

**THE BACKGROUND PERFORMER PARADOX IN INDIA**

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**ABSTRACT**

*The contributions made by performers such as dubbing artistes and stuntmen are intriguing because they satisfy the qualification of a performance as a form of intellectual property under Section 2(q) of The Copyright Act, 1957 but seem to get excluded with the application of the proviso to Section 2(qq). This paradox originates from the treatment meted out to these performers as people working on a system of wages with the perception that they are not worthy of being credited for their contributions along with a seemingly mischievous addition made by the 2012 amendment to the Act.*

*The industry term for a performer who provides minor contributions such as standing in a crowd is an 'extra' or a 'junior artiste' or a 'background performer'. The Proviso does not use any of these terms. Instead, it relies on industry practice to interpret a casual performer and exclude him from being a performer under the Act.*

*Considering power equations in the industry, performers face an uphill task for fair treatment. In such a situation, it is important that ambiguities at least do not arise from law. While the Amendment has brought many benefits to the Indian performer such as moral rights and the 'Right to Receive Royalty', these performers who provide sufficiently original performances are unable to exercise their rights due to the perceptions in the industry. There is a difference between a 'background performer' and a 'casual performer'. This paper seeks to identify the origins of this ambiguous position in The Proviso, analyses its effect on Indian performers and attempts to provide possible solutions.*

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## I. INTRODUCTION

The 2012 Amendment [“**Amendment**”] to the Copyright Act, 1957 [“**Act**”] has been nothing short of a watershed moment for Indian authors and performers. As Prashant Reddy points out, it is a landmark piece of legislation that marks a clear shift in the Indian stance from the adoption of the traditional Anglo-Saxon approach to the *droit d’ auteur* approach based on human rights.<sup>1</sup> Performers in India awoke to their own moral rights and to a more nuanced economic rights structure, in tune with the developments in information technology.

The focus of this article will be on the addition of a proviso to the interpretation of performer provided under the Act in Section 2(qq) [“**Proviso**”]. At first glance, it seems harmless:

*“Section 2(qq): Performer includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance:*

*Provided that in a cinematograph film a person whose performance is casual or incidental in nature and, in the normal course of the practice in the industry, is not acknowledged anywhere in the credits of the film shall not be treated as a performer except for the purpose of clause (b) of Section 38B;”*

In fact, some may even say that by writing down the unwritten, this law now provides more certainty in identifying audio-visual performers. These perceptions and opinions take a bashing when we dig deeper and ask questions such as, who is a casual performer and what justifies basing its interpretation on the industrial practice of non-acknowledgement. Instead of bringing more clarity, the proviso makes the classification of performers dubious. The insidious effect of the proviso is such that it may exclude even qualified performers from protection under The Act.

The industry-specific terms for this excluded category of performers are ‘extra’/ ‘junior artiste’/ ‘background performer’. According to Marnie Hill, who has extensively studied the Australian entertainment industry, an extra is known by various names. These could be a background actor, an atmosphere actor, a supernumerary or even a walk-on.<sup>2</sup> These individuals do not have

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<sup>1</sup> Prashant Reddy, *The Background Score to the Copyright (Amendment) Act, 2012*, NUJS L. REV. 469–527 (2012).

<sup>2</sup> MARNIE HILL, *THE ACTORS’ HANDBOOK: A GUIDE TO THE AUSTRALIAN ENTERTAINMENT INDUSTRY* 270 (Dean Nottle, 2007).

dialogues and work *en-masse*. According to Hill, these individuals are directed by the 3<sup>rd</sup> assistant director and not by the principal. Extras can also be called in for providing voices, such as crowd noises.<sup>3</sup> Featured extras are persons whose faces can be seen clearly and are directed individually, but don't speak. These types of featured extras get paid more.<sup>4</sup>

A 2013 film from the Philippines called 'Ekstra' captures the difficulties of the extras quite well. It is a poignant story familiar to so many who work as bit-part players in the industry. There is no comfort afforded to an extra on the film sets, they might work for unfixed hours, in harsh conditions, for a measly sum of money. The problems highlighted in the film are real and its blunt characterisation captures the travails of this community very well. Russell McConnell, a veteran extra had said that it is easy to take advantage of this group because they are the most vulnerable.<sup>5</sup>

A number of performers' organisations do not represent background or "extra" performers who may have few words to say or no dialogue, and literally do appear in the background.<sup>6</sup> Katherine Sand explains that such performers get covered through agreements in the Television and Film industry or through Unions, but they don't get payment for secondary usage.<sup>7</sup> For instance, in the US, The Screen Actors Guild, the American Federation of Television and Radio Artists AFTRA claim jurisdiction over such performers but they are not 'performers'.<sup>8</sup> The definition of extras in the AFTRA Network Code is as follows:

*"Walk-ons and extras are those performers who do not speak any lines whatsoever as individuals but who may be heard, singly or in concert, as part of a group or crowd."*

In India, a good example is the Cine and Television Artistes Association ["CINTAA"], where a junior artiste explained to News18 that while membership to work as an extra or a junior artiste is compulsory, the pay can be as low as 750 Rupees for contributions in television shows such as

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<sup>3</sup> *Id.* at 270.

