

- 2. *Usually performances of classical music involve a main artiste accompanied by one or more accompanying artistes such as a tabla or a sarangi player. Sometimes verbal permission to record the concert is sought from the main*

artiste by the organisers (although in many cases organisers consider it a matter of right to record recitals) but accompanying artistes are not extended even this basic courtesy. Would you say that accompanying musicians also have a right to object to recording of their performances?

Hardeep Singh Anand: “The definition of a ‘Performer’ in the Indian Copyright Act is all encompassing and extends to musicians. Therefore, they also have the statute bestowed ‘Performer’s Right’ and their written consent is also required before recording their performance.

From a practical point of view, when music recording companies undertake a commercial recording, the lead singer who may have his own troupe of back-up musicians / artistes may contractually be made responsible to obtain such consents from the accompanying musicians. Thus, in such a case it would become the responsibility of the lead singer to obtain/ arrange for such written consent from the accompanying musicians.”

Dahlia Sen Oberoi: “Yes. Each accompanying musician is a ‘performer’ as defined by Section 2 qq of the Act and can object to recording.”

Chander M.Lall: “The law does not make any distinctions between main artists and accompanying artists. All are equal in the eyes of law and each performer in its own right is entitled to the same benefits and remedies. An accompanying tabla or sarangi player is given the same rights as the more prominent counterpart, the singer.”

Conclusion: *When discussing Indian classical music, it may be necessary to understand that accompanying musicians cannot be called “back-up artistes”. This term is probably better suited in the context of popular and film music but in the context of Indian classical music, the role of accompanying musicians is one of independent freelancers. Therefore, all negotiations including permission for recording of live performances must be conducted with them individually and separately. AIR has established a valuable precedent in contacting each artiste individually and making separate payments to them. Organisers of private concerts and music festivals can also follow the same example instead of shirking their responsibility by saying that it will be too difficult for them to handle independent negotiations with each member of the ensemble. Similarly, main artistes too must realise that they cannot take their accompanying artistes for granted, and should consult them before agreeing to have their live performances recorded or published.*

3. *Is permission in writing required from all members of the ensemble, or is it enough to have a verbal understanding?*

Hardeep Singh Anand: “Statutorily, written consent is required from all accompanying musicians. However, if one were to base a legal action only on a non-compliance of obtaining a written permission for an obviously commercial recording, it may not succeed. Courts also weigh equity while deciding cases, and may lift the veil to ascertain the true intention of the parties when the

recording was made, and may also go by trade practise which to date, with a few exceptions I believe, does not follow any norm of obtaining written consents from accompanying musicians.”

Dahlia Sen Oberoi: “A written assignment is required for purposes of performer’s rights as required for purposes of copyright. Similar provisions that apply to copyright also apply to performer’s rights. (Section 18, 19)”¹

¹ **Section 18.** Assignment of copyright. – (1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of copyright or any part thereof:

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

(3) In this section, the expression “assignee” as respects the assignment of copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.

Section 19. Mode of assignment. – (1) No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent.

Chander M.Lall: “According to the strict letter of the law, only ‘consent’ is required. This could include oral consent as well. However, it is always advisable to obtain a written consent document from each member of the ensemble.

4. Most organisers coax musicians into permitting recording of live concerts by saying that they maintain an archive.

(2) The assignment of copyright in any work shall identify such work, and shall specify the rights assigned and the duration and territorial extent of such assignment.

(3) The assignment of copyright in any work shall also specify the amount of royalty payable, if any, to the author or his legal heirs during the currency of the assignment and the assignment shall be subject to revision, extension or termination in terms mutually agreed upon by the parties.

(4) Where the assignee does not exercise the rights assigned to him under any of the other subsections of this section within a period of one year from the date of assignment, the assignment in respect of such rights shall be deemed to have lapsed after the expiry of the said period unless otherwise specified in the assignment.

(5) If the period of the assignment is not stated, it shall be deemed to be five years from the date of assignment.

(6) If the territorial extent of assignment of the rights is not specified, it shall be presumed to extend within India.

(7) Nothing in sub-section (2) or sub-section (4) or sub-section (5) or sub-section (6) shall be applicable to assignments made before the coming into force of the Copyright (Amendment) Act, 1994.

However in reality the archive is a private collection that is housed in the organiser's bedroom or living room and accessing the collection remains virtually impossible for music students and music lovers. What then is an archive? And can such private collections be termed illegal if written permissions from musicians are not available with the collectors?

