

PART III

**(9) THE ISSUE OF COPYRIGHT PROTECTION FOR PERFORMERS -
MAJORITY VIEWS**

60. The Rome Convention does not require the introduction of a property right. To do so would clearly go further than is required by the Convention. Article 7 prescribes the 'rights' that are to be afforded performers and limits performers' protection to the possibility of preventing unauthorised fixations, broadcasting and communication to the public of a live performance and the reproduction of unauthorised fixations or authorised fixations for unauthorised purposes. It does not require the creation of a copyright reproduction right as distinct from the right of first fixation. Nor does it require States to grant performers further property rights in respect of subsequent uses such as public performance and broadcasting rights.

61. The case for conferring copyright protection for performances was presented by the Australia Council and a number of organisations representing performers, namely Actors' Equity, the Musicians' Union and the Performers' Collecting Society. They claimed that the development of technology which permitted the fixation of performances, simple methods of creating copies of those fixations, and greater varieties in methods of distribution have created a situation in which the only way in which performers can be equitably remunerated for the use of such fixations is through the granting of copyright in performances. This would also ensure that performers benefitted automatically from new uses which might be made possible by further technological developments. It was claimed that the levels of remuneration

for such uses rest entirely on the industrial strength which performers can muster and this is not great because of high levels of unemployment among performers and their vulnerability to victimisation. Present performers' rights rest on contracts which must be enforced by individuals and performers frequently lack the resources to do this. Although collective agreements exist in many sectors of the entertainment industry, they do not bind all producers. Moreover, attempts to enforce adherence to collective agreements through industrial action have in Actors' Equity's view been unreasonably limited by the use of section 45D of the Trade Practices Act 1974.

62. It was also argued, on behalf of performers, that the system of contractual negotiation is deficient in a number of respects. First, because of the basic principle of contract law that a contract does not bind third parties, a performer is unable to enforce any rights against parties other than the producer of the fixation. Therefore, where the rights to a fixed performance are sold to a third party, that person is liable to the producer of the fixation, but is not liable to the performer. Further, if the fixation is used in a manner which does not accord with the terms agreed to between the producer and the performer, the performer can neither restrain that use nor can he or she seek damages from the third party. Secondly, it was claimed that even where contractual agreements are used that provide for remuneration in respect of secondary uses (such as repeats which can be purchased up front by the producer) they are unsatisfactory. One reason for this is that producers are often not in a particularly strong financial position and cannot offer sufficient remuneration adequately to compensate performers. Thirdly, it is very difficult, if not impossible, at the time of production to determine accurately how successful a particular production will be or how large the demand for secondary uses will be.

63. It was claimed by those representing performers that granting of copyright in performances would solve many of these difficulties, as well as being philosophically and ethically justified. It would give performers a secure base from which to negotiate with producers and access to an independent arbitrator - the Copyright Tribunal - if agreement could not be reached. Rights of performers would be capable of being effectively enforced. Performers would be assured of a share of income from secondary uses and from any new uses which may become possible through technical change. Rights of performers would be able to be effectively enforced against employers and third parties. Copyright in performances could be effectively administered through a collecting society.

64. There is a division of opinion within the Committee on the central question whether a copyright should be created in 'performances'. The views of the majority of the Committee on this matter are set out below.⁹

65. In the majority's view the case for creating a copyright in 'performances' was based principally on two arguments:

- (a) there was a need to strengthen the individual and collective bargaining position of performers, including their legal position vis a vis third parties (discussed in paragraphs 66 to 107); and
- (b) performers brought as much creativity, skill and originality to their performances as did authors and accordingly performers should have statutory legal protection the equal of that granted to authors (discussed in paragraphs 108 to 116).