<sup>4</sup> *Supra* note 2 at 271.

<sup>5</sup> Richard Verrier, *Extras Are The Center Of Attention In Crackdown On Casting Company Fees*, L.A. TIMES (June 10, 2011), <https://www.latimes.com/business/la-xpm-2011-jun-10-la-fi-ct-extras-20110610-story.html>.

<sup>6</sup> Katherine Sand, *WIPO Review of Contractual Considerations in the Audio-visual Sector*, at 13, [https://www.wipo.int/edocs/pubdocs/en/copyright/1034/wipo\\_pub\\_1034.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/1034/wipo_pub_1034.pdf).

<sup>7</sup> Katherine M. Sand, *Ad Hoc Informal Meeting on the Protection of Audio-visual Performances: Study on Audio-visual Performers' Contracts and Remuneration Practices in Mexico, The United Kingdom and The United States of America*, at 10 (2003), [https://www.wipo.int/edocs/mdocs/copyright/en/avp\\_im\\_03/avp\\_im\\_03\\_3a.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/avp_im_03/avp_im_03_3a.pdf).

<sup>8</sup> *Id.* at 26.

standing in a street scene.<sup>9</sup> Such a person would be lucky to get a contract, forget secondary use remuneration.

The focus of this article is not on extras, but rather on the classes of performers who seem to be excluded by the drafting of the Proviso. Had this provision referred to extras, it would make sense because the contributions of the extra cannot be considered sufficiently creative to constitute originality and therefore be considered protected under the Act. Instead, the Proviso refers to an industry perception of a casual performer. While extras can be said to come wholly within the domain of labour law, artistes like stuntmen and dubbing artistes who also work on wages but contribute significant creative expressions can be said to fall within both labour law as well as intellectual property law. Stunt artistes under the Movie Stunt Artists Association, for instance, are paid 8,320 Rupees for a shift of work apart from other small allowances.<sup>10</sup> Dubbing artistes were paid anything between 500 to 30,000 Rupees depending on the type of dubbing a decade back.<sup>11</sup> As per an agent's website, this range has increased from a few thousand to 1.5 lakh Rupees;<sup>12</sup> but commercial revenue for films has increased manifolds in the same time.

Lack of recognition is another major issue which has been voiced by many who are part of/familiar with the industry practices. Bollywood action stars like Akshay Kumar<sup>13</sup> and Tiger Shroff<sup>14</sup> have spoken out openly in support of recognition for stuntmen. Similarly, with respect to dubbing, actress Raveena Ravi<sup>15</sup> and actor Sharad Kelkar<sup>16</sup> have recently expressed their

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<sup>9</sup>*Bollywood's "Extras": Story of Dreams Unfulfilled*, NEWS18 (June 13, 2011), <https://www.news18.com/news/india/bollywoods-extras-story-of-dreams-unfulfilled-375406.html>.

<sup>10</sup> English Wages, <http://www.moviesstuntartistsassociation.com/English-Wages.html> (last visited Nov 8, 2020).

<sup>11</sup> Kaveri Nandan, *If It Sounds Good, Lend Your Voice*, OUTLOOK INDIA (November 19, 2008), <https://www.outlookindia.com/outlookmoney/archive/if-it-sounds-good-lend-your-voice-91196> (last visited Nov 8, 2020).

<sup>12</sup> How Much Voice Over Artist Earns In India, , WWW.VOICEOVERMEHAK.COM (2020), <https://www.voiceovermehak.com/VoiceOverTalks/2020/05/28/how-much-voice-over-artist-earns-in-india/> (last visited Nov 8, 2020).

<sup>13</sup> Medha Shri Dahiya, *Akshay Kumar Pens Open Letter To Stuntmen: I'm Alive Thanks To You*, HINDUSTAN TIMES (March 2, 2016), <https://www.hindustantimes.com/bollywood/akshay-kumar-pens-open-letter-to-stuntmen-i-m-alive-thanks-to-you/story-x6qgBRcWcwhUH6AWTHPgOL.html> (last visited Nov 8, 2020).

