

# 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 Ltd* 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, 1994<sup>2</sup>, 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.<sup>3</sup> Therefore, Pakistan came up with formal national legislation for protection of performers' rights through a Copyright (Amendment) Ordinance, 2000<sup>4</sup>, that amended the Copyright Ordinance, 1962<sup>5</sup> (CO '62), thereby, harmonising its performers' rights legislation with other countries and the relevant international conventions, generally, and the TRIPS Agreement, 1994, in particular.<sup>6</sup>

## 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'.<sup>8</sup>

## 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, 1961<sup>9</sup>, may be considered to provide for conditions, limitations, exceptions and reservations<sup>10</sup>, therefore, one of the relevant definitions of performers comes from

Article 3(a) 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 years<sup>11</sup> 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'<sup>12</sup>. These rights are more elaborately stated as follows:

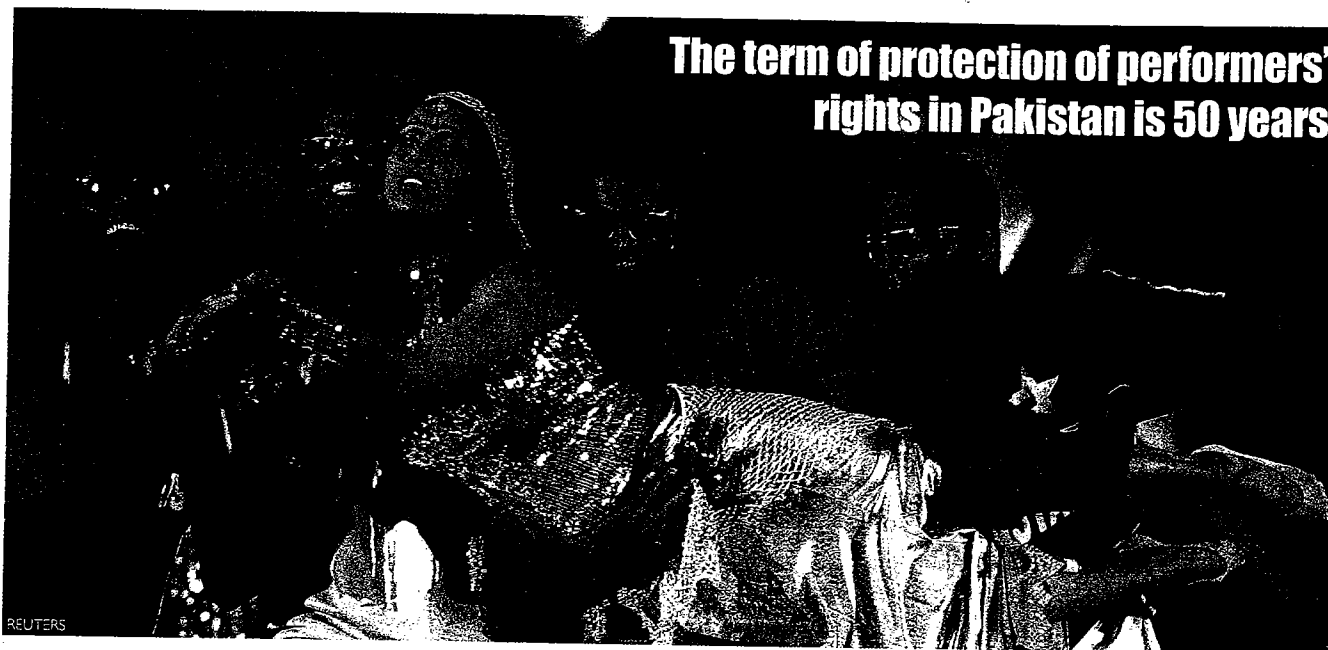
- ⊕ To authorise fixation of their unfixed performances or to prevent unauthorised fixation of their unfixed performances, where 'fixation means the incorporation of sounds or images or both in a device by means of which they can later be made aurally or visually perceivable'.<sup>13</sup>
- ⊕ To authorise 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'.<sup>14</sup>
- ⊕ 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'.<sup>15</sup>

CO '62 maintains that any unauthorised fixation, reproduction and broadcasting (as

## In summary

- ⊕ Pakistan came up with formal national legislation for protection of performers' rights through a Copyright (Amendment) Ordinance, 2000, that amended the Copyright Ordinance, 1962
- ⊕ Copyright Ordinance, 1962, maintains that any fixation, reproduction and broadcasting of a performance without authorization from the performer shall be deemed to an infringement of such performer's economic rights
- ⊕ Remedies available to performers against infringement their rights are:
  - injunction, damages and account for profits. The performers are also entitled
  - to prevent infringers from importing, exporting, destroying, hiding and
  - removing the infringing copies from the jurisdiction of the courts

## The term of protection of performers' rights in Pakistan is 50 years



described above) of a performance without authorization from the performer shall be deemed to an infringement of his above rights.<sup>16</sup>

### 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.<sup>17</sup>

### Remedies for Infringement

The remedies available to performers against infringement their rights as performers are: injunction, damages and account for profits. The performers 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'<sup>18</sup>. Moreover there is much emphasis on regulation of the performing rights societies, such as, filing of statements with the Registrar of Copyright<sup>19</sup>, invitation of objections on statements<sup>20</sup>, and limitation to initiate legal proceeding for efficient recovery of royalties and infringement of performers' rights.<sup>21</sup>

### 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 hat is 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 34 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
- 2 Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994
- 3 Article 14(1), TRIPS Agreement, 1994
- 4 Article 14(5), *ibid*
- 5 Ordinance LIII of 2000
- 6 Ordinance XXXIV of 1962
- 7 The International Conventions that afford rights to performers are: Rome Convention (1961), TRIPS Agreement (1994), WIPO Performances and Phonograms Treaty (1996)
- 8 Section 2(u), Copyright Ordinance, 1962
- 9 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961. (Rome Convention, 1961)
- 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(zd), *ibid*
- 15 Section 26(a), *ibid*
- 16 Section 25, *ibid*
- 17 Section 62 read with Section 25, *ibid*
- 18 Section 2(v), *ibid*
- 19 Section 31, *ibid*
- 20 Sections 32 and 33, *ibid*
- 21 Section 33(6), *ibid*

### \*About the author

#### Faisal K. Daudpota

Faisal K. Daudpota 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

