How Should A 'Performance' be Defined? A Comprehensive Study on Definitional Intricacies of Performers' Rights

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ABSTRACT

Though performance as an activity has a long and rich history, the giving out of performances as a professional expert and in expectation of a monetary return is a comparatively new phenomenon. It emerged out of a very practical necessity of modern times. In the modern era, abstract creations such as literary works or musical notations, which emerged much before the art of performance, required a certain level of understanding and skill to comprehend their essence. Hence, it is of utmost necessity that there is an intervention of a third party who would act as the medium of expression between the author and the audience. Every creation of an author has a target audience, and if the recipients or consumers of this creative activity are not able to decipher the idea portrayed or otherwise enjoy the work, the very purpose of the entire process stands frustrated. In view of this, it is necessary that these means of making the work reach the audience must not only be sufficiently identified but also be protected, much like the underlying work. This article aims to present a comprehensive picture of the subject matter of performers' rights protection and to make an attempt towards harmonizing different connotations of the term 'performance'.

Introduction to the Law on Performers' Rights.

Being a part of the twenty-first century where the human surroundings are brimmed with artificiality, it is crucial to discuss the abstract behaviour of human beings. Humans are essentially the product of nature and naturality is their natural habitat. This is evident from the fact that literature and art in all its forms have been the primary means not only of entertainment and learning but also of depicting and portraying natural human traits. The acceptability of this universal truth has given birth to the concept of "Abstract Expressionism"[1]. It traces the development of art, comprising of diverse styles and techniques, and emphasizes the artist's liberty to convey thoughts and emotions through non-traditional and non-representational means. What started as a mere philosophical utopia in New York City in the early phase of the twentieth century, soon took the world over and became a means of emancipation for the depressed community of performers.

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[1]What Is Abstract Expressionism? – Expression and Vitality Over Perfection, available at: https://www.theartist.me/art/abstract-expressionism-definition/#:~:text=Abstract%20Expressionism%20is%20an%20artistic,nontraditional%20and%20usually%20nonrepresentational%20means (last visited on March 29, 2021).

Leading actors such as John Pollock and Willem de Kooning have been the ardent protagonists of it.

However, practicalities of the entertainment industry require something more credible and real, than these philosophical thoughts. It requires legally enforceable entitlements and to make a case for such explicit benefits, one must be able to identify the subject matter of claimed protection, in this case, the performers' performance. The recognition of any benefit in favour of performers heavily depends on the meaning and understanding of their contribution to a work i.e., their renditions or performances. Given this, this research aims to seek answers to the fundamental question of – what is the meaning of the term 'performance' in the copyright or related rights perspective. For the said purpose, the present researcher has analysed and compared the positions of leading copyright economies. The sole aim is to create a comprehensive view of the subject matter of performers' rights so that the policymakers at the interstate or intrastate level can take guidance for their future law-making endeavours.

What is a Performance?

Though performance as an activity has a long and rich history, the giving out of performances as a professional expert and in expectation of monetary return is a comparatively new phenomenon. It emerged out of a very practical necessity of modern times. In the modern era, abstract creations such as literary works or musical notations, which emerged much before the art of performance, required a certain level of understanding and skill to comprehend their essence. Hence it is of utmost necessity that there is an intervention of a third party who would act as the medium of expression between the author and the audience.

Every creation of an author has a target audience, and if the recipients or consumers of this creative activity are not able to decipher the idea portrayed or otherwise enjoy the work, the very purpose of the entire process stands frustrated. In recognition of this fact, the writers, composers, and creators of all kinds started employing the services of professional performers who could, by use of their skill and talent, take the work to the audience in an easy and more entertaining form. Two instant benefits came out of this development. First, the recipients started enjoying a more personalized experience and

heightened emotional connectivity towards the work. The feeling of being a part of something lively and real such as the adaptation of a Shakespeare drama or an opera performance can by no means be compared with the consumption of these works in the crude form by reading a book or interpreting musical roles. Second, the contribution of performers became very crucial for the success of any forthcoming work and this realization placed these new professionals in the position to bargain their services.[2]

Over time, the art of performing attained new heights of creative expression. Working before a live crowd, Kazuo Shiraga of the Japanese Gutai Group made a figure by sliding through a heap of mud[3]. Georges Mathieu arranged comparable exhibitions in Paris where he savagely tossed paint to depict the ideas of the creator[4]. Actors like Hans Namuth initiated the concept of expressing pictures clicked with a camera as living creatures roaming around the surface of the mother earth. The revolutionization of performing arts with such unique and novel ideas infused a new life into the entertainment industry and the triggered never-dying expectations of the audience. This shift of attention from literary, dramatic, and musical work themselves to their performances demanded comprehensive changes in the approach of copyright law towards the performers.

