Performers' rights

Actors, circus performers, musicians, dancers and other live performers may have performers' rights in their performances, read on to learn more about these rights.

Introduction

The *Copyright Act 1968* (Cth) **(Copyright Act)** establishes the copyright in works and other material (such as sound recordings and cinematographic film) and also describes three categories of rights or protections that may be available to any person who qualifies a 'performer'. The rights or protections that flow from status as a performer are:

1. a share of the copyright in sound recording of a live performance that is granted to performers by virtue of s22 and s97 of the Copyright Act;
2. the moral rights of a performer described in Part IX of the Copyright Act; and
3. the performer's protections in Part XIA of the Copyright Act related to authorising the recording, reproduction and communication of a performance.

There are exceptions and limitations to these rights, which are discussed in this information sheet.

These performer's rights are important as they create an interest in the copyright (under s22). They provide a right of action for the breach of the performer's moral rights or for when there is an unauthorised exploitation of the sound recording or film/video recording of a performance. Film producers and people engaged in recording music should be aware of these rights or protections in order to comply with the obligations created by the performer's rights or otherwise to address the necessary authorisations from the performers in the contracts used to engage the services of the performers.

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 in Australia (or outside Australia using Australian performers) 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 performers have 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.

For further information on sound recordings of 'live performances' and studio recordings, see the Arts Law information sheet, Music Copyright and Publishing for Bands and Recording Artists.

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Which performers have performers' rights?

Performers' copyright is only conferred on performers who contribute to the sounds of the live performance; although where the performance is of a musical work, the conductor of the orchestra, choir or other performers is considered a performer as well as the musicians and singers. In other words dancers or mime artists or actors with non-speaking roles do not enjoy these rights.

The performers' moral rights described in Part IX of the Copyright Act also only apply to each performer who contributed to the sounds of the live performance.

The performer's protections in Part XIA of the Copyright Act apply to all performers participating in live performances whether or not they contribute to the sounds.

A performer who is not Australian but who is performing in Australia and Australian citizens or residents involved in performances outside Australia can enforce the performers' rights in the Copyright Act.

Copyright in the sound recording of a live performance

From 1 January 2005, in some circumstances, a performer contributing to the sounds of a live performance will share in the copyright in the sound recording. From 1 January 2005, ownership of copyright in a non-commissioned sound recording is shared between:

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 (see discussion below). 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. A one off payment to a session musician is not usually considered to be 'employment' – compare for example a person employed by a church on a wage to play the organ for all the church services each week.

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 only to performers contributing to the sounds of the live performance. Again, this general rule can be varied if there is a written agreement that provides otherwise.

When a performer is a co-owner of copyright in a sound recording, the performer now has an equal share in 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 they receive equitable remuneration for the broadcasts and public performances 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 do not own any copyright in **audio-visual recordings** of their performances.

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Commissioned performances and copyright

If an artist, music producer or other person pays (whether with money or something else of value) for a sound recording to be made of the performance, the general rule under Part IV of the Copyright Act is that the artist, music producer or other person owns the full copyright in that sound recording as the commissioner. The performers have no copyright interest. This is called a "commissioned" sound recording. The commissioner/copyright owner could be anyone – a performer, a relative, the entire band, a film producer or an advertising agency. This general rule can be changed by entering into a written agreement that says otherwise.

If a sound recording was made before 1 January 2005 or, if made since then is not commissioned and is not a recording of one of the live performances described above, the copyright is owned by the person who owned the recording medium (e.g. disc, tape, iPod) on which the recording was made (such as a recording studio, record producer, or record label)

Performers' rights of copyright in sound recordings made prior to 1 January 2005

Performers now own the copyright in equal shares (50% each) with the makers – which are likely to be the record company or producer – in non-commissioned sound recordings of live performances made before 1 January 2005.

However, the 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.

Performers can however take action to stop the making, distribution or importation of pirated copies of their recording where the original owner of the copyright does not, or is 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.

For information about whether a person is an independent contractor or employee, see the Australian Taxation Office's information on *How to determine if workers are employees or contractors*.

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For further information on the difference between an employee and independent contractor and the legal consequences that flow from those relationships contact Arts Law or refer to the Arts Law Information Sheets, *Employment issues (for NSW employees)*, *Superannuation and Contract for Services* and *Liability and insurance*.

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 a particular 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), Part IX of the *Copyright Act* was amended to introduce moral rights for performers who contribute to the sounds of live performances (of the types 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 performances performed or embodied in a sound recording 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).

Performers have no moral rights in audio-visual recordings of their live performances.

Performer's protections against unauthorised use of performance

Part XIA of the Copyright Act creates a third category of performers' protection in addition to the rights of copyright and moral rights discussed above. A 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;

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- 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.

Duration of the Performer's rights

The interest of a performer in the copyright in sound recording of a live performance continues until the end of 70 years after the end of the calendar year in which the recording is first published.

The moral rights of a performer described in Part IX of the Copyright Act exist for the following periods of time: The right of integrity continues until the death of the performer; whereas the right of attribution and protection against false attribution continues until the end of the term of copyright of the sound recording which is the 70 year period described above.

The performer's protections in Part XIA of the Copyright Act in relation to a sound recording of a performance, continue for the period beginning on the day when the performance was given and ending at the end of the period of 50 calendar years after the calendar year in which the performance was given. In relation to audio-visual recording the performer's protections continue for period beginning on the day when the performance was given and ending at the end of the period of 20 calendar years after the calendar year in which the performance was given.

What about protection for audiovisual performers?

The WIPO Beijing Treaty adopted on June 24, 2012 recognises performers' rights in their audio-visual performances (i.e. films, TV programs and multimedia) and gives them moral rights and economic rights – including the exclusive rights of reproduction, distribution, rental and making available of fixed performance. These rights will complement the copyright and moral rights of performers in sound recordings that are discussed above.

The treaty will enter into force once it has been ratified by 30 countries. 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 January 2016, 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 Copyright 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.

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Copyright in the underlying work

These performer's rights, such as the right to share the copyright in sound recordings of a live performance, are separate to the copyright that flows from being the 'author' of a work or a person who otherwise qualifies as the 'maker' of any sound recording or cinematographic film.

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 resources and information

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

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

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