

PART IV

MINORITY VIEWS

Introduction

120. A minority of the Committee is persuaded that performers should be granted a copyright in their performances; or a property right akin to copyright.

121. Before the invention of sound and visual recording a performer could have only a personality right in his or her performance. However, once a performer's performance could be mechanically fixed the once ephemeral performance could acquire permanence. At that stage the performance needs to be protected, and the performer should have the benefit of that protection.

122. The minority has reached this conclusion for the following reasons:

- (a) just as copyright law for authors in the traditional sense did not arise until fixation was possible, so now that performances are capable of being fixed the 'creators' of such performances, the performer or performers, should be protected by copyright law;
- (b) the justifications associated with copyright in its present form apply equally to performances which are fixed;
- (c) performers easily fulfil the test of originality which is the basis of copyright;

- (d) the industrial system upon which performers now rely is not an adequate alternative to copyright protection. Only copyright protection can provide a framework in which payment for use occurs, including payment for new uses;
- (e) the international situation is such that copyright protection would be appropriate;
- (f) there is a strong demand within Australia for such protection; and
- (g) the practical difficulties involved in the implementation of a copyright right for performers are not so great as to warrant denying performers this protection.

(a) The Fixation of Performances

123. Copyright does not subsist in ideas. Copyright subsists only in the tangible product which embodies the ideas.¹⁵ Before performances were capable of being fixed, they were ephemeral and not capable of being copied, or even imitated except by other performers. A performance which is not fixed is similar in concept to a story which may be recited - the story, if written down, is protected by copyright as a literary work. If not reduced to material form, the story is not protected by copyright. This is because the originality which is required for a grant of copyright is not in the ideas but in the expression of ideas in material form, for example, in print or writing.¹⁶ The minority believes it is now time for copyright to adjust not only to the fact of fixation of performances but the ease with which performances can be recorded:

'Performers - singers, musicians, actors, dancers, vaudevillians, comics, clowns - have for generations exercised their skills on stage, their performances ephemeral, accomplished and finished in the act of performance. There was no need for copyright type protection since the only people who would imitate the

performance would be other performers . . . However, with the rapid development of technology, it has become not only possible but common place to 'fix' a performance in a permanent form by sound recording, film or videotape. The resultant product is the result of the artists' talent and labour but the law gives them no rights over such fixations or their subsequent unauthorised use. It is therefore likely that performers are unfairly disadvantaged in the furtherance of their careers and their economic **potential.**'¹⁷

124. In its submission the Musicians' Union of Australia claimed that the whole basis of the economic and industrial life of the performing musician has been altered because technology has meant that their performances can be fixed, copied and then exploited or used by others dealing in or with those copies.

125. The most serious consequence of technology and the fixation of performances is that it obliges the performer to compete against him or herself. The extent of this competition is not often realised. It was described by the Musicians' Union in its submission:

"The fixed performances put on to the market by the record, film and broadcast industries are also commercially exploited by others. In the entertainment sector a dance company when staging a ballet may decide to use backing tapes or existing recordings rather than employ live musicians, recordings may be used in plays, film makers may include a number of recordings in the sound track, and so on. Other sections of the market may also utilize records and fixations, the owners of discotheques offer their patrons not live musicians but sound recordings of musicians' performances to dance to, while shops, hotels, clubs and even manufacturing industry use recordings, or broadcasts of recordings of performances, as background music.'

(b) Copyright Protection is Appropriate

126. The minority believes that for all the usual, although varying, reasons given as justification for copyright protection for those works which are presently protected, performances which are fixed should be similarly protected.

127. One of these justifications is what is termed the economic argument which largely forms the historical philosophical foundation for the Anglo/Australian system of copyright. Generally, it states that whoever takes the financial risks associated with creating works should be allowed to reap the benefits. This is only possible if that person or entity is protected by a right because, otherwise, a copyist can produce the same work at a lower cost because he or she has not taken any of the financial risks associated with creation. The consequences are twofold: the copyist will be unjustly enriched; and the originator will be deprived of the incentive to create similar materials.¹⁸

128. At first glance the economic argument appears to disqualify performers who are not generally seen as taking the financial risks associated with creating records or films. The record or film producers who pay the performers a salary for their services in the creation of a record or film are the entities seen as taking the financial risk. But 'financial risk' in this context must be seen as including not only the money which may be invested in the production of a work but the lost employment opportunities which a performer's fixed performance represents. A literary author receives a reward through his or her ability to collect royalties or to sell the right to royalties, based on the future exploitation of that work. Often an author, if he or she is popular, will receive an up-front payment from a publisher for a work. Performers, although they are often paid for the initial time they spend in creating a performance are not entitled to any payments for the future uses of a fixed performance. The minority believes this is inadequate given that a performer has, in a very real sense, to compete against these future uses of a fixed performance.