The Definitional Understanding of the term 'Performance'

If we go by the literal meaning of the term, it means something that is accomplished or completed, but in the generic sense, it is an art that is presented with the help of physical acts, accompanying sounds, or visual representations. Leading English dictionaries have also attempted to define this contentious term. The Oxford Dictionary defines 'performance' as: "An act of playing in concert or some other form of entertainment performed in front of the audience." The Cambridge dictionary defines it more elaborately. It provides: "How well a person, machine or any device presents an activity will be called a performance. Here the person is the one who represents an activity by

[2] Performance Art: An Introduction, *available at*: https://www.khanacademy.org/humanities/art-1010/conceptual-and-performance-art/performanceart/a/performance-art-an-introduction (last visited on March 29, 2021).
[3] Angie Kordic, "What is the Significance of the Japanese Gutai group?" *Widewalls*, Sept. 24, 2015.
[4] Jackson Pollock, Abstract Expressionism, *available at*: https://www.tate.org.uk/art/art-terms/a/abstract-expressionism (last visited Mar. 29, 2021).

his talent and intellect, and machine herein includes devices like camera, recorder, television, etc."

The present researcher also came across two other interesting and legally appropriate ways of defining performance. They are-

a. "Performance is a temporary stage that can be carried out without taking any help from technology because it is the creation of an individual, created with the intent to spread entertainment, education, or awareness among the general public."[5]
b. "A performance is the transitory activity of a human individual that can be perceived without the aid of technology and that is intended as a form of communication to others for entertainment, education or ritual."[6]

These definitions along with the ones in Oxford and Cambridge dictionaries prioritize four major points with varying emphasis. The first common point is the insistence on the transitory and non-permanent nature of the activity. Secondly, the performance is necessarily a human activity. Thirdly, the non-intervention of technology is the expectation of all, and finally and most importantly, performance is regarded as a form of communication for different purposes ranging from entertainment to education. Building on this understanding, the Rome Convention first attempted to provide a formal meaning to the term at the global level.

The International Law on Copyrights and the Concept of 'Performance'.

The Rome Convention.

Performances come under the protective umbrella of the related rights regime as established under the Rome Convention. This was the first convention at the global level which dealt with the rights of the performers over their renditions. Though it did not explicitly define the term 'performance', the meaning of the same can be deciphered through the definition of 'performer'. Article 3 (a) took a liberal view of the conception of being a performer[7] and not only mentioned the established categories of activities

[5] Owen Morgan, *International Protection of Performers Rights* 27 (Hart Publishing, 2002).
[6] *Ibid.* at 6-7 (raising questions regarding the scope of protection).
[7] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (496 U.N.T.S. 43) [hereinafter Rome Convention].

such as acting, singing, reciting which have traditionally been regarded as accepted forms of performances, but also provided due space to the ones which will evolve in future with new technological achievements. This was done by the use of the phraseology "otherwise perform" in the definition.

But the million-dollar question is – when would a person be said to be performing. Rome does not help one here. For this, one must go back to the generic meaning of the term as discussed by the present researcher under the previous headings to reach the only possible conclusion that 'to perform' here simply means an act of communication. Hence, whatever be the nature of the activities in which one indulges, there must be an element of transmission of ideas, emotions from the performer to the audience. After Rome, it was the turn of the World Trade Organization to dwell on the peculiarities of the subject.

The TRIPS Agreement.

TRIPS[8] did not even attempt to define the term performance or the performer, and it saved itself of the effort by adopting the definitional component of Rome. This lethargic attitude of WTO became the primary reason for the swift intervention of WIPO by the adoption of a specific treaty for performers and phonogram producers, which brought much-needed clarity into this highly contentious and poorly defined area.

WIPO Performers and Phonogram Treaty.

Theoretically, WPPT was the third addition to the international law on the protection of performers' performances, brought primarily to adapt the law to suit the rising digitalization of entertainment consumption.[9] Practically, it was this treaty that was far more alive to the plight and concerns of the performers than any of its predecessors. The present researcher has no hesitation in referring to it as 'Berne of Performers' because it has done for the performers what Berne did for authors.[10]

[8] The Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994, (33 I.L.M. 1125) [hereinafter TRIPS].
[9] Jorg Reinbothe and Silke Von Lewinski, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP* 236 (Oxford University Press, 2002).
[10] Convention for the Protection of Literary and Artistic Works, 1886 (828 U.N.T.S. 221) [Hereinafter Berne Convention].

As per WPPT, any act that communicates or conveys the essence of the underlying work to the audience for education, general awareness or entertainment purposes is a performance, which is deserving of equal protection and regard as the underlying literary or artistic work. WPPT follows the basic assumption that if intellect, labour, or capital is invested in creating any act which is then transmitted to the general audience in any form; it must fall within the protected domain of performance.

Most importantly, in addition to the already mentioned categories of acts mentioned under the definition in Rome, WPPT has made explicit provisions for expressions of folklore. This inclusion is not like the other inclusions already present such as singing or dancing because it brings far-reaching consequences to the idea of performance itself. All the other explicit categories whether they be singing, dancing, declaiming, are bound with the requirement of there being an underlying literary or dramatic work. The expressions of folklore by their very nature are independent of such a necessity and hence, since WPPT the meaning and extent of the term 'performance' covers all possible renditions, whether based on existing work or not, so long as there is an element of communication between the protagonist and recipients.

Beijing Treaty on Audio-visual Performances.

