

The Protection of Performers' Rights in Australia?

Natasha Serventy*



I. INTRODUCTION

The Copyright Act 1968 (Cth) confers protection upon authors, composers, artists, film makers, sound recording makers and publishers over their works, whether 'created' from scratch or 'made' from recording the creative efforts of others. Performers, whether musicians, actors, dancers, singers or clowns have no such protection. Traditionally, performances were fleeting rather than fixed, and impossible to copy. Newer technology has provided many methods of putting performance into a fixed and permanent form. These "fixations", as they are called, allow unlimited reproduction facilities. The performance that is recorded can be either copied or shown publicly for an indefinite period.

The makers of films, and sound or television broadcasts have had copyright since the 1968 amendments to the Copyright Act, which were in response to technological developments in the electronic media. These amendments were largely based on the amendments to the United Kingdom Copyright Act which were made in 1956. However, the level of technical development contemplated at that time, circa 1955, was primitive compared to the present day. Consequently further amendments were necessitated in 1984 to take account of computer technology.

* Deputy Director, Arts Law Centre.

Although broadcasts gained protection under the 1968 amendments, performers did not; perhaps because a performer was regarded as an interpreter rather than a creator, or as a member of a service industry who was paid to perform. The fact that performers have no statutory rights means they may have little control over who makes a fixation, how it is made, what is done with it and to whom it is published. This leads to several performance rights problems. First, where there is no relationship between the performers and the "fixer", as in the case of bootlegging¹, not only do performers lose earnings through their audiences buying bootleg recordings, but the bootlegger gains considerable economic benefit by the use of the performer's talent, without making any contribution to the furtherance of that talent. Moreover, a moral rights problem arises as the bootleg recording or, for that matter, the performance, may not be of the quality that the performer would wish to have released. It is also possible that the release of the unauthorised recording may cause over-exposure and lessen the performer's opportunity to work in a live situation, or release their own recording.

Another type of problem arises where a group of performers perform work written by one group member, and where there is a contractual relationship between the performers and the fixer. The contract may allow for performers' royalties or residuals, depending on the number of sales and public broadcasts. However, the writer will also obtain her or his copyright royalties, which may be many times the performance royalties. The copyright owner of the script of song usually obtains a set amount for each copy of the recording made, as well as each public performance of the recording. This imbalance of income can create inequality within a performing group.

This series of problems, which arises from the failure of copyright law to recognise performing rights has given rise to agitation for amendment of the law.

II. CURRENT PROTECTION FOR PERFORMERS

1. Contract

The law of contract contains the most significant current means of protecting performers' rights. Typically performers enter into agreements with the person hiring them to perform, usually the producer or organiser of the performances. This contract may

1. Bootlegging is the making and selling of unauthorised recordings of live performances.

provide for a fee for allowing a fixation to be made, a fee for the public showing or broadcasting of the fixation and further fees for selling or reproducing the fixation.

Performers' unions have been able through collective bargaining to introduce standard contracts into the performance industry (*i.e.* Actors' Equity and the Musicians' Union).

Although these contracts provide awards for percentage payments for repeat use of performances, both in Australia and overseas, they bind only the parties. Of course it is possible that the contract may be sophisticated enough to bind a third party who takes over the rights of, say, the employer or producer, but no contract can protect the performer from a third party who obtains a fixation without permission.

The unauthorised use of a performance may breach an implied term of a performance contract. In *Ekland v. Scripflow*², an actress had been contracted by a video and film company, to appear in a short sequence in a video. The video was duly completed and later the company released a film, also with the actress appearing, using off-cuts and filmed material which had not been needed for the video. The film was prepared and released without the actress' consent, and she brought an action to stop the production company using the film of her. It was held that the company had no right to imply a term in the contract to permit a film to be made (from the video).³ It was further held that as the contract related only to a video, the actress had "a contractual right to insist that the film for the video should not be used for any other purpose, as that [was] all that her contract extended to."⁴ The actress was granted an injunction to stop the film of her from being shown.

