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To: UK Intellectual Property Office
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Re: Beijing Treaty on Audiovisual Performances: Call for views. Published 23 April 2021

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Submission on behalf of The Centre for Science, Culture and the Law at the University of Exeter
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The protection of performances fixed in audiovisual recordings under UK law and the Beijing Treaty

Submission to the UK Intellectual Property Office

1. Submission description

1.1. Summary

This submission confirms that **the Copyright, Designs and Patents Act 1998 (CDPA) needs to be reviewed to comply with the Beijing Treaty on Audiovisual Performances 2012** (Beijing 2012) and the **Performances and Phonograms Treaty 1996** (WPPT 1996).

The submission also stresses that **further evidence needs to be collected on the impact of the current UK framework of performers' rights** to ensure the implementation is based on evidence-based policy.

[1] **Mathilde Pavis, 'The protection of performances fixed in audiovisual recordings under UK law and the Beijing Treaty' (2021). Email: M.Pavis@exeter.ac.uk. University of Exeter.**

Need for reform

The submission confirms that the CDPA should be modified to achieve 3 objectives:

> (1) **Ensure full compliance with Beijing 2012 and the WPPT 1996** (in relation to performers' economic, moral and equitable remuneration rights);
> (2) **Improve the language and internal coherence of the CPDA** to remove uncertainty in the interpretation and application of the Act (in relation to equitable remuneration and other provisions);
> (3) **Guarantee the sustainability of the UK framework of performers' rights in wake of recent global challenges** including but not limited to the use of performances by Artificial Intelligence systems, online working, and new online contractual practices for the hiring and use of performances.

There are **gaps in the protection of performances** conferred performers' rights under Part 2 of the Copyright, Designs and Patents Act 1998 (CDPA). The gaps will need to be removed to comply with Beijing 2012 (to be ratified) and WPPT 1996 (already ratified). Other aspects of the CDPA are already compliant with Beijing 2012. This is because performers' rights under the CDPA already apply to all performances fixed in sound recordings or films (i.e. audiovisual fixation), with only small variation of protection based on the medium of fixation. This point is further explained below (Section 1.5).

Need for further evidence

The submission also stresses the lack of evidence on aspects critical to the sound implementation Beijing Treaty 2002, including but not limited to:

(a) Data on the **revenues generated by existing performers' economic rights** across as a comprehensive range of performing practices;
(b) Data on the **revenues generated by existing existing performers' equitable remuneration rights**; and contrast these results with the revenues generated by author's equitable remuneration rights
(c) Data on **the existing provision of collective representation for performers in the UK**, including representation for the purpose of collecting royalties; and assess whether there is effective and comprehensive representation for UK performers.

The UK IPO should therefore undertake further research on these points to formulate evidence-based policies for the implementation of Beijing 2012.

1.2. Structure of the submission

The submission answers the questions set by the UK Intellectual Property Office (UK IPO) in the call for views in **Section 2. Section 3** includes extended analysis and evidence in support of each answer. References and sources to evidence are listed in **Section 4.**

1.3. Scope of the submission

The submission excludes from its analysis: (a) rights conferred to persons with recordings rights per s.180(1)(b); (b) the regime applicable to orphan performances per Schedule 2; and, (c) provisions relevant to the cross-border application of performers' rights and national treatment.

The submission will not repeat on the insightful comments made by experts by: **Prof. Tanya Aplin** and **Dr. Emily Hudson**; as well as **Prof. Charlotte Waelde** on the need and interest of the dance community in the UK.[2]

1.4. Evidence and state of knowledge on performers' rights

The submission brings evidence based on the author's academic research on performers' rights and the legal doctrinal analysis of the CDPA.[3] Relevant sources of evidence supporting the argument developed in this submission are included in footnotes, and Section 4.

Scholarship on UK performers' rights is not as developed as scholarship on copyright.[4] More problematic, is the absence of publicly available quantitative empirical evidence on the use of performances, performers' rights and the revenues generated by them in the UK. This evidence is critical to produce a comprehensive and robust analysis of performers' rights and measure the impact of existing and future statutory provisions.

Representative organisations and collecting societies may be in the position to share valuable evidence with the UK IPO in preparation for the ratification of Beijing 2012. This information is not currently available or accessible to the public or independent researcher and which could not be gathered within the timeframe set by the call for views.

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[2] Charlotte Waelde, Submission to the call for views on audio-visual performances to the UK Intellectual Property Office (Centre for Dance Research, Coventry University, June 2021).

[3] Mathilde **Pavis**, Submission to the UK IPO: Artificial Intelligence and Performers' rights (Center for Science, Culture and the Law at Exeter, 2020); Mathilde **Pavis**, 'Rebalancing our regulatory response to Deepfakes with performers' rights' (2021) Convergence (forthcoming); Mathilde **Pavis**, Huda Tulti and Jo Pye, 'Fair pay/play in the UK voice-over industries: a survey of 200+ voice-overs' (Center for Science, Culture and the Law at Exeter, 2019); Mathilde **Pavis**, 'Runway models, runway performers? Unravelling the Ashby jurisprudence under UK law' (2018) 13 Journal of Intellectual Property Law and Practice 867; Mathilde **Pavis**, 'Copyright and performers' rights in the creative industries; old laws for new challenges' in A. Brown and C. Waelde (eds) *Research Handbook on Intellectual Property and Creative Industries* (Edward Elgar 2018); Mathilde **Pavis**, Charlotte Waelde and Sarah Whatley, 'Who can profit from dance? An exploitation of copyright ownership' (2017) 35 The journal of Society for Dance Research 96; Mathilde Pavis, 'Is there Any-Body on Stage? A Legal Misunderstanding of performances' (2016) 19(3-4) The Journal of World Intellectual Property 99; Mathilde **Pavis,** *The author-performer divide in intellectual property law: a comparative analysis if the American, Australian, British and French legal frameworks* (University of Exeter, unpublished thesis 2016)

[4] Legal doctrinal analysis is available but remains limited by contrast to the volume of scholarship available on authors' rights.I am indebted to the important work of Sir Justice Richard Arnold on performers' rights (writing extra judicially): Richard Arnold, *Performers' rights* (Sweet & Maxwell 2016).

The UK IPO should collect evidence from industry organisations such as PPL, Equity, British Equity Collecting Society (BECS), PRS, Mechanical-Copyright Protection Society (MCPS) on topics such as revenue flows, contractual practices, and collective bargaining agreements.