129 The minority believes that owning copyright will not directly improve the bargaining position of performers where previously contract allowed for payment for future use. However, the minority believes performers' copyright will assist in providing a framework for performers' contracts, payment for use as use occurs.

130. Payment as use occurs is the underlying principle of copyright, unlike the industrial system on which performers now rely which looks to increases in productivity to justify increased payments and is essentially related to hours and conditions. The copyright concept is payment for use of the product of one's skill and labour. The minority believes that as a consequence of the present failure of the law to adequately recognise performers' rights, performers are unable to control uses of fixations of performances not covered in their initial contracts and performers are also denied any economic return from such uses, except insofar as they were anticipated in the original contract.

131. Another major justification for copyright protection is based on that principle of 'natural justice' which says that a work is an expression of the creator's personality. The creator should be able to decide whether and how his or her work is to be published and to prevent any injury or mutilation of it. This is an argument based on moral rights ideology which is presently not specifically adopted in Australian copyright law, but which is the subject of a "separate reference to the Committee. The relevance of it here is that the rationale behind moral rights applies equally to performances as it does to the creation of presently protected works.

132. Nevertheless, moral considerations do play a part in the Anglo/Australian copyright philosophy. Prevention of unjust enrichment of persons who have not taken any of the risks **or** invested any of the finances associated with the creation of a work is, as was explained above, one aspect of the economic justification of copyright protection. The 1709 Statute of Anne from which the Anglo/Australian copyright system is derived was expressed to be for the 'Encouragement of Learning'. The encouragement of creativity is often given as one of the justifications for copyright. Within the scheme of the Act the protection for a literary, musical, dramatic or artistic work is granted to the creator. The financial contributions made by the copyright entrepreneurs, for example, publishers and printers, are only indirectly protected. In the case of fixations of performances the essential creative contribution - the performance - has been by-passed. The importance of the performance is stressed by the Australian Film Commission in its submission:

'Film production, then, is the performance of the actors, necessary to create the work in fixed form. Performance is a creative component in film production, as on the live stage. Performances create the work, and reproduce it.'

133. It is often argued that performers need no encouragement because they are sufficiently encouraged (protected) by collectively bargained awards which establish conditions for their services. The minority, as will be seen, rejects this argument. Just as importantly, the minority feels this is not sufficient reason to deny performers* rights which, in principle, could only be seen as fair. The Musicians' Union, in its submission, refers to the inequality whereby only the contribution of the performer is not protected by copyright:

'Composers, arrangers and lyricists are granted copyright in original musical and literary works. Those who cause recordings or films to be made of those works or musical ideas are in fact making recordings or films of

performances of the works or ideas and are granted copyright in sound recordings or cinematographic films. The broadcasting organisations which broadcast either live performances or fixed performances in the form of records or films are granted copyright in those broadcasts. The contributions of all of these persons or organisations is recognised as valuable and deserving of protections spelt out in exclusive rights regarded as appropriate to the economic and other needs of their industry. It is only the contribution of the performer which is not recognised and which is denied a protection appropriate to the economic and industrial needs of those who provide it. This denial of copyright to performers is anomalous and unfair. '

134. The minority also rejects the proposition that the 'incentive' argument does not apply to performers because of the large number of persons anxious to perform. This is not the point. It is each individual creator that copyright seeks to encourage. The measure of each creator's worth is necessarily subjective. A critical factor is the reception by the public. If one creator is more popular than another he or she will be rewarded to a greater degree. This is what copyright seeks to achieve. If, **for** example, records are purchased or cinemas filled because the public wants to see or hear particular performers or particular performances, the performers concerned should benefit accordingly; just as authors of works are remunerated according to gross revenues, **or** 'films' profits, or royalties on copies sold. Performers' remuneration should be a mixture of fees for services and royalties for subsequent uses of the fixed versions of their performances. In this way the creativity of performers - on an individual basis - would be encouraged.

