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# Performers seek 'simple social justice' – Judge

**Should performers have legal rights that give them some effective control over the exploitation of their performance? This question has assumed significance as a result of developments in communications technology which have radically changed the environment in which performers have to make their living.**

The fixation and widespread dissemination of performances by means of records, films, broadcasting, cable and now satellites create a need for performing artists to have something analogous to property rights in their performance – some legal rights with which to negotiate for proper remuneration for subsequent uses of their recorded performance.

The issue was recently discussed at a conference at the Sydney Opera House organised by Actors Equity, the Musicians' Union and the Australian Copyright Council.

The conference was the first organised debate since the demise of the Commonwealth *Performers Copyright Bill* in 1974. Not surprisingly, therefore, this Bill was referred to in some length by a number of speakers including Peter Banki, executive officer of the ACC, who considered the substantive provisions of the Bill.

The thrust of the Bill would have granted to the performer, or his employer, a copyright of 20 years duration giving him or her control over fixation, transmission and broadcasting of live performances; and reproduction, transmission and broadcasting of fixed performances.

Despite some deficiencies in the 1974 Bill many speakers were adamant in their support of the copyright approach as a method of legislating for performers' rights. In opening the conference Mr. Justice Murphy referred to such legislation as "simple social justice" and this attitude was reflected in many of the speeches that followed.

Ironically, although a number of speakers represented the traditional opponents to property rights for performers, most speakers were sympathetic about the position of performers and drew attention to the challenges presented by the new technology and the inadequacies of the present system based on contract. Certainly, there was unanimity as to the valuable contribution of performers to their various industries.

Three international speakers were invited to the conference and gave a refreshing overview of the general policy of performers' protection and overseas initiatives. The fact that these were unclouded by the Australian particularities had its advantages and disadvantages, both of which were explored in the course of discussion.

John Morton, president of the International Federation of Musicians (FIM) answered some of the often raised objections to performers' protection, ranging from "feasibility" problems to "unfairness" to consumers. He also discussed the weaknesses of the United Kingdom legislation which adopts a penal approach creating offences for unauthorised dealings with performances, without giving

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the performer any civil remedy that characterises copyright legislation.

Rolf Rembe, secretary of the International Federation of Actors (FIA) criticised a narrow view of a copyright that gives intense attention to assisting authors and fails to recognise the creative contribution of actors and musicians, and generally emphasised the value to the consumer of legislation that rewards and therefore encourages creativity.

Edward Thompson, consultant to the International Federation of Phonogram and Videogram Producers (IFPI), proved that the record industry is not everywhere the opponent to performers' protection that some may have thought. Mr. Thompson treated the need to justify such legislation in an "advanced civilisation" as anomalous.

## SURPRISING

Probably more surprising was the speech of Victoria Rubensohn, executive director of ARIA, who acknowledged the contribution of performers as essential to the record industry and supported the principle of legislation for the protection of performers. This conclusion was reached despite the fact that Ms. Rubensoh rejected many of the arguments for performers' rights, including the suggestion that performers were in an unequal bargaining position in their dealings with record companies.

The only spirited opposition to performers' protection came from Jane North, executive director of the Film and Television Production Association (FTPAA). Ms. North denied that giving performers legal rights with which to negotiate would increase their bargaining power. She also denied any need to bolster the bargaining power of actors because of the adequate protection afforded in contracts negotiated between Actors Equity and film and television producers.

Ms. North and Ms. Rubensohn suggested that performers in their own industries were not in a weak bargaining position. These assertions did not sit very easily with the paper delivered by Margaret Wallace, the Australia Council's policy officer, who drew attention to the finding of a recent Australia Council survey, which found that the average gross income from arts sources for musicians was $9,500 per annum, and $12,000 per annum for dancers and choreographers. Michael Crosby of Actors Equity noted the Individual Artists Inquiry's finding that even experienced actors earn on average less than $9,000 per annum from their art form.

A point on which Ms. Wallace and Ms. North agree was that copyright is no panacea for a bad contract.

Ms. Wallace saw a need to educate performers to insist on better contracts, and in this regard Tom Knapp, legal officer of the Australian Film Commission (AFC), said that the Commission favoured the use of standardised agreements approved by the interest groups concerned.

Michael Crosby and Don Cushion of the Musicians' Union took the view that rights for performers in the form of a copyright would enable them to achieve better contracts.

