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Music Performers and Their Protection

Friday, August 05, 2005
by: *Sally Ramage*

Introduction

From antiquity, possibly before even speech actually took place, humans used songs, often accompanied by rhythmic movements of the body or by some musical instruments, to convey a message that could otherwise not be expressed, or expressed poorly or ineffectively, with words.

This way of communication is effective because rhythm heightens the effect of words as it allows performers to convey them with a passion that words alone often cannot.¹

Authorities, civil as well as religious, were quick to get control of these social moments when people forgot their daily troubles in those opportunities of social relaxation called festivals. The authorities have often lavishly remunerated those involved in the musical and scenic organisation because of the role that these moments have always played in preserving and fostering social cohesion and social grouping. But alongside these lucky protected performers, were those groups and individuals who were individual and creative and did not get remuneration but for the goodwill of the crowd they enthused. Today we would call the latter bush and the former would have rights in performance.

In 1886, the Berne Convention for the Protection of Literary and Artistic Works was the first attempt at creating a set of rules with a validity extending beyond notional borders.² It gives a broad definition of "literary and artistic works" that applies to every production in the literary, scientific and artistic domain using a variety of expressions. (Article 2.1)³

The Berne Convention was revised in 1979 to address these key points of literary and artistic works:

You grew up with Tom as "BIFF", the bully in "Back to the Future".



Now let his original paintings and art take YOU back.



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Related Story

Introduction To Intellectual Property Law In Italy

- a. The author has the right to claim authorship of the work and to object to any distortion or mutilation which would be prejudicial to his honour or reputation (Article 6 bis)
- b. Different media are protected for different periods of time (Article 7).
- c. Authors have the exclusive right to authorising the reproduction of their works, but reproduction of such works in certain cases are permitted. (Article 9)
- d. Quotations from a work made available to the public are permitted. (Article 10-1).
- e. Works can be used by way of illustration in publications, broadcasts or sound or visual recordings for teaching. (Article 10-2).

There are also universal conventions such as the Universal Copyright Convention of 1952, the International Convention for the Protection of Performing Artists, Producers of Phonograms and Broadcasting Organisations [THE ROME CONVENTION] of 1961, and the Convention for the Protection Producers of Phonograms Against Unauthorised Duplication of their Phonograms of 1971.

The Copyright and Related Rights Regulations 1996

The Copyright and Related Rights Regulations 1996 introduced extensive new rights for performers by way of amendment to the Copyright, Designs and Patents Act 1988. Performers have performers non-property rights and recording rights. A performer's consent is required to exploit his or her performance. The Copyright, Designs and Patents Act 1988 defines "performance" as a dramatic or musical performance, a reading or recitation of a literary work, or a performance of a variety act or any similar presentation which is or so far as it is, a live performance given by one or more individuals. (Section 1(1)).

Section 180(2) states that "A person having contractual recording rights in relation to a performance may take action in respect of any unauthorised recording of such performance"

But this Act was NOT retrospective.

What is a musical work?

A Musical work

The 1988 Copyright Act states that there are 3 essential ingredients of an original musical work in which copyright subsists.

It must consist of "music" [not defined], excluding all accompanying words and actions.

It must be original in an "originating" sense.

It must be recorded in some form, eg, fixed in writing.

The author of a work means the person who created it (Section (CDPA 1988)).

The author of a musical work has the right (Section 77, Copyright, Designs and Patents Act 1988) to be identified as the author of the work in the circumstances specified in the section. One of these rights is the right to be identified whenever copies of sound recordings of the work are issued to the public.

Other sections of CDPA

Section 180 (3) says that any act done before 1/1/89 or in pursuance of arrangements made before that date is NOT to be regarded as infringing performers' rights or rights of persons having recording rights.

A performance qualifies for protection if it is given by a qualifying individual or if it takes place in a qualifying country (section 206)

A qualifying country includes the UK, other EC Member States and any country party to the ROME CONVENTION for the Protection of Phonograms ⁴

Performers property rights and non-property rights.

Performers property rights subsist for a period of 50 years from the end of the calendar year in which the performance takes place (section 191(1)). An infringement of a performer's property rights is actionable by the rights owner.