1.5. Terminology and approaches to protected performances under the CDPA

It is important to stress that the level of protection granted to performances by the CDPA requires a two-stage assessment: (i) defining the **performances in which performers' rights subsist**;[5] and (ii) defining and identifying the **acts controlled by performers' rights**.[6] The acts protected by performers' rights apply to all performances in which performer's rights subsists, unless the CDPA specified otherwise.[7]

Performances

The CPDA does not distinguish between 'audio' (or performances fixed in sound recordings) and 'audiovisual performances' when defining performances in which performers' rights subsist -- unlike international law on performers' rights (WPPT 1996, Beijing 2012).

Instead, the CDPA refers to live 'dramatic performances', 'musical performances', 'readings and recitations of a literary work' and 'performances of variety acts or any similar presentations' (s.180(2)) that may be fixed in a 'recording'.

Recording

A 'recording' means a 'sound recording' or a 'film' made directly from the live performance, a broadcast of the performance (s. 180(2)(a)-(b)*).[8] The CDPA does not refer to 'audiovisual recording' or 'audiovisual fixation' for the purpose of performers' rights.

A 'recording' can also mean a recording made directly or indirectly from another recording (s.180(2)(a)-(b)*).[9] The fixation of all live performances is protected by a performer's right to consent to making a recording of their performance (s.182), as an act controlled by performer' rights.

'Sound recording', 'film' and 'broadcast' in the context of performers' rights share the same meaning as in Part 1 of the Act (copyright) (s.2011(1)). This cross-referencing is not problematic except for the treatment of 'sound tracks' by s.5B(c) which causes uncertainty in

[5] The definition of performances in which performers' rights subsists is governed by sections 180 (rights conferred on performers), s. 181 (qualifying performances) and s. 191 (duration of rights).
[6] The definition of the acts controlled by performers' rights are governed by s. 182 to s. 184 (economic rights), s. 205C and s. 205F (moral rights) with exceptions provided under s. 189, s. 190, s. 205E and s. 205G.
[7] See for example, s.205C(1)(a) and (b) applies to all performances in which performers' rights subsist, but s.205C(1)(c) and (d) appears to be limited to performances fixed in a sound recording. This provision will need to be reformed to comply with Beijing 2012, as discussed below in this submission.
[8] The numbering of the CDPA on s.180 prevents accurate referencing to different provisions of sub-section 2. Here, the submission refers to: and "recording", in relation to a performance, means a film or sound recording (a) made directly from the live performance, (b) made from a broadcast of the performance, or (c) made, directly or indirectly, from another recording of the performance.
[9] Ibid.

interpretation when applied to performers' rights (see Section 3 of this submission for more on this point).

Definitions under Part 1 of the CDPA

Sound recording means '(a) a recording of sounds, from which the sounds may be reproduced, or (b) a recording of the whole or any part of a literary, dramatic or musical work, from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced.' (s.5A(1)).

Film means 'means a recording on any medium from which a moving image may by any means be produced' (s.5B).

Broadcast means 'an electronic transmission of visual images, sounds or other information which (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or (b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public' (s.6(1)).

Acts controlled by performers' rights

The acts protected by performers' rights apply to all performances in which performer's rights subsists, unless the CDPA specified otherwise.[10]

A feature of the UK framework of performers' rights is that the performer's consent is required to (i) fixation the performance in a recording, and (ii) for subsequent use of that recording. This **two-part approach to consent[11]** stems from the writing and structure of Part 2 of the Act, and is consistent with the approach to performers' protection under international treaties (WPPT 1996 and Beijing Treaty). This two-part consent to the performances was confirmed by UK case law in *Bassey v Icon Entertainment Plc* (1995).[12] It is important that any modification of the CPDA maintains this approach to the acts controlled by performers' rights.

The rights to communicate, show or play in public a recorded performance provided under s.183 of the CPDA currently stand out as the only acts controlled by performers' rights which do not require the performer's consent for the subsequent use of the recording if the latter was made with consent. As explained and argued below, the CDPA should be reformed to remove the inconsistency of s.183 with the rest of Part 2 of the Act. This submission includes recommendations for reform to that effect.

[10] See for example, s.205C(1)(a) and (b) applies to all performances in which performers' rights subsist, but s.205C(1)(c) and (d) appears to be limited to performances fixed in a sound recording. This provision will need to be reformed to comply with Beijing 2012, as discussed below in this submission.
[11] i.e. the need to secure consent for the recording, and then again for the subsequent use of such recording
[12] *Bassey and Another v Icon Entertainment Plc and Another* [1995] EMLR 596, 606.

2. Answers to UK IPO's questions

This section directly answers the questions outlined by the UKIPO in the call for views. Further commentary support these answers with extended analysis and evidence is included in Section 4 of this submission.

2.1. Questions on performers' moral rights

Question 1. Would this approach provide sufficient protection for audiovisual performers?

Question 2. Would this approach result in any problems in the normal use of audiovisual performances? If so, in what ways and how could this be resolved?

Answer

Existing moral rights provisions need to be modified to comply with Beijing 2012 and WPPT 1996. Section 205C needs to be amended to include performances recorded in films, and Section 205F needs to be modified to apply to (all) live performances.

See commentary in Section 3 'Extended analysis and evidence'

Question 3. Would this approach result in any problems for freedom of expression? If so, in what ways and how could this be resolved?

Answer

The approach proposed by the UK IPO in implementing Beijing's standards for moral right protection of performances is unlikely to negatively impact the freedom of expression. The scope of moral right protection under UK law is narrow, and there is no evidence to date that existing provisions have stifled free speech or innovation.

See commentary in Section 3 'Extended analysis and evidence'

Question 4. Do you have any other comments on the issue of moral rights for audiovisual performances?

Answer

The submission stresses the importance of reviewing the CPDA's provision on performers' moral rights in light of the challenges posed by online working due to COVID19 and AI systems as per **Observation 4** and **Observation 5** above.

2.2. Questions on broadcasting and communication to the public of performances in audiovisual fixation

Question 5. To what extent do audiovisual performers currently benefit when their performances are broadcast or communicated to the public, including being played in public, in the UK? Is the remuneration that audiovisual performers receive for these uses appropriate?

Answer

The protection conferred by the rights of showing or playing a recording in public[13] and communication (s.183) is **weak and inconsistent** with the rest of the UK framework of performer's rights. The CDPA should be reformed to address this.

The main limitation of the rights stems from the fact that the performer's consent to making a recording (or copies thereof) removes the obligation to seek their consent to communicate, play or show the recording in public (s.183(1)-(2)). This limitation should be removed.

This weak level of protection will have impacted the economic and moral or reputational benefit performers and their representative organisations have been able to generate in the past, and will hinder the economic and moral benefits performers would be able to generate in the future. It is difficult to imagine a digital and creative economy in which the playing/showing and communication of performances are not key to their commercial exploitation.