BTAP[11] is the latest attempt of the international community to address the concerns of the performing artists. It was a major development not because it extended the rights of the existing beneficiaries by metes and bounds but for the reason that it extended the web of protection to a segment of performers who were the victims of absolute deprivation among the already deprived community of performers i.e., the visual and audio-visual performers. Since Rome Convention, the performers who indulged in audio-visual performances were kept out of the purview of the new regime of performers' rights and they were left on their own to face the heat of regressive practices of the ever-booming film industries around the world. All the major international conventions and treaties that followed, be it TRIPS, WPPT, justified and entrenched the divide among the performers based on the nature of their performances. While the

[11] Beijing Treaty on Audiovisual Performances, 2012 (WIPO Lex No. TRT/BEIJING/001) [hereinafter BTAP].

performers of musical works were slowly being recognized as deserving of rights and dignity, the market forces of demand and supply were deciding the fate of the audio-visual performers.

It was BTAP which for the very first time dealt with the audio-visual performers in a manner which they had long deserved and brought them at par with the performers of musical works. However, BTAP did not bring any change into the meaning and understanding of the term 'performance' and largely adopted the same connotation which the WPPT had provided, i.e., performance is an expression of the underlying work or folklore which establishes a direct connection between the artist and the audience. The only change that can be implied is that the expression of the underlying work or folklore after BTAP can also be in a visual or audio-visual format.

To make the law more specific and clearer, the treaty also provides for the definition of "audio-visual fixation" which includes the recording of all visual or audio-visual representations in any form that can be perceived reproduced, or communicated by use of any modern technological means.

Meaning of 'Performance' under Domestic Laws.

The American Performance.

The US has a unique history of performers' rights. Decorated with the badge of being the oldest modern democracy and having a Constitutional provision for Intellectual Property protection, it did raise the hopes of the present researcher. The very first article of the American Constitution signifies the importance of IPRs in American sociology and economics. It states that:

> "Congress shall have the power to promote the Progress of Science and useful Arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries."[12]

In the context of performers' rights, the terms 'useful art', 'authors' and 'inventors' deserves special mention. A Performance is artistic creativity presented by an individual which may have varying uses for the audience in entertainment or education and hence it must constitute protectable subject matter under the Constitution. But when

[12] The Constitution of the United States, 1787, art. 1, s. 8, cl. 8.

it comes to the beneficiaries, the provision uses very specific terms i.e., 'authors' and 'inventors.

a. Is Performance an Invention?

The latter of the two terms is comparatively easier to interpret. An inventor is the one who invents. The subject matter of the invention can be anything, but its creation must involve an inventive step. The most essential prerequisite of an invention is the element of novelty. There must be something new and that newness must constitute the essence of the product. The question is- Can a performance manifest novelty? Performances are by their very nature adaptive and in most cases function as a means of transmitting the underlying work to the target audience. If the underlying work is original i.e., has an element of novelty in it, would the resulting performance also necessarily be novel?

It is not possible to provide a definite answer to the above question, as there can be innumerable possibilities especially after WPPT which liberated the concept of performances from its dependency on the existence of an underlying work and introduced expressions of folklore as the new possible basis of performance. However, the American experience has shown that this path of invention is full of complications and should better be avoided.

b. Performance: A work of Authorship?

The other term used in the article is 'authors'. The generic understanding of the term hints in the direction of the creative process. An author is the one who is the creator of the work. However, it is more popularly associated with the creation of a specific category of works i.e., literary, dramatic, musical, and artistic works. But this fact does not limit the basic connotation of the term and creators of all categories of works can be referred to as authors.

Once the purview of the term 'author' is settled, the questions that need to be addressed are – Can performance be the subject matter of authorship, and if yes, then who is its author, the performing artist or the creator of the underlying work. To be authorable, the work must be such which can be said to be created and this leads one to the fundamental question – Is the performance a product of creation or expression? In the very first chapter of this thesis, the present researcher clarified that performance is a

means of expression which communicates the thoughts, ideas, and opinions of the author of the underlying work with the target audience.

However, every performance has an element of uniqueness in it and the peculiar style and different approach of each artist impacts the resultant performance. Therefore, there is an element of creativity in every performance, howsoever planned and repeated over time it may be. Creativity here does not mean something which has not been priorly done at all. It is not based on the idea of novelty as is the case with the invention. Here, the originality of the work is the established standard. Originality simply means a work that is originating from its author and is not copied from any existing work. Hence, if a performance depicts its independent creation and is not a copy of an existing performance, it can form an authorable subject matter.

Coming to the second part of the question i.e., who is to be the author of the performance? There are two primary candidates, the first is the author of the underlying work and the second is the performing artist. The claim of the original authors is based on the argument that it is their works that are being performed and the performances are nothing but a mere means of communication comparable with other modern technological instruments such as the audio cassette player or the reading devices.

On the other hand, the claim of the performing artists is based on two arguments; first, they say that though they act as means of taking the work to the audience, their performances are much more than that. Every performance is an extension of the personality of its performer and there is always an element of personal touch which portrays the style and character of the performing artist. These elements of the performances help the audience to demarcate among the renditions of different artists. The audience feels a more direct connection with the artists performing the work and associates its peculiar experiences with their talent and skill. Hence, every performance has its own distinct identity and separate existence.

Second, the uniqueness of each performance is to be traced to the performing artists and not the author of the underlying work, for the reason that the original work is the ground on which the entire superstructure of the performance is constructed by the artists exercising discretion and taking important calls on style, way of presentation and different approaches to be adopted, etc. There can be two performances based on the same underlying work which may be received very differently by the audience because

of their different approach and feel. Therefore, a performance, even if based on an existing literary or artistic work, is an independent creation of the performing artists.