(c) The Requirement of Originality

135. In the view of the minority the performer's contribution easily meets the test of originality which is the basis of copyright:

'...some original result must be produced. This does not mean that new or inventive ideas must be contributed. The work need show no literary or other skill **or** judgment. But it must originate with the author and be more than a copy of other **material.**'¹⁹

136. The case for a copyright in performances is strengthened by the comparatively small degree of originality required for a literary work, for instance, to be regarded as 'original*. In the case Ladbroke (Football) Ltd v William Hill (Football) Ltd[1964]1 WLR 273 Lord Hodson said at p. 287:

'If the plaintiffs have employed more than negligible skill and **labour** in their selection of 16 lists containing varieties of bets which they offer their customers they are entitled to be protected in respect of their coupons as being original compilations.'

137. Courts have recognised the copyright of authors of a doctor's medical certificate, a coupon of tables of wagers and odds relating to the outcome of football matches, a sequence of numbers published for use in a 'bingo' game (as literary works), a wooden model for making 'frisbees', a plaster model of a wolf cub's head used for making papier mache copies for totem poles (as 'sculptures'), engineering drawings for **lavatory** pan connectors and spare parts of vacuum cleaners (as drawings) and half tennis courts (as a building). The copyright claim of performers (on grounds of originality) is also strengthened **by** reference to the copyrights already recognised by the law. These include a copyright in editions of a work and the copyright of broadcasters in the electromagnetic signals they broadcast. In fact:

'The position of performers, viewed internationally, is rather paradoxical. Although of all neighboring rights owners, they are closest to the author, their rights are in many jurisdictions and in international law the weakest. Unlike the other neighboring right owners, they are physical persons, like the authors and from a purely philosophical point of view it is difficult to see the essential difference between the work of a derivative author, say a translator, or an arranger and that of a performer. Just as the translator renders the original work as faithfully as possible in another language, so the performer interprets the spirit of the work as truly as he can musically or on the stage. Just as the arranger,

although basing himself on the original work adds another dimension to the work, so does the performer and different performances by different artistes vary greatly from one another. Most languages emphasise the creativity of the performer by expressions like an actor 'creating' a part or a pianist presenting a most 'personal' or 'original' rendering of a well-known concerto. That is applying the more stringent tests of the 'droit **d'auteur**'. In 'copyright' there is not much doubt that performers *spend sufficient skill and **labour**' to merit copyright protection. '20

(d) The **Inadequacy** of the Industrial System

138. The minority does not deny that many of the rights and advantages granted by copyright protection may be achieved, in certain circumstances, by other means. The minority's concern is that this argument ignores the fact that performers, unlike other copyright owners, are unable to depend on their ability to control uses of their fixed performances, especially by third parties, and, similarly, are unable to depend on a right to remuneration for such uses. Performers cannot depend on receiving the economic benefits which are a principal reward of copyright owners.

139. The present position is that performers have a fee for service system developed in the early 1900's when the use of performances was limited and the public's exposure to performers was principally by means of live performances.

140. Specifically, musicians - constituting over half Australia's performing artists' population - receive nothing from the use of fixations of their work. This results in a number of anomalous situations. For example, while the composer of a recorded work, and the record manufacturer, are recompensed for the broadcast of the work, the performers whose work is heard receive nothing. Similarly, variety artists are entirely unprotected. Only one group of performers currently receives any form of protection - actors,

who are members of Actors' Equity. Collective agreements, incorporated into the personal contract of each actor provide for the payment of fees for various uses. This represents a clumsy and uncertain attempt to use contract to ensure a proper reward for such actor's creativity. It is no effective substitute for copyright protection.

141. Actors are forced to sell their 'rights' in advance. The Committee cannot therefore determine whether the payments made to performers reflect proper reward for future uses, or whether they simply reflect the market 'price' of the performers creating the original work. That such uncertainty exists merely underlies the inappropriateness of current arrangements.

142. The need for protection for performers is apparent when one studies performers' current earnings. The report of the Australia Council Individual Artists Inquiry shows that performers receive no payments from many broadcasters and advertisers for residual or repeat uses.