<sup>14</sup> Tiger Shroff Wants Stuntmen To Get Due Recognition, MID-DAY (March 25, 2018), <https://www.mid-day.com/articles/tiger-shroff-wants-stuntmen-to-get-due-recognition/19237192> (last visited Nov 8, 2020).

<sup>15</sup> Ashameera Aiyappan, *Dubbing As A Craft Deserves More Recognition: Raveena Ravi*, NEW INDIAN EXPRESS (May 6, 2020), <https://www.newindianexpress.com/entertainment/tamil/2020/may/06/dubbing-as-a-craft-deserves-more-recognition-raveena-ravi-2139633.html> (last visited Nov 8, 2020).

<sup>16</sup> Yashika Mathur, *Sharad Kelkar: Dubbing Artists Are Not Promoted Enough In Bollywood*, HINDUSTAN TIMES (May 8, 2017), <https://www.hindustantimes.com/bollywood/sharad-kelkar-dubbing-artists-are-not-promoted-enough-in-bollywood/story-40INJ4aPflFpAerVirtjLP.html> (last visited Nov 8, 2020).

anguish. These artistes perform in the ‘background’ in the literal sense of the word, as stuntmen perform stunts and dubbing artistes provide dubbing for other performers who stand in the foreground with respect to the audience. This article highlights the argument that being in the background is not the same as being a casual performer like an extra. The interpretation of the Proviso can lead to exclusion of background performers as per industry practice, posing a big problem considering that the Amendment intended to promote their interests as performers. This article first seeks to find the origin of this provision, then analyses its effects on Indian performers and provide possible solutions.

## II. SCOPE OF THE TERM ‘PERFORMER’

### A. The Rome Convention & WPPT

The International Convention for the Protection of Performers, 1961 [“**Rome Convention**”] brought performers into the domain of intellectual property protection and gave them rights over their performances. The phonogram industry benefitted much from the advancement in broadcasting technologies to disseminate recordings to various parts of the world and thereby increase revenue. It was considered essential that the contribution of the performer was rewarded, and that was precisely what the Convention tried to provide – which is also referred to as the classic justification.<sup>17</sup>

The Rome Convention is also a testament to a historical shift in the evolution of Performers’ Rights. Prior to this instrument, performers were considered merely as industrial workers. Their performances were seen as work tendered for the employer’s purposes and labour organisations bargained for their remuneration and recognition. Thus, the stature of classes of performers as significant contributors to the industry developed and they could now put forth their demands better. Therein grew the industrial practice of recognition and remuneration.

The performer’s inclusion in the fold of intellectual property considers rewarding the distinctive intellectual creative expressions of the performer. Every performer leaves an indelible mark on his performance. This mark is of his personality, clearly identifiable to him.

The Rome Convention defined a performer under Article 3(a) as:

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<sup>17</sup> *Standing Committee on Copyright and Related Rights: Summary of the Outcome of the National and Regional Seminars on the Protection of Audio-visual Performances and Stocktaking of Positions*, at 14(2008), [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_3.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_3.pdf).

*“Performers means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works;”*

This definition does not place any restriction on the inclusion of performers performing literary or artistic works. The World Intellectual Property Organisation’s [“**WIPO**”] guide to the Rome Convention gives us an understanding that there is a category of performers called ‘extras’, who may be people in a scene with an army or with a crowd.<sup>18</sup> These are people with limited contributions and who cannot be said to act or play.<sup>19</sup> It adds that unless interpreted very extensively, this definition does not cover these contributions.<sup>20</sup>

An earlier guide to the Rome Convention also published by WIPO states that if the Convention includes in a single group, a wide category of persons who communicate works to the public, this does not mean that in practice their situations are identical.<sup>21</sup> Some artists mark their personality within their performance of their work: the conductor of an orchestra completes the score by his personal annotations; the soloist plays his instrument in an individual way; the actor gives his own interpretation to a part.<sup>22</sup> They are in a sense creators who are tied, in their performances, to the work itself but who, in practice are with difficulty distinguished since one cannot determine with precision who, by virtue of his inventiveness, must be judged artist.<sup>23</sup>

But it is clear that he must “perform” and the words used in French in the Convention might tend to exclude more extras of theatre or cinema and those who assume a merely mechanical role (stagehands for example) since their part in the show bears no personal stamp and is marginal or secondary.<sup>24</sup> The French text uses, for the single word “*performer*,” “*artiste interprete ou executant*”.<sup>25</sup> The words “*artiste interprete*” are usually used for soloists and actors, whereas members of an orchestra, including the conductor, are usually “*artistes executants*.”<sup>26</sup> In order that there should be no doubt that conductors of instrumental and vocal groups were protected, both were

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<sup>18</sup> Dr. Mihaly Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO And Glossary of Copyright and Related Rights Terms*, 140 (2003), [https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo\\_pub\\_891.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf).