Development of the Statutory and Case Law

i. Evolution of the Statutory Laws

However, the fact that the emergence of Article 1 and inclusion of the term 'author' in it was done keeping in mind the protection and promotion of the creators of literary and artistic works, not the performers' performances can't be denied, and this was the reason that when in 1790[13] the US Congress enacted the first copyright statute for the newly formed nation, it had no direct or indirect reference to the protection of performances.

But this does not mean that the Constitution of the first modern democracy of the world completely ignored the concerns of the performing artists. When Congress came up with the first amendment to the Constitution on December 15, 1791, the freedom of speech and expression was guaranteed to all the citizens, and what can be the better mode of expression than the performance.[14] Therefore, though there was no direct reference to the protection of performances, the same could be implied within the fundamental rights regime.

The next development in the American Copyright law came with the adoption of the 1831 Amendment[15] to the Copyright Act. It brought musical compositions under the umbrella of protection. But there was nothing for the performing artists as it essentially catered to the interests of the music composers who were subsumed within the understanding of the term author. It was the 1856 Amendment[16] which formally introduced protection for dramatic works such as operas and operettas and gave space to the concept of performance. The meaning of performance that could be adduced under the new amendment was:

[13] Copyright Act, 1790, 1 Stat. 124.
[14] The Constitution of United States, *available at:* https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/ (last visited March 25, 2021).
[15] Jeff Langenderfer and Steve Kopp, "The Digital Technology Revolution and Its Effect on the Market for Copyrighted Works: Is History Repeating Itself?" 24 *Journal of Macromarketing* (2004)
[16] Legislation U.S. Copyright Amendment Act, 1856, 11 Stat. 138.

"An act composed with dramatic features and performed for profit in front of a sophisticated audience or the general public."[17]

Here the special emphasis was placed on three interrelated requirements. First, performances with dramatic features only i.e., dramatic performances were covered. Second, the profit motive became the essential pre-requisite keeping gratuitous and other free-of-cost dramatic performances out of the purview. Finally, the need for the most essential element of any performance i.e., the presence of the audience was reiterated. However, despite all this, the performers of these dramatic works were nowhere in the picture. The new provisions were introduced for the benefit of the authors of the dramatic works, not their performers. Hence, the recognition of the performing right and grant of the same to the authors of the underlying work did not bring any beneficial change for the performers.

Within a year, the Congress felt the need to bring certain new changes into the domestic copyright regime and introduced the concept of public performance in 1897[18]. This proved to be a significant breakthrough in the recognition of the public performance rights of the authors. Even though the performers were kept out of the protective umbrella, the acknowledgment of 'performance' as the subject matter of copyright was a step in the right direction.

Later, the Copyright Act of 1909[19] reiterated the conditions for establishing the public performance right, which included-

a. The performance must be presented before the audience (the requirement of communication to the public)
b. The performance must be rewarded with monetary benefits (the profit motive requirement)

The Act also introduced one additional requirement-

c. The performance must be licensed by the legislature (the license requirement)

[17] *Ibid*. The first protection in the United States of any performing right for any type of work was granted in 1856 when dramatic literary works - stage plays - were protected. See Act of Aug. 18, 1856, chap. 169, § 1.
[18] Copyright Act (Public Performance of Musical Compositions), 1897, 29 Stat. 482.
[19] 35 Stat. 1075, 1909

All three conditions applied with equal rigor to both dramatic and musical performances, bringing both categories of performances on equal footing. By the time, the Copyright Act of 1958 was adopted there have been many crucial developments in communication technologies, though not as sophisticated as witnessed in the last quarter of the twentieth century. The new Act defined 'Public Performance' as:

"An act of transmission from one person to another who is not a family member or a close relative."

The 1958 Act prioritized the element of transmission (communication) and the nature of recipients (public in contrast to private members) and did not explicitly mention the profit motive requirement. However, this does not mean that the performance was no longer required to be for-profit or in exchange for a money consideration. It remained an essential prerequisite, now implied within the communication to the public stipulation. The new definition also clarified that transmission of the performance even to a single individual who is not a part of the family or close relative of the person or persons transmitting the performance can amount to communication to the public. Hence, the term 'communication to the public' no longer denoted communication to the public in general i.e., communication to several individuals.

Finally, it was the Copyright Act of 1976[20] which for the very first time defined 'performance' as a separate specific concept, independent of its public nature requirement. Moreover, it also acknowledged the uncanny influence of the developments in information and communication technologies over the meaning of the term 'performance'. The Act defined 'Performance' as:

"To perform means to recite, render, play, act, dance either directly or through any device, and in the case of audio-visual performances, it can be in the form of pictures in definite sequence accompanied with music or sounds."

[20] The Copyright Act of the United States, 1976, s. 101.

Instead of specifying as to what it means to perform work, this definition relies more on certain categories of activities that have generally been regarded as constituting the art of performance. Dancing, acting, and playing a character in a stage play or an instrument musical or otherwise before the audience has long been accepted as the most prevalent forms of performances around the world, and hence, the definition by making an explicit inclusion of them did not contribute much to the legal understanding of the term performance. Moreover, by making the specific inclusion of recitation, the definition has hinted on the point that in addition to the dramatic, musical, or dramatic-musical works which generally form the subject matter of performance, literary works can equally qualify as an appropriate basis of a performance, though of a limited stature of recitation.