The CDPA should be modified to read:

Recommendation

Section 183 of the CDPA should be modified to read:

183 Infringement of performer's rights by use of recording ~~made without consent~~

A performer's rights are infringed by a person who, without his consent

(a) shows or plays in public the whole or any substantial part of a qualifying performance, or

(b) communicates to the public the whole or any substantial part of a qualifying performance.

~~by means of a recording which was, and which that person knows or has reason to believe was, made without the performer's consent.~~

See commentary in Section 3 'Extended analysis and evidence'

[13] The right of 'showing' or 'playing a performance in public' is the CDPA's equivalent of Beijing 2012's 'broadcasting' right.

Question 6. What would be the impact of introducing exclusive rights for audiovisual performers over these uses?

Answer

The introduction of exclusive rights to cover the right of communication and showing/playing will improve performers' legal protection. However, a reform of these rights will not necessarily translate into a tangible benefit for performers. Exclusive rights rely on performers' knowledge of the law, contractual bargaining power and collective representation to generate benefits. Research reveals that performers do not have access to these resources (Pavis & Tulti 2019; Towse 1992; Taylor & Towse).[14] Performers will not be able to take full advantage of exclusive rights, if they were introduced, until these needs are addressed.

See commentary in Section 3 'Extended analysis and evidence'

Question 7. What would be the impact of introducing rights to receive equitable remuneration for audiovisual performers over these uses (similar to those already provided for performances in sound recordings under section 182D of the CDPA)?

Answer

Research indicates that equitable remuneration rights applicable to performers do not achieve their aim (Pavis & Tulti 2019). This is attributable to their narrow scope of application as well as the reliance on the effective collective representation and collection of royalties on behalf of performers which is very uneven in the UK. These points need to be addressed for a regime of equitable remuneration rights to be effective generating fair remuneration for performers.

See commentary in Section 3 'Extended analysis and evidence'

Question 8. What approach would you want the government to take and why?

Answer

There is a lack of clear, verifiable and peer-reviewed evidence to answer this question.

[14] Mathilde Pavis, Huda Tulti and Jo Pye, 'Fair pay/play in the UK voice-over industries: a survey of 200+ voice-overs' (Center for Science, Culture and the Law at Exeter, 2019); Millie Taylor and Ruth Towse, 'The value of performers' rights: an economic approach' (1998) 20(4) *Media, Culture & Society* 631; Ruth Towse, 'The earnings of singers: An economic analysis' in R Towse and Abdul Khakee (eds) Cultural Economics (Springer 1992) 209.

Based on the current state of knowledge, we note that exclusive rights will benefit well-known performers, or those enjoying a strong bargaining power; as well as, the less well-known performers who are well represented by their representative organisation or union who have put in place collective agreements with producers, hirers and distributors. Conversely, equitable remuneration rights will benefit well-known and less well-known performers, as long as the latter receive effective representation and effective coverage by a representative organisation collecting royalties on their behalf.

Although useful, these pointers are not enough to come to a conclusive decision on which regime is better if the only option is to choose one over the other. More evidence on the current impact of equitable remuneration rights is needed to provide a better assessment of their potential contribution to the UK framework of performers' rights.

With this mind, The UKIPO should undertake further research into:

(a) The state of collective bargaining agreements relevant to the remuneration of performers in the UK;
(b) The current state and level of use of equitable remuneration rights by performers and representative organisations. This includes the use of the Copyright Tribunal by individual performers and their organisations, respectively, in the context of disputes related to equitable remuneration.
(c) Standard contractual practices across various sectors of performance work.

Representative organisations and collecting societies such as Equity, BECS, PPL should be consulted in the context of this research to access important data.

2.3. Question on transfers of rights

Question 9. In your view, should existing rules on the transfer of performers' rights be maintained? If not, how should they be changed? Please provide any evidence to support your comments.

Answer

The protection of performers' interests in transferring performers' rights under existing rules is weak. It favours freedom of contract to the detriment of performers who are rarely in the position to take advantage of it, and lose the benefit of fair remuneration UK framework of performers' rights aims to support. Existing rules could, and should, be modified to limit the freedom of contract where it does not serve or protect performers' interests or policy of fair remuneration underpinning Part 2 of the CDPA.

Presumptions of transfers may be envisaged if they are introduced in tandem with robust rights to equitable remuneration -- where the right to equitable remuneration shows to be more effective per **Observation 12, Observation 13** and **Observation 14** made above.

In any event, any review or reform of the CDPA should be careful to avoid fragilising an already weak standard of protection on the transfer of rights.

See commentary in Section 3 'Extended analysis and evidence'

2.4. Questions on the protection of foreign performances

Question 10. If the UK introduces rights of broadcasting and communication to the public for audiovisual performers, how should these apply to nationals of other countries that are party to the Beijing Treaty?

Question 11. Do you have any other comments on how the UK should extend audiovisual performers' rights to foreign performers or the impact of doing so?

Answer

The UK should consider extending the same level of protection to performers of signatory parties to safeguard the competitiveness of UK performers on the global market. This would mitigate the risk of producers and distributors favouring collaboration with less-well protected foreign performers (i.e. performers located in countries which afford a level of protection lower than what qualifying performers or qualifying performances would receive in the UK).

2.5. Question on Other issues

Question 12. Are there any other areas where you consider it necessary for the government to take action in the course of ratifying the Beijing Treaty? Please provide any evidence to support your comments.

Answer

We would like to draw the attention of the UKIPO to **five considerations** relevant to the implementation of performers' rights in the UK:

(1) **Artificial intelligence and performers' rights**
A revision of Part 2 of the CDPA should be mindful of uses of protected performances by or with the assistance of AI systems. Performers would benefit from a robust standard of protection rooted in strong economic and moral rights in this context.

For more on this topic: **Mathilde Pavis, 'Submission to the UK IPO: Artificial Intelligence and Performers' rights' (Center for Science, Culture and the Law at Exeter, 2020)**

(2) **Online and remote workers**

The review and reform of the CDPA to implement Beijing 2012 should be mindful of the fact that Part 2 applies beyond the creative industries and the heritage sector. Part 2 of the CDPA applies to most online workers, granting valuable protection to workers who record their voice, face and likeness in the context of their work (employment and self-employment).

Most online workers would class as a 'performer' in the meaning of the CDPA. This is the welcome result of the broad definition of protected performances under the CDPA (Pavis 2018; Pavis 2020; Arnold 2016).[15]

During the COVID19 pandemic, an unprecedented volume of live and recorded media has been produced by workers (employees and self-employed individuals) which would class as performances in which performers' rights subsist. For example, this applies to teachers and lecturers who have sustained their curriculum online during national lockdowns. Many professions are expected to retain a greater share of online working as part of the normal course of business; and there will be greater investment into live and recorded performances by online workers as a result.

