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## **AD HOC INFORMAL MEETING ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES**

**Geneva, November 6 and 7, 2003**

INFORMATION ON INDIA RELATING TO THE QUESTIONNAIRE TO NATIONAL  
EXPERTS CONTAINED IN THE APPENDIX TO THE STUDY ON TRANSFER OF THE  
RIGHTS OF PERFORMERS TO PRODUCERS OF AUDIOVISUAL FIXATIONS  
(DOCUMENT AVP/IM/03/4)

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\* The views expressed in the Study are those of the author and not necessarily those of the Member States or the Secretariat of WIPO.

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## PART I

## Substantive Rules Governing the Existence, Ownership and Transfer of Audiovisual Performers' Rights

## I. NATURE AND EXISTENCE OF AUDIOVISUAL PERFORMERS' RIGHTS

## A. Characterization of Audiovisual Performers' Rights

1. *Does your national law characterize the contribution of audiovisual performers as coming within the scope of:*

- a. *Copyright*
- b. *Neighboring rights (explain what in your country "neighboring rights" means)*
- c. *Rights of personality*
- d. *Other (please identify and explain)*

The only legislation under which a Performer gets statutory protection for her performances is the Copyright Act, 1957 (hereinafter referred to as the "Act").

There was no provision in the Act to protect Performer's Rights till 1994. The same was introduced by an amendment as a special right and codified in Section 38 of the Act.

Performer's Right is a neighboring right, i.e. a right akin to Copyright as it confers certain exclusive rights that are similar to copyright. However, the said performer's right cannot be characterized as Copyright as understood in the classical sense of the term.

It is pertinent to mention, however, that in terms of Section 38(4) of the Act, once a performer has consented to the incorporation of her performance in a *cinematography film*, she loses all the rights set out in the said section and the Performer's Right, therefore, ceases to exist.

The term "cinematography film" is defined under Section 2(f) as any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and includes a video film.

Though this provision has not been interpreted in the context which is the subject of the present questionnaire, however, the language used in the definition of cinematography film is broad enough to apply to all audiovisual fixations.

Thus, Indian law does not recognize a Performer's Right where the performer has consented to fixation of such a performance in an audiovisual work. Further support for this interpretation is derived from the definitions of Performer and Performance under Section 2(q) and 2(qq) of the Act that use the words "visual or acoustic presentation made live", thereby indicating that such a right is conferred only in respect of a Live Performance.



It is pertinent to mention that although, by virtue of Section 38(4) of the Act, a performer who had consented to incorporation of his/her performance in an audiovisual fixation loses his/her Performer's Right, however the same Performer has a right to restrain an unauthorized video recording of the Performer's Live performance.

The only other legal theory under which an audiovisual performer may initiate a claim is the Rights of Personality theory. However, jurisprudence on this right is yet to develop in India.

## B. SCOPE OF RIGHTS COVERED

1. *Do audiovisual performers enjoy exclusive economic rights?*

- a. *Fixation*
- b. *Reproduction*
- c. *Adaptation*
- d. *Distribution of copies, including by rental*
- e. *Public performance; communication to the public*
- f. *Other (please describe)*

Please see the answer to the foregoing question.

2. *What is the duration of performers' exclusive rights?*

In respect of non-audiovisual performances, performer's rights in respect of a performance last for 50 years from the beginning of the calendar year following the year in which the Performance is made.

3. *Do audiovisual performers enjoy moral rights?*

- a. *Attribution ("paternity")*
- b. *Integrity*
- c. *Divulcation*
- d. *Other (please describe)*

No. Moral rights do not apply even to Live Performances.

4. *What is the duration of performers' moral rights?*

Not applicable.

5. *Do audiovisual performers have remuneration rights?*
- a. *Are these in lieu of or together with exclusive rights? (Please explain)*
  - b. *Describe the rights to remuneration that audiovisual performers have.*

Audiovisual performers may exert common law rights under a Right of Publicity theory, the contours of which are yet unclear. Thus, the answer to this question shall depend upon an adjudication on this issue when brought before a court of law.

6. *Are audiovisual performers' rights subject to mandatory collective management?*
- a. *Which rights?*
  - b. *Which collective management associations; how do they work?*

No. please see answers to question A1 and B5.

## II. INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS

### A. Who is the initial owner?

1. *In your country, is the performer vested with initial ownership?*

In view of the foregoing statements, the Performer is vested with the initial ownership of a Live Performance. Once the performer consents to the incorporation of the Performance in an audiovisual work however, the special right as well as the exclusive rights flowing therefrom cease to have application to that performance.

2. *Is the performer's employer/the audiovisual producer so vested?*

In case of an audiovisual performance, the audiovisual producer shall be vested with the copyright in the audiovisual work as a whole and will not have a separate Performer's Right in the Performance in question.