143. The minority believes "t"hat a system of payment when use occurs would be fairer to producers - who would only pay for those rights which they actually use - and would place performers in a direct bargaining relationship with the end-users of fixations of their performances, such as broadcasters and systems providers for satellite transmissions and computer storage and retrieval. The present system of up-front payments to performers is outdated. As technology developed, so it became clear that fixations of performances were being used and **re-used** in a variety of ways. Thus, in the 1970's, Actors' Equity began to negotiate for additional payments in respect of these additional uses. However, performers had no property right with which to conduct the negotiations. Accordingly, they purported to sell to the producer the right of a number of repeats in exchange for higher initial payments.

144. The present industrial system permits producers to build into a performer's fee an illusory payment for an illusory right. At the same time, the system **places** an undue burden on the producer. The producer rather than the end user **is** forced to pay for repeat and residual uses. This may have been satisfactory when such uses were limited by technology, but these days it is unrealistic. It is impossible for any producer to predict the nature and value of the potential residual use of any performance. Broadcasting, satellite transmission, computer storage and retrieval, cable television, video and record rental and lending, reproduction and synchronisation rights; all are now possible as a means of exploiting performances. Where would authors be if they depended on negotiations with their book publisher in respect of all these potential uses of their work? How could the author be asked to assess the value to place on his work and how could a publisher be expected to bear the cost? Many works might never achieve the full potential that technology offers, in which **case** the publisher would have paid far more for the work than it was worth. On the other hand, if a work did reach its full potential, then - under the system that now pertains to performers' rights - the author would have little prospect of matching the revenue he can now receive under copyright.

145. It is impossible to contract for use that is not foreseen. Technological development creates new forms of delivery and new markets and the control over these new uses, and the need for payment to performers must be addressed. For example, in the absence of a property right, performers may have difficulty in obtaining (and retaining) an equitable share of blank tape royalties - should such **payments** be introduced in Australia in response to domestic video and audio recording - or revenues derived from Video and Audio Entertainment and Information Services (**VAEIS**). Other countries recognise the fairness of including performers as beneficiaries in any legislation for such new uses.

146. One advantage of the copyright system is that it enables authors to deal separately with users of different rights: publishers in relation to volume rights, broadcasters in relation to broadcast rights, cable operators in relation to cable transmission, computer systems providers in relation to computer storage and retrieval, record manufacturers in relation to sound recording and film makers in relation to synchronisation rights for the soundtrack for films. The copyright system is geared to a divisibility of each of the monopoly rights which the Copyright Act creates, in order to maximise the return to the creator.

147. Performers deserve the same protection, otherwise performances could be used by persons not authorised by the performer. Thus performers, who clearly give an 'added value' to the works performed, have limited control over the manner in which fixations of their performances are exploited. In the minority's view, the existence of an industrial system for a fee for services does not preclude the introduction of a copyright regime for so-called 'secondary uses' of fixations of performances.

(e) The International Situation

148. It is only 26 years since the Rome Convention came into existence. There are, to date, 30 countries who are party to the Convention (see Appendix 4). The minority thinks this is a remarkably successful number given the short life of the Convention and the widespread misunderstanding which, the minority feels, still exists as to its effect.

149. There are at least 11 European countries which grant performers a form of protection which includes rights of remuneration as well as of fixation (Austria, Czechoslovakia, Denmark, Finland, The Federal Republic of Germany, France, Hungary, Iceland, Italy, Norway and Sweden).²¹ Over 10

South American countries grant both these types of rights to performers as does Japan. The latest Canadian Report on Copyright has recommended protection for performers allowing them control over fixations and remuneration for use.²² **In** its response of February 1986 the Canadian Government accepted these recommendations in principle.²³

150. The United Kingdom has adopted criminal law sanctions but not civil law remedies in respect of unauthorised fixations or unauthorised uses of authorised fixations. However, the growing amount of unauthorised copying of records and films, and the appearance of the video-cassette has meant that such provisions are insufficient for both the protection of performers and the suppression of these undesirable activities. Accordingly, the United Kingdom intends to supplement the criminal provisions by giving performers new rights of civil action in respect of trading in unauthorised sound recordings and films of protected performances.²⁴ **It** appears that these proposals have been overtaken by a recent decision, **Rickless v United Artists corporation** [1987] 1 ALL ER 679, in which the Court of Appeal held that on its true construction, 'section 2 of the Dramatic and Musical Performers' Protection Act 1958 imposes not only a criminal penalty of a fine for a breach but, in addition, imposes an obligation or prohibition for the benefit of a particular class of individuals, namely performers, and this confers a right to civil remedies at the suit of a performer whose performance **is exploited** by others without his or her written consent. In this case the personal representatives of Peter Sellers' estate were successful **in their** action against the defendants who had used, without permission, film footage of Sellers' performances used in previous films or taken but not used during the filming of previous films.