2. Copyright

Copyright protection may protect a performance against third parties, thereby overcoming the privity limitation in contract law.

Performance is one of the exclusive rights of a copyright owner, including performance of a version of a work.⁵ As such, a performance of a work, without authorisation, may be an infringement of the work's copyright. An unauthorised reproduction of a work (being performed) will also infringe copyright, if that reproduction is performed without consent. Naturally the support

2. [1982] F.S.R. 431.

3. *Id.*, 437.

4. *Id.*, 438.

5. Copyright Act 1968 (Cth) s.31.

of the copyright owner (if she and the performer are not one and the same) is needed for such an action.

An exception to the above occurs when a record manufacturer seeks to make a record of an already recorded work, as the Copyright Act 1968 (Cth) provides compulsory licences in that situation.⁶ However, if an adaptation of the work is performed which debases the work, a record cannot be made from it (nor can any adaptation be recorded which is a debasement of the work).⁷

The Copyright Act imposes a duty not to attribute falsely the authorship of the work.⁸ This duty precludes selling, performing and broadcasting a work as being the work of another author.⁹ There is a corresponding duty not to attribute falsely any altered work as being the unaltered work of the original author. If a work is reproduced in an unaltered state, and then attributed falsely as being the unaltered work of an author, the performer may only be protected if the author chooses to take action for breach of the duty, and stop the reproduction or publication of the performance. This duty is always owed to the author, and *not* the copyright owner. Therefore even if the author has assigned her copyright, the attribution provision can still be used.

If the performance is not one which uses copyright material, it is possible that the Copyright Act may still be of limited assistance, where the performer is also the composer or author of the work. This situation could arise where the performance is fixed by the performer as it is performed. A copyright may then exist, with the owner being the creator (performer): the performer would then have rights as an author or composer, but not as a performer. Although it would appear that this argument has not been put before a court, it could be used to give an impromptu performer some copyright on a work devised by that performer.

Section 22 (1) of the Copyright Act 1968 (Cth) requires that to attract copyright a 'work' must be in a 'material form'. A 'work' gains a 'material form' at the time the sounds are embodied in that article or thing.¹⁰ So, a verbal or musical 'work' can attract copyright by its very fixation in a tape or recording device, or perhaps even the memory of a synthesizer. It is possible that this form of copyright could also be extended to video tape recordings of improvised dance, drama and performance art, if it were

6. *Id.*, s.55(i).

7. *Id.*, s.55(ii).

8. *Id.*, s.190.

9. *Id.*, s.191.

10. *Id.*, s.22(3).

accepted that the tape was a 'material form' in which the performance was embodied. There is a problem with a film of the 'work', as the definition of a 'dramatic work' in the Act excludes a cinematographic film from being a 'dramatic work'.¹¹ One then faces a complex question as to whether the film (not the 'work') is separate from the performance filmed, especially as the film itself will attract copyright as a cinematographic film, under section 90 of the Act. If one accepts this argument, or part of it, the 'copyright' could be an important right for persons who create their performance as they perform, with no script, score or written notation of choreography, for in such instances there is no 'material form' in their performance to otherwise attract copyright protection.

3. *Artistic Defamation*

A major concern for performers is to protect their "moral rights", and in particular their artistic integrity. If an unauthorised fixation is made of their performance, it may easily be used in such a way as to damage their reputation, whether by alteration, juxtaposition, repeated use, or simply by showing the work "fixed", when it was not meant to be other than a live performance, seen and heard from all angles. There is already some concept of defamation as a useful tool for performers, and it may be that the existing law could be developed to provide some protection on this point. In that case a wholly new performers' right may not be necessary.

