



New moral rights for performers

Performers will be able to enjoy moral rights for the first time in UK law - but only for performances that take place after the new regulations come into force, which is likely to be 1 February 2006. These two new rights are the right to be identified as the performer (the "right of paternity") and the right to object to derogatory treatment (the "right of integrity"). They are very similar to the provisions for authors and directors which have existed since 1988. They only apply to "qualifying" performances, that is where the performer is a citizen or resident in the UK, an EU or other designated country or the performance takes place in one of those countries.

As explained below, these rights are particularly relevant to record companies and musicians who sample from the sound recordings of other artists.

The right of paternity

This right applies whenever a person (a) produces or puts on a qualifying performance that is given in public, (b) broadcasts live a qualifying performance or (c) communicates or issues to the public a sound recording of a qualifying performance. It covers live performances, live broadcasts and sound recordings (whether made available over the internet or in a physical format). It does not apply to audio-visual recordings of performances (such as films or videos) but would apply to film soundtracks which are released as sound recordings.

The performer has the right to be identified in a manner likely to bring his/her identity to the notice of the person seeing or hearing the performance (or as otherwise agreed with the person producing or putting on the qualifying performance, etc). As with the right of paternity for authors and directors, this right cannot be infringed unless it has first been specifically asserted by the performer, that is, in writing signed by the performer or on his behalf by, for example, an authorised agent, manager or union.

We can therefore expect assertions to start appearing in recording contracts. There is no need to identify each group member; it is enough to name the group alone. The right is subject to a number of exceptions, such as where it is not reasonably practicable to identify the performer or the group or where the performance is given for the purposes of reporting current events or of advertising goods or services.

The right of integrity

This right is infringed if a qualifying performance is broadcast live or made in public or communicated to the public by means of a sound recording, with any distortion, mutilation or other modification that is prejudicial to the performer's reputation (and made without his consent). A number of exceptions are included, such as modifications which are consistent with normal editorial or production practice. In contrast to the right of paternity, there is no need for the right of integrity to be asserted.

For both....

Infringement of a moral right is a breach of statutory duty, the normal remedies for which are an injunction and damages. The moral rights cannot be assigned but can be "waived by instrument in writing signed by or on behalf of the person giving up the right". Therefore, agents or managers could sign away the rights of their clients.

Whilst all performers (and their representatives) will be keen to ensure that the right to paternity is specifically asserted, music companies will wish to ensure that, as of February 2006, appropriate waivers are included in their standard contracts with all but key artists to avoid having to name every performer on the record label.

A copy of the finalised Performances (Moral Rights, etc) Regulations 2005 can be found at: <http://www.patent.gov.uk/copy/notices/pdf/performances.pdf>.

The right of paternity cannot be infringed unless first asserted by the performer.

Commission recommends cross-border management of copyright for online music

The European Commission has proposed a radical overhaul of the management of online rights in musical works, in an attempt to boost the growth of legitimate online content services in the EU. This follows the publication in July of a consultation paper proposing a new system for cross-border collective rights management. The Commission has taken the novel step of addressing its recommendation not only to EU Member States but also to all businesses involved in managing copyright and related rights in the EU. However, given that the recommendation itself is non-binding, it remains to be seen whether collecting societies and rights holders will now take up the baton and develop a workable system of pan-European collective copyright licensing.

From the consultation, it was clear that commercial users favoured improved co-operation amongst EU collecting societies, allowing each society to grant an EU-wide licence covering the other societies' repertoires. The majority of collective rights managers favoured a modified version of this, too. However, the music publishing community and the independent record labels, together with some collective rights managers, instead favoured giving rights holders the option of appointing a single collective rights manager to manage their works across the entire EU, so-called "EU-wide direct licensing".

The Commission recommended in October that rights holders and commercial users should be given a choice as to their preferred model of licensing. It recognises that different online services might require different forms of EU-wide licensing policies. As well as proposing the elimination of territorial restrictions and customer allocation provisions in existing licensing contracts, the Commission believes that those rights holders who do not wish to use such contracts should be able to tender their repertoire for EU-wide direct licensing.

This new recommendation would enable a rights holder:

- to appoint a collective rights manager of his own choice, irrespective of either person's residence or nationality;
- to determine the online rights to be entrusted, as well as the territorial scope of the manager's mandate; and
- to terminate the relationship and transfer the multi-territorial management of those rights to another manager, provided that he gives reasonable notice.

Under the proposal, collective rights managers should:

- grant commercial users licences on the basis of *objective* criteria and without any discrimination amongst users;
- give reasonable notice of any changes in the repertoire they represent, to each other and to commercial users;
- report regularly to all rights holders on any licences granted, applicable tariffs and royalties which are collected or distributed; and
- distribute royalties in an equitable manner, specifying whether – and to what extent – deductions will be made for purposes *other than* the management services provided.

The Commission has invited EU Member States and collective rights managers to report annually on their progress in implementing these recommendations. This is viewed as a clear sign that the Commission intends to monitor developments carefully, with the possibility that it will issue more binding legislation should its current approach prove too light-handed.

The Commission recommendation of 18 October 2005 (L 276/54), together with background material, is at: http://europa.eu.int/comm/internal_market/copyright/management/management_en.htm.

This bulletin contains a brief summary only of recent legal developments. If you have any questions or require specific advice on any matter discussed in this publication, please contact Stephen Gare (sgare@mayerbrownrowe.com) or Robert W. Allan (rallan@mayerbrownrowe.com) in the Intellectual Property & Information Technology Group or your regular contact.

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EU-wide direct licensing to be permitted, removing the need to appoint individual collecting societies to manage repertoire in each Member State.

