

## **GOING LIVE! THINK TWICE!**

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### **ABSTRACT**

*As a disciple of intellectual property rights, it becomes second nature to relate everything around with rights under the intellectual property (IP) regime. With the pandemic hitting the world, internet became a stop place for almost everything. Thus, when one came across many “live” videos being broadcasted/uploaded on social media platforms like YouTube, Facebook and Instagram, a natural query arose- how is this act related to Intellectual Property Right? Is one allowed to simply use the ‘live’ feature on social media to bring real-time content to one’s list of friends or, if it is an account visible to all those who use that platform? These platforms allow its users to use the ‘live’ feature to share content and events but have policies intact; of not being responsible for the content that is uploaded or shared. They allow people who claim to be owners of copyrighted work, only, to report any illegal or infringing content which is removed after scrutiny. In some cases, the user’s accounts are blocked for sharing such content, but in general, one can upload any and everything as long as it goes unnoticed or unreported.*

*So, one can be at an enthralling play or a stand-up comedy show and choose to share it with his/ her friends online by using the live feature or be at a musical concert and want to do the same. The important question which comes to mind is, can a person go live in such scenarios without seeking permission from the performers who enact the play or the singers and musicians who are performing at the musical concert? Live sharing or web-casting can range from streaming live-shows to broadcasting televised shows or computer games. This paper aims to flag certain legal issues involved in the context of such scenarios where a member from the audience starts ‘live sharing’ a real-life event he is at.*

### **I. INTRODUCTION**

The internet has made its impact on our lives in unfathomable ways. From the era of painstakingly slow download speeds to lightning-fast downloads, the internet technology has advanced swiftly. With the COVID pandemic hitting the world in 2020, people were constrained in their homes and the internet became a necessity for all to communicate and be in touch, virtually. Artists and performers took to the internet to showcase their talent and used the live-feature on social media platforms to engage with their audience. A welcome step in the stressful times, but this is not the only way the live feature on these platforms is being used. Many events of public interest are also

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live-streamed over the internet<sup>1</sup> and it is here that the legality of such live-streams are questioned. It is one thing to perform one's own content and stream it live over the internet and a whole different thing where someone else's performance is live streamed by someone in the audience. Earlier, only big corporate entities ventured into buying rights for live broadcast of important events over the television but now the technology has advanced to an extent where anyone who has access to a smart phone and internet can be virtually present at any event they desire. The history of live streaming goes back to the mid 1990's, where a performance of an American musical band 'Severe Tire Damage' was transmitted over a private network over the internet and had a range reaching up to countries like Australia.<sup>2</sup> The next major event was the public broadcasting of a baseball match held in California by the internet company 'RealNetworks'.<sup>3</sup> However, the potential of this technology did not see the light of the day until the end of the 20th century. In November, 1999 the first-ever American presidential webcast was held at George Washington University in Washington DC involving the then president Mr. Bill Clinton.<sup>4</sup> This event made evident the impact of this booming technology and soon the trend caught up. YouTube, an online video sharing and social media platform was launched in February, 2005 and in 2008, the company hosted its first live stream - 'YouTube Live' - a concert involving interviews and performances of many celebrities across the globe.<sup>5</sup> The company hosted many important events over live streaming including the live streaming of a session of Questions and Answers by the then American President, Mr. Barack Obama, after his 'State of the Union' speech, in 2010.<sup>6</sup> Until 2012-13, the public could only view such events from the comfort of their homes but YouTube allowed live streaming by any of its subscribers in 2013 and revolutionized the live streaming game like never before.

## II. LIVE STREAMING OF EVENTS - LEGAL ISSUES INVOLVED.

As discussed above, until the advent of live streaming by the public, the web-casting of events was commonly undertaken by event organizers who used to make arrangements with the performers

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<sup>1</sup> *FIFA World Cup Final Ignites Interest in Illegal Live Streams*, TIMES NOW, available at <https://www.timesnownews.com/technology-science/fifa-world-cup-final-ignites-interest-in-illegal-live-streams-article-96323127> (last visited Jan. 13, 2023).

<sup>2</sup> Alex Bybyk, *The History of Live Streaming*, RESTREAM BLOG (Sept. 30, 2022, 10:11 PM), <https://restream.io/blog/history-of-live-streaming>.

<sup>3</sup> Kara Rogers, *livestreaming*, BRITANNICA (Nov. 18, 2022), <https://www.britannica.com/technology/livestreaming>.

<sup>4</sup> Chris Pfaff, *First Presidential Webcast, 'Online Town Hall With President William Jefferson Clinton,' Now Part of Clinton Presidential Library*, PRWEB (Sept. 19, 2005), <https://www.prweb.com/releases/2005/09/prweb286917.htm>.