(3) **Online marketplaces and performers' rights**

We draw the attention of the UK IPO to the growing presence of online peer-to-peer recruitment platforms. These online peer-to-peer platforms or 'online marketplaces' have introduced Uber-like business models for the commissioning of creative content, and the hiring of performers. These platforms bring both threats and opportunities to the UK creative economy. Online marketplaces like Fiverr, PeoplePerHour, Quidjob or Upwork bring the phenomenon of 'uberization' to the creative industries.

An important aspect of these platforms is their terms and conditions. It is common for online marketplaces to impose on artists using their services the outright assignment of all 'new' intellectual property rights to clients, without requiring proportionate or fair remuneration in exchange.

Research indicates that their terms and conditions do not reference, signal or raise the possible application of equitable remuneration rights (Pavis & Tulti 2019).[16] This includes platforms operated by companies registered in England & Wales, or whose standard-form contracts nominate the laws of England & Wales as applicable to their agreement.

The contractual practice of peer-to-peer recruitment platforms also indicates that full assignment of intellectual property rights are introduced without clear and transparent notification to the parties, without providing a genuine

[15] Mathilde Pavis, 'Runway models, runway performers? Unravelling the Ashby jurisprudence under UK law' (2018) 13 Journal of Intellectual Property Law and Practice 867; Mathilde Pavis, 'Submission to the UK IPO: Artificial Intelligence and Performers' rights' (Center for Science, Culture and the Law at Exeter, 2020); Richard Arnold, Performers' rights (Sweet and Maxwell 2016).

[16] Mathilde Pavis, Huda Tulti and Jo Pye, 'Fair pay/play in the UK voice-over industries: a survey of 200+ voice-overs' (Center for Science, Culture and the Law at Exeter, 2019)

opportunity of negotiation, and last but not least, without appropriate financial compensation.

The fact that peer-to-peer recruitment platforms apply this practice to all transactions, and on a global scale, adds cause for concern. As such, the terms of use currently applied by peer-to-peer recruitment platforms hold the potential to defeat the purpose of the intellectual property framework, circumventing measures put in place to ensure equitable remuneration for protected artists.

Existing rules on transfer of performers' rights allows these new "Ubers" of the creative economy to circumvent the protection conferred to performers by the CDPA. This issue could be addressed in a review and reform of the Act.

For more on this topic: **Mathilde Pavis, Huda Tulti and Jo Pye, 'Fair pay/play in the UK voice-over industries: a survey of 200+ voice-overs' (Center for Science, Culture and the Law at Exeter, 2019).**

(4) **Provisions on 'sound tracks' under Part 1 of the CDPA**

Part 2 of the CDPA refers to Part 1 of the Act for the definition of 'sound recording' and 'film'. This has the effect of extending the definition 'soundtrack' under Part 1 to Part 2 of the Act.

This is problematic in the context of performers' rights as it weakens the protection of performers whose performances fixed in sound recordings are used in the context of a film, and the protection of performances whose performances fixed in a films is used as stand-alone sound recording.

The CDPA should be reviewed and modified to avoid uncertainty of interpretation on this point and ensure that this is consistent with the aims of the UK framework of performers' rights and Beijing 2012.

See commentary in Section 3 'Extended analysis and evidence'

(5) Other difficulties and incoherences in the CDPA

The UKIPO may want to take the opportunity of this review to remove other, minor, areas of incoherence and imprecision from certain provisions of the CDPA which complicate its enforcement and interpretation.[17] An annotated copy of the CDPA recording these incoherences and areas of imprecision can be shared with the UKIPO on request to the author.

[17] Most of these areas of incoherence and imprecision have been documented by Richard Arnold in his seminal work *Performers' Rights* (2016).

3. Extended analysis and evidence

Commentary to Question 1 and Question 2

Three observations ought to be made to answer this question accurately and comprehensively:

Observation 1 — references to 'sound recording' by Section 205C

Aspects of Section 205C **limit the scope of application of the right of attribution to performances fixed in sound recording**. This will have to be modified to include performanced fixed in films to comply with Beijing 2012. With this in mind , the phrase 'sound recording' under s.205C(1)(c)-(d) and s.205C(2)(c) and (d) need to be replaced by the word 'recording' to ensure that the protection applies to all recorded performances.

Observation 2 — no protection for live performances under Section 205F

At present, **the CDPA does not provide moral right protection against the derogatory treatment of live performances** (s. 205F). This affects all performances whether they are destined to be fixed in sound recordings, films or broadcast. This is a result of the drafting of Section 205F(1) which only extends protection to broadcast and sound recordings played in public or communicated to the public. Section 205F(1) fails to comply with Article 5(1) of the WPPT 1996. This limitation will also affect the implementation of Article 5(1)(ii) of Beijing 2012 if Section 205F(1) is extended to performances fixed in films without including live performances.

Observation 3 — protection against false attribution

The introduction of **a right to object against the false attribution** would be a welcome addition to the UK framework of performers' rights. Such a right would prevent the use of a performer's name in relation to a performance they did not execute. This is distinct from the non-attribution of a performer to their performance, or the mis-attribution of a performance to the performer, where the performer's contribution is not accurately described.

Observation 4 — Moral rights and uses of performances by Artificial intelligence

Moral right protection for all performances will be critical to protecting the interests of performers and those invested in the production and dissemination of performances against the use of protected performances by Artificial Intelligence (AI) systems. In particular, we draw attention to the synthetisation of performances by AI systems (colloquially known as 'Deepfakes') which pose a major challenge to the stakeholders protected under the UK framework of performers' rights (Pavis 2020; Pavis 2021).[18]

[18] Mathilde Pavis, Submission to the UK IPO: Artificial Intelligence and Performers' rights (Center for Science, Culture and the Law at Exeter, 2020); Mathilde Pavis, 'Rebalancing our regulatory

There are outstanding questions posed by the use of performances by AI systems in the context of moral rights. For example, is the synthetisation of a performance with or by AI systems an infringement of performers' moral rights? We tentatively answer that it is. Would or should the synthetisation of a performance be treated as the 'normal course' of exploitation?

We think not. The UKIPO should carry out further research on these points to ensure that moral rights are compatible with innovation in the field of AI and performances.

See also **Mathilde Pavis, Submission to the UK IPO: Artificial Intelligence and Performers' rights (Center for Science, Culture and the Law at Exeter, 2020).**

Observation 5 — Moral rights and the protection of online workers

Moral right protection is also critical to online workers. Online workers are not typically regarded as 'performers' by the public or their employers, but are nevertheless protected as such under the CDPA (Arnold 2016; Pavis 2018; Pavis 2020).[19] Workers to work online and/or remotely deliver protected performances via broadcast and recordings on a regular basis. For many sectors or professions, the ability to control the use of these broadcasts and recordings is critical to protecting workers' employment, as well as other economic and moral interests such as their reputation. This is the case of teachers and lecturers for example.