(a) The Individual and Collective Bargaining Strength of Performers

66. Remuneration for performers in Australia is presently determined at three separate levels. These are first, at the negotiation stage, where the performer or the performer's agent bargains for the terms of the performer's contract, secondly, by employment awards made by the Arbitration Commission and, thirdly, by collective agreements negotiated by performers' unions with industry representatives. Arbitration Commission awards cover matters such as hourly rates of payment and hours of work, while collective agreements cover matters such as payment for repeat fees, residual fees (overseas uses of the recorded performance), and ancillary usage (uses such as home video, pay and cable television, but not normal television broadcasts and theatrical releases).

Awards and Industrial Agreements

67. The following briefly sets out some of the Federal industrial awards and agreements that affect performers in Australia. The industrial awards and agreements negotiated by the Musicians' Union for the benefit of its members include:

- . The Standard Agreement for Performance by Musicians in Programmed;
- . The Musicians (Casual Employment in Television) Award 1982; and
- . The Musicians (Casual Employment in Records for Sale to the Public) Award 1980.

The Committee notes that various State awards exist which, in essence, mirror the provisions of the Federal Awards.

68. The Musicians' Union was also involved in the establishment of the Phonographic Performance Company of Australia Limited (PPCA) Performers Trust. PPCA collects licence fees for the broadcast and public performance of sound recordings. A proportion (25%) of the net collected funds is distributed to a trust fund, the beneficiaries of which include members of the Musicians' Union and Actors' Equity, and students of the performing arts. Grants are made by the trustees for such purposes as prizes for music exams, music workshops and generally for the encouragement of music and the performing arts.

69. The performers' unions have successfully negotiated a number of agreements, the terms of which are usually incorporated into performers' contracts. Actors who perform for commercial television receive remuneration for the secondary uses of their performances in accordance with the Australian Television Repeats and Residuals Agreement (ATRRA). This is an agreement between Actors' Equity and the Commercial Television stations which provides for the payment of residuals, repeats and ancillary uses. All payments to performers for these uses are calculated as a percentage of the 'basic negotiated fee'. (This fee is comprised of the minimum award payment together with whatever personal margin the performer is able to negotiate with the producer.) Differing scales of payment apply in respect of each type of use. However, in general terms a performer is entitled to be paid for a fixed number of repeat uses. If the performer wishes, he or she may sell any number or a limited number of those repeat uses 'up front'. Payment for these uses is calculated as a percentage of the basic negotiated fee. The percentage decreases as the number of the uses for which payment is made increases.

70. Unlike their counterparts who work for production companies servicing the commercial television stations, most performers working with the ABC do so in an employer-employee relationship. Accordingly, the payment of repeat and residual fees to these performers is regulated by a determination of the Commonwealth Public Service Arbitrator (Det. No. 114 of 1974). This, like the ATRRA, provides for payments to performers for repeats to be calculated as a percentage of their basic negotiated fee. Payments in respect of overseas sales are calculated at 16 2/3 percent of the gross revenue from the sales and disbursed among the employees engaged in the recording of the programme.

71. The rights of performers working in advertisements have been negotiated in a 'memorandum of understanding' between Actors' Equity and the Advertising Federation of Australia. The memorandum sets out a standard contract to be used by agencies, producers and artists.

72. Finally, there are three major Federal theatrical awards that govern the employment of performers in theatres. They are:

. " The Actors (Theatrical) Award 1981;

. The Opera Award 1980; and

. The Ballet Award 1979.

Individual Bargaining Position

73. Obviously, remuneration will vary greatly from performer to performer. Performers whose services are in demand probably earn what are, by community standards, well-above average incomes, while the majority who cannot find full-time employment as performers earn much less by comparison. This

reflects the fact that many are attracted to work in the performing arts, but comparatively few succeed. Although this is really a matter of common sense, statistical support for the proposition can be found in a comprehensive Canadian study carried out in 1981.¹⁰ Interestingly, the authors of the study, Globerman and Rothman, come to the conclusion that

'since a performers' (copyright would, if anything, decrease the employment opportunities of most performers, it would not contribute meaningfully to the goal of increasing performers' incomes.'¹¹

74. The discussion below deals separately with the relationship between actors and film makers on the one hand, and musicians and makers of sound recordings on the other, before providing an assessment of the possible effects of a grant of a performers' copyright.