<sup>5</sup> Tom Meisfjord, *The Not-So-Ancient History of Live Streaming*, SWITCHBOARD BLOG (Sept. 29, 2022, 9:30 PM), <https://switchboard.live/blog/live-streaming-history>.

<sup>6</sup> Doug Gross, *YouTube testing live streaming*, CNN (Sept. 13, 2010, 11:07 PM), <https://edition.cnn.com/2010/TECH/web/09/13/youtube.livestreaming/index.html?hpt=C2>.

for procuring the intellectual property rights in their performance. An event involves creative pursuits of the performers who bring life to the stage. However, a stage is not the only conventional place of performance. Peter Brook, a celebrated English theatre and film director wrote, “*I can take any empty space and call it a bare stage. A man walks across this empty space whilst someone else is watching him, and this is all I need for an act of theatre to be engaged.*”<sup>7</sup> There could be many scenarios wherein a performer can perform, but the scope of this research paper is limited to performances before a physically-live audience. Again, it can be an audience who has paid to see the performance or an audience who is present at any festival, carnival or other such events which are free for public access. Moreover, an event could be an impromptu collaboration of some artists on the street or a hall, or a well-organized and planned affair on a proper stage involving guests and audiences. But, at the heart of any of these events lay the efforts and enthusiasm of a performer. Thus, it is imperative to understand what rights are given to a person who makes a performance. The present research paper intends to offer an analysis of such rights and the effect of live-streaming such performances without any authorization from the rights holder.

### III. LEGAL PROTECTION OF PERFORMERS IN INDIA

From a legal point of view, every person’s fundamental right to life and liberty under Article 19(1)(a) of the Constitution of India includes the right to his/her person not being recorded without consent i.e., his right to privacy.<sup>8</sup> In addition to this fundamental right, a performer is also granted certain rights in relation to his/her performance, under the Indian Copyright Act, 1957 (“**Act**”), which are dealt with in the following part of the paper. Section 2(qq) of the Act provides a very wide definition of the term ‘performer’ and includes anyone who makes a performance but excludes those artists whose presence in a movie is only incidental to the main project. Even these artists are given certain moral rights under the Act.<sup>9</sup>

#### **A. Performers’ Rights under the 2012 amended Copyright Act, 1957.**

The traditional notion of copyright imports the meaning ‘right to copy’ and was limited mostly to literary, artistic and musical works. But the development of ingenious methods of copying in the 19th century onwards and the growth of the internet compelled the international community to grant protection to intermediaries who were responsible for bringing the works of authors to a larger audience. This protection was granted under the umbrella term ‘neighboring rights’ to

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<sup>7</sup> Victor Vazquez, *Improving the Status of Performers Efforts and Perspectives*, WIPO MAGAZINE, 2009, at 6, 8, available at [https://www.wipo.int/export/sites/www/wipo\\_magazine/en/pdf/2009/wipo\\_pub\\_121\\_2009\\_06.pdf](https://www.wipo.int/export/sites/www/wipo_magazine/en/pdf/2009/wipo_pub_121_2009_06.pdf).

<sup>8</sup> K.S. Puttaswamy J. (Retd.) & Anr. vs. Union of India &Ors., (2017) 10 SCC 1.

<sup>9</sup> The Copyright Act, 1957, §2(qq), No. 14, Acts of Parliament, 1957 (India).

performers, broadcasting organizations and producers of phonograms who were recognized as such intermediaries.<sup>10</sup>

Though the rights of performers were incorporated in the Act in the year 1994,<sup>11</sup> vide an amendment to bring it in conformity with the TRIPS<sup>12</sup> agreement. It was not until the year 2012 that the Indian legislature recognized the potency of these rights. The 2012 amendments have given a positive tool in the hands of the performers and replaced Sub-sections 3 and 4 of Section 38 with a new Section 38A,<sup>13</sup> which enlists the exclusive rights a performer has in respect of his performance. This right subsists for a term of fifty years, next following the year in which the performance is made, provided the performance does not infringe the copyright in any other work. These changes have been introduced to make these rights economically exploitative rather than being defensive in nature. The rights now allow the performers to really own and control their work in stark contrast to the earlier times when the law allowed them to only sue for infringement. The moral rights of the performers to claim authorship and the right of integrity are also statutorily recognized under the new Section 38B. This particular provision of the Act states that *‘the performer of a performance shall, independently of his right after assignment, either wholly or partially of his rights, have the right,*

- (a) *to claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance; and*
- (b) *to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation’.*<sup>14</sup>

### **B. Effect of live-streaming on performers right.**

The present legislative framework has defined the term ‘performer’ under Sec. 2(qq) in an inclusive manner and brings within its ambit, *“actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance”* thus giving it a very wide meaning.