This should be taken into account as an added rationale for the implementation of a robust standard of moral right protection for performers for it will serve the interests of a very vast range of performers, not least teachers and lecturers.

Commentary to Question 3

This answer is based on two key points, outlined below.

Observation 6 — Moral rights provide narrow provision

Moral right protection provided by the CDPA has been interpreted narrowly by UK courts -- in relation to authorial works.[20] This jurisprudence will guide courts in the interpretation of moral rights applicable to performers, as it has been in the case in relation to other provisions similar in

response to Deepfakes with performers' rights' (2021) Convergence (forthcoming); Mathilde Pavis, Regulating Deepfakes using performers' rights (Internet Newsletter for Lawyers, 19 January 2021).

[19] Richard Arnold, Performers' rights (Sweet and Maxwell 2016) 63-76; Mathilde Pavis, 'Runway models, runway performers? Unravelling the Ashby jurisprudence under UK law' (2018) 13 Journal of Intellectual Property Law and Practice 867; Mathilde Pavis, Submission to the UK IPO: Artificial Intelligence and Performers' rights (Center for Science, Culture and the Law at Exeter, 2020).

[20] *Morrison Leahy Music Ltd v Lightbond Ltd* [1993] EMLR 144; *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274; *Tidy v Trustees of the National History Museum* (1995) 39 IPR 501; *Pasterfield v Denham* [1999] FSR 168; *Harrison v Harrison* [2010] FSR 25.

nature.[21] This technique of interpretation improves the internal coherence of the CDPA, and is expected to continue where appropriate.

Observation 7 — Low case law related to moral rights

There is no evidence or case law to suggest that moral rights protected granted to either authors or performers by the CDPA to date has stifled innovation. There has been relatively little litigation on moral right protection in the UK which could be taken as an indicator that there is no large-scale, concerning use of moral right protection to limit freedom of expression.

Commentary to Question 5

The rights of communication and showing/playing a performance in public are weak because they are (1) narrow in scope, and (2) the unclear reference to 'recording made without consent' of Section 183 -- as explained below.

Observation 8 — Narrow scope of application

Recorded performances can be communicated or played/showed in public without the consent of the performer if the recording used was made with their consent (s.183). This limitation currently impacts the protection of performances fixed in sound recording and films.

This is unlike other rights[22] to control the use of a recorded performance whereby the performer's consent is necessary at two stages: (1) for the fixation of the performance in a recording; (2) for the subsequent use of that recording, as per *Bassey v Icon Entertainment Plc* (1995).[23] In this regard, the communication right and the right to show/play a recorded performance in public is an oddity of the CDPA by contrast to other protected uses of recorded performances under Part 2, and to the corresponding right under Part 1 (s.19).

There is no clear rationale for this difference in the standard of protection between different performers' economic rights. It complicates the legibility and readability of the CDPA for no obvious benefit or justification.

Observation 9 — Unclear language

Section 183 has been described as requiring a two-stage assessment of the performer's consent (or lack thereof) (UKIPO 2021; Arnold 2016): the performer must not have consented to the recording (presumably the making of the recording as per s. 182), and must not have consented

[21] e.g. *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPCC 7, para 48 per Birss J.

[22] See, the right to make copies of a recording (reproduction right right), to issue copies of a recording (distribution right), to lend or rent copies of a recording (lending and rental right) and to make available copies of a recording (making available right).

[23] *Bassey and Another v Icon Entertainment Plc and Another* [1995] EMLR 596, 606.

to the subsequent use of that recording (the act of communication to the public, or the showing/playing of the recording in public).[24]

This reading of Section 183 is only one of the possible interpretations of the provision. Other, more complex, readings of the same provision can be made. The heading and content of Section 183 refer to two key phrases: (i) "use of recording made without consent" and (ii) "a recording which was [...] made without the performer's consent".

(i) "Use of a recording" is not defined by the act, nor it is a term of art of Part 2 which refers to controllected acts in relation to protected performances (live or recorded) using different terminology.

(ii) "A recording made without the performer's consent" or a "recording" (of a performance) can refer to the output of two different acts controlled under Part 2 of the CDPA. There can be a recording that first fixes a performance (the original recording) requiring consent due to the fixation right. There can also be a 'recording' that is the copy of a recording of a performance (the copy) for which the performer's consent is due to the reproduction right. The phrase "recording made without the performer's consent" could refer to either act.

In practice, different consent (or lack thereof) will be required depending on the recording used (original recording or copy), and the context in which these recordings have been made, to enable the communicating or showing/playing of a recorded performance in public.

Scenario 1. If the performer consented to making the original recording, and that original recording is communicated to the public or showed/played in public without consent, s.183 is not infringed. A two-stage assessment of consent is required.

Scenario 2. If the performer consented to neither the making of the original recording nor the making of copies, and that such copies are communicated or showed/played in public, s.183 is infringed (with the caveat that the person knows or has reason to believe the performer did not consent). A three-stage assessment of consent is required.

Scenario 3. If the performer consented to the making of the original recording, but not to the making of copies of that recording, and that such copies are communicated or showed/played in public, s.183 should be infringed. Another interpretation would be inconsistent with s.182A (reproduction right). A three-stage assessment of consent is required.[25]

Scenario 4. It is unclear whether s.183 is infringed in the event that the performer gave consent for the making of an original recording, or for the making of copies of such a recording for specific purposes other than, or not including, the communication or showing/playing in playing of the recorded performance. Arnold suggests that use of a recorded performance for a different

[24] UK IPO, Beijing Treaty on Audiovisual Performances: call for views (23 April 2021) Available <https://www.gov.uk/government/consultations/beijing-treaty-on-audiovisual-performances-call-for-views>; Richard Arnold, Performers' rights (Sweet and Maxwell 2016) 164.

[25] In practice, it is possible that the performer's consent to recording the performance (making the original recording) and their consent to making copies of that recording will be secured as part of the same agreement by the producer or distributor, for example. This would remove some of the complexity described above. The difficulties described in *Scenario 4* may still apply in such instances.

purpose when the recordings were made with consent in the first place appear not to be an infringement of s.183.[26] We disagree. Whilst this interpretation is possible based on a literal approach to the provision, it would **significantly weaken the right to fixation and the right to reproduction both of which are pillars of the UK framework of performers' rights**.