A related issue to that of artistic defamation is the wrongful appropriation of a professional reputation. The major case in this area is *Henderson v. Radio Corporation Pty Ltd.*¹² The Hendersons were a professional dancing couple, well known in professional dancing circles. A photograph which featured them was used by the other party on a record cover. The record was a strict tempo dance record entitled "Strictly for Dancing Vol. 1". The Hendersons were not identified on the cover but were easily recognisable. The Full Supreme Court of New South Wales held that the picture of the Hendersons indicated that they had been paid to endorse or sponsor the record, when in fact the record cover photograph was used without their knowledge or permission. The fact that the other party had knowingly used the Hendersons' photograph did not change the situation. Justices Evatt and Myers held that the appropriation of the professional

11. *Id.*, s.10.

12. (1960) S.R.(N.S.W.) 76.

reputation of the Hendersons for commercial ends (endorsement) was an injury in itself. They held that the use of the picture was a wrongful deprivation of the Hendersons' right to give or withhold "their professional recommendation". Moreover, Manning J. compared the Hendersons to actors, and noted that a financial detriment must be suffered, a detriment which flowed from the act of another party. Although this case is a 'passing off' case, it is a decision which in similar circumstances involving artistic defamation could be used to aid performers to stop unauthorised use of their photographs or performances.

For the purposes of a performer's reputation, character or distinguishing feature, passing off will not normally be of assistance when a performer wants to stop the use of an unauthorised fixation which is not a 'copy' of the performance, but the performance itself, fixed in some way. However, a 'copy' or 'adaptation' which has some portions missing or incorrectly portrayed may be, passing off if there is a misleading representation regarding the 'copy' which amounts to a passing off of the 'copy' as the actual original performance.

III. INTERNATIONAL PERFORMERS' PROTECTION

1. *Rome Convention*

The Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, in force from 18/5/64), which Australia has not ratified, is the only Convention for the protection of performers', record producers' and broadcasters' rights.

Articles 7 and 12 of the Convention deal with the minimum levels of protection. Article 7, allows performers to prevent:

- (a) fixation of live performance
- (b) broadcasting or communication to public of live performance
- (c) reproduction of fixation of live performance
 - where fixation was unauthorised
 - where reproduction is made for unauthorised purposes.

Naturally, the rights to authorise the above, and to sell and deal with a "fixation", flow from the rights of prevention. The economic aspects are obvious as a fee may be required before a fixation, *etc.*, would be allowed.

Article 12 entitles both performers and record producers to remuneration if a record is broadcast (or communicated to the public). Under our Copyright Act 1968 (Cth), record producers

and broadcasters have rights which are in fact greater than the minimum specified in the Rome Convention.

Partly to enable Australia to ratify the Rome Convention, a Performers' Copyright Bill was produced in 1974 but lapsed. Performers have no specific rights under the Copyright Act. The Rome Convention could be ratified if a Performers' Protection Act was introduced.

The old Performers' Copyright Bill provided for injunctive remedies, damages and an account of profits. Additionally a Performers' Protection Act could have civil or criminal penalties. In the United Kingdom, there are penal sanctions only and no mechanism for damages for the performer.¹³ The Act could provide for a collection of royalties on either an individual basis or a collective basis. If an individual approach were used, collection agencies could be set up to collect and disburse monies in a similar way to agencies which now exist for copyright owners (for example the Australian Performing Right Association, A.P.R.A.).

Alternatively, a collective basis could be established. In Norway the performers' residual fees are kept by a performers' trust and used to benefit needy and aged performers and their dependants. This is a redistribution of performers' wealth rather than a method of increasing income of performers who are in work. The problem for collection agencies is the same problem which leads to a need for performers' rights - technology. New technology makes it easier to record or tape and harder to patrol the fixations. Perhaps a blank tape royalty is the answer, with the money split between the performer and any other copyright owners.