Performers also have non-property rights. These are the original rights under the Copyright, Designs and Patents Act 1988 to consent to the recording or line transmission of a performance and to importing, possessing or dealing with the recording. Infringement is a breach of statutory duty and a right to seize illicit recordings⁵ and sometimes criminal sanctions.

Non-property rights, like property rights, also subsist for 50 years maximum and performers' non-property rights are NOT retrospective before 1/1/96.

Permitted acts include fair dealing for the purpose of criticism, review or news reporting, incidental inclusion and things done for instructional, educational purposes or parliamentary and judicial proceedings. (section 189).

In Europe and the US.

Most European countries grant consumers the right to make private copies, based on the principle that these are NOT likely to compete with , and so reduce the market for, the original works. At the same time they accept a levy on recording equipment, including blank tapes.

In the US, there is the Audio Home Recording Act 1992 which grants consumers the ability to make private copies of broadcast music. The US copyright law has adopted the notion of fair use to include 4 parameters :

- character of use (eg. educational and non-profit purposes)
- nature of work (eg. factual as opposed to creative)
- portion of work (eg. small portion)
- effect on the market value of work (eg small impact)

WIPO Performances and Phonograms Treaty.

The UK's Copyright and Related Rights Regulations 1996 were due to the World Intellectual Property Organisation's conference on certain copyright and neighbouring questions, which also led to the adoption of two treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁶ Both treaties extend some provisions of the Berne Treaty and add provisions which offer responses to the challenges brought about by information and communication technologies. So now,

- computer programs are protected as literary works;
- compilations of data and other material constitute intellectual creations;
- authors of computer programs; cinematographic and phonographic works have the exclusive right of authorising commercial rental of their works;
- authors have the exclusive right of authorising any communication to the public of their works by wire or wireless means;
- states that are party to the treaties provide legal remedies to those who alter Rights Management Information, ie, information which identifies the work of the author, the rights owners, information about the terms and conditions of use, and any numbers and codes that represent such information.
- states that are party to the treaties make it unlawful to have any device or component incorporated into a

device or product in order to circumvent any process or mechanism or system that prevents or inhibits the exploitation of rights of rights holders.

Draconian penalties now in force.

In the UK, the new 2002 Copyright and Trade Marks Offences and Enforcement Act state that the court may make an order for forfeiture of illicit recordings and of destruction of unauthorised decoders with search warrants available to find same. It is a criminal liability to make or import an unauthorised decoder.

Although the UK might have brought in draconian penalties for IP infringements, as regards computers world-wide, it is still difficult to stop illegal copying of copyright musical works by means of computer software.

But it seems that there has been more hype and fear than actuality in music piracy and after a four-year slump, global sales of recorded music increased in 2004, largely through the success of fee-charging on-line services and the expansion of portable music devices such as Apple Computer Inc.'s iPod. The concern now is that it seems inevitable that the cd will become obsolete with music internet and mobile phone delivery. Mobile operators offer downloads of songs directly into handsets, though fees for this service are higher than per-track prices for portable music players such as the iPod.

In the recent case of BUMA/Stemra v KaZaA in Amsterdam, the court of appeal in Amsterdam reversed the decision of the District court which had ordered KaZaA to stop illegal copying of copyright musical works. KaZaA disseminates software which allows its users to find date files, download them and offer them to users. The exchange of MP3 files used for musical works is very popular. There are at least 17 million users of KaZaA software exchanging BILLIONS of files.

The Appellate Court held that it would be impossible for KaZaA to comply with the demand of BUMA/Stemra (the collecting society for copyright owners such as composers and lyricists) since, once it has allowed users to copy its software, KaZaA no longer has power to control its use and so dissemination of KaZaA software is NOT a tort and the infringement was committed by the USERS of KaZaA software and not be KaZaA itself.

In China, there is so much copying of software without licence that the estimated loss to Western copyright owners is over \$50 billion. This can only be curbed by the Chinese authorities.

File-Sharing.