Further, the interpretation of what consent was granted by the performer, the types of activities they have authorized in relation to the original recording, or its copies, may also be subject to principles of contract law on interpretation. Past case law suggests that where parties agreed to the transfer of rights for specific purposes or uses of the protected subject-matter, these contractual terms were interpreted restrictively by the court, in favour of the rightsholder (*Pink Floyd* (2010)[27] on copyright).

Recommendation

For the reasons outlined above, the author recommends that the provision be modified to remove the uncertainty surrounding its interpretation. The UK IPO is encouraged to strengthen the protection afforded to performers and the rights of communication and playing/showing the performance in public uses to which their consent is required, subject to primary infringement.

This can be done via the creation of exclusive rights to that effect, or an equally strong right to equitable remuneration.

This recommendation will (a) augment the protection conferred to performers, (b) simplify the interpretation of s.183; (c) improve consistency and coherence within Part 2 of the CDPA; and (d) improve coherence and consistency between Part 1 and Part 2 of the CDPA.

With this in mind, the CDPA should be modified to read:

> **183 Infringement of performer's rights by use of recording** ~~made without consent~~
>
> A performer's rights are infringed by a person who, without his consent
>
> (a) shows or plays in public the whole or any substantial part of a qualifying performance, or
>
> (b) communicates to the public the whole or any substantial part of a qualifying performance.
>
> ~~by means of a recording which was, and which that person knows or has reason to believe was, made without the performer's consent.~~

[26] Richard Arnold, *Performers' rights* (Sweet and Maxwell, 2016) 164.
[27] *Pink Floyd Music Limited, Pink Floyd (1987) Limited v EMI Records Limited* [2010] EWHC 533 (Ch)

Commentary to Question 6

Observation 10 — Performers' lack of awareness on their rights

Research records that performers are not well aware of their intellectual property rights, and how these rights operate to their advantage in practice (Pavis & Tulti 2019).[28] This lack of knowledge and awareness negatively impacts performers' capacity to negotiate their rights (exclusive or other).

This has two key consequences: (a) existing performers' rights currently appear under-used by performers; (b) performers' rights are acquired in full and perpetuity by those who deal with performers (where such transfers are possible). Consequently, individual performers will not be in the position to take advantage of exclusive rights unless they possess or have access to knowledge of their intellectual rights and enjoy the contractual bargaining power to put such knowledge into application. This is to the exception of well-known performers, who represent a small minority amongst the performers protected by the CDPA.

This state of play will impact the effectiveness and implementation of Beijing 2012 into the CPDA, in practice. It should be taken into account when deciding whether to implement exclusive rights or a right to equitable remuneration in this instance. This should not be a factor deterring the reform because augmented levels of protection are likely to increase performers' awareness of their rights, especially if the reform simplifies the UK framework for performers' rights.

Observation 11 — collective bargaining agreements

Qualitative research indicates that exclusive rights are well utilized where collective bargaining agreements have been struck between organisations representing performers, producers and distributors. In this instance, it is our understanding that exclusive rights exploited via collective bargaining agreements have achieved higher levels of remuneration for the performers concerned in comparison to existing provisions on equitable remuneration. This observation mitigates Observation 12 (below). Representative organisations, like Equity, who have been able to put in place such collective agreements should be consulted on this point.

[28] Mathilde Pavis, Huda Tulti and Jo Pye, 'Fair pay/play in the UK voice-over industries: a survey of 200+ voice-overs' (Center for Science, Culture and the Law at Exeter, 2019)

Commentary to Question 7

Observation 12 — Narrow scope of application

The existing regime of equitable remuneration rights is too narrow and complex in its application. This could be addressed in a reform of the CDPA, should this strategy for the implementation of Article 11 of Beijing 2012 be adopted in the UK.

The narrow scope of application of existing equitable remuneration rights for performers have significant practical impact on the performers and the organisation of the sector. First, for the rights are narrow and complex they are less well-known compared to other rights, which reduces compliance by the relevant parties. Second, the rights are too narrow in scope to be worth the expense of pursuing enforcement before the court by performers themselves, or by representative organisations on behalf of protected performers. The costs of litigation outweighs the benefits the rights once enforced. Third, the rights are too narrow to generate sufficient incentive for representative organisations to invest in collecting equitable remuneration where it is due, and campaign for greater awareness and education. This leads to a loss of revenues for performers, and income taxable in the UK.

Observation 13 — Complex scope of application

The regime of equitable remuneration rights is complex. The complexity stems from: (a) the absence of a clear definition for what constitutes 'equitable remuneration' and 'commercially published'[29]; (b) unclear references to 'the owner of the copyright in the sound recording' or 'successors'[30] as the persons responsible for paying equitable remuneration; and (c) the application of equitable remuneration in the context of cross-border exploitation of protected performances is unclear.

This complexity impacts the implementation and enforcement of these rights via contracts or before the Copyright Tribunal by performers or their representative organisations. This complexity deters use and litigation in the event of infringement.

Lack of definition of 'equitable remuneration' or 'commercially published'

Neither 'equitable remuneration' nor 'commercially published' are phrases defined by the CDPA despite the fact that they are critical to the enforcement of the rights.

Case law from the ECJ gave a list of factors national courts ought to take into account in determining what amounts to 'equitable remuneration' on a case-by-base basis (e.g. C-245/00 *Stichting* referring to fixed and variable factors; Case-192/04 *Lagardere* referring to the use in trade taking into account all relevant parameters including actual and potential audience; Case-271/10 *Vereniging* on flat fees for the remuneration regarding public lending). The Copyright Tribunal has produced little to no jurisprudence on the matter. The UK will lose the assistance and guidance of the ECJ on this point due to Brexit. EU case law and regulations will be of little to no assistance to UK courts in interpreting provisions on equitable remuneration introduced

[29] s.182D(1)
[30] s.191G(3)

based on Beijing 2012. The UK will need to fill this gap in knowledge about the meaning of 'equitable remuneration' if new provisions are introduced. This guidance will also be useful for the interpretation of existing provisions of equitable remuneration.

Such guidance can come in the form of new statutory provisions within the CDPA or non-binding guidance issued by the UK IPO to support parties dealing with performances protected by equitable remuneration. The UK IPO is encouraged to draw on, and adapt, the ECJ's approach to the definition of 'equitable remuneration'.

'The owner of the copyright in the sound recording'

The CDPA points to the 'owner of the copyright in the sound recording' as the party responsible for discharging the performer's right to equitable remuneration. It would be accurate and adequAte for the CDPA to refer to the person receiving the benefits of the commercialisation of the sound recording as the party responsible for paying equitable remuneration to the performer (Arnold 2016: 120).[31] This is because the owner of the copyright in the sound recording may not necessarily be the person who is commercially exploiting the sound recording. Similarly, the performer themselves may be the copyright owner in the sound recording.