<sup>19</sup> *Id.* at 140.

<sup>20</sup> *Supra* note 19

<sup>21</sup> Claude Masouye, *Guide to the Rome Convention and the Phonograms Convention*, 21 (1981), [https://www.wipo.int/edocs/pubdocs/en/copyright/617/wipo\\_pub\\_617.pdf](https://www.wipo.int/edocs/pubdocs/en/copyright/617/wipo_pub_617.pdf).

<sup>22</sup> Masouye, *supra* note 21 at 22.

<sup>23</sup> Masouye, *supra* note 21 at 22.

<sup>24</sup> Masouye, *supra* note 21 at 22.

<sup>25</sup> Masouye, *supra* note 21 at 22.

<sup>26</sup> Masouye, *supra* note 21 at 21.

considered included in the expression “*artiste interprete ou executant*.”<sup>27</sup>It is a matter for the courts to interpret these terms.<sup>28</sup>The words, “*act, sing, deliver, declaim, play in or otherwise perform*” give them wide latitude.<sup>29</sup>

The confinement of performers towards performing literary or artistic works rendered them as related to copyright. But in the same instrument under Article 9, Contracting States were allowed extending protection to variety performances not based on a literary or artistic work.

India signed this instrument but has not ratified it. The imposition of performers’ rights through The Agreement of Trade-Related Aspects of Intellectual Property Rights 1995 (“TRIPS”) has rendered this otiose. In the wake of international and national debates surrounding performers and their inclusion within the fold of intellectual property, India inserted the term ‘performers’ within the Act in 1994. The Indian interpretation of a performer did not tie him to the performance of a piece of work. For instance, what work would a snake charmer perform? The original Section 2(qq) has stood the test of time. It did not provide for any particular exclusion of a performer. If a performer could satisfy the criteria under Section 2(q) of the Act, he would be a performer:

*“Section 2(q): Performance in relation to performer’s right, means any visual or acoustic presentation made live by one or more performers;”*

While the TRIPS came into effect, WIPO provided a parallel forum for effective protection of performances in the digital era. The WIPO Performances and Phonograms Treaty, 1996 [“WPPT”] restricted its application to phonograms even though many parties such as the European Community [“EC”] wanted it to encompass both sound and audio-visual fixations.<sup>30</sup> This void was sought to be filled with a protocol within the WPPT which would cover audio-visual fixations. According to the EC, its principal objective would be to update and improve the protection of audio-visual performers and not audio-visual producers.<sup>31</sup> But in India, it was

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<sup>27</sup> Masouye, *supra* note 21 at 21.

<sup>28</sup> Masouye, *supra* note 21 at 22.

<sup>29</sup> Masouye, *supra* note 21 at 22.

<sup>30</sup> *Submission on Behalf of the European Community and Its Member States on the Protection of Performers’ Rights in their Audio - visual Performances to the WIPO Standing Committee on Copyright and Related Rights*, (2000), [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_4/sccr\\_4\\_2.doc](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_4/sccr_4_2.doc).

<sup>31</sup> *Id.*

viewed that an independent treaty was required as the issues of the film industry were quite different from the phonographic industry.<sup>32</sup>

The WPPT has the following definition for a performer in Article 2(a):

*“Performer are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;”*

Like the Rome Convention, there is no mechanism to exclude a class of performers in WPPT.

## **B. Discussions leading up to the Beijing Treaty**

The WIPO discussions on the protection of audio-visual performers took place on two platforms – A Committee of Experts on A Protocol Concerning Audio-visual Performances [“APCE”] and the subsequent Standing Committee on Copyright and Related Rights [“SCCR”]. The WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights in December 1996 and the WPPT laid the foundations of the APCE,<sup>33</sup> which drew its conclusion in June 1998 handing the mantle to SCCR.<sup>34</sup>

These discussions and deliberations are an eye-opener on how extras are perceived by the Member States in the context of audio-visual performances. To the APCE, Mexico provided that as per their law, the term performer would exclude ‘extras and understudies’.<sup>35</sup> However, the Mexican Federal Law on Copyright, 1997 does not explain who an extra or an understudy is. The Chinese referred to their definition in the Implementation Regulations of the Copyright Law of the People’s Republic of China, 1991 which did not specially exclude any class of performer:<sup>36</sup>

*“Performer refers to any actor or any other person who performs literary and artistic works;”*

In the second session of the APCE, the delegation from USA initially submitted a proposal for a treaty to protect audio-visual performances, where it defined a performer in Article 2(a) as:

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<sup>32</sup>WIPO Standing Committee on Copyright and Related Rights’ Report of Second Session, at 6 (1999), [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_2/sccr\\_2\\_11.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_2/sccr_2_11.pdf).