The 1976 Act has also given due consideration to the popular technological means used to communicate the performances to the public and declared that the transmission of the stated activities such as acting or dancing through modern technological apparatuses very well falls within the meaning of the term performance. Besides, the discrete endorsement of the audio-visual performances renders the definition all-encompassing. In addition to the fact that the 1976 Act took a comprehensive view of the concept of performance, it also took the efforts to provide meaning to following terminologies which are widely used throughout the statute in specific relation to the performances of the performers-

a. Audio-visual Performances: These types of performances are conveyed or transmitted by using various devices such as projectors, electronic equipment accompanied with sounds, or any technology such as films or tapes or any type in which performances can be embodied and be shown to the general audience.[21]
b. Display: Any work which is shown to the public in a non-sequential manner with the help of slideshow, film, television, or any device or process with or without any sound will be qualified to be called the display.[22]

[21] Audio Home Recording Act of 1992, Pub. L. No.102-563, 106 Stat. 4237.
[22] Visual Artists Rights Act of 1990, title VI of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128.

c. Device: It means any machine or procedure which is known now and will develop in the future.

d. Motion Pictures: They fall within the realm of audio-visual performances consisting of images which when shown in succession with sounds if any, give a sense of motion to the recipients.[23]

e. Sound recordings: It refers to the end product which is developed by recording all kinds of sounds melodious or scattered through technological devices into a tangible form such as disks, and tapes and does not include sounds accompanying visual or audio-visual works. [24]

ii. The Judicial Intervention

The American judiciary has a big contribution towards the development of copyright and related right principles, whether it be the well-established fair use doctrine or the idea of protecting the performers' interests and investment-based activities such as broadcasting or fixing of phonograms within the copyright regime. As to the meaning of the term 'performance' in relation to performers' rights, the following precedents settle the law on point: -

Waring v. WDAS Broadcasting Station Inc.[25]

The contribution of Waring lies in establishing a universal test to identify protectable subject matter under the concept of performance. It clarifies that any act or set of acts that have been reproduced from an existing performance using a transfixed mechanical process must fall out of the definitional understanding of the term performance. A performance, as per the court, is the result of original labour and noble values, and there exists a clear line of distinction between a literary work and its artistic performance.

[23] *Ibid.*
[24] An Act to make certain record rental provisions in title 17, United States Code, Copyright Act, permanent, 1988, Pub. L. No. 100-617, 102 Stat. 3194 (extending for an additional eight-year period certain provisions of title 17, United States Code, relating to the rental of sound recordings and for other purposes).
[25] 27 Pa. D. & C. 297

Fonotopia, Ltd. v. Bradle[26]

Fonotopia was another attempt of the American judiciary to elucidate the meaning of performance. It provides that the most essential element of performance is the application of intellectual labour, which may come from a particular performer or a group of artists. Once this is certain, whatever may be the nature of a performance, mode of its expression, or the quality of values conveyed, should not make much of a difference.

Metropolitan Opera Association Inc. v. Wagner Nichols Recorder Corp.[27]

Opera Association adopted a comprehensive approach towards the conceptualization of performance. It specified a few essential elements which indicate quiddities of a performance-

a. An activity necessitating the use of skill and labour. Here the term labour must be given a broader connotation i.e., the act must not necessarily be labour intensive in the strict sense of the term. Labour here simply means moderate efforts, mental or physical towards the final expression of work. It may be at the stage of rehearsals or the main event or both.
b. There must be engagement and transmission of thoughts and expressions among the artists.
c. Finally, the act must take its final shape which is to be presented before the target audience.

Zacchini v. Scripps[28]

Zacchini took a technological take on the concept. It defined performance as-

An individual act or a set of activities that originate from the talent, energy, and expense of the performing artists and are transmitted through the broadcasting means to the general audience.

[26] 171 F. 951 (1909)
[27] 101 N.Y.S.2d 483.
[28] 433 U.S. 562, 97 S. Ct. 2849 (1977)

Ettore v. Philco Television Broadcasting Corp[29]

Ettore took a very audience-centric view of the concept and provided that performance is not just a planned presentation of well-synced actions before the general public. Rather, only those representations which establish an emotional connection between the artists and the audience deserve to be referred to as a performance in the true sense of the term.

Baltimore Orioles Inc. v. Major League Baseball Players Association[30]

Baltimore has its share of following among the leading jurists and scholars around the world, primarily for the reason that it defined performance as any action or activity which is presented before an individual or a group of people in their immediate presence (live) or through recording means. Based on this, Baltimore declared live or recorded displays of sporting events to be performances within the meaning of the copyright law.

A. The British Take on Performances

The UK conceded copyrights over the performance only in the year 1925 with the adoption of the Dramatic and Musical Performances Act 1925[31]. It defined performance as 'any dramatic or musical work consisting of sound recordings'.