2. *The United Kingdom Position*

In the U.K., their Performers' Protection Acts (1958-1972) protect performers by making it illegal to do certain things in relation to a performance without having the performers' written permission. They are:

- * making a record (directly or indirectly)
- * making a film (directly or indirectly)
- * selling, hiring an unauthorised record or film
- * publicly performing an unauthorised record or film
- * broadcasting and diffusing by wire service either a live performance, or an unauthorised recording or film
- * making or possessing plates for making unauthorised records.

13. Dramatic and Musical Performers' Protection Act 1956 and two statutes which increased penalties, the Performers Protection Acts 1963 and 1972.

These remedies are seen as inadequate, partly as they are dependent upon the efforts of persons uninvolved (economically) with the infringement, who may not have the time or resources to enforce adequately the criminal statute, but also as they do not give performers rights in their performances, nor a right to receive remuneration for their use. This has led to a number of attempts to obtain civil remedies.

In *Island Records v. Corkindale*¹⁴ the thirty plaintiffs were artists, songwriters and the record companies to whom they were exclusively contracted, who produced and sold records. The defendant was bootlegging records of the artists' live performances, thereby depriving the plaintiffs of record sales and royalties.

They sought an 'Anton Piller' order, arguing that the established practice of allowing such orders in musical piracy¹⁵ cases ought to be extended to bootleggers. Lord Denning M.R., in the majority, held that there was a general equitable principle that a person who is carrying on a lawful trade or calling has a right to be protected from any unlawful interference with it.¹⁶ He also held that the artists' rights to royalties and the record companies' right to record and exploit the artists' performances were both rights in the nature of property which they were entitled to have protected from unlawful interference.¹⁷ Waller J. also held that there was an equitable principle which allowed the court to restrain unlawful interference with rights akin to rights of property, and that the plaintiffs' rights were such rights.¹⁸

In *Island Records*, there was clear unlawful interference by the defendant. The plaintiffs had rights which they were entitled to have protected, and it was held that the court could grant an 'Anton Piller' injunction to protect them. Unfortunately for performers who might have used the case to obtain civil protection from unauthorised and unlawful acts in relation to their performances, subsequent decisions have not approved that of *Island Records*.

In *R.C.A. Corporation v. Pollard*¹⁹, Oliver J. made some interesting comments on the nature of performers' rights, stating that:

14. [1978] 3 W.L.R. 823.

15. Piracy is the making and selling of unauthorised recordings copied from existing, authorised recordings. Piracy is a criminal offence in the U.K. and it is also a tort as copyright is infringed.

16. Note 14 *supra*, 830.

17. *Id.*, 831.

18. *Id.*, 837.

19. [1982] 3 W.L.R. 1007.

The "exclusive right" which (the performer) contracts to confer on a recording company is no more than an undertaking that he will not give consent to a recording by anybody else.²⁰

He then discussed the three ways in which a claim could be framed, only one of which may be useful in Australia. They were:

1. That the Performers' Protection Acts confer, by implication only, civil rights to restrain criminal offences under the Acts. He agreed with the decision in *Island Records* that the Acts conferred no such civil right of action, whether on performers or record companies.²¹
2. The equitable principle, that an illegal act causing injury to a person's rights of property, is an actionable wrong, may also provide a basis for a performers' rights remedy. Oliver J. decided that the principle only extended to a case where the damage to the plaintiff's property or business was a direct and intended consequence of the defendant's act. He did not feel that any cause of action arose where the damage was economic damage, arising from a breach of a statute not designed to protect the plaintiff.²² This left open the question of a performer bringing an action, but only in relation to the U. K. Acts.

His Honour then went further and discussed his opinion of the 'property' of the plaintiff's, stating that the defendants had not interfered with the contractual relationship between the plaintiff company and its recording artist Elvis Presley. He went on to state that because, in his opinion, the House of Lords had rejected Lord Denning's proposition in relation to the nature of the contractual rights of the plaintiffs in *Island Records*, he did not have to decide the property point.²³ However, the point is of interest as an injunction can only be obtained to prevent the infringement of a property right (or in equity's exclusive jurisdiction). If it is correct that unauthorised use of a live performance causes no 'infringement' of the performers' rights, there will be no jurisdiction to bring an action.