<sup>33</sup>Information Received From Members by The WIPO Committee of Experts on a Protocol Concerning Audio-visual Performances, (1997), [https://www.wipo.int/edocs/mdocs/copyright/en/ap\\_ce\\_i/ap\\_ce\\_i\\_3.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/ap_ce_i/ap_ce_i_3.pdf).

<sup>34</sup>Organizational and Procedural Matters and Overview of Substantive Issues of the WIPO Standing Committee on Copyright and Related Rights, (1998), [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_1/sccr\\_1\\_2.html](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_1/sccr_1_2.html).

<sup>35</sup>Supra note 33 at 13.

<sup>36</sup>Supra note 33 at 5.

*“Performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore, but not including extra performers or background performers;”*<sup>37</sup>

No interpretation of the meaning of these definitions was provided by the proposal. In the June session, it was explained that the exclusion of “extra performers” and “background performers ” was an important addition in order not to upset industry practice.<sup>38</sup> Such performers had no speaking roles, but, for example, filled out crowds, were sitting at tables in restaurants as mere background to the acting, were marching soldiers and in other ways participated in filling out the picture without being listed in the credits normally given by the end of the film.<sup>39</sup> Having said that, the USA in their revised proposal at the first session of the SCCR in 1998 changed the definition of performer:

*“Performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore, but not including ancillary performers considered such by professional practice;”*<sup>40</sup>

The Delegation from the USA also commented that the earlier proposal was changed as a response to the concerns raised at the APCE about the scope of “extra performers” and “background performers”.<sup>41</sup> The revised language, according to the delegation, comes directly from the WIPO’s English translation of the French copyright statute and it seeks to provide greater clarity.<sup>42</sup> According to them, it is sufficient to cover the basic concept while providing flexibility for national interpretation.<sup>43</sup>

The French Intellectual Property Code by Article L212-1 excludes ‘Ancillary Performers’ by stating:

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<sup>37</sup>*Proposal from the United States of America to The WIPO Committee of Experts on a Protocol Concerning Audio-visual Performances*, (1998), [https://www.wipo.int/edocs/mdocs/copyright/en/ap\\_ce\\_2/ap\\_ce\\_2\\_4.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/ap_ce_2/ap_ce_2_4.pdf).

<sup>38</sup>*Report of the Second Session of The Committee of Experts on a Protocol Concerning Audio-visual Performances* , at 11 ( 1998), [https://www.wipo.int/edocs/mdocs/copyright/en/ap\\_ce\\_2/ap\\_ce\\_2\\_9.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/ap_ce_2/ap_ce_2_9.pdf).

<sup>39</sup>*Id.* at 11.

<sup>40</sup>*Submissions Received by The WIPO Standing Committee on Copyright and Related Rights*, at 4 (1998), [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_1/sccr\\_1\\_4.html](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_1/sccr_1_4.html).

<sup>41</sup>*Id.*

<sup>42</sup>*Supra* note 40.

<sup>43</sup>*Supra* note 40.

*“Save for ancillary performers, considered such by professional practice, performers shall be those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts.”*

According to Dr. Lewinski, in France, extra performers can be excluded from protection (depending on the importance of the performance).<sup>44</sup>

USA again revised the definition of a performer in their proposal submitted to the SCCR in their third session in 1999.<sup>45</sup> This definition in Article 2(a) read as:

*“Performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore with the exception of extras, the definition of the latter term being left to the legislation of each Contracting Party;”*

USA, in this document, explained that it had made revisions based on the deliberations placed by other countries before the SCCR.<sup>46</sup>

A Regional Consultation Meeting was held at New Delhi in May, 1998 for countries of the Asia and the Pacific concerning the protocol for audio-visual performances.<sup>47</sup> Apart from India, Bangladesh, Brunei Darussalam, Indonesia, Malaysia, Mongolia, Pakistan, Philippines, Qatar, Republic of Korea, Singapore, Thailand and the United Arab Emirates participated. Their report was submitted to the APEC. Two important points raised in this consultation were:

The context of extending performers' rights to audio-visual performances is not uniform. For example, it may differ in developing countries in view of the special industrial practices existing in the film industry. Administration of copyright and related rights needs to be developed much in these countries. In the absence of a well-developed collective administrative system, the provision of new rights to performers in their audio-visual performances may not help the performers. It is also necessary to wait for the results of the rights given to performers in their

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<sup>44</sup>Dr. Silke Von Lewinski, *Comparative Analysis of National Solutions in Protecting Audio-visual Performers' Rights – Germany and France*, at 7, [https://www.wipo.int/edocs/mdocs/copyright/en/wipo\\_cr\\_tia\\_18/wipo\\_cr\\_tia\\_18\\_4.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_tia_18/wipo_cr_tia_18_4.pdf).