The word 'performance' got recognition with the enactment of the Dramatic and Musical Performances Act 1925[32]. It defined the performance of a dramatic or musical work as 'an audible performance rendered through mechanical/electrical means or otherwise. Later, with the appointment of the [33] Gregory Committee, the British lawmakers got another opportunity to upgrade their copyright laws and bring necessary changes to deal with rapid inventions in acoustic and digital technologies. The Committee prepared a comprehensive report on the effectiveness of the 1925 Act and the grey areas that need to be dealt with. The recommendations did go a long way to make a case for an entirely new statute i.e., the 1958 Act. However, the new act adopted

[29] 126 F. Supp. 143 (1954)
[30] 805 F.2d 663 (7th Cor. 1986).
[31] The United Kingdom Dramatic and Musical Performers' Protection Act, 1925.
[32] *Ibid.*
[33] HS Gregory, "Report of Copyright Committee" (1952).

the definition of performance from the 1925 Act in the same terms. Hence, the concept of performance remained limited to oral renditions.

The visual artists had to wait for another 30 years and with the adoption of the Copyright Designs and Patents Act[34] (CDPA) in the year 1988, the term 'performance'[35] under the UK law now included not only the acoustic and musical performances but also dramatic presentations including dance and mime, recitation of literary works, and variety acts which are performed live either individually or as part of a group. Moreover, the Act also moved beyond the ephemeral character of the performance and attempted to bring the recordings of the performance under the umbrella of protection. The audio recordings of the performances were to be protected as sound recordings and visual/audio-visual recordings as films, and it did not make any difference if the live performance itself was recorded or it was a copy of the already existing record or broadcast of the performance.

It was no doubt a herculean effort on the part of the British Parliament to broaden the purview of performers' rights. The use of phrases such as 'any act represented live' in the definition of performance depicts the comprehensive approach with which the lawmakers dealt with the matter. The result was those unconventional forms of display such as street plays, raps, and other modern mannerisms could all be protected. The Whitford committee observed in the report[36] that the lack of clarity and overlapping interpretations proved distressing for jugglers, acrobats, magicians, clowns, and other artists who could not take benefit of the statute. Similarly, the adjoining terms 'similar representations' mentioned after the four different forms of renditions explicitly included within the definition, left enough space for judicial dictums to make inroads into the law.

Finally, and most importantly, the definition does not require the performance to be original. The originality has been one of the basic perquisites of a copyright claim since

[34] The United Kingdom Copyright, Designs, and Patents Act, 1988, c. 48.
[35] The United Kingdom Copyright, Designs, and Patents Act, 1988, s. 182.
[36] Sir John Norman Keates Whitford, *Copyright and Designs law: Report of the Committee to Consider the Law on Copyright and designs* 105 (HM Stationery Office, 1977)

Berne has not opted for performances. Performances, therefore, may be inspired or even be a copy of an existing performance, subject to the rights of the performers of the previous work and the authors of the underlying work on which the previous performance is based. But the fact of it being a copy will not stop it from being considered as performance under CDPA. Therefore, the definition of 'performance' under CDPA is of wide amplitude and greatly surpassed the idea of performances as introduced under Rome. If the truth is told, it is much ahead of the same in the other European counterparts.

The Swedish Approach and Performances

The Swedish Copyright law[37] understands the term performance as:

'An act or series of acts which portray dramatic, artistic or literary features and may include theatrical plays and dance choreographies, etc'. Therefore, there must be an element of drama and artistic creativity present to satisfy the definitional benchmark. However, the Swedish law categorically excludes circus artists, athletes, impersonators, magicians, and acrobats from the ambit of protection.

B. The Finnish Stand

Performance[38] under the Finnish Copyright Act 2015[39] has been indirectly delineated in Section 1 to mean: 'Formation or creation of a literary or artistic work in writing or speech, in musical or dramatic format. The result may be a photographic or cinematographic work or a work of architecture or handicraft or any work expressed in any other form.' Even though the Finnish copyright law does not provide for the definition of the term 'performance', the meaning that has been attributed to it doesn't set the standard to be unnecessarily high for a rendition to be protected.

[37] Copyright in Sweden, *available on*: https://www.lexology.com/library/detail.aspx?g=2b8145b5-a80b-4a19-9d8d-a42b2131f96c (last visited on March 26, 2021).
[38] World Intellectual Property Organization, "Standing Committee on the Law of Patents, Thirtieth Session" (June 2019).
[39] Copyright Act (404/1961, amendments up to 608/2015), *available on*: https://www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf (last visited on March 26, 2021).

C. The French System

The French Copyright Law defines 'Performance' as:

"An act or a set of activities which may include live dramas, musical renditions, dance choreographies, recitals of literary pieces, the narration of stories, and expressions of folklore. The domain of performances is so vast under French Law that it even covers not-so-sophisticated forms of presentations such as performances of artists working in a circus and other points of entertainment.

D. The Spanish Slant

The Spanish copyright law traces its origin to the French copyright system. The efforts of Victor Hugo towards internationalization and universalization of the protection of the literary and artistic work have had a great influence on its future course. The Copyright Code was adopted in the year 1879 to which the latest amendment was made in 2018. The Royal Legislative Decree 1/1996[40] explicates the concept of performance as:

> "All sorts of presentations including singing, dancing, recitation of a poem, narration of a story or any other activity accompanied by spoken words or physical acts."

Moreover, there is an explicit requirement of communication to the public before a rendition could be said to be performed under the Spanish Copyright Law.

