
PERFORMERS' RIGHTS

Which performances involve performers' rights?

Whether in the presence of an audience or otherwise, performers' rights apply to the following live performances:

1. a dramatic work, or part of such a work, including a performance given with the use of puppets;
2. a musical work or part of a musical work;
3. a dance;
4. a circus act or a variety act or any similar presentation or show; and
5. an expression of folklore.; or
6. a reading, recitation or delivery of a literary work or part of a literary work, or the recitation or delivery of an improvised literary work.

If you are staging a live performance within the above categories, or recording or filming such a live performance, performers' rights should be considered. .

If the performance in question does not fall into any of these categories, the performer has no performers' rights in that performance. It should be noted that certain performances do not attract performers' rights, such as performances by teachers and students in class, reading news and information, performing sporting activities, participation by members of an audience and certain performances by teachers and students in the course of educational instruction.

What rights do performers have in such performances?

The performer's permission is required for the following:

1. to record the live performance by sound recording or film (whether directly from a live performance or indirectly from a broadcast or cable transmission) [see notes below on authorised recordings];
2. to broadcast or rebroadcast a live performance; and
3. certain further (knowing) distributions and uses of such recordings.

Authorised recordings

Once the performer has given permission for a recording or broadcast of his/her performance to be made, the performer generally has no further rights in relation to that 'authorised' recording and cannot prevent its use (including copying, broadcasting, transmission or other use) except:

- the right to say whether or not the recording can be used as a soundtrack for a film;
- any express limitation on use imposed by the performer at the time permission to record was given;
- where the recording is a sound recording (not audio-visual) of the performance and the performer has rights of copyright (discussed below).

This is also subject to any contract to the contrary or the terms of any award, and any performers' moral rights (discussed below).

Exempt recordings

Permission from the performer is not required in relation to "exempt" recordings. "Exempt" recordings include certain recordings for domestic use, scientific research, and educational purposes and for use by handicapped readers or institutions assisting them. Further, recordings may be made and used for reporting news or current affairs, criticism or review or for the purpose of judicial proceedings or legal advice.

Copyright in the sound recording of a live performance

From 1 January 2005, the *Copyright Act 1968* (Cth) (as amended by *US Free Trade Agreement Implementation Act 2004* and the *Copyright Legislation Amendment Act 2004*) (the Act) extended performers' rights and established performers as "makers" of sound recordings of the specified live performances. Under the Act, in some circumstances, a maker of a sound recording is now the owner of copyright in the sound recording. From 1 January 2005, a "maker" of a non-commissioned sound recording is both:

1. the person or entity who, at the time of the recording, owns the recording medium on which the recording is made (e.g. the person who owns the tape or disc – usually the record label or producer); and
2. the performer or performers who contributed sounds to the performance fixed in the sound recording.

However, this situation does not apply if a sound recording is commissioned. If a sound recording is commissioned, then the commissioner owns all copyright in the sound recording.

In addition, a performer providing services under an employment contract does not have a copyright interest in the sound recording; in that situation, the performer's employer owns what would otherwise be the performer's share of copyright in the sound recording.

It is important to remember that this extension of performers' rights only applies to audio recordings, not to audio-visual recordings (like film or video), and to performers contributing to the sounds of the live performance.

When a performer is a co-owner of copyright in a sound recording, the performer now has an equal share in the exclusive rights:

1. to make a copy of the sound recording;
2. to cause the recording to be heard in public;
3. to communicate the recording to the public; and
4. to enter into a commercial rental arrangement in respect of the recording.

To ensure that a performer receives equitable remuneration for the making of broadcasts of the new sound recording and for the public performance of the sound recording, performers should register as the copyright co-owner with the collecting society, [Phonographic Performance Company of Australia \(PPCA\)](#). Performers should also consider whether they should register with the [Australasian Performing Rights Association \(APRA\)](#). For further information see Arts Law's information sheet on [Copyright Collecting Societies](#).

Performers' rights in pre 1 January 2005 sound recordings

For non-commissioned sound recordings made before 1 January 2005, the makers - which are likely to be the record company or producer and the performer(s) - now own the copyright in equal shares (50% each).

However, the new rights of performers in such pre-existing sound recordings are very limited:

1. the owner of copyright immediately before that date will be able to go on exploiting the copyright as they expected to do when contracting the performers to make the recording (for example, when the record company and the band entered into a recording agreement);
2. the performers will not be able to stop the original copyright owner, from licensing the use of the sound recording to third parties; and
3. the performers will not be able to sue for damages, recover infringing copies or receive remuneration for the use of the recording under statutory licences, or for the retransmission of broadcasts.

However, performers will be able to take action to stop the making, distribution or importation of pirated copies of their recording where the original owner of the copyright was not able to take action.

