

Copyright Law Review Committee

PART I

TO: The Hon. Lionel Bowen  
Attorney-General of Australia.

(1) TERMS OF REFERENCE

- \* Whether there is a need for the legislative protection of performers in respect of their performances; and
- \* If there is, what form should the legislation take?

(2) SUMMARY OF RECOMMENDATIONS

1. The Copyright Law Review Committee is unanimous in its view that there is a need for legislation to protect performers against the unauthorised fixation of their performances (see Part II of the Report). However, a majority of the Committee recommends "against the introduction of a proprietary right for performers in their performances (see Part III of the Report). A minority of the Committee comprising two of its members recommends that copyright rights or property rights in the nature of a copyright be granted to performers (see Part IV of the Report).

2. The Committee unanimously recommends the law be amended to provide both civil remedies for performers and criminal penalties in respect of:

- the unauthorised making from a live performance, for commercial purposes, of:

sound recordings (tapes, records etc.),  
cinematography films (films and videotapes),  
broadcasts, and  
transmissions by cable; and

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- the sale or distribution for commercial purposes, public performance, broadcast or transmission by cable of sound recordings or films made from a live performance without the performers' authorisation (paragraphs 44 and 48).

These civil remedies and criminal offences should be subject to the same kinds of exceptions regarding the protection of performers as those which apply to the protection of copyright materials. Reproductions of a fixation of a performance originally made pursuant to these exceptions should not be permitted for purposes different to those contemplated by the exceptions (paragraphs 49 and 58).

3. Related recommendations are:

- The requirement for 'knowledge' in the proposed criminal offences should be the same as that now provided for in respect of criminal offences under the Copyright Act. The requirements for knowledge for civil actions, including unauthorised uses of a performance fixed without the performer's permission, should also be the same as that now applicable to criminal offences (paragraphs 44 and 48).
- Courts should have the discretion to order the destruction of bootleg sound recordings and films, together with the recording equipment used to produce the copies (paragraph 46).
- Protection should extend to performances by performers as defined in Article 3 of the Rome Convention, as well as performances by variety artists and others who do not normally perform literary, musical or artistic works (paragraph 53).

4. The Committee also unanimously recommends that the law be amended to give performers the right to prevent a sound recording of a performance from being used in a film without the consent of the performer (paragraph 55).

(3) COURSE OF THE INQUIRY

5. At its first meeting on 17 October 1983 the Committee decided to seek submissions from parties considered to have an interest in this reference. Ninety organisations were invited to make submissions from which 21 submissions were received. (A list of those organisations which made submissions is at Appendix 1.)

6. The Committee appointed a sub-committee to analyse the submissions and to prepare a discussion paper. The discussion paper was published in April 1985 and invited further comment on points made in the original submissions. Over 400 copies of the discussion paper were distributed to previous submitters, interested parties and the press. A further 11 submissions were received. (A list is at Appendix 2.)

7. At its meeting in December 1985 the Committee decided that a meeting with representatives of some of the major organisations whose members would be affected by the introduction of performers' protection would further assist its consideration of the matter. On 4 March 1986 the Committee held discussions with representatives of the organisations listed below:

- . Actors' Equity;
- . The Advertising Federation of Australia;
- . The Federation of Australian Commercial Television Stations;

- . The Federation of Australian Radio Broadcasters;
  - . The Musicians' Union;
  - . The Performers' Collecting Society; and
  - . The Screen Producers Association of Australia.
8. The submissions received by the Committee, and its discussions with various interests, proved to be comprehensive and very helpful in its deliberations.

(4) GENERAL COMMENTS

9. The issue of performers' protection centres on the commercial exploitation of performers' performances. In addition to the performers' 'live' performances, technology has given rise to further means of commercial use of performances, namely recording, diffusion by cable and broadcasting. In Australia there are presently no legislative provisions which protect a performer's performance. State and Commonwealth legislation enables performers to seek arbitration on the terms and conditions of their employment, but it does not deal with the protection of performances as such. Unlike a copyright owner, a performer cannot, aside from contractual arrangements, control the use of his performance. This, it is claimed, gives rise to particular difficulties when third parties exploit the fixed version of a performance.