E. The Austrian Stance

The development of the Austrian Copyright regime has been full of hiccups and controversies. The dilly-dally attitude of the Austrian lawmakers and general dislike towards an international influence kept Austria out of Berne until 1908 when it was forced to opt for the same under immense international pressure.[41]

[40] Licensing in Spain, *available at*: https://www.lexology.com/library/detail.aspx?g=805cfea5-7e43-4b88-94b0-5f13d32970f3. (last visited on March 26, 2021).
[41] Copyright laws in Austria, *available at*: https://www.literaturhauseuropa.eu/en/topics/articles/copyright-laws-in-austria-urheberrechtsgesetze-in-osterreich (last visited on March 20.2021).

The reigning law contained in the Copyright Act in Works of Literature, Arts and Related Rights mentioned in the Federal Gazette I No. 99/2015[42] defines performance as:

> "A presentation given by dancers, musicians, actors or performers of literary works before the target audience".

The Austrian connotation is very restrictive in the sense that the designation of the individual involved attains the primary importance in determining the nature of the final work. Moreover, the Austrian copyright law is very specific in pointing out that performances cannot be covered under the domain of creativity for the reason that they are a mere means of displaying the creativity of the author of the underlying work, instead of being a product of creativity itself.

F. The Italian Perspective

The Italian Copyright Statute conceptualize performances[43] as:

> "A visual or audio-visual representation by an individual or a group of artists".

It is one of the most liberal interpretations of the term 'performance' that one may come across especially among the EU member states. There is no precondition of any specific form of the presentation e.g., musical, or dramatic, or a designated performer e.g., dancer or singer. Moreover, much emphasis has been placed on the fact that the domain of performance under Italian law includes cinematographic, photographic, and other modern modes of expression.

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G. The Greek Panorama

The Greek Copyright law [44] understands performances as:

> "An act which is conveyed or communicated through speech or physical actions to entertain, educate or generate awareness among the audience".

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[42] AEPO ARTIS, "Performers' Rights in International and European Legislation: Situation and Elements for Improvement" (December 2014), *available at*: https://www.aepo-artis.org/usr/files/di/fi/2/AEPO-ARTIS-study-on-performers-rights-1-December-2014-FINAL_201611291138.pdf (last visited on March 26, 2021).

[43] Italian Copyright Statute, Law for the Protection of Copyright and Neighbouring Rights, 1941, s. 15.

[44] Copyright in Greece, *available at:* https://www.lexology.com/library/detail.aspx?g=8766adb5-874f-485c-b7f7-4a5c45b4490b (last visited on March 20,2021).

This definition is broad enough to include all varied forms of performances such as singing, dancing, and more unconventional examples as rapping and stand-ups. Besides, a liberal interpretation of the terms conveyance and communication tends to cover renditions via technological means.

H. The Belgian Outlook

Though the Belgian Copyright Law does not contain the definition of the term performance, the interpretation can be drawn from Article XI.212 of the Belgian Code on Economic Law [45] which indirectly defines the term performance as:

> "Any work which includes acting, dancing or depiction of other relatable skills which act as the mode of communicating ideas and beliefs' will be qualified to be called as performance".

I. The Dutch Law

In the Netherlands, the definition of performance is construed under the Copyright Law of 2015. This law is the result of many amendments which were brought to define the term more appropriately which can be suited to present conditions. The Copyright Law of 2015[46] defines performance as:

> "Any act which includes artistic works such as films, cinematographic work accompanied with additional sound or music will be qualified to be called a performance."

J. The Portuguese lookout

The 2008 amendment to the Copyright Act[47] of Portugal provides for certain examples of works that are covered within the meaning of the term 'performance'. They included:

- A work consisting of drama and additional music,
- Works of mime or dance choreographies expressed or written in any form,
- Musical compositions with or without sound,
- Visual or audio-visual works forming part of cinematographic film, televised shows, radiophonic pieces, etc,

[45] Copyright in Belgium, *available at:* https://www.lexology.com/library/detail.aspx?g=8b8075c3-0b31-4655-b08c-0b1912541c02 (last visited on March 20,2021).
[46] Copyright in the Netherlands, *available at:* https://www.lexology.com/library/detail.aspx?g=560596f0-069d-49bc-ae51-1feba07b3d4b (last visited on Feb 15, 2021).
[47] European Parliament, "Copyright Law in the EU: Salient Features of Copyright Law across the EU Member States" (June 2018).

- Works consisting of drawing or other arts expressed in any form,
- Photographic works, moving slideshows with additional music.

This approach has brought mixed results. While it provides certainty as to the fate of works that are specifically mentioned in the list, it is a troublesome task to adjudge some of the other similarly placed works.

K. The Irish Blend

Ireland is the third-largest European country, which determines the fate of a large number of performing artists. The Irish Copyright Act of 200[48] defines 'performance' as: "Any act which is capable of being recorded or which can be broadcasted will be called as performance". In simple words, it can be said that the act which can be kept in the form of recording which can be shown to the public by using broadcasting organizations will be covered under the domain of performances.

L. The Hungarian Postulation

The Hungarian Law defines performance in Act No. LXXVI of 1999[49] as:

> "An act of presentation by an individual or a group of artists in a theatre or concert and includes oral recitation and narration".

