

## CASE FILE #26: THE RECORDED PERFORMANCE

### LEARNING AIMS

- Understand the benefits of performers' rights
- Be able to provide a few examples of performances or performers who might be protected by performers' rights
- Be able to explain the difference between the protection given to 'authors' with copyright and the protection given to 'performers' with 'performers' rights

### KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- Why did we introduce performers' rights into UK copyright law?
- What are the benefits of performers' rights?
- What type of performance (or performer) attract performers' rights?
- Should authors and performers receive the same rights?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

### WHY DID WE INTRODUCE PERFORMERS' RIGHTS INTO UK COPYRIGHT LAW?

- See **TEXT BOX #4 and #6**
- **In theory** - Performers' rights were introduced for the same reasons we introduced copyright for authors: allowing performing artists to be rewarded for their efforts, thereby promoting the creation of new work. Like copyright, the ultimate goal of performers' rights is the creation and spread of knowledge.
- **In practice** - Performers' rights were introduced shortly after recording technologies had made it possible for individuals to record and sell unauthorised copies of live performances. Before then, producers and performers could monetise the showing or viewing of performances relatively effectively by selling tickets at the doors of venues. Performers' rights were introduced to prevent the bootlegging of recorded performance.

### WHAT ARE THE BENEFITS OF PERFORMERS' RIGHTS?

- See **TEXT BOX #2 and TEXT BOX #6**
- Like copyright, performers' rights grant economic rights, moral rights and remuneration rights to performing artists. This allows performers to receive remuneration for the use of their performance but also to protect their name and reputation by controlling how the performance is used or edited by others.

### WHAT TYPE OF PERFORMANCE (OR PERFORMER) ATTRACT PERFORMERS' RIGHTS?

- See **TEXT BOX #3 and #7**
- Many performances will receive performers' rights. Performers have rights in performances which can be defined as '(a) a dramatic performance (which includes dance and mime), (b) a musical performance, (c) a reading or recitation of a literary work, or (d) a performance of a variety act or any similar presentation'.

This list is exhaustive, but it is rather broad. It will cover any musical or dramatic performances protected under UK copyright law.

- It is not clear whether more contemporary performances like Reality TV performances or football games fit that description. Experts are divided on this question.

The majority are of the view that performers' rights should only apply to conventional performances so to avoid stretching the scope of performers' rights too far.

Others believe that the legislator intended to keep the scope of performers' rights open-ended by providing a broad definition. Therefore, new types of performers should be given performers' rights. They warn us of the 'snobbism' which may subsist in protecting performances given in traditional settings like the theatre, the cinema or the opera but not performances taking place in Reality TV programs, football games or fashion shows.

What do the students think?

### SHOULD AUTHORS AND PERFORMERS RECEIVE THE SAME RIGHTS?

- See **TEXT BOX #5 and #8**
- **There is not right or wrong answer to this question.** This is a matter of opinion.
- At present, performers' rights are shorter and narrower than copyright. In practice this means that the average performer receives less remuneration and less rights from intellectual property law than authors do.

Today, many performing artists would like the law to be reformed to improve performers' rights. Experts are divided on this topic. The majority of legal experts think the difference is justified. Experts from the creative industries, performance and creative studies think that the difference is not justified.

- **NO.** Many argue that the difference between copyright and performers' rights is fair because it is more difficult to create a work than to perform it. This view is based on the idea that creating a work (writing a book or composing a piece of music) requires more creativity than interpreting it (playing a character or singing a song).

Those in favour of keeping this imbalance between copyright and performers' rights also say that if it was not for the author of the work there could be no performance, because the performance relies on the work to exist.

- **YES.** On the other hand, those who think that the difference between copyright and performers' rights is not justified argue that performing is just as demanding in terms of creativity and work as composing a piece of music.

They explain that the view that composer creates the work from scratch is outdated because a composer relies on other composers' works to create a piece a music, in the same way the performance (e.g. actor) relies on the work (e.g. the script) to exist. Performers do more than just behaving like the mouthpiece or the puppets of the author whose work they interpret. It takes a lot of skills and practice to give a performance.