Exceptions

There are exceptions to performers' rights of copyright. A performer will not be a maker, and therefore not be a co-owner or an owner of an equal share in the sound recording of a live performance if:

1. the performer was performing under the terms of a contract of employment (the employer will own his/her share in the copyright in the sound recording of the live performance);
2. the sound recording was commissioned (the commissioner will own the copyright in the sound recording of the live performance); or
3. the written agreement signed by the performer states otherwise. For example if, under a recording agreement, the performer assigns all rights in the performance of any kind to the publisher or record company, this agreement will continue to have effect. The performer's ownership of the copyright in the sound recording is assignable, which means it can be given away or sold to someone, provided the assignment is in writing. It is also important to remember that if a performer consents to the recording of a performance for a particular purpose, then it is implied that they have given consent to the use of the recording for that particular purpose.

What happens if one performer cannot locate another performer?

Where there are two or more owners of the copyright in a sound recording of a live performance and one or some of them want to use the performance for another purpose but cannot, find the other owners, the Act now allows these owners to use the sound recording without the permission of the untraceable owner or owners provided that they have made "reasonable inquiries" to identify and locate the other owners. In these circumstances the copyright owners using the performance must hold the relevant share of proceeds from the further exploitation on trust for the untraceable owner for four years in case they are located. If you find yourself in this situation then you should seek further legal advice from Arts Law.

Performers' moral rights

On July 26, 2007 following Australia's accession to the *WIPO Performances and Phonograms Treaty 1996* (WPPT), the *Copyright Act* was amended to introduce moral rights for performers who contribute to the sounds of the categories of live performances listed above and performers whose live performances are recorded in a sound recording. The performer's moral rights include three kinds of rights:

1. right of attribution;
2. right against false attribution; and
3. right of integrity against derogatory treatment of the performance in a way that prejudices the reputation of the performer.

For further information about moral rights, see Art's Law Information Sheet [Moral rights](#).

These rights apply only to performers who contribute to the sounds of the performances created on or after 26 July 2007. It means that a dancer has no moral rights in his her live performance although a musician does (except arguably if the dancer is a tap dancer who can be said to contribute to the sounds of the performance).

What about protection for audiovisual performers?

The WIPO Beijing Treaty adopted on June 24, 2012 recognises performers' rights in their audiovisual performances and gives them moral rights and economic rights - including the exclusive rights of reproduction, distribution, and rental and making available of fixed performance.

Arts Law is hopeful that the Australian government will ratify this Treaty and make appropriate changes to the Act to recognise the rights of audiovisual performers. As at 1 October 2012, Australia has yet to ratify this Treaty.

Other restrictions on the use of performances

Contracts and awards

We have set out above the limited rights given to performers in the Act.

Performers may, however, negotiate rights to control the use of their performances under contractual arrangements between themselves and the person making use of the performance. Such rights may also be conferred under the provisions in an industrial award. You should check the terms of any applicable contract or award before making use of a live performance. For further information on performances affected by award provisions, contact the [Media Entertainment and Arts Alliance \(MEAA\)](#) or the Musicians Union in your State/Territory.

Copyright in the underlying work

If the performance involves the performance of an original literary, dramatic or musical work (whether created by the performer or another person), the copyright in the underlying work needs to be considered. The permission of the copyright owner of the underlying work is likely to be required before the performance can be reproduced, published, performed in public, communicated to the public or adapted.

Confidential information

Where a performer agrees to the recording of his/her performance but makes it known that the performance is confidential and cannot be used or disclosed without the performer's permission, any unauthorised use of that performance may entitle the performer to bring an action for breach of confidence. For further information see Arts Law's Information Sheet [Protecting Your Ideas – Confidential Information](#).

Protection of names and reputation

Any use of a performance in such a way as to suggest that the performer is *endorsing* or affiliated with any product or service, in a way that is not authorised by the performer, may entitle the performer to bring an action to restrain use of his/her performance under the law of passing off and trade practices legislation. For further information see Arts Law's Information Sheet [Unauthorised Use of Your Image](#).

Defamation

Any use of a performance in a way that damages the reputation of the performer may entitle the performer to bring an action in defamation. For example, it could be defamatory to use a performance in a way that is not authorised by the performer and wrongly implies that the performer has given his/her consent or, alternatively, in a way that juxtaposes the performance with other material in such a way as to impute false or demeaning attributes to the performer. If the performance is defamatory of some other person or organisation, an action may be brought not only against the performer but also the producer or distributor of that performance. Material may be defamatory if it lowers the reputation of the performer or exposes them to hatred, ridicule or contempt. It should be noted that truth is not always a defence, so if the use of the performance may be defamatory, legal advice should be sought. See also Arts Law's Information Sheet [Defamation](#).

Additional information may be obtained from:

Australian Copyright Council information sheets:

- [Music Bands](#)
- [Music Choirs, Orchestras, Ensembles & Private Music Teachers](#)
- [Music Concerts, Musicals & Plays](#)
- [Music DJs](#)

- [Music Use in Film](#)
- [Music Use in Student Films & Videos](#)
- [Performers' Rights](#)

Media Entertainment Arts Alliance (MEAA) (www.alliance.org.au), ph: (02) 9333 0999

Musicians Union (www.musicians.asn.au), ph: (03) 9388 8992

Need more help?

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

Also visit the Arts Law website (www.artslaw.com.au) for more articles and information sheets

Disclaimer

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