151. The present state of authorities in the United Kingdom is not clear. What is clear, in the minority's opinion, is that performers are not sufficiently protected by legislation which merely imposes sanctions upon those who, without permission, record, film or use their performances. This is a fact which not only commentators, but also the courts, have realised. Further, the position towards which the United Kingdom legislation and the cases appear to be heading is one which, to paraphrase Professor **Cornish**²⁵, is in every sense, apart from name, closely akin to copyright rights.

152. The minority accepts that the United States has not specifically enacted rights for performers, but it believes that to simply state this, without further explanation, is misleading. An examination of the American copyright system reveals that the United States has a long tradition of recognizing performers' rights in not only their fixed performances but also their unfixed performances. The leading commentator on copyright law in the United States, Professor Melville B Nimmer, has stated:

'There is little **question** but that a performer's rendition of a work written **by** another may in itself constitute an original work. '26

153. This statement is based on an understanding of American common law and the interpretation of the Copyright Act of 1976 in the light of the common law. The Copyright Act of 1976 does not state who is the owner of sound recordings and motion pictures and other audiovisual works, except to say that it is the author (section 201(a)). In order to determine who is the author of a sound recording or motion picture one must turn to the common law. The common law quite clearly considers that performers in sound recordings and motion pictures make an original contribution to these works such that they may claim as authors.

154. A well known passage from a judgement of Judge Learned Hand in Capital Records v Mercury Records corporation (1955) 221 F 2d 657 makes the point that performances are recognised as works and performers as authors:

'I also believe that the performance or rendition of a 'musical composition' is a 'Writing' under Article I, S8, **Cl.8** of the Constitution separate from, and additional to, the 'composition' itself. It follows that Congress could grant the performer a copyright upon it, provided **it** was embodied in a physical form capable of being copied. The propriety of this appears, when we reflect that a musical score in ordinary notation does not determine the entire performance, certainly not when it is sung or played on a stringed or wind instrument. Musical notes are composed of a *fundamental note* with harmonics and overtones which do not appear on the score. There may indeed be instruments - eg. percussive - which do not allow any latitude, though I doubt even that; but in the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a 'composition' as an 'arrangement' or 'adaptation*' of the score itself, which **Sl(b)** makes copyrightable. Now that it has become possible to capture these contributions of the individual performer upon a physical object that can be made to reproduce them, there should be no doubt that this is within the Copyright Clause of **the** Constitution. '

155. The cases are not limited to performances of 'works' in the usual copyright sense. In 1956 in Ettore v Philco Television Broadcasting corporation 229 F.2d 481 the federal court found that under the laws of all the relevant states - Pennsylvania, Delaware, New Jersey and New York - a prizefighter had rights in his performance, in this case a film of his performance, such that he could prevent it being employed for some use other than that for which it was made.

156. Under the Copyright Act of 1976, therefore, it is open to performers in both sound recordings and motion pictures to claim authorship. But, as Nimmer explains, because of the generality of the Act, the question of ownership of both sound recordings and motion pictures is largely left up to the employment relationship and bargaining among the interests

involved. In the case of motion pictures it is almost always possible to determine the question of ownership on the basis of the employment relationship which generally exists between the production company and the performers, writers, technicians, etc. This is somewhat different from the recording industry where the relationship between the record producer and the performers may more frequently be that of independent contractor **and**, absent an employment relationship, or an express assignment of copyright from the performers to the record company, the resulting ownership of the sound recording copyright will either be exclusively in the performing artists, or (assuming an original contribution by the sound engineers, editors, etc, as employees of the record producer), a joint ownership between the record producer and the performing artists.²⁷

157. The Copyright Act of 1976 does not deal with 'works of authorship not fixed in any tangible medium of expression* for which state common law rights are specifically preserved (section 301(b)). Rights of performers against unauthorised fixation of unfixed performances are therefore a matter dealt with by the common law. The American cases, although few in number, are quite strongly in **favour** of upholding the right of the performer against unauthorised fixation. The relevant cases are Metropolitan Opera Association Inc. v Wagner-Nichols Recorder Corporation (1951) 279 App Div 632; Time Inc. v Bernard Geis Associates (1968) 293 F Supp 130; Lennon v Pulsebeat News Inc. (1964) 143 USQP 309; Zacchini v Scripps-Howard Broadcastings comp a ny (1977) 433 US 562.