Actors playing in a film do more than reading the script out loud. For example, they inject their personality in the performance to make the character come to life. They also have to add elements to the character to perform which cannot be written in the script in enough detail, but which are nevertheless essential for the performance to come across as natural, convincing or authentic. These elements might involve facial expressions, the tone of the voice, the ways of walking or smiling – a myriad of details which only a performer can craft. For this reason, they say, performers should get the same protection for their work as authors get for theirs.

What do the students think?

## SUGGESTED ACTIVITIES

Before discussing the topic in **TEXT BOX #6**, you might ask the students to look for examples of famous creations (films, books, music etc.) where the author is more famous than the performer, and for other examples where the performer is more famous than the author. They can use these practical examples to analyse the contribution of the author and that of the performer to the final work. They can use their examples and their analysis to evaluate whether it is fair that performers should receive less protection than authors.

## CASE FILE #26: THE RECORDED PERFORMANCE

### 1. INTRODUCTION

Sherlock and John's investigation takes them to the studio where the film *The Forger's Apprentice* is being made. In [Case File #13](#) we considered how the law defines the concept of the author in relation to films, and how a film might be based on different types of protected works belonging to different copyright owners. We now turn to another group of creative professionals involved in the making of films: actors. In this Case File #26, we look at the protection conferred to actors and other performers by *performers' rights*.

### 2. PERFORMERS' RIGHTS

As performing artists, actors receive legal rights known as performers' rights, similar in nature to copyright. Performers' rights were introduced shortly after recording technologies had made it possible for individuals to record and sell unauthorised copies of live performances. Before then, producers and performers could monetise the showing or viewing of performances relatively effectively by selling tickets at the doors of venues. However, cheaper recording technologies enabled bootlegging to thrive (making and selling unauthorised records), which motivated the government to introduce new rights to better protect the interests of producers and performing artists.

Like authors' rights (copyright), performers' rights are set out in the Copyright, Designs and Patents Act 1988 (the CDPA). Section 182 of the CDPA gives performing artists the right to authorise the making of a recording of their performance; that is, the right to consent to their work being recorded or not. The CDPA also allows performing artists to control the use of recordings, after authorisation (see, sections 182A-182CA). This right enables artists to seek royalties for the use of records of their performance, in the same way that authors can claim royalties for use of their work.

The CDPA also grants moral rights to performing artists. They have the right to protect the integrity of their performance against 'derogatory treatment' (see section 205F) and the right to be identified as the performers in live performances or on the records of their performance (see section 205C). When artists perform as a group, crediting the band is enough to satisfy this legal obligation: there is no need to name every artist individually.

Performers' rights last for a period of 50 years, from the end of the year in which the performance takes place. However, if during that period a recording of the performance is released to the public, the duration of rights will be extended for another 50 years calculated from the end of the year in which the recorded performance is released.

Also, interestingly, when calculating duration, performances fixed in a sound recording are treated differently from performances recorded by other means. For a sound recording – rather than, for example, an audiovisual recording – the additional period of protection following the release of the recording to the public will be 70 years rather than 50 years. That is, performances captured by sound recordings are granted an additional 20-year protection compared to other types of recording.

In addition to these economic and moral rights, performers also benefit from what we call 'remuneration rights' to ensure they receive equitable revenues from the owner of the copyright in the sound recording or the film capturing their performance (see,

sections 182D and 182CA(2)). And, just as performances fixed in sound recordings enjoy the additional benefit of an extra 20-year protection, they also receive additional remuneration rights, such as the '20% fund' measure (see, sections 191HA(1), 191HA(2) and 191HB(3)): this provision requires record producers and companies to pay organisations representing performing artists 20% of the gross revenues generated by the commercialisation of sound recordings of performances during the additional 20 years of protection.

### 3. WHAT IS A PERFORMANCE?

Performers' rights only apply to performances as identified by the CDPA. Section 180(2) of the CDPA defines a relevant performance as 'a live performance given by one or more individuals' of either: '(a) a dramatic performance (which includes dance and mime), (b) a musical performance, (c) a reading or recitation of a literary work, or (d) a performance of a variety act or any similar presentation'.