3. *Is a collective so vested?*

Not applicable in view of the above.

4. *Anyone else? Please explain.*

Not applicable in view of the above.

B. What is owned?

1. *Is the performer the owner of rights in her performance?*

As stated above, the performer owns the right to her performance as long as it is not incorporated in an audiovisual work. Once such a performance is so incorporated, the statutory right ceases to exist.

2. *Is she a co-owner of rights in the entire audiovisual work to which her performance contributed?*

No. Please see the foregoing response.

3. *Other ownership? Please describe.*

Not applicable in view of the above.

III. TRANSFER OF AUDIOVISUAL PERFORMERS' RIGHTS

A. Legal provisions regarding contracts

1. *Does the copyright/neighbors rights law, or other relevant legal norm set out rules regarding transfers of rights?*

No. The information related to the following questions (2 to 5) refers to non audiovisual performances.

2. *Please indicate if the rule is a rule of general contract law, or is a rule specified in the law of copyright and/or neighbors rights.*

The rule, derived from general law of contract, is specified in Sections 18, 19 & 30 of the Act.

3. *Must the transfer be in writing?*

Yes under Section 18(1) of the Act.

4. *Must the terms of the transfer be set forth in detail, e.g., as to the scope of each right and the remuneration provided?*

The terms of transfer have to be set out clearly and specifically. The details to be set out include: identification of the work, rights transferred, duration and territorial extent of transfer, amount of remuneration payable, etc. These requirements are enshrined Section 18(2) & Section 18(3) of the Act.

5. *Must the writing be signed by the performer? By the transferee?*

The writing has to be signed by the Performer. There is no requirement of the transferee's signatures

In case the personality rights theory is invoked, a transfer, if any shall be governed by general principles of contract law. The contract need not be in writing, but the terms thereof must not be vague.

#### B. Transfer by Operation of Law

1. *Are there legal dispositions transferring either the performer's exclusive rights, or a share of the income earned from the exercise of her exclusive rights, or from the receipt of remuneration rights?*

2. *Expropriation*

3. *Bankruptcy*

4. *Divorce; community property*

5. *Intestacy*

6. *Other (please explain)*

There are no legal dispositions transferring the rights contemplated in this opinion, especially the situations mentioned in question 2 to 6.

C. Irrebuttable Presumptions of Transfer

1. *Does the employment relationship between the audiovisual performer and the producer give rise to an irrebuttable transfer of the performer's rights?*
2. *What rights does the transfer cover?*
3. *If fewer than all rights, please identify and explain which rights are transferred and which are retained.*

D. Rebuttable Presumptions of Transfer

1. *Does the employment relationship between the audiovisual performer and the producer give rise to a rebuttable transfer of the performer's rights?*
2. *What rights does the transfer cover?*
3. *If fewer than all rights, please identify and explain which rights are transferred and which are retained.*

Answer for Sections C and D Irrebuttable/Rebuttable Presumption of Transfer:

Section 17 of the Act addresses a situation wherein a work created during the course of employment may come to be owned by the employer in case the conditions set out therein are satisfied.

This provision does not apply to any performance capable of protection under Section 38 of the Act. Thus, the Act does not envisage either a rebuttal or irrebuttable presumption of transfer of the right in question. The only possible manner in which an employment relationship may result in an automatic transfer of rights is under an agreement between the parties in question.

E. Contract Practice

1. *If the transfer of audiovisual performers' rights is not effected by a legal presumption, are there standard contractual provisions?*

There are no standard contractual provisions in this regard to the best of our knowledge.

2. *Do these provisions appear in collective bargaining contracts?*

3. *In individually negotiated contracts?*
4. *What rights do these provisions transfer? Please describe.*

Answers 2, 3 and 4. Not applicable in view of our answer above.

F. Limitations on the Scope or Effect of Transfer

1. *Does copyright/neighboring rights law or general contract law limit the scope or effect of transfers? Please indicate which law is the source of the limitation.*

The details of how a transfer take place in respect of a non-audiovisual performance are set out in Section 19 of the Act. The limitations envisaged therein apply only when the terms of assignment are vague or ambiguous.

2. *Do these limitations concern:*
  - a. *Particular rights, e.g., moral rights*
  - b. *Scope of the grant, e.g., future modes of exploitation*
  - c. *Other (please describe)*

The limitations are:

- Where the transferee does not exercise the right transferred with a period of one year from the date of transfer, the rights so transferred shall, in the absence of contract to the contrary, be deemed to have lapsed.
- If the period of transfer is not stated, the same shall be deemed to be one year from the date of transfer.
- If the territorial extent of the transfer is not specified, it shall be deemed to be limited to India.

3. *Do audiovisual performers enjoy a legal right to terminate transfers of rights?*
  - a. *Is this termination right transferable?*
  - b. *Waivable?*

No.