Don Cushion, in a lengthy address, said that despite some successes achieved by collective bargaining, musicians were disadvantaged because all they could sell was their personal services, and had no underlying property right to share in the products generated by those services. He and Crosby agreed that present contractual remedies were insufficient, and Crosby gave examples of the difficulties where contract alone governed performers' payments and their control over further uses of their performance. Contracts can only be enforced against the other contracting party and so give the performer no rights against bootleggers, for example.

## VICTIMISATION

Even where the contract remedies were available many actors, rightly or wrongly, were discouraged in taking action against their employer for fear of victimisation, Mr. Crosby said. In this situation it would be preferable to have a copyright system enforced on behalf of individual performers by a collecting society. Mr. Crosby also referred to the great difficulties involved, legally and practically, in ensuring that small independent employers were bound by collective agreements operating in the industry.

An interesting feature of the conference overall was that the industry speakers tended to see copyright as a method of assisting performers to obtain adequate payments for each use made of their performance when commercialy exploited. For example, performers could hope to share in the fees paid by broadcasters to the owners of copyright in the material broadcast.

The performers themselves, however, (or so it appeared from the questions they asked) seemed more concerned with copyright as a means of maintaining some control over the fixation and presentation of their performances, to ensure that the quality and integrity of the performance were maintained. In a sense, they were requesting what is termed "moral rights" – the ability to prevent such things as alterations to the performance that might damage the performer's reputation.

## MORAL RIGHTS

Whilst many of the examples cited (such as the unauthorised

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# COPYRIGHT ISSUES RELATING TO SATELLITE DISSEMINATION OF MATERIAL AND SIGNAL PIRACY

regulated internationally by the so-called **Satellites Convention** – the convention relating to the distribution of program-carrying signals transmitted by satellite.

Eight States have ratified this convention: Austria, the Federal Republic of Germany, Italy, Kenya, Mexico, Morocco, Nicaragua and Yugoslavia.

Articles 2 (1) and 8 (2) state: "each contracting state undertakes to take adequate measures to prevent the distribution on or from its territory of any program-carrying signal by any distributor from whom the signal emitted to or passing through the satellite is not intended. This obligation shall apply where the originating organisation is a national of another contracting state and where the signal distributed is a derived signal".

**The effect of these provisions is that contracting states can protect foreign transmissions made by an organisation constituted under the laws of a foreign country, or made from a place in that country – but not both.**

The Convention applies only to encoded signals and only to signals carrying programs "emitted for the purpose of ultimate distribution" [definition of program, Article 1 (ii)]

## CONVENTION

Section 184 (f) of the **Australian Copyright Act** states that the Act applies: "... in relation to television broadcasts and sound broadcasts made from places in that country by persons entitled under the law of that country to make such broadcasts in like manner as those provisions apply in relation to television broadcasts and sound broadcasts make from places in Australia by the Australian Broadcasting Commission, by the Special Broadcasting Service, by a holder of a licence for a television station, by a holder of a licence for a broadcasting station or by a person prescribed for the purposes of sub-paragraph 91 (a)(iii) of 91 (b)(iii)".

In other words, the Act applies to "transmissions" both made from a foreign country and by a "competent" organisation. An amendment to the Act would therefore be a necessary precondition to ratifying the Convention.

The Satellites Convention would appear to provide the legal means for combatting signal piracy internationally, but I thing it would be unwise for the Government to ratify the Convention until such time as all the components of programs that might be transmitted are fully protected under Australian law.

At present, for example, there is inadequate protection for the performers of works comprised in transmissions. This should be guaranteed in the form of the minimum level of protection envisaged by the Rome Convention before the Government contemplates Australia's adherence to the **Satellites Convention**.

**As I mentioned at the outset, satellite transmission may raise fresh considerations for licensing the use of copyright materials.**

For example, it has always been necessary to specify accurately the territorial limits of copyright licences. However, the added technological capacity of transmission by satellite may make this an even more important feature of the drafting of agreements. I am sure it will become critical for film producers and music copyright owners, for instance, to develop clear definitions for the new territorial arrangements that satellite transmission makes posible.

Another feature of the drafting that might need to be clarified is the definition of the site of a broadcast or transmission. This can be significant in interpreting the scope of broadcasting contracts and, in particular, in difining the rights of the broadcaster or other transmitter – in the event that a satellite transmisson is deemed not to be a broadcast.