As these cases show, attempts to use economic torts to extrapolate from the criminal Performers' Protection Acts to gain civil remedies for performers and others have not been entirely successful, although it is possible that a performer could rely on the Acts to stop unlawful acts which damage the performer. That

20. *Id.*, 1016.

21. *Ibid.*

22. *Ibid.*

23. *Id.*, 1021.

the cases have been fought and that there are acknowledged problems in the performing industry of piracy and bootlegging, highlights the fact that the protection afforded by the U.K. Acts is insufficient, at least to some members of the industry.

IV. POLICY CONSIDERATIONS

A protectable performance right will prevent exploitation by third parties for profit. With the right equipment, it is relatively easy to obtain an unauthorised "fixation" of a performance. This may then be reproduced endlessly, sold, hired, or broadcast to the public. Needless to say, uses will be profitable to the pirate or bootlegger but not to the performer.

In addition to the economic advantage inherent in performance rights, a performer's right would allow control over when, whether and how the performance is released. Incautious release of a fixed performance may diminish demand and earning power through over-exposure. It may also diminish the artist's reputation by a poor quality recording, recording of a poor quality performance, release to the wrong audience or simply the fact that a static recording of a work may lessen its value or style as a live piece. The context in which a performance is seen, and perhaps the order in which pieces from it are shown, may serve to satirise or belittle the work. This may either be deliberate or accidental — the performer has no remedy, apart from professional defamation in extreme cases.

In some sense the desire for control is a desire to ensure the integrity of the work, and to obtain not only a right to privacy, if needed, but also a right over one's style, name and personality. The importance of these rights is beginning to be recognised, especially in the U.S.A., where they are seen as akin to property rights.

Finally from the point of view of equity in treatment, performers even if they are interpretive creators of other peoples' works, should not be in any different position to film makers, broadcasters, or the makers of sound recordings, all of whom are protected by copyright. In a sense, the rights a performer could have are analogous to the rights of broadcasters who own the reproduction rights in their broadcasts, whether live or pre-recorded.

A significant policy consideration opposing the grant of performers' rights is the question of public access to works. It is arguable that the law should not grant rights which allow a 'monopoly' on works which are of cultural value and which will

improve the quality of life by their free dissemination. Those who oppose regulation believe that adequate remuneration for creative souls can be given in other ways, such as government grants, public lending rights,²⁴ commissions and sales. Certainly most authors, composers and artists receive much more of their income by these methods rather than through their copyrights.

A problem with giving rights to performers is that directors, producers, conductors and others involved in creating a 'work' may feel that their input is equally creative. Who is entitled to what share in the 'rights'?

Some definition of 'performer' is needed. Is it to include variety artists? Entertainers? Sports women? Clowns? Buskers? Actors in advertisements?

If performers receive rights in their performances, their creative input is acknowledged. There seems no reason then why the creative input of the person who organised a performance should not also be acknowledged. Entrepreneurs of live events, directors of stage shows, producers and others involved in films — the list is endless. One may feel that the film camera person and editor should have rights over their 'creative input'. If one limits the definition, and clearly some limit is necessary, how does one deal with the situation where all members of a group act as an artistic co-operative each making contributions to the final performance? In that case, should only 'performers' have rights?

Any administrative system which is set up to collect performers' fees must have a cost. A collection agency like A.P.R.A. works on an approximate overhead fee of 13% per year, which is simply the cost of collection of public performance royalties for recorded material. The precedent provided by A.P.R.A. is particularly relevant, for the difficulties faced by its musician members are the same difficulties that will be faced by the owners of performance copyrights in finding out just when and by whom performances have been recorded, reproduced and published, especially in domestic or private situations.