Performers in the Film Industry

75. It is relevant, in considering the relationship between performers and film makers, to examine first the relationship of producers with film distributors and television. This will demonstrate the complex chain of negotiations required from employment of performers to sale of major films for television and theatrical distribution.

76. By way of background reference should be made to the considerable assistance to film production provided by the introduction of tax incentive measures under Division 10BA of the Income Tax Assessment Act 1936. This Division enables investors contributing to 'qualifying Australian films' to claim substantial tax deductions against their investment. 'Qualifying Australian films' include feature films, telemovies, television mini-series and documentaries.

77. To secure investment towards qualifying Australian films, the film producer must usually secure what is known as a **'pre-sale'** (an agreement from a distributor or television broadcaster to purchase the relevant rights, payment being made usually upon the delivery of the programmed). The purpose of the pre-sale is to satisfy the prospective film investors that the combination of the tax deduction and pre-sale will generate a sufficient internal rate of return for the investor to commit funds.

78. Owing to the requirement for **pre-sale**, the film producer must negotiate prior to commencement of financing, let alone production, a distribution agreement for the film.

79. As film distribution is as speculative as film production, and because the distributors guarantee money prior to commencement of the production of the film, the distributor is in a strong negotiating position to obtain considerable concessions from the film producer.

80. Standard terms and conditions for most distribution agreements include some of the following warranties:

1. That the picture when delivered to the distributor will be free and clear of any liens, claims or demands of any kind or character whatsoever which would in any way prejudice, affect or be inconsistent with the rights granted to the distributor.
2. That the picture including the contents thereof will not violate or infringe upon any rights inter alia trade mark, trade name, copyright, patent or any literary, dramatic, musical, artistic, personal, private, civil, contract or property right or right of privacy, right of publicity, or any other right of any person, firm or corporation.

3. That all persons who perform services in connection with the picture have received full payment with respect thereto and with respect to any and all uses of the picture as authorised within the distribution agreement, and that no fees, charges or other payment whatsoever will be payable by the distributor or by any parties claiming under the distributor or licensed by the distributor to broadcast, distribute or otherwise exploit the picture or any of the rights granted under the agreement, to any producer, director, actor, **writer** or any other person who performed services or furnished material in connection with the picture or to any union by reason of the broadcast, exhibition or any other use of the picture or the exercise of any rights granted under the agreement.
4. That the owner of the film controls or owns all motion picture and allied rights in and to the picture and all literary, dramatic and musical material and all payments relating thereto have been fully **paid** and discharged.
5. Delivery requirements of most distribution agreements require the following under 'Copyright Information' : detailed information as to the copyright proprietor(s) of the picture as well as copies of all copyright registrations and/or assignments of copyright in the owner's possession (or in the possession of the owner's agents or attorneys) pertaining to the picture or any component element thereof.

81. It can be seen from the brief summary above that the delivery requirements and distributor's requirements are extensive and broad. Whether or not the distributor enters

into a pre-sale agreement prior to completion of the film, or enters into a distribution agreement after receiving and viewing it, there are inherent risks in film distribution and high costs of distribution, such as **film prints, advertising, promotion, sub-distribution fees, interest on advance paid, market research and multi-market exploitation.**

82. Although producers usually have a strong bargaining position vis a **vis** performers, local and international distributors, and broadcasters, in turn, normally have a much stronger negotiating position than producers. Unless performers' protection were widely recognised internationally, Australian producers would be severely disadvantaged in their dealings with distributors if they were not in a position to contract for the distribution **of** films free of all rights or claims on the part **of** performers.

