

Performers' rights

Gail Fulton argues that despite the introduction of performers' rights in Australia, they remain on the agenda

Players, buffoons, musicians, opera singers and opera dancers were cited by Adam Smith in *The Wealth of Nations* as classical examples of unproductive labour. Part of the justification for this comment was that "the work of them all perishes in the instant of its creation". However, with changing technology, the once fleeting performance may now be recorded, manipulated and distributed on a scale previously unknown. Despite these changes, which have been occurring for over a century, copyright laws have been slow to acknowledge and recognise the creative contribution of the performer.

Introduction of performers' rights

In 1989 the *Copyright Act* ("the Act") was amended to introduce for the first time in Australia a system of protection for performers. The introduction of the scheme followed the recommendations of the Copyright Law Review Committee in its 1987 Report on Performers' Protection. "Performance" is defined in the Act to mean a live act. The Act does not confer on performers a true copyright or proprietary right. Instead, performers are granted a right of action in relation to their performances.

Under Part XIA of the Act it is now necessary to obtain the performer's consent to record a live performance either directly or from a broadcast or cable transmission. It is also necessary to obtain the permission of a performer to broadcast, or transmit via a cable diffusion service, a live performance or an unauthorised recording of a live performance.

Generally, performers do not have a right under the Act to control the subsequent use of authorised recordings of their performances. A performer's ability to benefit from the subsequent commercial exploitation of their performance will therefore depend on any contractual entitlements which the performer is able to secure. The only exception to this general position is the synchronisation of sound recordings onto films, for which the specific consent of the performer is required. The performer does have rights in relation to unauthorised recordings and this gives some measure of redress in the context of bootleg recordings.

The Rome Convention

In October 1992 Australia acceded to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the "Rome Convention"). This Convention, established in 1961, requires member states to provide a very basic level of protection for performers.

Article 7 sets out the rights which must be granted to a performer. These rights are the right to control fixation of unfixed performances, to broadcast live performances, to reproduce unauthorised fixations, and to reproduce authorised fixations for purposes different from those for which it was originally recorded. The scope of Article 7 is, however, severely curtailed by Article 19 which provides that Article 7 does not apply to performers who consent to the fixation of their performance in a visual or audio visual form such as a film. Arguably, Australia has not fully complied with its obligations under Article 7. Australia has not granted a general right to control the use of a recording for purposes other than those for which it was originally recorded. In Australia this right is limited to the synchronisation of a sound recording onto film.

Article 12 deals with rights to receive remuneration from the secondary exploitation of performances. Article 12 provides:

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

The adoption of Article 12 of the Rome Convention is optional, in that it is permissible for countries to make a reservation under Article 16 in relation to all or part of Article 12. Both performers and producers of phonograms receive remuneration under Article 12 in most member states of the Rome Convention. In Australia performers are given no right to receive remuneration for

secondary uses of recordings of their performances. Owners of copyright in sound recordings and films do have such rights. Australia is one of only 6 of the 40 member states which have made a complete reservation in relation to the operation of Article 12. The other countries are the Congo, Fiji, Luxembourg, Monaco and Niger.

Administration of performers' rights

Given that the Act does not provide for any remuneration to performers for secondary uses of their performances, no Australian performers' collecting society has been established. Such societies exist in a number of other countries where rights to remuneration are granted.

International agreements are of two basic types. Type A agreements provide for the retransmission of fees to each others' members in accordance with the rules in the country where earned. Type B agreements provide that there will be no exchange of fees and that the fees will remain in the country where earned and be used for the members of the administrative organisation in that country. Unless Australian performers are able to secure individual membership of the various national collecting societies, they are unable to access monies collected overseas in respect of their performances under Article 12. This is also currently the position for American performers and, given the extensive use of US recordings in Europe, constitutes an important economic impetus for legal change in the US.

The London principles

Also relevant in Europe are the so-called London principles. These principles take the form of an agreement between the International Federation of the Phonograph Industry ("IFPI") and the International Federation of Musicians ("IFM") for the sharing of remuneration under Article 12 of the Rome Convention. Under the agreement, in countries where both performers and producers of phonograms are entitled to a share of the money, the proceeds are divided equally.

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Where only one of the two is entitled to receive remuneration, one third to one half of the money received by the recipient is paid to the other party.

Possible international treaty

At the World Intellectual Property Organisation ("WIPO") meeting of governing bodies held in Geneva in September 1992, it was agreed to convene a meeting to discuss a possible new international instrument relating to performers and producers of phonograms. This meeting will take place from 28 June to 2 July 1993.

There is some uncertainty as to whether the instrument will eventually deal with the rights of performers in audio visual works. The initial discussions in June are not to include questions concerning audio visual fixations. Clarification on this issue is to be sought from the Governing Bodies of WIPO in September 1993.

The need for a new treaty relating to performers arises both from the limited scope of the protection afforded by the Rome Convention and more importantly from the technological developments which have occurred since the formulation of the Rome Convention. Of particular importance has been the development of digital technology which radically affects the exploitation and use of recorded performances. These developments create new possibilities for the delivery of recordings to consumers. Consequently, the existing rights of fixation and reproduction may not be sufficient and a broader type of right may need to be considered.

The issues that will be discussed in the June meeting include the coverage and definitions of important concepts in the new instrument, moral rights for performers, the nature of the economic rights of performers in respect of live and fixed performances, the economic rights of producers of phonograms, limitations or exceptions to rights, the term of protection, enforcement mechanisms, including the possibility of the inclusion of GATT type enforcement mechanisms, and issues of national treatment.

EC Directive

A directive was issued on 19 November 1992 by the EC Council in relation to Rental and Related Rights. This directive includes provisions requiring member states of the EC to grant rights to performers in relation to the fixation,

reproduction and distribution of their performances. Although the directive has no legal force or effect in Australia it is an important document. In addition to its operation in the EC, the Directive is likely to influence international copyright law reform, particularly in relation to the formulation of any new treaty which deals with the issue of performers' rights.

Current developments in Australia

In Australia the issue of performers' rights is again on the agenda. This is partly in response to the international developments described above and partly in response to discussions arising from the proposed changes to the *Copyright Act* regarding the importation of sound recordings. In December 1992 a Bill was introduced into Parliament which included amendments to the importation provisions of the *Copyright Act* as they apply to sound recordings. This Bill was not passed before the calling of the 1993 Federal election and therefore lapsed. It must be reintroduced if it is to become law.

The impetus for the provisions in a Bill dealing with the importation of recordings was, in large part, the recommendations of the Prices Surveillance Authority ("PSA") in its 1990 Report on the Price of Sound Recordings. The PSA also recommended that a performer's copyright be introduced, although the report did not discuss this recommendation in detail. In June 1992 the Federal government announced its response to the PSA report. Part of this response was the establishment of a Music Industry Advisory Council ("MIAC") to advise the government, prior to the anticipated commencement date of the new import provisions, on the anticipated effect of these provisions on the Australian music industry.

MIAC is to consider, amongst other matters, the issue of performers' copyright. MIAC is currently preparing its initial report to government. It may be expected that issues of performers' rights will remain topical for some time to come.

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