158. Although the rights of performers in the United States are not specifically given, and despite the fact that the Act of 1976 provides that there are no performance rights in sound recordings (sections **114(a)**, 106(4)), what the minority believes is demonstrated by an examination of the whole United States copyright system is that performers are recognised as creators in the copyright sense and, arguably, at least for virtuoso soloists and leading actors, treated as having property rights in their performances.

159. However it is the French and Scandinavian laws and schemes which the minority finds the most attractive international examples. France is significant because it has only very recently legislated for copyright protection for performers and it is difficult to conceive of too many practical difficulties or disruptions arising from the scheme which has been formulated. In July 1985 France passed Law No. 85-660 in which a full copyright - moral rights and economic rights - was given to performers:²⁸

Article 17. A performer shall have the right to respect for his name, his authorship and his interpretation.

This inalienable and imprescriptible right shall be attached to his person.

It may be transmitted to his heirs in order to protect the interpretation and the memory of the deceased.

Article 18. The fixation of his performance, its reproduction and its communication to the public and also any separate use of the sounds or the images of the performances, where the latter has been fixed as regards both the **sounds** and the images, shall be subject to written authorisation by the performer.

Such authorisation and the remuneration deriving therefrom shall be governed by Articles L 762-1 and L 762-2 of the Labor Code, subject to the fourth paragraph of Article 19 below. '

160. Under Article 19 the signing by a performer of a contract for the making of an audiovisual work implies that performer's authorisation to fix, reproduce and communicate to the public the performance. Thus, it is open to the performer, in the contract, to limit the use to be made of the performance and to state the payment to be made for the agreed uses. Where the contract is silent as to certain uses, authority for such uses will be implied and the amount of remuneration shall be determined by reference to specific agreements set down for that purpose.

161. Article 22 deals with sound recordings. It provides, in effect, a statutory **licence** for certain performances of sound recordings which have been published for commercial purposes upon payment of remuneration. Initial fixation of a sound recording is covered by Article 18, reproduced above.

162. Thus, in accordance with the Rome Convention, performers retain the 'possibility **of** preventing' live broadcasts or other communications of their performances and the fixation, without their permission, of their performances. In addition, the implied contractual licence provision for audiovisual works and the statutory **licence** provision for sound recordings ensures that performers, whilst being justly remunerated, cannot disrupt the ordinary commercial practices associated with the exploitation of such works.

163. The copyright legislation of the Nordic countries contained provisions on **the** protection of neighboring rights before the Rome Convention. The rights are not called copyright rights, but in substance they are similar. Although there are certain differences between the provisions in the Nordic countries, the protection granted to performers generally ensures that nobody may, without authorisation from the performer:

- (a) fix the performance on 'any material support' from which it could be reproduced;
- (b) broadcast or otherwise make directly available to the public the unfixed performance; and
- (c) make copies of recordings of performances.

164. Performers are not granted an exclusive right in relation to secondary uses of performances but instead there is a compulsory **licence** in the sense that such use may take place without the authorisation of the beneficiary but an equitable remuneration shall be paid.²⁹ In those Nordic countries where the compulsory **licence** does not extend to audiovisual works (Finland, Sweden, Norway), industrial laws and/or agreements ensure that a system, equivalent to a compulsory **licence**, works successfully.

165. Through a mixture of copyright and industrial laws the Nordic countries have, in practice, a system of protection for performers very similar to that which, under the new French legislation, is fully controlled by copyright laws. Of major significance, for present purposes, is the success with which performers' protection has, in practice, been carried out in the Nordic countries. As it is impracticable to rely on individual agreements between performers and users of performances, the beneficiaries of neighboring rights in the Nordic countries have formed organisations which have concluded collective agreements with the users.

166. The main aim of the collecting societies is to collect and distribute, on behalf of the performers, remuneration paid for the use of recordings in broadcasts. For example, the relevant collecting society in Sweden is called 'The Professional Organisation of Swedish Artist and Musicians' (SAMI) and is an incorporated association founded by the two trade unions representing, respectively, Swedish Artists and Musicians. Under a membership contract a performer transfers to SAMI the right to enter on his or her behalf, into agreements concerning such remuneration. In return, SAMI undertakes to, *inter alia*, pay remuneration to the member in accordance with rules on distribution. Except for Norway, similar organisations and systems operate in the other Nordic countries. Norway differs *in* that the remuneration collected is distributed not necessarily to those whose performances have been used, but according to social considerations.