83. The majority notes also that, in addition to medium to large budget film productions, there exists in Australia a significant sector of the film and television industry which operates on a much smaller scale. This section of the industry has comparatively low **budgets**, and produces, in particular, educational and training films. It nevertheless provides regular employment at Actors' Equity rates for a large number of performers. Many of these small operations may not have the administrative or financial infrastructure to provide additional ongoing remuneration in respect of subsequent use of material incorporating performers' performances.

Musicians Performers for Recording Industry

84. Insofar as musical performers are concerned, the majority notes that evidence accepted by the Copyright Tribunal in its 1979 Inquiry into the mechanical royalty **rate**, demonstrated

'the increasing bargaining power of the successful artist and that the copyright owner's share of revenue from record sales had deteriorated when compared to the artist as well as the record manufacturer during the period 1968-78' .12

85. Generally speaking, musicians provide their services **to** the recording industry on one of two bases: as 'session' (ie background) musicians performing under the relevant award, or as featured performers under recording contracts with record companies. It is useful to summarise the position that generally applies now in regard to both kinds of performers:

86. The Musicians (Casual Employment in Records for Sale to the Public) Award 1980 binds members of the Musicians' Union of Australia and virtually all recording companies throughout Australia. It specifies rates of pay to apply to 'session' (background) musicians for 'calls' (that is, performances or rehearsals or recording sessions or combinations of these for a minimum duration of three hours).

87. Contracts with featured performers:

- (a) generally provide for payment of a royalty, in respect of all sales of records and tapes embodying the performer's performances, calculated as a percentage of the retail selling price of such records or tapes;
 - (b) generally further provide for the performer to receive from the recording company a percentage (often 50%) of all monies received by the recording company in respect of secondary or other uses of the recording embodying the performer's performances, for example, deriving from casual video exploitations
 - (c) sometimes provide for an 'advance' **against** future royalties to be paid.
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88. In summary then, it may be said that session musicians are remunerated in a way which reflects the 'background* nature of their contribution to the recording - on a fee-for-performance basis - while featured musicians, on the other hand, are paid royalties by their record companies in respect of any income generated from the sale or other exploitation of reproductions of their performances.

Possible Effects of Grant of COPYRIGHT to Performers

89. It is next necessary to consider the likely practical effects of the grant of a performers' copyright on the music, film and television industries. In essence, a copyright for performers would involve the control of the public performance, broadcasting and diffusion by cable (collectively referred to as 'the performing right') as well as the right of reproduction.

90. It is obviously difficult to predict with certainty the practical outcome of the grant of such a copyright, given the competing aims and strengths of the different interests involved. To the extent that individual performers are in a weak bargaining position, the ultimate effect of granting a performers' copyright might be negligible. Given the considerable oversupply of performers and the commercial needs of producers and distributors for an end product incorporating all relevant rights, performers might be faced with a situation in which they are forced to 'contract out' of their rights in **favour** of producers. In this connection, it should be noted that common to all submissions in **favour** of a performers' copyright was the view that performers should be able to deal contractually with their new rights in whatever manner they see fit. On the other hand, depending to some extent on the way in which the rights were exploited, there could be quite significant effects in the industries concerned.

91. Insofar as the right of reproduction in a material form is concerned, little was said in the submissions by those proposing a performers' copyright about the way in which such a right would be administered. In answer to questions put by the Committee, however, it was stated by those representing performers that it was not envisaged that such a right would be collectively administered.

92. In the majority's view, if the reproduction **right were to** be retained and licensed (or assigned) on an individual basis by performers, there would likely be little change in the commercial relationship between performers and producers. If, however, the right - or at least part of it - was assigned **to**, and administered by, a collecting society, significant changes to that relationship could occur. For example, it is not difficult to envisage the video reproduction right of performers being administered by a collecting society in order to achieve a system of royalty payments for performers based on actual video sales. Such a situation would obviously have important implications insofar as the present **'pre-sale'** arrangements between film producers and distributors (see paragraphs 75 to 83) **are concerned.**

93. By way of further example it is not difficult to imagine that collective ownership and administration of a musicians' right of reproduction on recordings for sale to the public would be a potentially attractive means of securing higher payments for session musicians. This would clearly have an important effect on the relationship between performers and recording companies.