<sup>45</sup>*Submission of USA on a Treaty for Audio-visual Performances Submitted to The WIPO Standing Committee on Copyright and Related Rights*, (1999), [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_3/sccr\\_3\\_7.html](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_3/sccr_3_7.html).

<sup>46</sup>*Id.*

<sup>47</sup>*Report of the Regional Consultation Meeting For Countries of the Asia and the Pacific on a Protocol Concerning Audio-visual Performances Submitted to The Committee of Experts on a Protocol Concerning Audio -visual Performances*, [https://www.wipo.int/edocs/mdocs/copyright/en/ap\\_ce\\_2/ap\\_ce\\_2\\_8.html](https://www.wipo.int/edocs/mdocs/copyright/en/ap_ce_2/ap_ce_2_8.html).

audio performances. In this scenario, several participants felt that it was necessary not to hasten with a new Protocol.<sup>48</sup>

Considering the special nature of the audio-visual industry, the group expressed the need to consider exclusion of certain categories of performers, whose performances are casual or incidental, from the definition of performers, but felt it necessary to discuss the issue further.<sup>49</sup>

This meeting marked the birth of the proviso to Section 2(qq). Interestingly, while India adopted this proviso raised in this consultation meeting with 9 other countries, none of the others did. In fact, the departure of most of these other countries can be seen from the regional consultation held in Shanghai in October 1998 for countries of Asia and the Pacific concerning the protocol for audio-visual performances. The participating nations included China, Bangladesh, Brunei Darussalam, Fiji, Indonesia, Malaysia, Mongolia, Nepal, Pakistan, Philippines, Republic of Korea, Singapore, Sri Lanka and Thailand. Their report was submitted to the SCCR. It did not contain any reference to an exclusion of casual or incidental performers.<sup>50</sup>

At the second session of the APCE, the Delegations of South Africa (on behalf of the African Group), Singapore, Philippines, Senegal, Nigeria, Kenya, Morocco and India, along with the National Association of Broadcasters' ["NAB"] observer, supported the view that "extra performers" and "background performers" participating in audio-visual fixations should be excluded from the definition of the term "performer."<sup>51</sup> The delegation of India also mentioned that dubbers, dummies and stunts should be excluded.<sup>52</sup> The delegation of South Africa, speaking on behalf of the African Group, supported by the delegations of Kenya, Nigeria and Senegal, pointed out that the question of how possible exclusions should be done should be left to national legislation, and the delegation of Nigeria added that the remuneration of these participants should be dealt with in contracts.<sup>53</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Supra* note 47.

<sup>50</sup> *Report of the Regional Consultation Meeting for Asia and the Pacific Concerning a Protocol on Audio-visual Performances Submitted to the WIPO Standing Committee on Copyright and Related Rights*, at 5 (1998), [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_1/sccr\\_1\\_5.html](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_1/sccr_1_5.html).

<sup>51</sup> *Supra* note 39 at 11.

<sup>52</sup> *Supra* note 39 at 11.

<sup>53</sup> *Supra* note 39 at 11.

An observer from the International Federation of Actors [“**FIA**”] said that she supported the exclusion of extras, but not of background performers.<sup>54</sup> She further favoured the extension of the definition to circus and variety of artists.<sup>55</sup> The observer from the International Federation of Film Producers’ Associations [“**FIAPF**”] said that, whatever the wording of the exception for extras, background performers, dummies and the like, which were concepts determined by professional practice, the terms did not require a detailed definition in the Treaty; it added however that a certain minimum was necessary to qualify for the status of a performer.<sup>56</sup>

At the second session of the SCCR, India submitted a proposal for a treaty to cover audio-visual performances. The definition India gave to performers under Article 2(a) was:

*“Performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary or artistic works or expressions of folklore but does not include performers whose performances are casual or incidental in nature such as extras.”*

This was in tune with the regional consultation held in New Delhi in 1998. The Indian delegation went on to explain to the SCCR in its second session in May 1998 that this proposal was in fact the result of a long consultation process and reflected concerns of the film industry, the performers and the Government.<sup>57</sup> The delegation went on to say that the primary aim of protecting the rights of performers better could not be pursued in a vacuum.<sup>58</sup> In line with this, India said that it had a strong interest in its important film industry, as well as the practices of relationships between performers and producers, had to be considered; these relations were based on mutual trust and not on written documents.<sup>59</sup> Therefore, according to the delegation, it was necessary to maintain the existing balance when granting new rights which should be meaningful.<sup>60</sup>

In the same session, India also explained that it did not have a practice of remuneration rights as provided for in Article 15 of the WPPT.<sup>61</sup> Again, India clarified to the SCCR in its third session in

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<sup>54</sup> *Supra* note 39 at 11.