167. The international situation with regard to performers indicates clearly to the minority that the introduction **of** copyright or similar rights to protect performers in Australia would not be inappropriate.

(f) The Demand for Performers' Copyright

168. Submissions were received from 23 different organisations. More than half of these were in favour of protection for performers in the nature of copyright. These included submissions from The Australian Writers Guild, The Australian Society of Authors, the Australian Film Commission, the Australian Copyright Council, the Australia Council, and The International Federation of Phonogram & Videogram Producers (IFPI) as well as from organisations actually representing performers such as the Musicians' Union of Australia and Actors' Equity of Australia.

169. The minority thinks it is significant that traditional copyright owners, represented by the Writers Guild and the Society of Authors, expressed support for copyright protection for performers. In its submission the Australian Writers Guild wrote:

'The Guild fundamentally supports the establishment of performers' protection which would legislatively enshrine the rights of performers, many of which can only now be gained through individual agreements with producers.'

170. The Australian Society of Authors, in similar fashion, wrote:

'The Society has always been concerned that performers of its members' works, whether they be actors in plays or in television adaptation of novels (a common form) or musicians in support, should have to rely only upon the strength of their own union organisation. Manifestly this is unfair, in that only strong well managed unions have a matching bargaining power with say national TV station networks or groups. That the legislation should be in a copyright form accords well with the Society's basic contention that its members are individuals whose work is of great importance in creating the norms of our Australian society; and that as the commercial basis of their works has always been copyright so also should be the basis for performers' protection.'

171. The Australian Film Commission stated that:

'...there appears to be cogent and lucid arguments as to why a performance captured on film is fairly the subject of copyright protection.'

Whilst conceding that copyright payments to performers might cause some unrest amongst film investors the Australian Film Commission supported the creation of a copyright for performers, subject to its approving of the method of implementation.

172. It is important to stress the support for copyright protection for performers which is evident amongst many respected commentators on Anglo/Australian copyright law:

'In the end, however, the reality ought to be faced: in principle, performances are an independent activity deserving and needing copyright; the precise scope of the right is then for discussion.'
(Cornish W.R., 1981).³⁰

'Thus it seems that even in those countries like the United Kingdom where performers do not have a copyright or a neighboring **right** the courts are beginning to fill the gap in different ways and the position of performers seems to be in a state of development. Professor **Cornish's** summing up seems to point to the most likely outcome: 'The reality ought to be faced: in principle, performances are an independent activity deserving and needing Copyright; the precise scope of the right is then for discussion.'
(Stewart, S.M., 1983).³¹

*Performers, authors and composers are workers in the intellectual field, and should be fairly remunerated for the use of their work by others. Few will deny that the worker deserves his reward. **Masouye** (East Asian-Pacific Copyright Seminar 1976, Report, p. 5) says 'the author must benefit from the fruits of his **labour** . . . royalties will be the intellectual worker's salary'. It is submitted that this is just for performers, authors and composers alike. As a corollary, creative individuals should, like other workers, benefit from provisions of laws protecting and securing their economic status in the community.'
(Sterling, J.A.L. & Carpenter, M.C.L., 1986).³²

In such cases, even if there is an infringement of copyright, there is little that the performer can do to prevent his individual performance being appropriated. This is clearly unjust, as it is frequently the interpretational aspects of a performance which attract a potential audience, rather than the work which is performed. The problems do not stop here. The owner of the copyright in a musical, dramatic or literary work has the right, at least potentially, to control the future performance, broadcasting and diffusion of that work once it is fixed in material form. An actor, musician or singer who has taken part in a film or recording, however, has no power to restrain the future performance, broadcasting or diffusion of the film or recording once it is made, unless he is in a powerful enough position to extract a suitable fee for the making of his original performance.'

(Ricketson, S., 1984).³³

(9) Practical Aspects.

173. The minority accepts that there will be difficulties introducing any new scheme of rights for performers, but believes that all the practical difficulties likely to arise can be overcome.