Experts have proposed that references to the 'owner of the copyright in the sound recording' be replaced with a reference to the person who enjoys the exclusive right to authorize the use of the sound recording (Arnold 2016; Laddie, Prescott & Vitoria 2011).[32] Similarly, the reference to "successor" under S.191G(3) as parties liable for the payment of equitable remuneration to performers is not clear. There is no definition of the term in the CDPA (Arnold 2016).[33]

The implementation of Beijing 2012 would be a good opportunity to make this modification; especially if equitable remuneration rights are to be extended to performances fixed in films.

Cross-border application of equitable remuneration rights

The CDPA is unclear on the application of equitable remuneration rights in the context of cross-border contract and the cross-border exploitation of protected performances. Do equitable remuneration rights arise per the place of the commercialisation of the performance, per the presence of a qualifying performer or a qualifying performance in the meaning of the CDPA? Can a UK performer based in the UK claim a right to equitable remuneration for the exploitation of their work overseas?

A reform of the CDPA bringing greater clarity on the cross-border application of equitable remuneration rights would be a welcome development of the law and a major contributor to the success of equitable remuneration rights under the UK framework of performers' rights.

[31] Richard Arnold, *Performers' rights* (Sweet and Maxwell, 2016) 120, citing Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs* (Butterworths 2011, 4th edn).
[32] Richard Arnold, *Performers' rights* (Sweet and Maxwell, 2016) 120, citing Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs* (Butterworths 2011, 4th edn).
[33] Richard Arnold, *Performers' rights* (Sweet and Maxwell, 2016) 120, 122.

Observation 14 — lack of collective and *collecting* representation

Equitable remuneration rights relies, in large part, on the collective representation of performers by a collecting society. The collective representation of performers (as defined in the CDPA) in the UK is uneven. The breadth of industries and media in which they work is not currently captured by representative organisations. Examples of performers absent, or less present in collective representation, despite their strong contribution to the UK's creative industries and heritage sector, include voice-over performers (Pavis & Tulti 2019), dance artists (Waelde 2021),[34] and Reality TV participants.

This contrasts with the position of authors (for the purpose of copyright) for which more structured and active collective representation is available. At present, performers' rights, notably performers' equitable remuneration rights are perceived within the field as 'not worth' organising for, or defending in court, due to the limited benefits they bring by contrast to the cost of enforcement.

Unless comprehensive collective representation is in place, a vast number of performers will not receive the benefit of equitable remuneration rights. Raising the standard of protection for performers under the CDPA, is likely to generate further incentive within the relevant industries to organise collective representation.

Commentary to Question 9

Observation 15 — Freedom of contract and the fair remuneration objective of performers' rights

Existing rules protect the principle of freedom of contract to the detriment of the objective of fair remuneration of the UK framework of performers' rights. The majority of performers are not in the position to leverage the freedom of contract afforded to them by the CDPA due to lack of legal knowledge or contractual bargaining power. As a result, they lose out on key benefits of the UK framework of performers' rights.

The CDPA imposes very few formal requirements or conditions to the formation of contracts arranging the transfer of performers' rights (assignments or licences). The main consequence of the non-regulation of the transfer of performers' rights means that once a contract has been formed the protection conferred by the CDPA is spent, and the matter is governed by principles of contract law.

[34] Charlotte Waelde, Submission to the call for views on audio-visual performances to the UK Intellectual Property Office (Centre for Dance Research, Coventry University, June 2021).

Ongoing research evidences that **the compatibility between principles of contract, law and the remuneration policy of the CDPA is low** (Pavis and others 2020-21).[35] Existing common law and statutory principles of contract law provide little in the form of effective regulation and protection against unfair terms for performers' contracts. Regulation of unfair terms excludes contractual transfers of intellectual property rights.[36] The doctrines of illegality, restraint of trade, duress, or undue influence have yielded little result in protection performers' interests against the transfer of their rights on the basis of unfair terms (Pavis and others 2020-21).[37]

Performers' weak bargaining position is a well-known and evidenced fact. It was addressed by Member States of the European Union in the context of the Directive on Copyright in the Single Market (Directive 2019/790, Articles 18 to 23). Similar changs to the law are under consideration at EU level for transfers of rights between consumers and online service providers (Loos & Luzak 2021).[38]

Regulations and case law in France have addressed this question by regulating contractual terms of transfers to protect and strengthen the rightsholders' bargaining position. For example, regulatory measures include declaring any transfer of IPR in future works or performances as null and void; requiring that the assignment or exclusive licensing of each economic rights be listed individually, indicating the corresponding remuneration (French Intellectual Property Code, Article L131-1 to L131-9 on copyright; Article L212-3 on performers' rights). These measures have contributed to strengthening the contractual position of performers by limiting unfair contractual terms and certain oppressive contractual practices (*UFC-Que Choisir v Twitter* (2018); *UFC-Que Choisir v Google* (2019); *UFC-Que Choisir v Facebook Inc* (2019); Pavis 2018, Pavis 2019).[39]

Performers are particularly vulnerable in two situations: when the commercialisation of their performance is subject to **chain of contracts** (combining assignments and licences); and when they have formed contracts via **an online marketplaces**.

[35] Research conducted by Pavis and the class of 2020-21 (LAW2004B) on contract law and the remuneration policy of intellectual property rights (unpublished, 2020-21). Findings available by request to Mathilde Pavis (email: M.Pavis@exeter.ac.uk).

[36] Unfair Contract Terms Act 1997, Sch. 1, s.1(c)

[37] Research conducted by Pavis and the class of 2020-21 (LAW2004B) on contract law and the remuneration policy of intellectual property rights (unpublished, 2020-21). Findings available on request to Mathilde Pavis (email: M.Pavis@exeter.ac.uk).

[38] Marco Loos and Joasia Luzak, 'Update the unfair contract terms directive for digital services' (February 2021, Study requested by the JURI committee, European Parliament) 10-20; 40-41.

[39] Paris Tribunal (Tribunal de Grande Instance), *UFC-Que Choisir v Twitter* (9 August 2018); *UFC-Que Choisir v Google Inc* (12 February 2019); *UFC-Que Choisir v Facebook Inc*. (9 April 2019). Mathilde Pavis, 'Paris Tribunal guts Twitter's T&C's ...including clause fo user-generated content' The IPKat (26 September 2018); Mathilde Pavis 'Paris Tribunal strikes again and guts Google's T&C's...including its copyright clauses for user-generated content' The IPKAT (15 March 2019); Mathilde Pavis 'Things come in threes – Paris Tribunal guts Facebook's T&C's', The IPKat Blog (6 May 2019).