Other issues include:

- Defamation and privacy (discussed by Henric Nicholas in his paper); and
- Property law questions – which are not new but may perhaps become more involved than we have been used to in this field.

All in all, I think that the advent of satellites means a lot more to the consumer than it does to the copyright lawyer.

*(Extracted from a paper by* **Peter Banki, Executive Officer, Australian Copyright Council,** *for the Australian Communications Law Association's Satellite Law Symposium in Sydney, May 4, 1984.*

Further inquiries about papers delivered at this seminar may be directed to:

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compilation of segments of film by third parties) could be prevented if performers were given a copyright, no present owner of copyright enjoys full moral rights in Australia.

Not even the Rome Convention which seeks to establish a minimum level of protection for performers (and record companies and broadcasters) is of assistance in the area of moral rights.

The Rome Convention, which was referred to by a number of speakers, obliges contracting states to give performers the "possibility of preventing" such acts as the unauthorised fixation and broadcasting of their live performances and may also provide for equitable remuneration for performers for secondary uses of recorded performances.

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# BOOKS IN BRIEF

**DICTIONARY OF MASS MEDIA & COMMUNICATION**
**By Tracy Daniel Connors**
**(Longman)**

This U.S. publication is of limited practical value in Australia. Leafing through, this reviewer found no entries for: beat up, back-pack, basket, copy-taster, crosshead, copy basket, drop edit, anytimer, grab, happy snap, hold up, h-and-j, inside page, in depth, intrusion, man-in-the-street, noddy, piece, re-jig, ringaround, splash, do-up, standfast, stone sub, stop press, taste, vox pop, write-off. window box, blockline [this list is not exhaustive].

Perhaps, an Australian supplement is in order?

**AUTHORS AND PUBLISHERS – Agreements and Legal Aspects of Publishing**
**By Lazar Sarna**
**(Butterworths)**

This slim Canadian publication is mainly of background value, but definitely is worth skimming through if you're on the author's side of a publishing agreement. It contains some examples of forms of publishing agreements, drafted by the author, with handy paragraph headings and commentaries providing a summary of the purpose and scheme of the various contracts.

**THE LAW OF TORTS (6th edition)**
**By John G. Fleming**
**(Law Book Company)**

As usual in the author's strongly individual style, it has the advantage of serving up to the general inquirer all the essentials of Defamation in just over 60 highly-readable pages.

**REPORTS OF PATENT CASES**
**Edited by Michael Fysh**
**(Lawyers Bookshop Press – Brisbane)**

For the specialist only, at $7,450.00 for the set of the Reports of Patent Cases, 1884-1982.

**EQUITY DOCTRINES & REMEDIES (2nd edition)**
**By R. P. Meagher Q.C., W. M. C. Gummow & J. R. F. Lehane**

It is nine years since the 1st edition, and of major interest to those of us involved in the communications law field are the developments in Confidential Information (subsequently rewritten and Passing-Off (a new chapter).

[Reviews in Brief by **John Mancy**, Barrister]

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Twenty-six states have ratified the Convention, and Edward Thompson indicated that ten or twelve states intended to join soon. Australia has not ratified the Convention and cannot because it has no domestic legislation to protect performers - even to the minimum level required - despite the fact that its Copyright Act gives the other beneficiaries (record companies and broadcasters) protection well in excess of the Convention standards.

In the environment of the present debate, it was unfortunate that there were no speakers representing traditional copyright owners, such as authors and composers. In the past these groups have tended to oppose copyright for performers, arguing that the effect of creating new classes of rights' holders is generally to "devalue" the rights of traditional copyright owners. This has been said to result in reduced payments to authors - the so-called "cake theory" which has been repeatedly challenged at international meetings.

It seems to me that not only is this fear unwarranted, but it is also outweighed by the advantages to traditional owners if performers are brought into the copyright fold. Performers would become the natural allies of authors, artists and composers in many crucial areas of copyright law reform – particularly in the movement for moral rights legislation and in schemes (such as the proposed royalty on blank tape) designed to meet the impact of new technologies. These, of course, affect performers just as they affect present copyright owners. Many of the performers present at the conference, and their powerful unions, would make valuable and articulate lobbyists for moral rights and law reform generally if their skills were recognised by the Copyright Act.

**Susan Bridge**
**Legal Officer**
**Australian Copyright Council**