Hardeep Singh Anand: “An ‘archive’ would be a library whether open to the public or not, however it is not defined or used in our Copyright Act. Section 52 (p) provides another limitation to Performers Rights by implication, in as much as it permits the keeping of unpublished works in a library subject to the caveat that it should be accessible by the public.”

Dahlia Sen Oberoi: “An archive has not been defined by the Act and the closest meaning thereof could be that of ‘recording for purposes of research’. However there are specific provisions dealing in archives/ archival recordings in the U.K. Act. Sections 37 to 43 of the U.K. Act talk of Libraries and Archives. However such libraries and archives have to adhere to regulations that are laid down by the Secretary of State. Only a designated body can maintain an archive. So far only eight bodies in the U.K. have been designated by the Order of the Secretary of State for maintaining archives. However there are no similar provisions in the Indian scenario and in any case none of the bodies that actually make recordings could be said to be ‘designated’ by any authorised body. A private collection, in the absence of a written permission of the performers, can be termed illegal since it does

not qualify as a non-infringing act within the meaning of section 39.”

Chander M.Lall: “If the performer can show that he or she consented to making of the recordings for purposes of archives only, which would be open to the public at large, or to music students or music lovers, then the archives cannot be maintained in the organiser’s bedroom or living room where such access is not possible. On the other hand, if the organiser can show that that the performer consented to the recording for archival purposes only for private use by the organisers, the performer cannot then claim to the contrary.

5. Would it be possible to lodge a formal legal complaint against such collectors? Can their premises be raided for illegal possession of music? Which body or organisation or branch of the government would look into these issues?

Hardeep Singh Anand: “As long as a collector keeps his recording only for private use, you cannot raid his premises for illegal possession of music.

However if it can be prima-facie proved that the collector is planning to commercially release the sound recording / visual recording, and he does not have the requisite performer’s consent, then such a collector is liable for civil as well as criminal action. A suit for injunction, damages, accounts can be filed, as well as police action for seizing Master plates and infringing copies of the sound / visual recording.”

Dahlia Sen Oberoi: “The Copyright Act provides for both civil (Sections 54 to 62) as well as criminal (sections 63 to 70) remedies against infringement of copyright. These provisions apply to infringement of performer’s rights.”

Chander M.Lall: “A police officer not below the rank of sub-inspector, if satisfied that an offence under the Copyright Act is being, or is likely to be committed, can seize without a warrant all the copies of the work and thereafter initiate criminal proceedings before a Magistrate.

The government has initiated some measures for better enforcement of copyright laws. A summary of some of these measures is given below:

- The Department of Education, Ministry of Human Resource Development, Government of India has constituted a Copyright Enforcement Advisory Council (CEAC). The CEAC is reconstituted from time to time to review periodically the progress of enforcement of the Copyright Act and to advise the government on measures for improving the enforcement.

- Creation of separate cells in state police headquarters. Special cells for copyright enforcement have so far been set up in the following 23 States and Union Territories:

These are the States / Union Territories of Andhra Pradesh, Assam, A & N Islands, Chandigarh, Dadra & Nagar Haveli, Daman & Diu, Delhi, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Meghalaya, Orissa, Pondicherry, Punjab, Sikkim, Tamil Nadu, Tripura and West Bengal. States have also been advised to designate a nodal officer for copyright enforcement to facilitate easy interaction by copyright industry organizations and copyright owners.

These bodies can be approached and appropriate complaints be made. It is also possible to initiate civil proceedings in a court of law.”

6. *In recent years, many archives or so-called archives as well as private collectors have offered their collections for sale to recording companies. Even main artistes and their legal heirs have been known to offer recordings of live concerts to recording companies. In such situations, all negotiations and permissions are concluded with the main artiste alone and very often no assignments are taken from accompanying artistes. Neither are they paid a penny for the sale of their work, while the main artiste is paid large sums of money, often to the tune of several lakhs. But for the fact that they are acknowledged sometimes on the jacket of the album it is*

almost as if the accompanying artistes had never contributed to the music at all. The current trade practise is for the recording company to conveniently ask the main artiste or the heirs to indemnify them against all third party claims. In instances like this, where no assignment has been obtained from accompanying musicians, can an accompanying musician claim his due from the company and / or the main artiste? If so, what course of action would you suggest?

Hardeep Singh Anand: “The very threshold issue would be that it ought to be incumbent upon (the main artiste) who is a fellow colleague Performer, to ensure that he ought to remunerate the accompanying musicians when he has struck, a shall I say unforeseen windfall. This issue should be addressed internally by our proposed Performers Society. However, if a concerned person wants to take up this issue at this stage by himself, I would advise that IMI should be apprised of the ramifications of this issue and some reasonable demand be made from (the main artiste at fault) under intimation to the music company concerned.