One would not wish to take too far the right of performers to control their performances. Artistic development so often depends on reference to and influence by the work and ideas of other artists. The rights of all artists must be considered, including the

24. Public Lending Rights (P.L.R.) is the right of an author (not the copyright owner) to receive payment when more than 50 copies of the author's book are held in public libraries in Australia. A sampling is held to determine the amount of books held and payment is made at the rate of 50 cents per book. Publishers also receive P.L.R. at the rate of 12.5 cents per book.

artistic freedom of some performers to criticise, review and satirise the performances or style of others. Artistic comment may require the use of the exact form of a performance and the obvious danger in allowing performers complete control is that they will not allow use of their work in ways which they perceive as critical of that work. This would be a misuse of control.

Another danger is possible conflicts of interest that could arise. If one (or several) of the performers wish to allow a fixation and one (or several) does not wish to see the performance reproduced, who is to resolve the conflict? If the cast or group decide not to allow the performance to be shown on television, what of the young director or writer who wishes to have her work seen or heard and appreciated? The balancing of these rights and controls will be complex, as many performances involve authors, musicians and artists as well as performers, directors and producers.

It may be that a system of compulsory licensing is set up to allow reproduction of authorised fixations on payment of a fee, in a similar way to that which exists for sound recordings.

Unlike most other creators, performers are usually paid to perform and as such are seen both as part of a service industry and as receiving direct payment for their work at the time of doing it. Opponents of performers' protection say that performers are called upon to interpret, rather than to create, a work which has already been 'created'. Why then, should they have a right over their performance of a work that is the result of someone else's creativity?

Although it would be impractical to insist on a judgment being made as to how much creativity a performer puts into a work, the fact remains that when one watches a play, or hears a record, it is often the performer who most closely associates with the play or record. It is their performance which makes the work live in our minds, or which alternatively, immeasurably lessens our pleasure in the work. If we agree that a performer is a creator who is entitled to protection whether employed or not, a problem could still arise from the fact of their employment. In essence, does the fact they have been paid once for their creativity bar them from further rights, and means to obtain further payment?

Under the Copyright Act the employer (of a creator) usually owns the copyright in work produced by an employee.²⁵ If the approach is similar for performers, in almost all cases the rights will not be owned by them, as most performers perform as

25. Copyright Act 1968 (Cth) s.35.

employees. Even though with the necessary muscle one may be able to contract out of any statutory provisions, there is little point in keeping that pro-employer structure if one is genuine about granting performers' rights.

Instead of simply stating that the performers' rights remain with the performer even when the performance arises when the performer is an employee, the legislation may declare that performers rights are inalienable. In that case the employer of a performer would be granted only a licence for particular uses of a performance, and it would not be possible for an employer to ask employees to alienate all their rights. This is unlikely to happen in Australia as it would not be in line with the rights already granted to authors, artists and composers in their work under the Copyright Act.

V. CONCLUSION

This whole topic is one which has been hotly debated by lawyers in the entertainment field for many years. Together with the related issue of "moral rights", the matter is at present under review by the Attorney-General's Department. If one accepts that performers, as creative people in their own right, should have protection, the problems outlined above, especially those concerning the complexity of the legal machinery that would be necessary and the conflicts of interest that are inherent in the concept, must be tackled. From a comparison with the United Kingdom position, it would seem that a proper civil right is to be preferred to a penal code and an uncertain common law which may or may not allow attendant civil rights. To professional performers, a grant of rights would not only prevent the abuse of the artistic integrity of their performance, it would also allow them the opportunity to negotiate proper contracts with employers and entrepreneurs concerning the use and re-use of their performance.

Any performers' rights legislation will carry with it both benefits and problems, but unless consideration is given to practical evidence of problems to be solved and inequalities to be resolved, the benefits of legislation are less likely to outweigh the detriments.

There are no easy answers, the basic questions are clear — is there a need, and if so is that need great enough to warrant legislation? The issues involved are of concern to all performers.