Chain of contracts

Performers' contractual vulnerability in chains of contracts transferring their intellectual property is attributed to the precedent set in *Barker v Stickney* (1919) (on copyright).[40] According to *Barker v Stickney*, it is possible for an assignee who has acquired performers' rights from a performer on the condition that the performer receives royalties proportionate to the exploitation of the performance, to re-assign these rights to a third party without passing on the obligation of royalty payment. As a result, the third party is not contractually bound to pay royalties to the performer, even though they benefit from the exploitation of their performance. This ruling is consistent with the principle that the benefit of a contract can be re-assigned but not the burden.

There are ways around the *Barker v Stickney* rule but these are uncertain and yet to be tested in court (Adams 2007; Arnold 2016).[41] A better solution would be to modify the provisions of the CDPA so as to exclude the rule of *Barker v Stickney,* and require that the re-assignment or re-licensing of performers' rights carry both benefits and burdens.

Online marketplaces

A review of online peer-to-peer recruitment platforms' contracts performed by the research team indicate that their terms and conditions do not reference, signal or raise the possible application of equitable remuneration rights (Pavis & Tulti 2019).[42] This includes platforms operated by companies registered in England & Wales, or whose standard form contract nominates the laws of England & Wales as applicable to their agreement.

The contractual practice of peer-to-peer recruitment platforms also indicates that full assignment of intellectual property rights are introduced without clear and transparent notification to the parties, without providing a genuine opportunity of negotiation, and last but not least, without appropriate financial compensation.

The fact that peer-to-peer recruitment platforms apply this practice to all transactions, and on a global scale, adds cause for concern. As such, the terms of use currently applied by peer-to-peer recruitment platforms hold the potential to defeat the purpose of the intellectual property framework, circumventing measures put in place to ensure equitable remuneration for protected artists.

This type of contractual practice is currently under review in the context of consumer protection (Loos & Luzak 2021).[43]

[40] *Barker v Stickney* [1919] 1 KB 121.

[41] John Adams, 'The Passing of the burden of royalty payments' (2007) 4 Intellectual Property Quarterly 403; Richard Arnold, Performers' rights (Sweet and Maxwell, 2016) 298.

[42] Mathilde Pavis, Huda Tulti and Jo Pye, 'Fair pay/play in the UK voice-over industries: a survey of 200+ voice-overs' (Center for Science, Culture and the Law at Exeter, 2019)

[43] Marco Loos and Joasia Luzak, 'Update the unfair contract terms directive for digital services' (February 2021, Study requested by the JURI committee, European Parliament) 10-20; 40-41.

Recommendation

Existing rules under the CDPA could be improved with modifications aimed at limiting the principle of freedom of contract where it does not serve or protect performers' interests.

Such modifications could include:

(a) Introducing new conditions of enforceability of contracts transferring performers' rights similar to those enforced in France under the Intellectual Property Code, adapted to the UK's legal tradition on performers' rights and contracts;
(b) Introducing new provisions inspired by the Directive adapt to the UK's legal tradition on performers' rights and contracts.
(c) Introducing new conditions to exclude the *Barker v Stickney* rule.

Commentary to Question 12

Observation 16 — the definition and treatment of 'sound tracks' under the CDPA

There is uncertainty surrounding the treatment of 'sound recordings' and 'soundtracks' in films due to the definitions provided under Part 1 of the CDPA (s.5B(3)).

Section 5B(3) specifies that the soundtrack of a film is to be treated as part of the 'film' and not regarded as a separate sound recording when it is communicated to the public or showed/played in public (for the purpose of copyright, Part 1). The provision simplifies the enforcement of copyright in films and sound recordings. However, it is unclear how the provision applies to protected performanced fixed in sound recordings, and their subsequently use in films. This point of law is particularly important in circumstances when different parts of a recorded performance is used, for different purposes.[44]

For example, a voice-over actor may fix their voice-over performance for the purpose of a television advertisement, a documentary or animated film. The sound recording is (pre)exists, separate, from the sound track of the film, and will be integrated into it at a second stage. Is the sound recording protected as a stand alone recording of a protected performance under performers' rights?

[44] Certain acts controlled by performers' rights apply whether the 'whole or a substantial part' of a performance in which performers' rights subsist. There is no statutory definition of what constitutes 'a substantial part' of a performance. The expression is likely to be interpreted by courts to mean the same as the use of 'the whole or a substantial part' of a copyright work under Part 1 of the CDPA. The expression is likely to be interpreted by courts to mean the same as the use of 'the whole or a substantial part' of a copyright work under Part 1 of the CDPA. If so, a 'substantial part of a performance' will be interpreted qualitatively and quantitatively. See, *Designers Guild Ltd v Russell Williams (textiles) Ltd (trading as Washington DC)* [2000] UKHL 58, [2001] 1 All ER 700; *Ladbroke v William Hill* [1964] 1 WLR 273. See also, Richard Arnold, Performers' rights (Sweet and Maxwell 2016 148-149)

Another scenario may involve a performer producing their own sound recording of their musical performance, added to the sound track of a film by a third party, at a later stage. This is common practice in the production of films for the purpose of entertainment as well as advertisement. Should this subsequent use of the soundtrack be treated as the exploitation of a film or the exploitation of a sound recording? Should this subsequent use require the consent of the performer? We think it should, to confer performers with a robust level of protection. Yet, current provisions could be interpreted to mean that once a sound recording is integrated into a film, subsequent use of the film (and the sound recording in its sound track) no longer requires the performers' consent or equitable remuneration.

Conversely, it is not clear how the provision would apply to performances fixed in film but from which only the sound recording (or sound track) is subsequently (i.e .without the moving images capturing the visual dimension of the performance). For example, the performance of an actor may be fixed in a film, and the sound track subsequently used for the purpose of an audio-only release via the radio or online platforms. Should this subsequent use of the soundtrack be treated as the exploitation of a film or the exploitation of a sound recording? Should this subsequent use require the consent of the performer? We think it should, to confer performers with a robust level of protection.

This lack of clarity on the treatment negatively impacts on the application of existing equitable remuneration rights applicable to sound recording, and the right to communication, show/play a recorded performance in public. These issues will be repeated in the reformed version of the CDPA if provisions on sound tracks are not modified.

Recommendation

Any recording of sound capturing a protected performance capturing a protected performance should be treated as a sound recording, regardless of the purpose or context in which it was made. Treating certain sound recording as 'sound tracks' of films risks complicating the enforcement of performers' rights and prejudicing the interest and protection of performers. Voice-over performers, in particular, would be negatively affected by the treatment of sound tracks as a part of films.

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