<sup>55</sup> *Supra* note 39 at 11.

<sup>56</sup> *Supra* note 39 at 12.

<sup>57</sup> *Supra* note 33 at 4.

<sup>58</sup> *Supra* note 33 at 4.

<sup>59</sup> *Supra* note 33 at 4.

<sup>60</sup> *Supra* note 33 at 4.

<sup>61</sup> *Supra* note 33 at 10.

December 1999 where it referred to its proposal for a Treaty and said that the proposal has been discussed with many different government departments, private sector groups involved in the area, including the Film Federation of India.<sup>62</sup>

In 2008, the SCCR released a document summarising the outcomes of the national and regional seminars on the protection of audio-visual performances.<sup>63</sup>The following important points were noted by the SCCR:

Some national legislations contain provisions excluding ‘extras’ from the definition of performer on the basis that their contribution is casual or incidental in nature; and some States argue that ‘extras’ or ‘ancillary performers’ do not qualify as performers as they do not in the proper sense, perform literary or artistic or expressions of folklore. In consequence, the SCCR notes, national legislation often does not deem it necessary to incorporate an explicit provision excluding extras; each jurisdiction determines the threshold at which a person is entitled to protection. In doing so, it interprets national legislation in the light of the established industry practice and criteria such as whether a person has a speaking role or is rather in the background with regard to acting.

In the end, The Beijing Treaty on Audio-visual Performances, 2012 incorporated a definition that did not create any exclusion. Under Article 2(a), the Treaty states:

*“Performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;”*

At the WIPO Regional Workshop on Beijing and Marrakesh Treaties held in Georgia in 2015, Jean-Vincent explained that in the Beijing Treaty definition, extras, walk-on actors or figurants do not own performers’ rights.<sup>64</sup>

### **III. PARLIAMENTARY DISCUSSIONS ON THE INCLUSION OF PROVISIO IN SECTION 2(qq)**

As can be seen from the earlier section, although India has only recently acceded to the WPPT and has not signed The Beijing Treaty, it did play a big part in the discussion at the APCE and SCCR on the topic concerning inclusion or exclusion of extras from the definition of

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<sup>62</sup>The WIPO Standing Committee on Copyright and Related Rights’ Report of the Third Session , at 11 (1999), [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_3/sccr\\_3\\_11.html](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_3/sccr_3_11.html).

<sup>63</sup>Summary of the Outcome of National and Regional Seminars on Protection of Audio-visual Performances by The WIPO Standing Committee on Copyright and Related Rights, (2008), [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=142872](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=142872).

<sup>64</sup>Jean Vincent, *The Beijing Treaty: Performers’ Perspective Transfer of Rights and Remuneration Schemes* , 3 (2015), [https://www.wipo.int/edocs/mdocs/copyright/en/wipo\\_cr\\_tbs\\_15/wipo\\_cr\\_tbs\\_15\\_t6a.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/wipo_cr_tbs_15/wipo_cr_tbs_15_t6a.pdf).

performers. The Indian proposal submitted to the SCCR included a definition of performer which would exclude casual or incidental performances such as those of extras from the scope of 'performer'. The implication of such exclusion is married to the industrial system, wherein such performers are not considered creative contributions.

But the provision proposed by India at WIPO is not the provision inserted by the Amendment. It removes a possible explanation into the construction of a threshold for the exclusion of a casual or incidental performance from the purview of cinematograph films. Having said that, the removal of a performance's dependency on works and the decision to keep the original provision intact is a welcome development. This is because the work of performers need not be based on works, as noted correctly by the Australian Copyright Law Review Committee.<sup>65</sup>

Since the provision is now devoid of an accompanying explanation in the form of an example, it becomes fertile ground for misinterpretation. The industrial practice for instance is to hire dubbing artistes, voiceover artistes and stuntmen for a few days of work and pay them for the same. The industry also does not credit them for their performances. Therefore, all three categories would stand excluded from the purview of performers' rights in India.