174. Fears of upheaval in the film and record industries seem to the minority to be exaggerated; for example, insistence of investors and distributors that the owner of the film control all the rights, or erosion of the bargaining position of Australian producers (already said to be weak) as against international distributors and broadcasters. The French and Italian film industries are a comforting example of the ability of the industry to accommodate new ideas. Performers' rights have been accepted internationally for many years and there is not the slightest evidence to suggest that Australian producers would be disadvantaged by the introduction of performers' rights in Australia.

'By the 1950s, the main thrust of the performers' arguments had won general acceptance from the international organisations, from certain governments, some of which had begun to legislate in this field, and also from producers of sound recordings (**phonograms**) and broadcasters. With this consensus that some form of

protection for performers was necessary went a parallel agreement that there should be a 'balance of protection' for phonogram producers and broadcasting organisations. To be sure, under a system in which performers were to be given legal rights, it would be to their advantage if those who used their performances - phonogram producers and broadcasters - also had rights against third parties and were thus able to guarantee the exercise of the performers' rights against secondary uses' .34

175. The experience in overseas countries is that performers' rights are administered collectively. The Performers' Collecting Society (PCS) was established in Australia for that purpose and is **modelled** on overseas societies. The evidence, the Committee heard from representatives of SAMI suggests that Swedish performers acting collectively are able to collect and distribute Article 12 remuneration properly and effectively. Remuneration is collected for broadcasting and public performance and, under collective agreements, for other secondary uses such as video and pay television. Remuneration is also distributed to individual performers through the collecting societies. Broadcasting and public performance remuneration is calculated by various methods and distributed according to set tariffs or on the basis of the points system, similar to that used by performing rights societies, such as APRA .

176. There are approximately 20 agreements concluded between collecting societies regarding distribution to foreign performers. These operate either according to bilateral agreements - under which revenues are retained in the country of collection - or according to the so-called 'London Principles, agreed between the International Federation of Musicians and IFPI in 1969. The principles were refined in 1968 by an agreement between these parties and the International Federation of Actors and are commonly used where two countries have compatible collection and distribution arrangements.

177. The Australian Performers' Collecting Society will inevitably encounter many of the teething problems faced by new copyright collecting societies. It is clear that its members will have much to learn from the experience of APRA and others. The minority believes, however, that performers can work through PCS and maximise their returns by granting **licences**. As with **APRA**, which operates successfully without a compulsory **licence**, there is no evidence to suggest that a workable scheme cannot be instituted within an acceptable time-frame.

178. The minority is satisfied that given the necessary legislative framework PCS can be a viable collecting society. Significantly, PCS would negotiate directly with user groups such as broadcasters. A direct relationship would be established between the broadcaster and the performers. In the view of the minority such arrangements would be enforceable and desirable. Performers would also be able to enforce their rights against third parties. Broadcasters would thus pay when performances are broadcast - a fee quite separate from the fees "paid by producers for the performers" services in making, recording or filming what is broadcast.

179. The minority concludes that the present system of performers' protection is arbitrary and inadequate. Performers need protection and this is best achieved by Commonwealth legislation. There are no convincing objections in principle or evidence of insurmountable practical difficulties in countries where such rights are administered collectively.

180. Accordingly, the minority is of the view that, in addition to the legislation recommended in Part II, the Government should legislate to:

- (a) grant performers (as defined in paragraph 53) a copyright or a property right similar to copyright in their performances;

- (b) include in the performers' right the right to control:
 - (1) reproduction of authorised fixations;
 - (2) broadcasting or otherwise communicating, authorised fixations of performances to the public.
- (c) provide for one of either a compulsory **licence** or an implied **licence** for the use of fixations of performances, provided that the use does not differ from the purpose for which the performance was fixed;
- (d) provide that the rights granted should be capable of being assigned;
- (e) provide that the rights should subsist for a minimum period of 20 years after the end of the year in which the recording or film is first published;
- (f) enable a single organisation representative of performers (such as PCS) to be authorised to; negotiate, collect and distribute remuneration paid for the use of fixations of performances.

181. As the International Federation of Actors stated in its submission:

'Revision and introduction of legislation in the field of copyright and 'neighboring rights' is a slow process. States which are about to revise their legislation in this area therefore have a particular responsibility towards not only their own national culture and those who contribute to it but also to the whole international community. Much attention will therefore be **focussed on the coming protection of performers in Australia. We certainly expect it to have a modern approach, based on the realities of the 21st century.'**