Because it is so easy to copy, upload, download and send as a email digitized content has led to the term commonly known as peer-to-peer file sharing and several business models have been developed over many years to enable file-sharing. The 2001 US case MGM v Metro-Goldwyn-Mayer v Grokster, is a case closely watched by the business world and which decision was given only today, 27th June 2005. The case hangs on whether file sharing is legal or illegal although that will not enlighten lawyers as to who is liable, the person who downloads the file, the person who uploads the file in order for it to be shared. The Court ruled today for the music companies. This, together with the recent US Supreme Court ruling that cable television operators did not have to allow rivals to offer high-speed Internet access over their systems puts performers rights firmly in place for the long-term future.

Out-Of-Copyright Music.

The recent case of Hyperion Records Ltd v Dr Lionel Sawyers [2005] AC 17th May, looks like a case where the person who first makes a composition of this after expiry of the copyright, is the person who owns the copyright. And anyone who copies that new rendition is breaching that person's copyright and also infringing that person's moral rights as that person must be identified as the author of the first edition since the expiry. A work may be complete rubbish and utterly worthless, but yet copyright protection may be available for it, just as it is for the great masterpieces of imaginative literature, art and music. A work need only be "original" in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by another person.

The essential elements of originality were explained in Walter v Lane [1900] House of Lords and the Copyright Act 1842. Again, in Express Newspapers plc v News(UK) Ltd. [1990] FSR 359 when it was held that copyright subsisted in shorthand written reports of public speeches as "original literary"

works.

Conclusion.

There is more protection for performers than there ever was. Contrary to fears, the better advanced technology becomes, the more it will safeguard performers rights as the criminal fraternity will not be able to keep up with the technological advances, made possible by multinational corporations who are all working in unity against the bandits. There will be inevitable disruption from hackers but on the whole performers will prosper.

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L.B.Plastics v Swish Products Ltd [1979] RPC 555

Metro-Goldwyn-Mayer v Grokster[2005] US Supreme Court, 27th June 2005.

Positive Black Talk Inc v Cash Money Records Inc, US court of Appeals for the 5th Circuit, Case 03-30625.

The Recording Industry Association of America v Charter Communications Inc, US Court of Appeal for the 8th Circuit, case 03-3802.

Walter v Lane [1900] AC 539

Table of Statutes and Conventions- A TIMELINE

1709 English Copyright Act;

1842 Copyright Act UK

1886 Berne Convention for the Protection of Literary & Artistic Works;

1952 Universal Copyright Convention

1961 Rome Convention for the Protection of Performing Artists,

Producers of Phonograms and Broadcasting Organisations;

1971 Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms

1979 Revised Berne Convention;

1988 UK Copyright, Designs & Patents Act , Part 2;

1992 US Audio Home Recording Act;

1992 Trade Related Aspects of Intellectual Property Rights

Agreement (TRIPS);

UK Copyright & Related Rights Regulations;

WIPO Copyright Treaty

1996 WIPO Performances and Phonograms Treaty Offences (came into effect May 2002)

1997 US Digital Millennium Copyright Act (H.R.2281, 105th Congress;

2002 UK Copyright, etc and Trade Marks (Offences & Enforcement Act) Digital Copyright Millenium Act (US)

Footnotes

1. <http://leonardo.telecomitalialab.com/paper/WIPO99>" Technologies for e-content"

2. Before this there was the English Copyright Act of 1709.

3. Berne Convention Article 2(1) states:

"The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainment in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works

expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."

4. A qualifying country include those which the Rome Convention signed on October 26th 1961 and the Trade Related aspects of IP rights (TRIPS) agreement which was signed by 124 countries on the establishment of the WTO.

5. A recording for these purposes means a film or sound recording of the whole or substantial part of a qualifying performance. In the case of *Basseley v Icon Entertainment plc* [1995] EMLR 596, there is the issue of the wide definition of sound recording , capable of including "record", The making of a record from a master tape constitutes the making of a separate sound recording, requiring separate consent, BUT the court will look at the quality of the recording that has been taken rather than the quantity as in the case of *L.B. Plastics v swish Products Ltd.*[1999] RPC 555.

6. See Appendix 1.

(This paper was presented at New Hall, Cambridge University, IP Workshop on Monday 27th June 2005).

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