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<sup>10</sup> See, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations Oct. 26, 1961, 496 U.N.T.S 43; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; WIPO Performances and Phonograms Treaty (WPPT), Dec. 20, 1996, U.S. G.P.O. 105-17; Beijing Treaty on Audiovisual Performers, June 30, 2012. U.S. G.P.O 114-8).

<sup>11</sup> The Copyright (Amendment Act), 1994 §12, No. 38, Acts of Parliament, 1994 (India) [hereinafter “1994 Amendment Act”].

<sup>12</sup> TRIPS Agreement, *supra* note 9.

<sup>13</sup> The Copyright (Amendment Act), 2012, §38A, No. 27, Acts of Parliament, 2012 (India).

<sup>14</sup> The Copyright (Amendment Act), 2012, §38B, No. 27, Acts of Parliament, 2012 (India).

But it excludes those performers who are generally termed as extras in the movie industry.<sup>15</sup> The only exception being such, the exclusive rights of performers under Section 38A can broadly be classified under two heads:

- a) Fixation of performance in a sound or visual recording and allied rights thereon.
- b) Broadcasting right and right to communicate, unfixed (live) performances.

So, what happens when a person decides to go 'live' at a concert he is attending as an audience? Firstly, there is generally no one to stop him/her from making such a live-stream, but is it legal? Secondly, if a person performs at a place which is open to the public without any fee or admission charge, can it be said that he has implicitly consented to being Live -streamed? In order to examine the above questions, one needs to understand the technology behind the live-streaming process. Whether live-streaming involves any fixation or recording of the performance or not as fixation rights vest with the performer. Also, what other, if any, rights get affected while live-streaming.

#### 1. *Does live-streaming involve fixation/recording*

A live-stream simply means that the viewer enjoys the content in real-time, as it happens, without any significant delay or time gap. The technology involves the capturing of the audio and/or video content, its compression and encoding, transmission and then decoding at the viewer's end.<sup>16</sup> It is worth noting that live streaming always creates a digital recording, and indeed, often many digital intermediary copies of the recording, on the way to the media consumer.<sup>17</sup>

Section 2(xxa) of the 1957 act defines visual recording in the following words "visual recording means the recording in any medium, by any method including the storing of it by any electronic means, of moving images or of the representations thereof, from which they can be perceived, reproduced or communicated by any method."<sup>18</sup> Thus, this recording/storage, however small, over the internet for transmission also comes within the purview of fixation.<sup>19</sup> Consequently, the fixation right, which is an exclusive right held by the performer, gets violated if the audience member does not have proper authorization to live-stream the performance. Additionally, the live-streamer can save such a video for viewing and sharing it in future which also is in violation of the

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<sup>15</sup> The Copyright Act, 1957, Proviso to §2(qq), No. 14, Acts of Parliament, 1957 (India).

<sup>16</sup> See generally, DAVID AUSTERBERRY, THE TECHNOLOGY OF VIDEO AND AUDIO STREAMING, 138-140 (2nd ed. 2013).

<sup>17</sup> Brain N. Larson & Genelle I. Belmas, *Fixed? The Law of Live-Streaming*, LEGAL AND ETHICAL ISSUES OF LIVE STREAMING 115, 121 (Nicole Allaire, Shing-Ling S. Chen, Zhuojun Joyce Chen, 2020).

<sup>18</sup> The Copyright Act, 1957, §2(xxa), No. 14, Acts of Parliament, 1957 (India).

<sup>19</sup> *Supra* note 10.

right of reproduction of such fixed performance<sup>20</sup> as every time such a video is played, a copy of the fixed-original file is created for viewing.

2. *Effect of live streaming on broadcasting rights of performers*

Another right that gets affected is the performers right to broadcast the performance and communicate the performance to public.<sup>21</sup> These rights allow the performer to control the ways and means in which his performance will be seen or enjoyed by a remote viewer. Both these rights involve the transmission of the performance over wire or wireless medium. Thus, whenever a live stream is made available or played without due permissions, the respective rights get violated. It is not relevant whether anyone actually views the performance or not.

The act of live-streaming clearly impinges upon these rights in as much as the performer might not want his performance to be seen by any other person than those who have come to see the performance physically; as his performance could lose its context over the live-stream or they could have given this right to someone else like the organizer of the event, or for any other reason.