## PART II

## International Private Law Rules for Determining the Law Applicable to Transfer of Audiovisual Performers' Rights

## I. LAW APPLICABLE TO DETERMINE INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS

## A. What country's (countries') copyright/neighbors rights law determines whether the granting performer initially owned the rights transferred:

It is pertinent to mention at the outset that rules of Private International Law are not well developed under Indian law. In the thin body of decisions pronounced by the various courts in India, the primary issue considered on the subject matter of Private International Law is that of jurisdiction.

Thus, choice of law questions have seldom arisen before Indian courts and even cases that the courts have had occasion to consider the same are limited to issues of admiralty, arbitration and matrimonial disputes. Accordingly, Indian courts have never had an occasion to pronounce on choice of law rules in respect of a matter pertaining to intellectual property rights.

In case a matter such as the one envisaged in the questionnaire does arise, the courts are most likely to refer to decisions of English Courts as is done in other cases, where the body of law is not as well developed. It is accordingly likely that the Indian courts shall also follow the ratio in *Campbell Connelly & Co. Ltd. v. Noble*, Ch.D. (1963), i.e., the law of the country whose substantive rights are at issue will determine whether the right can be granted at all, but the law of contract will determine whether the grant was effectively made.

1. *The country of origin of the audiovisual work?*

- a. *If so, how does your country's law determine what is the country of origin of the audiovisual work?*
- b. *By reference to Berne Conv. Art. 5.4?*
- c. *By reference to the country having the most significant relationship to the work's creation or dissemination?*
- d. *Other? Please describe.*

Accordingly, it is likely that the Indian Courts shall apply the law of the country of origin of the audiovisual work in determining whether the performer initially owned the rights transferred. The reason for the same is as set out in c, i.e., reference shall be made to the country having the most significant relationship to the creation or dissemination of the work.

2. *The country of residence of the performers? In the event of multiple countries of residence, the country in which the majority of featured performers reside?*

3. *The country designated by (or localized to) the contract of transfer?*

These questions need no response in view of the foregoing answer.

4. *Each country in which the work is exploited?*

The decision shall turn on the paramount consideration of Indian courts when dealing with Private International law questions, i.e., public interest. Thus, in case the public interest dictates the application of law of the country of origin of the transmission/communication, the courts are likely to apply the same.

## II. LAW APPLICABLE TO TRANSFERS OF RIGHTS

### A. Transfers by operation of law

1. *Does your country's law or case law give local effect to a transfer by operation of a foreign country's law?*

- a. *by expropriation*
- b. *bankruptcy*
- c. *divorce; community property*
- d. *intestacy*
- e. *other (please explain)*

As stated above, the decision shall turn on the paramount consideration of Indian courts when dealing with Private International law questions, i.e., public interest.

Public interest is unlikely to dictate recognition of transfer by way of expropriation or bankruptcy in India. However, in respect of the other examples, the courts are likely to return a finding only by weighing the same in the light of public policy considerations.



B. Transfers effected by contract

1. *When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others); is the substantive copyright or neighboring rights law underlying the grant determined:*

- a. *with reference to the country from which the communication originates?*
- b. *or with reference to the country or countries in which the communication is received?*

As stated above, the decision shall turn on the paramount consideration of Indian courts when dealing with Private International law questions, i.e., public interest. It is interesting to note that public policy considerations also affect questions of contract law interpretation.

2. *What law governs issues going to the scope and extent of a transfer:*

- a. *The (single) law of the contract?*
- b. *The substantive copyright/neighboring rights laws of the countries for which the rights are granted?*

3. *What law governs issues going to the validity of the form of a transfer:*

- a. *The (single) law of the contract?*
- b. *The substantive copyright/neighboring rights laws of the countries for which the rights are granted?*

It is likely that the Indian courts shall also follow the ratio in *Campbell Connelly & Co. Ltd. v. Noble*, Ch.D. (1963), i.e., the law of the country whose substantive rights are at issue will determine whether the right can be granted at all, but the law of contract will determine whether the grant was effectively made.

C. The Role of Mandatory Rules and *Ordre Public*

1. *Do mandatory rules (lois de police) automatically apply local law to local exploitations made under a foreign contract?*

No, there is no such automatic application. It depends from case to case and is a prime consideration in the decision of whether to apply local law is one of public interest.

2. *Describe the instances in which mandatory rules apply to transfers of rights by audiovisual performers.*

Not applicable.

3. *Do local courts, having initially identified the applicability of the law of the foreign contract, nonetheless apply local law on grounds of public policy/ordre public?*

Indian courts are likely to do that.

4. *Describe the instances in which the ordre public exception applies to invalidate transfers of rights by audiovisual performers*

There has been no such instance in Indian law.

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