So long as a performance falls within this definition it will be protected. There are no additional conditions or criteria to satisfy. For example, whereas literary, dramatic, musical and artistic works must be original before they will attract copyright protection, a performance does not need to be original to enjoy protection under the law. This means that most traditional forms of performance – such as stage or street acting, musical and dance interpretations, recitations or improvisation – will be protected, even if they are similar or even identical to other, earlier performances.

Live performances of copyright works – such as a literary or a musical work – clearly qualify for protection. But, what about other types of contemporary performance, such as participating in a Reality TV show or modelling on a cat-walk? It is not clear that they are protected. Should they be? Do they fall within the definition of a performance set out above? Or how about the stuntman in the *Forger's Apprentice*? Would his fall from the scaffolding be protected as a performance?

Do you think your school teachers are 'performers' within the meaning of the CDPA? Have you ever been a 'performer'?

### 4. PERFORMERS' RIGHTS AND COPYRIGHT

In general, performers' rights provide a very similar form of protection to the rights granted to authors by copyright. Nevertheless, there are a few notable differences between the rights enjoyed by authors and those granted to performers. First, the duration of these rights differ, with copyright typically lasting longer than performers' rights. Second, performers' rights only protect the *recording of a performance*; they do not protect the actual performance itself in the way that copyright protects against copying the actual work. For example, it is perfectly lawful to copy or imitate another performing artist's style, demeanour or mannerisms: these aspects of their performance are not protected. Lastly, and perhaps most surprisingly, performers do not have right to object to false attribution under UK law, which is an important moral right enjoyed by authors (see section 84).

Finally, it is worth noting that the same artist may enjoy both copyright and performers' rights in his or her contribution to a creative work. For example, consider an actor who directs and/or produces his own film, or a singer-songwriter who writes, composes and records her own music. As a songwriter, the musician will enjoy

copyright in the songs that she writes. And, when she records her song, she will enjoy performers' rights in the recorded performance.

### **5. THE CASE: *RICKLESS v UNITED ARTISTS CORP* (1988)**

Performers' rights were a relatively late addition to UK law. There were only introduced in 1988, in their current form. One famous case, known as the *Peter Sellers* case (*Rickless v United Artists Corp* (1988)), is understood to have played a significant role in the introduction of the performers' rights regime.

A dispute arose between the makers of the sixth 'Pink Panther' film – *Trail of the Pink Panther* – Blake Edwards and United Artists on the one hand, and the relatives of comedian Peter Sellers on the other. Peter Sellers had played the famous French detective in the first five Pink Panther films. Shortly after Peter Sellers' death in 1980, Blake Edwards and United Artists decided to make a sixth instalment of the Pink Panther franchise from existing footage of his performances in previous films. Peter Sellers' relatives took legal action against the making and release of the film; they objected to re-using the work of the deceased without seeking his or their consent. In effect, Peter Sellers' family were asking for the enforcement of performers' rights which did not exist at the time. Due to the sensitive nature of the facts, the Court accepted their request, urging the legislators to improve the legal protection of performers and to prevent such incidents taking place in the future.

### **6. FOR DISCUSSION: AUTHORS vs PERFORMERS**

Compare the duration of performers' rights to the duration of authors' rights described in [Case Files #2](#) and [#22](#). Which is shorter? Can you think of a scenario where the performers' rights would outlast the copyright vested in a film?

We know that authors and performers do not receive the same level of protection. Why do you think that is? Do you think it is justified?

To help you answer these questions, think of your favourite film. What do you like most about it: the story as it is told by the script, the images created on screen or the performance of the actors? Alternatively, think of your favourite song. Which do you prefer, the singer or the song? Check whether the singer also composed the music and/or wrote the lyrics. Does this change your opinion?

### **7. USEFUL REFERENCES**

The Copyright, Designs and Patents Act 1988 is available here: <http://www.legislation.gov.uk/ukpga/1988/48/contents>

*Rickless v United Artists Corp* [1988] QB 40 (unfortunately, this case is not readily available online)