M. The Slovakian Silence

The Slovakian Copyright Act of 2015[50] does not contain an explicit definition of the term 'performance'. However, having regard to the other related provisions of the statute, the same could be understood as:

- A theatrical work consisting of dramatic features with or without music,
- A pantomimic work,
- Staged dance choreography or other choreographic works, and
- Other artistic presentations requiring a specific skill.

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[48] Copyright and Related Rights Act 2000,
available at:
http://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/html (last visited on Feb 15, 2021).
[49] Act No. LXXVI of 1999 on copyright, s.1.
[50] Martin Husovec, Slovakia adopts a new Copyright Act: It's a Mixed Bag – Part I, *Kluwer Copyright Blog*, Feb. 29, 2016, *available at:* http://copyrightblog.kluweriplaw.com/2016/02/29/slovakia-adopts-a-new-copyright-act-its-a-mixed-bag-part-i/ (last visited on Feb 15, 2021)

N. The Croatian Know-how

Croatia is located in Central Europe. Here the definition of performance is mentioned in its Copyright and Related Rights law. This law has been amended many times since its inception. The recent Copyright and Related Rights law was published in the Official Gazette of the Republic of Croatia No. 127/2014 on October 29, 2014[51] as Copyright and Related Rights Act incorporating all the provisions according to the digital world. The definition of 'performance' according to this act is:

> "Any act which includes artistic works such as musical works with or without words, or any choreographic work or pantomime, or any work of visual arts accompanied with music and communicated to the public will be qualified to be called as performance".

O. The Indian Uniqueness

India is known for its cultural diversity, and performing arts such as traditional dance forms, *lok geets*, *nukkad nataks* have been playing a crucial role in keeping this image alive. The propagation and promotion of the Indian cultural heritage remained the driving force behind the emergence and sustenance of the performing arts in this country until very recently.

Surprisingly, in India, the term 'performance' had a negative connotation for the reason that ancient Indian history portrayed performing artists as people who entertained the royal courts in anticipation of royal patronage and money. However, with the formalization of the entertainment industry and a multi-fold rise in the popularity and accessibility of stage plays, musical concerts, and movies, the performing artists and their renditions attained rightful regard and respect in society.

In India, the first copyright law[52] was adopted in 1914. It took its inspiration from the English Copyright Act of 1911[53]. There was no provision in the statute for the

[51] Copyright and Related Rights Act and Acts on Amendments to the Copyright and Related Rights Act, 2003 (OG Nos. 167/2003).
[52] Charul Tripathi, "India: Historical Development of Law of Copyright", *Mondaq – Connecting Knowledge and people*, 25 August 2020, *available at:* https://www.mondaq.com/india/copyright/978858/historical-development-of-law-of-copyright (last visited on Feb 15, 2021)
[53] *Ibid.*

protection and rights over the performances. The Copyright Act of 1957 then became the first truly indigenous copyright statute of independent India. Though the 1957 Act did not explicitly define performance, the interpretation of the other related terminologies helped in deciphering its meaning. They included-

- Communication to the public[54] has been defined as a work or performance which can be accessed by the general public directly or utilizing display or diffusion.
- Cinematographic film[55] is defined as a work of a visual recording with or without sounds.
- Broadcast (dd) includes wired or wireless diffusion of signs, sounds, or visual images.
- Dramatic work (h) may include reciting, acting, choreography, and other activities utilized for public entertainment purposes.
- Musical work is a work that consists of music and includes graphical notations also.

All these definitions provided meaning to the essential components of a performance. However, the need for statutory clarification was repeatedly felt and it was in 1994 that the Indian Parliament decided to specify the law on point. The 1994 amendment to the Copyright Statute brought major changes in the area of related rights specifically performers' rights. It defined performance as:

"Any visual or acoustic presentation made live by one or more performers".

This definition is broad enough to cover many unconventional forms of renditions. It tends to protect both visual and musical performances, however on the first impression, one may deduce that the use of 'or' between the terms 'visual' and 'acoustic' indicates non-inclusion of a performance that has both visual and acoustic elements.

Here, one needs to reinstate the basic principle of the interpretation of statute i.e., no part of a statute must be read and understood in isolation. The categories of artists that are specifically mentioned within the definition of the term 'performer', which was also adopted by the 1994 Amendment Act, clearly establish the fallacy of the above

[54] The Copyright Act, 1957 (Act no. 14 of 1957).
[55] *Ibid*.

argument. The inclusion of actors, dancers affirm the fact that the definition of performance is all-encompassing. Moreover, the number of artists contributing towards the final performance is irrelevant. Performance can be of an individual performer or a group of performing artists.

Concluding Remarks

After a deep analysis of all the definitions and explanations provided of the term 'performance' in the above-noted countries, the present researcher has concluded that there are essentially three components that together constitute a 'performance'. Firstly, there must be a performer, the individual who will indulge in a set of visually or aurally expressive activities. Second come the audience, the group of individuals who are the recipients of these renditions at the hands of the individuals mentioned in the first component. Finally, the first two components i.e., the performers and the audience must also interact with each other, in other words, a direct connection must be established between the two groups, the performers and the group forming the audience. The consequence of this interaction can confidently be referred to as a 'performance'. Hence, it is not just the performers or the specific set of activities such as dancing or singing that bring performance into existence, but the presence of the audience, either immediate, in a theatre or remote through television broadcasts or webcasts is equally important.