3. *Live streaming of Public events without authorization - effect thereof.*

Now, to answer the second question, it is important to understand that a fundamental right cannot be waived or surrendered by a person.<sup>22</sup> Right to privacy being a fundamental right is not lost if one happens or chooses to be at a public place. The Hon'ble Supreme Court of India has categorically held that "While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place."<sup>23</sup>

As seen above, the act of live streaming involves recording of the performance and thus, the act of video streaming a performance without proper consent even at places where one is not expressly prohibited from live-streaming, like public fairs or events staging performances, does interfere with the right to privacy of the performer along with his statutory rights under the Copyright Act as demonstrated above.

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<sup>20</sup> The Copyright Act, 1957, §38(a)(1), No. 14, Acts of Parliament, 1957 (India).

<sup>21</sup> The Copyright Act, 1957, §§2(dd), 2(ff), No. 14, Acts of Parliament, 1957 (India).

<sup>22</sup> *Basheshar Nath v. The Commissioner Of Income Tax*, 1959 AIR 149.

<sup>23</sup> *Supra* note 8.

4. *Performers rights cannot be relinquished*

Another interesting factor is that performers' rights, unlike copyright in original works, cannot be relinquished as Section 21 of the 1957 act is not made applicable to performers rights as is evident from the express omission of this Section from the list of Sections which find mention under Section 39A of the Act; dealing with applicability of certain provisions to the rights of performers.<sup>24</sup> Thus, it cannot be assumed that a performer has abandoned his performers' rights only because he has not charged any fee for the performance at a public event.

5. *Effect on Moral Rights of a Performer.*

In addition to the economic rights of a performer under Section 38B, a performer also has moral rights which get infringed if the live-streamer adds some objectionable matter to the stream or does not credit the original performer with the performance.

For instance, the performer of a song could have written and composed the original song he is performing himself, so he is the author of the underlying literary and musical works respectively. Since the performers' right is without prejudice to the rights in underlying works, in such a scenario, the live-streamer can just seek authorization of one person- the performer but in case the author of the underlying works are different people, the live-streamer would have to procure authorization from all the rights holders. It is here that the work of copyright societies who are authorized to issue such licenses comes to the fore. But is it possible that an innocent person who just wants to share his experiences with his friends over social media, be asked to procure such authorizations prior to the event? Can he claim exceptions to rights violation under the 1957 act to save his live-streams?

6. *Can live-streaming be protected under fair-use provisions?*

As per Section 39 of the Copyright Act, certain acts will not constitute infringement of performers' rights. These are listed as:

- (a) a fixation/recording made solely for 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

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<sup>24</sup> The Copyright (Amendment Act), 2012, §39, No. 27, Acts of Parliament, 2012 (India).

(c) such other acts, with necessary adaptations and modifications, which do not constitute infringement of copyright under Section 52 of the Act.<sup>25</sup>

A live-streamer can claim benefit of Sections 39 by showing that his intent was only to use the performance in a fair manner and without any commercial interest and for reporting or showcasing certain current events. Now, there can be a situation where a streamer only has a private group of people who can view his live-streams. Can it be claimed that this viewing is for private use? The answer would be in the negative because the definition of the term ‘communication to public’<sup>26</sup> clearly provides in the explanation to the main provision that, “the communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to the public.”

Also, if the live-stream contains a substantial amount of the performance being used, the same will not be saved under the fair use doctrine as is evident from the simple language of the provision which allows only excerpts of performances to be used for reporting of current events. Even the judiciary has held that substantial copying will not be covered under fair use provisions<sup>27</sup> and on similar footing, the language of Section 39 has been drafted. As is judicially settled in the case of *Hubbard v. Vosper*,<sup>28</sup> every case involves its own facts and issues thus what may constitute fair dealing under one situation may not always apply to others. Thus, one will have to tread carefully while venturing to use social media for live-streaming any content.

Now, if the live-streamer aims to earn revenue by sharing such live-streams over social media without proper authorization, the fair use provisions will not be of any aid to him as an exclusive and non-alienable right is granted to a performer being the right to receive royalty from commercial exploitation of performances.<sup>29</sup> Since the aim of the streamer is to commercially exploit the protected performance, little is left for him to claim any benefit under fair-use provisions.

As per Section 39(c) of the Act, Section 52 of the Act applies to the rights granted under Section 38A with necessary modifications. Section 52 deals with acts which do not constitute copyright

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<sup>25</sup> *Id.*

<sup>26</sup> The Copyright Act, 1957, § 2(ff), No. 14, Acts of Parliament, 1957 (India).

<sup>27</sup> *Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd.*, 2011 PTC (45) PTC 70 (Del.).

<sup>28</sup> *Hubbard v. Vosper*, (1972) 1 All ER 10231.