94. Moreover, it is by no means clear in relation to the second example above, or indeed in relation to any other aspect of the proposed reproduction right, how the collective administration of such a right would sit with existing industrial awards relating essentially to the same

activities. For example, a blanket **licence** negotiated on behalf of musicians by a collecting society administering their reproduction right would provide them with remuneration for uses of their fixed performances. Those same uses will also have been taken into consideration in the negotiation and fixing of the award governing the employment of musicians.

95. It was proposed by those seeking a performers' copyright that the performing right component of such a copyright would be administered by a central collecting society. It was not, however, envisaged that the society would have an exclusive (statutory) right to deal with these rights and performers could deal individually with them, even to the extent of waiving them.

96. The grant of a copyright in performances would, in the absence of a system of compulsory licensing, enable a single performer, by exercising any of the exclusive rights (in particular, reproduction, broadcasting and public performance), to prevent the use of a recorded performance involving tens or even **hundreds** of other performers.

97. This problem was readily acknowledged by the proponents of a copyright for performers who accepted that a system of compulsory licensing, where the performers' right becomes a right to remuneration, not a right to prevent the use of the material, would be acceptable. They saw any further practical problems being overcome if these rights were administered by a collecting society. Performing right societies (which presently administer broadcasting and public performance rights on behalf of composers and music publishers) such as APRA were offered as the model upon which the performers' collecting society would function (see paragraph 14 and Appendix 5). The Committee also heard evidence of the workings of performers' collecting societies in the Nordic countries, societies which evidently function very effectively.

98. There are, in the majority's view, however, important differences both between organisations like APRA and any performers' collecting society, and between the situation that exists in a country like Sweden and the situation in Australia. Insofar as APRA is concerned, it has been operating for over sixty years and in a very real sense it 'grew up' with broadcasting from which most of its revenue is derived. Indeed, it had been operating for approximately thirty years and already had the necessary infrastructure and rights by the time its major licensee, the television industry, came along. Furthermore, it was part of an international network of similar societies each of which had an administrative framework and controlled the rights to its national repertoire. The Performers' Collecting Society would find itself in a very different situation on both counts.

99. Similarly, the Professional Organisation of Swedish Artists and Musicians (SAMI), whose representative provided the Committee with a most interesting and valuable picture of the situation in the Nordic countries, was established more than twenty years ago in the context of having to deal with a single Government-operated broadcasting organisation which supported the principle of performers' rights. Furthermore, the majority of broadcasting time in Sweden was (and is) allocated to performances of Nordic origin. (The significance of this is that most of the other Nordic countries also provide statutory protection for performers, thus facilitating a workable system of reciprocal treatment.)

100. By contrast, in relation to broadcasting, the performers' collecting society in Australia would face a commercial broadcasting industry strongly opposed to the notion of a performers' copyright, as well as airwaves dominated by Anglo-American **programme** material, the performances in which would presumably not attract performers' protection under Australian law.

101. It is significant that the United Kingdom and the United States do not provide a statutory performing right for performers. If Australia were to grant such a right for all performers, it would be remunerating performers of those countries for something that their own country did not recognise. If, on the other hand, Australia were to limit such a right to Australian performers there would be a major incentive for broadcasters not to use Australian material.¹³

102. In this regard it is necessary to consider the Australian Broadcasting Tribunal requirements for the broadcast of a specified amount of Australian material on both radio and television. The Committee understands that in practice the amount of Australian material broadcast varies, with a number of broadcasters exceeding the specified levels while in some cases the required levels are not satisfied. In any event the effect of a requirement to pay more in respect of Australian than overseas performances must, in the majority's view, be that broadcasters will reduce their use of Australian material. Other users would face similar difficulties. This would have significant economic and public policy implications for the relevant Australian industries - a matter that in the majority's opinion has been given insufficient attention by those supporting performers' claims.