Considering that this is not a small effect, one wonders why this example was dropped. The 227<sup>th</sup> Parliamentary Standing Committee on Human Resource Development Report on the Copyright (Amendment) Bill, 2010 submitted to the Rajya Sabha, suggested the insertion of this proviso. But curiously, no debate or discussion was done over this inclusion either in the Rajya Sabha or the Lok Sabha. The conclusion was that this proviso sailed into the Act in 2012 without any deliberation about the consequences it would have on scores of performers in India.

Let's look at the consequences. With the inclusion of a 'Right to Receive Royalties' provision in The Act through the 2012 Amendment, producers of cinematograph films are now bound to share their revenue with performers. It is perhaps keeping this in mind that some sense of clarity was sought to be made in the interpretation of a performer. This objective in itself would be admirable since the producer has to be able to classify people working in his film as performers and thus, it works in the best interests of both. If this was the objective, the Proviso has failed since it leaves the interpretation wide open for limiting performers.

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<sup>65</sup>*Report on Performer's Protection*, (1987), <http://www.austlii.edu.au/au/other/clrc/10/>.

This wide interpretation could well be the reason that performers are still being protected by their labour organisations. Some of these associations like the Association of Voice Artistes (AVA) do not even have minimum pay, let alone a uniform rate card for its members. As noted by the WIPO, these labour associations can work along with collective management organisations to implement the collection of remuneration and distribution to its members.<sup>66</sup> In the absence of Performers' Societies, labour associations are burdened. The task of a performers' society is a complex one that cannot be taken up by disparate associations working in different regions and catering to different performers. The knowledge concerning rights provided by the Amendment continues to be shallow and is perhaps the reason why no active movement has been initiated to collect royalties except by singers.

#### **IV. POSSIBLE SOLUTIONS**

From the above discussion, it becomes clear that the proviso to Section 2(qq) does more harm than good. There are 3 ways that I propose this issue can be resolved:

- Remove the proviso completely; or
- Include the phrase 'such as extras'; or
- The Copyright Office can list out casual performers.

##### **A. Removing the Proviso**

This is the easiest of the 3 solutions and will prove to be thoroughly effective. This is so since performances like works are based on the concept of originality. If a person fulfils the criteria of having delivered a performance under the Act, it means his performance is sufficiently creative and is thus worthy of protection. Extras, who provide no distinctive contribution such as people in a crowd are easily excluded from the scope of 'performer'. This solution is more appropriate of the three as it is grounded in intellectual property and its justifications.

##### **B. Include the Phrase 'Such as Extras'**

This solution is more grounded in the industry and has little to do with intellectual property justifications. Leaning on the industry for interpretation can majorly backfire considering how the film industry in India operates. It heavily favours producers. The Indian delegation pointed to the SCCR that relations in the Indian film industry are based on mutual trust and not written agreements.<sup>67</sup> It is the author's view that this trust is forced and not based on any real choice.

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<sup>66</sup>*Supra* note 64 at 3.

<sup>67</sup>*Supra* note 33.

### **C. Listing**

This is at best a temporary solution but can prove very helpful. There is no study in India at the moment which attempts to segregate performers on the basis of contributions to cinematograph films. To simply say that a performance will be casual if in the normal course of the practice of the industry it is considered so, is to leave the issue wide open. Instead, the Copyright Office can initiate an in-depth study into the classes of performers engaged in cinematograph films. It can then proceed to make a list of such performers. This list can help performers and producers alike, in understanding the scope of the provision.

### **V. CONCLUSION**

Extending the 'Right to Receive Royalties' to the Indian performer shows that the motivation of the legislators was to bring parity to the conditions of the Indian performer. Unfair remunerations for contributions rendered, dominate the Indian film landscape. A film earns crores in revenue, but the Indian performer sees only a small percentage of the same. The conditions of well-known artistes have no comparison to the majority of performers in India and it is this precise reason why the proviso to Section 2(qq) cannot afford to be so wide.

The audio-visual performers in India need to know that The Act covers them within its fold. Singers know all too well that they are performers and that is the reason why theirs is the only class of performer having a performers' society in the shape of the Indian Singers' Rights Association. Voice-over artistes, dubbing artistes and stuntmen to name a few have to depend on an interpretation of the proviso to Section 2(qq).

This lack of clarity goes against the purpose behind which the discussions on extending rights to audio-visual performances took place under WIPO. The Indian position was also correctly aligned to exclude only extras. But, when the proviso was finally introduced in the Act, it moved away from this understanding.

Performers form the struggling community in the Indian film industry. They are side-lined as they are made to feel that they are replaceable. It is time that the Indian performer realised the worth of his contribution and the State provided him with every support to attain his reward.