Performers’ Rights

Faisal K. Daudpota* discusses the protection of performers’ rights in Pakistan

In the good old days the performances of actors, musicians and singers were accessible only to the spectators who were in the immediate vicinity when the performance was made. This made it relatively easy for performers to collect payment for their performances. However, in today’s era of information technology performances can be recorded, and both live and recorded performances can be broadcasted and communicated to the public all over the world. Performances are therefore received for entertainment by public that cannot be accessed by the performers for collection of payment. Further, the development of recording and information technologies meant unprecedented possibilities of making and distribution of copies of performances without the permission of the performers involved and without making any payment to them. So, as information technology developed, performers demanded for rights to control the fixation, reproduction and broadcasting of their performances so that they could secure greater financial returns.

Performers’ rights have always been given protection in Pakistan. This fact is evident from the case of Hotel Metropole Ltd v Performing Right Society Ltd¹ whereby the Italian musical works: “these foolish things” by Holt Marvell and “Portrait of my Love” by Cyril Ornadel, were held by the Karachi High Court as protected by the copyright law in Pakistan. Further, Pakistan enhanced the protection of performers’ rights by implication when it signed the TRIPS Agreement, 1994², that required it to implement the regime of legal protection of performers’ rights, whereby, performers can effectively control the fixation, reproduction and broadcasting of their performances for a term of 50 years from the end of the calendar year in which fixation was made or the performance took place. Therefore, Pakistan came up with formal national legislation for protection of performers’ rights through a Copyright (Amendment) Ordinance, 2000³, that amended the Copyright Ordinance, 1962⁴ (CO ’62), thereby, harmonising its performers’ rights legislation with other countries and the relevant international conventions, generally, and the TRIPS Agreement, 1994, in particular.¹

Subject Matter of Performers’ Rights

The subject matter of the performers’ rights is their performances and under the copyright law of Pakistan the word ‘Performance includes any mode of visual or acoustic presentation, including any such presentation by the exhibition of a cinematographic work, or by means of broadcast, or by the use of record, or by any other means and, in relation to lecture, includes the delivery of such lecture’.⁶

Beneficiaries of Performers’ Rights and the Term of Protection

As regards the beneficiaries of performers’ rights are concerned, they have not been identified in the CO ’62, however, as the TRIPS Agreement, 1994, provides that the Rome Convention, 1961⁷, may be considered to provide for conditions, limitations, exceptions and reservations⁸, therefore, one of the relevant definitions of performers comes from Article 3(8) of the Rome Convention, 1961, that states that ‘performers means actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, or otherwise, perform literary or artistic works’. The term of protection of performers’ rights in Pakistan is 50 years⁹ from the end of the calendar year in which fixation was made or the performance took place.

Economic Rights of Performers

The economic rights available to performers in Pakistan as regards their performances is ‘to do or to prevent fixation of their unfixed performance and reproduction of such fixation and broadcasting by wireless means and communication to the public of their live performance’. These rights are more elaborately stated as follows:

To authorise fixation of their unfixed performances or to prevent unauthorised fixation of their unfixed performances, where ‘fixation means the incorporation of sounds or images or both in a device by means of which they can later be made aurally or visually perceivable’.¹¹

To authorise reproduction of their fixed or unfixed performances or to prevent unauthorised reproduction of their fixed or unfixed performances, where the word ‘reproduction in case of literary, dramatic or musical work, includes a reproduction in the form of a record or of a cinematographic work and, in the case of an artistic work, includes a version produced by converting a work into three-dimensional form, or if it is in three dimensions, by converting it into a two dimensional form and references to reproducing a work shall be construed accordingly’.¹²

To authorise broadcasting (by wireless means) and communication to public of their live performances or to prevent unauthorised broadcasting (by wireless means) and communication to public of their live performances, where ‘broadcasting means communication to the public of sound or images or both by means of radio diffusion including communication by telecast, or wire, or both, or any other means of communication’.¹³

CO ’62 maintains that any unauthorised fixation, reproduction and broadcasting (as
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Moral Rights of Performers
Performers have two kinds of moral rights available to them in Pakistan: the paternity right, whereby a performer shall have the right of attribution in relation to his performance, and (2) the integrity right, whereby, a performer is entitled to claim damages for any distortion, mutilation or any action that prejudices his honour in relation to his performance.

Remedies for Infringement
The remedies available to performers against infringement their rights as performers are: injunction, damages and account for profits. The performances are also entitled to prevent infringers from destroying, hiding and removing the infringing copies from the jurisdiction of the courts. Further, they have customs authorities confiscate the infringing copies of the performances and prevent import and export of the same as the case may be.

Performing Rights Society
The provision in the CO ’62 relating to the performing rights societies stand very much against the spirit of TRIPS Agreement, 1994, and are also against the principles of natural justice, in the opinion of the writer, as there are too much compliance costs mainly because of an obsolete regulatory regime. The CO ’62 maintains that a ’performing rights society means a society association or other body, whether incorporated or not, which carries on in Pakistan the business of issuing or granting licences for the performance in Pakistan of any works in which copyright subsists”.

Moreover there is much emphasis on regulation of the performing societies, such as, filing of statements with the Registrar of Copyrights invitation of objections on statements, and limitation to initiate legal proceeding for efficient recovery of royalties and infringement of performers rights.

The Future: Performers’ Rights and Internet
In the recent past it is being realised that information technology renders performers more vulnerable to the misappropriation of their rights as internet makes it much easier to deprive the performers of their rightful remuneration, therefore, 160 countries entered into intense negotiations and concluded a treaty under the auspices of World Intellectual Property Organisation has called WIPO Performers and Phonogram Producers Treaty, 1996 (WPPT ’96). The WPPT ’96 enables the protection of performers’ rights on the internet and entered into force on 20th May 2002 and by then 54 countries had formally ratified it. Of course, Pakistan has not ratified WPPT ’96 yet, but, the fact remains that Pakistan is also affected by information technology revolution, has committed to TRIPS Agreement, 1994, and reaps sizeable foreign revenues from the performances (that are invisible exports) of its performers and their activities.

1. PLD 1967 Karachi 168
3. Article 14(1), TRIPS Agreement, 1994
4. Article 14(5), ibid
5. Ordinance LII of 2000
6. Ordinance XXXIV of 1962
8. Section 2(a), Copyright Ordinance, 1992
10. Article 14(6), TRIPS Agreement, 1994
11. Section 24A(3), Copyright Ordinance, 1962
12. Section 24A, ibid
13. Section 26(b), ibid
14. Section 2(a), ibid
15. Section 26(a), ibid
16. Section 25, ibid
17. Section 62 read with Section 55, ibid
18. Section 2(v), ibid
19. Section 31, ibid
20. Sections 99 and 105 ibid
21. Section 35(6), ibid

*About the author
Faisal K. Bandpota has been identified in America and Europe as the only specialist in Pakistan on the complex matters relating to Intellectual Property Law and WTO law. He is highly respected for his experience in tendering multi-jurisdictional legal advice to his clients as regards protection and enforcement in all aspects of intellectual property.