103. The Committee notes that in the United Kingdom and the United States there is no major debate about the introduction of a performers' copyright. The April 1986 White Paper does not address the issue in its discussion of the strengthening of the United Kingdom Performers Protection Acts 1958-1972. In both the United Kingdom and the United States there is available a system of collective bargaining between performers and the end users of the fixed performance (although it should be noted that in the United States there is no broadcast right in respect of sound recordings).

104. The majority regards the arguments in **favour** of copyright in performers' performances as **involving, in** essence, an attempt to provide an addition to the industrial arbitration system by which terms and conditions of engagement of performers are determined. This is not in itself an argument against granting a copyright if it were otherwise justified. On the other hand, it is important to have regard to this underlying purpose in examining the claim on behalf of performers for copyright. It would seem that what is sought is a legally effective basis on which collective bargaining can be introduced so as to enable remuneration to be sought directly from the broadcaster as 'end user' of the material incorporating performers' performances.

Third Party Use

105. Another aspect of the claim for an improvement in the position of performers concerns the legal difficulties encountered because performers are unable to enforce contractual rights against third parties (that is, parties other than those with whom they have a contract).

106. It was argued that the new technologies such as video, satellite and cable transmission compound the problems for performers. For example, if an actor contracts with a film producer to act in a film and to receive a royalty for each video-cassette of the film sold to the public, the actor will have no right to sue a third party, to whom the producer sells video-cassette rights, for his or her royalties.

107. Clearly, performers may face difficulties in securing remuneration through their inability to enforce contracts against third parties, particularly when the parties with whom performers contract become bankrupt or go into liquidation. The same kinds of problems are also faced by other sectors of the community. Indeed, copyright owners themselves face these

problems. For example, if an author assigns copyright to a publisher who assigns its rights to a third party, the author will not be able to sue the third party for royalties payable by virtue of the original contract between the author and the publisher. A cause of action may lie against the publisher, but similarly, the actor may have a right of action against the film producer in the example referred to above. The position will depend, upon the terms of the contract between author/actor and primary user. Perhaps more importantly, it would seem, on the basis of the information available to the Committee, that the problem is not particularly widespread and thus not significant enough to give cause for the creation of special legislative protection for performers.

(b) The Creativity of Performers

108. It was submitted by those representing performers that actors, dancers, singers and musicians can, and often do, bring creative skill to their performances. The majority - indeed the entire Committee - has no argument with that submission. Taken at face value it is an appealing argument. In the majority's view, however, the real issue is not whether performers are creative, but whether there is a need that they be granted a property right in the nature of copyright.

109. One matter that the majority considers highly relevant in this context is that there are undoubtedly other contributors to the processes of artistic and cultural endeavour whose claim to a copyright, if the sole criterion was creativity, would be as great as that of performers. The majority has in mind, for example, film directors, editors, record producers and cinematographers.

110. Moreover, there seems to the majority to be an inherent contradiction in the argument advanced by performers. It is a contradiction which indicates to some members of the Committee that there may not be a sound philosophical basis to the

argument for a performers' copyright. It is this: while creativity is advanced as the underpinning reason for a performers' copyright, no protection is sought by performers from the copying by other performers of the original characteristics of their performances.

111. Thus, while there are traditionally two aspects of copyright (ie. the protection of originality of expression in a material **form and** the creation of a basis for remuneration) a copyright for performers is sought only for the latter. It seems to the majority that the underlying purpose of the claim as one for remuneration manifests itself in two ways:

- (i) the suggestion that a performer should be entitled to restrain or seek legal relief against another performer who copies his performance (whether it be the interpretation of a role or the playing of a musical work) was disclaimed by those representing performers;

- "(ii) the suggestion that individual performers would have individual "proprietary rights in collective performances (for example, films involving many actors or records of orchestral performances) was disclaimed in favour of the view that the right would be a collective right, enforceable only at the instance of a collective representative. It appears that collectivity would be a part of the right itself, as distinct from merely being a convenient means of administering many individual rights (as is characteristic of the administration of composers' rights).