<sup>29</sup> Copyright Act, 1957, *supra* note 13, §38A.



infringement and for the purposes of the present article, sub-Sections (b)<sup>30</sup> and (c)<sup>31</sup> are relevant. These provisions were mainly incorporated in the act via the 2012 amendments to protect the internet service providers (ISPs) for any incidental storage/fixation of a performance. At the same time, the act mandates the ISPs to remove any content against which objections have been received regarding it being violative of rights under the act. Hence, if the streaming platform is aware that a particular stream is violating the rights of a performer or where there is a complaint to that effect, the platform is duty bound to remove such infringing content. Even though the websites claim to have a copyright protection policy by inviting objections of copyright violation, there is no mechanism to ensure that the infringing copy will be destroyed or the person infringing the rights is penalized.

#### IV. CONCLUSION

In conclusion, live-streaming the entire or a substantial amount of a live-event violates the rights of a performer - fundamental and statutory as both these rights cannot be relinquished. An argument could be made; and is seldom advanced in such cases, about the live-streamer using the content for enjoyment and sharing only; and not seeking to earn any revenue out of these acts. It is here that the public vs. private rights debate comes to the fore. Whether substantial live-streaming of events can be allowed because it caters to the public at large and is cost free for the viewer? But the question of earning revenue from live-streaming becomes irrelevant in light of the fact that the act per-se is illegal. One is allowed to record a performance/live-stream only for the *bona fide* purposes specified under Section 39 of the Act and nothing more. Hence, only if the live-stream is for personal use or for bona fide reporting of current events, can it be saved. A paradox is found in the case of claiming fair use provisions for personal use in such cases. A live-stream by its very nature is created for being viewed by a group of individuals which necessarily involves communication to the public as has been discussed in the foregoing parts. This shows that very little help will come to the aid of a live-streamer who chooses not to take proper authorizations from the owner of the rights.

The civil and criminal remedies provided under the Act can come to the aid of the performer only when a performer is aware about these rights. In personal interviews with folk artists, poets and musicians, it was common to see that the majority of performers are not even aware of the basic

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<sup>30</sup> The Copyright Act, 1957, §52(b), No. 14, Acts of Parliament, 1957 (India).

<sup>31</sup> The Copyright Act, 1957, §52(c), No. 14, Acts of Parliament, 1957 (India).

rights they have regarding their performance *i.e.*, the right of fixation of live performances and the right of broadcasting. Artists generally don't bother about rights until they reach a point in their career where they command the market space. Until then, the more audience they get, through whatever means, the more chances they have of becoming a bigger name in the industry.

Even the social media platforms do not take initiative to educate their users in such important matters and simply put such clauses in their usage agreement which absolves them of any liability in case there is any intellectual rights violation by the user. It reflects the revenue earning model of these corporations who earn by allowing the display of content which is engaging and entertaining, though illegal in many cases.<sup>32</sup> Though some changes have been implemented by some organizations, by and large, illegal content gets unnoticed. The person who uploads such content also has incentive from these platforms to increase his/her subscribers so that he may also generate some revenue.<sup>33</sup> The performer needs to report any such videos wherein his rights are being violated and only then such videos can be removed. Considering the speed at which such videos spread and the methods enabling copying of such content, it becomes a futile attempt in most cases to raise any objections to these infringing live-streams or videos. It is in this light that the research paper suggests that there needs to be a mechanism put in place which will enable stakeholders to be vigilant of their rights. Necessary assistance can be taken from academic institutions who can arrange for awareness camps and legal aid clinics. Since the general audience at open-to-all events cannot be stopped from making recordings or using the live-feature at such events, the burden lies on platforms, which allow such content to be disseminated, to model out effective steps which allows only original and legal content to be aired. Small steps in the right direction will result in ameliorating the conditions of those performers who are the repository of Indian culture and tradition. Their art and talent not only needs protection, but also needs to be channelized and used to earn revenue in this era of technology. The live-feature of social media platforms, when used effectively and strategically can help small scale performers to earn revenue from such platforms too. But if illegal live-streaming is not contained, an artist's revenue earning avenue is being severely jeopardized.

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<sup>32</sup> Kurt Hunt, *Copyright and YouTube: Pirate's Playground or Fair Use Forum?*, 14 MICH. TELECOMM. & TECH. L. REV. 197, 198-199 (2007).

<sup>33</sup> See, *How to earn money on YouTube*, GOOGLE SUPPORT (September 22, 2022), <https://support.google.com/youtube/answer/72857?hl=en#:~:text=You%20can%20make%20money%20on,special%20perks%20that%20you%20offer>.