The other important issue to be seen before making the demand is whether the recordings in question were made prior to 10th May 1995. The Performers Right came onto the Statute book only on the 10th May 1995, and are not applicable retroactively. Thus the recorded performance in question ought to have been made after 10th May 1995 for the Performer to have a cause of action based on his ‘Performers Rights’.

As far the music company who has made this recording is concerned, if it has obtained an indemnity and also contractually made it the responsibility of the Performer to obtain licenses/consents from other performers, then they would be in the clear, and in any proposed civil action could at best be joined as a proforma defendant.”

Dahlia Sen Oberoi: “It is my opinion that no Indian artiste...ever takes a ‘written assignment’ from accompanying artistes and neither do the accompanists ever insist that one is taken from them. Once an accompanying artiste is paid the agreed ‘flat rate’, everybody forgets about him/her. People go to see and hear the main artiste and the accompanist is perceived only as ancillary to the performance. In fact the accompanying artistes’ contribution is not even recognised as a ‘performance’ in its own right. The Act has provided for every performer, even a ‘snake charmer’. But can you envisage a ‘snake charmer’ chasing a ‘foreigner’ who captures his performance in his video camera for future commercial gains. If you seek legal redress in a case..., it would mean the accompanying artiste suing the main artiste for giving rights in a performance that is not exclusive to him. But practically speaking I hardly think that an average ‘accompanying artiste’ would be in a position to spend any amount in litigation. I would personally suggest that awareness be created amongst all artistes and each should insist on written negotiations in future. However if they are ready to sue the artiste who has given the rights as well as the music company, they can do so.”

Chander M.Lall: “The claim of the accompanying artists would be against the party who has committed the wrong. In the facts of the present case, the artist can stake a claim only against the recording company. If the main artist has indemnified the recording company, it for the recording company to take up the issue with the main artist. In my opinion, in a majority of the cases a letter to the recording should suffice in sorting out the problem.”

7. *Since the Copyright Act was amended in favour of Performers on 10th May 1995, does it mean that someone who has a bootlegged recording of a live performance made before this date, can sell it to a music company and publish it or use it for commercial gains without compensating the participating performers?*

Chander M. Lall: “Having studied the Act, due compensation will have to be given to all the Performers even if the performance in question took place before 10th May 1995.”

***Some startling facts:** Some startling discoveries have been made in the course of this study, and while documentary proof regarding these is still unavailable to me, they are being submitted for consideration although I hope to be able to provide necessary proof in the near future.*

1. *Television crews often record live performances for reporting purposes. Did you know that channels then treat the footage as their property and sell it for as much*

*as **Rs.300 to 400 for per second?** Naturally, no royalty is given to the performers who are the actual owners of the recorded material. (Information provided in private conversation by the director of a popular programme on the arts telecast on Doordarshan).*

2. *The Sangeet Natak Akademi provides footage from their archival recordings to television networks and channels at the rate of **approximately Rs.1500 per thirty seconds**. Not a penny from this revenue goes to the performers. (Information provided in private conversation by the director of a popular programme on the arts telecast on Doordarshan).*
3. *Television channels such as the Bangla Channel telecast entire concerts from prestigious festivals such as the Dover Lane Conference held annually in Calcutta. No permission for the same is taken from the performers, and neither are they compensated for the telecast. This is a blatant infringement of Performers Rights and yet music lovers have been heard to praise the channel for its decision to promote classical music by telecasting recordings of live performances. Perhaps they do not realise that music is being promoted at the cost of infringing performers rights. (Information based on a private conversation with a classical music maestro).*

Remedies:

Despite having some of the most artiste-friendly laws in the world, no remedies for this exploitation will be effective unless

performers themselves ask for their due. Seminars, and awareness campaigns are urgently required to educate all artistes about their rights. In the past, artistes have risen above personal differences to defend their rights collectively. Many of us have read and heard about the Sangeet Kalakar Mandal agitation in 1953 and some of the leaders of the agitation such as Smt. Kaushalya Manjeshwar and Pandit Arvind Parikh are among us. With their guidance, problems of performers can be handled collectively and reasonably without undue hostility.

Subsidised legal aid is also required and will have to be arranged for. This too is not impossible but can be sought only when artistes put aside their insecurities and fears and tackle the problem openly. While there is a lot of discontent simmering in the world of classical music, few artistes are willing to even voice their protest for fear of being branded troublemakers. Unless this fear is set aside, exploitation will continue unchecked.

This initial report therefore, is submitted in the hope that those who read it will come together to protect the rights of performers and musicians.

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