112. To the extent that the claim is solely one for additional remuneration, the discussion concerning the issue of a strengthened bargaining position for performers under (a)

above is relevant. It is nevertheless necessary to consider the question whether, notwithstanding the nature of the claim, it would be appropriate to confer copyright, as a property right, in performances. That is, is it an appropriate mechanism for enabling performers to seek remuneration for their performances?

113. The argument was ~~put to~~ the Committee that 'property' exists in a performer's work and that the **Copyright Act** should be amended to recognise this 'property'. This argument misunderstands the basis on which the law recognises a property right. The **Copyright Act** itself creates the property in, for example, a literary work - the right does not exist apart from the Act. A property right, in the form of a copyright, is granted because it is thought that it is appropriate to provide that form of protection for authors. Property rights of a different form are recognised by the law for the protection of land", goods and other entities. The fundamental question therefore is not whether the **COPYRIGHT Act** should recognise a performer's property because no such property exists. Rather it is whether the appropriate way to protect performers is through the creation of a property right in the form of a copyright.

114. In this context it is worth quoting Stephen Ladas who spoke of the basis of copyright in the following terms:

'To secure the **interests of** the author, the law has adopted and recognised certain legal rights with correlative legal duties subjecting other persons to prohibitions of conduct. The delimitation of the author's legal rights and the determination of the legal powers or capacities for their enforcement should be governed primarily not by any conceptions related to specified categories of rights (property right or general right of personality), but by the weighing of the interests that these rights purport to secure in the whole scheme of interests that the law seeks to satisfy and protect. In this connection the interests of users of the authors' creations and the social interest in the advancement of culture or the **progress** of arts and letters are to be considered. '14

115. One of the reasons for granting copyright in something is to provide an incentive for its production. The entity or activity is seen as providing benefits to society. Without the economic return that the exploitation of the copyright would provide, resources would not be devoted to its production - hence the grant to authors of the monopoly rights which copyright confers. There does not seem to be the need to provide this incentive to performers. Indeed one of the reasons advanced for the grant of the rights sought was that there are a large number of persons anxious to perform and that has resulted in performers being in a weak bargaining position.

116. Moreover, the majority perceives other, substantial difficulties with the proposal. Who are to be the 'performers' protected and which 'performances' are to be protected? The practical problem of where to draw the line between those whose artistic or creative contribution warrants protection and those whose role is insufficient to do so will be encountered in relation to the Committee's recommendations that performers have a right of action in respect of bootlegging (see paragraph 48). However, the difficulties would be even greater where a direct right of remuneration is involved. Wherever the line is drawn the result would be an arbitrary one to some extent. It might be considered that a narrow definition of performers contained in the Rome Convention should be adopted. Even such a narrow definition would, for example, provide to a television quiz show compare or newsreader a copyright in his or her delivery of the scripted comments, questions or news. Whether such a result is appropriate seems to the majority to be questionable.

conclusion

117. In the majority's view the case for a performers' copyright fails on a combination of philosophical and practical grounds.

118. It seems to the majority that what is in substance sought by those representing performers is not a 'copy-right' at **all**, but rather a convenient basis upon which a system of enforceable collective bargaining can be superimposed upon the arbitration system. The issue, in a very real sense, is an industrial issue rather than a copyright issue.

119. The practical problems associated with a performers' copyright seem to the majority to be considerable. To some extent they would depend upon the precise nature of the rights comprising the 'copyright' and the areas in relation to which statutory **licences** were enacted. The overall effect, however, would be disruptive in the several industries where fixations of performances are used and a substantial disincentive within those industries to utilise the performances of Australians.