10. At the international level the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the 'Rome Convention') sets out the minimum rights of performers (as well as phonogram producers and broadcasters) that member States agree to provide. (The text of the Rome Convention is at Appendix 3.) As at March 1987 there were 30 States party to the Convention. (A list of those States is at Appendix 4.) Australia participated in the Diplomatic Conference held in Rome in 1961 to adopt the Convention but has not acceded to it.

11. In 1974 a draft Bill to amend the Copyright Act 1968 was prepared. The enactment of the Bill would have introduced provisions into the Copyright Act consistent with the requirements of the Rome Convention relating to performers' protection. In the event, however, the Bill was not introduced into the Parliament before the change of Government in 1975. Since the mid 1970's, there have been a number of approaches to the Attorney-General's Department urging the enactment of legislation to enable Australian accession to the Rome Convention.

12. There is a question as to the constitutional basis for any legislation in this field. The Committee has not considered it necessary to examine this matter in detail, particularly having regard to the conclusions of the majority of the Committee contained in Part III of the Report. However, it notes that a claim for validity of any such legislation could be based on the external affairs power (Section 51(xxix)) if it were sought to ratify and implement the Rome Convention. In this case there could nevertheless be questions as to the precise scope of legislation justified by this Convention, having regard to the limitations in its scope and mandatory requirements. In this connection there is doubt whether the external affairs power is available to implement convention provisions that do not impose obligations on States. Also, legislation based on the, external affairs power must be an 'appropriate' means of giving effect to convention obligations. The alternative, basis of power for such legislation would be Section 51(xviii) of the Constitution (copyrights, patents of inventions and designs, and trade marks). The question to be considered in respect of reliance upon the copyright power is whether the rights to be conferred on performers are in the nature of a 'copyright'. In this regard, the Committee is aware of advice given in 1979 by the former Solicitor-General, Sir Maurice Byers QC to the effect that performers\* protection legislation would be valid under this power. In the circumstances, it would, no doubt, be wise for any legislation to be based on overlapping constitutional powers.

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13. In considering the possible introduction of a copyright in performances and the practical administration of such a copyright, it is also appropriate to consider the role and operation of relevant collecting societies in Australia. Increasingly, the exercise of rights in the copyright field, especially in the field of music, depends in practice on there being an efficient and effective system of collective administration. It is likely that as a practical matter the need for collective administration in the context of any system of performers' copyright would be at least as great as in the traditional areas of copyright. Certainly this has been the experience overseas. The position in the Nordic countries is discussed below (see paragraphs 31 and 38).

14. Reference is made in this report to certain collecting societies in the context of performers' protection. These are the Performers' Collecting Society (PCS), phonographic Performance Company of Australia Ltd (PPCA) and Australasian Performing Right Association (APRA).

15. It is intended by those who established the PCS in 1985 that this society should administer, either by assignment or licence from or on behalf of performers, any rights relating to broadcasting and public performance which may be conferred on performers by legislation enacted in this area. It does not therefore have any practical operation at this stage. The other two collecting societies have a much longer history. For present purposes it is sufficient to note that APRA has operated in the music field since 1926 and PPCA since 1969. Further brief detail concerning the role and functions of APRA and PPCA are set out in Appendix 5 (which reproduces in substance, information brochures **on** these organisations available from the Attorney-General's Department).

16. The argument for moral rights for performers was presented, on behalf of performers, to the Committee in relation to its reference on moral rights. The Committee was initially of the view that the matter should be dealt with as an issue relating to performers' protection, but subsequently it has decided this issue would be more appropriately dealt with in the context of its work on moral rights. Accordingly, this Report, apart from a brief reference in the minority views (see Part IV), does not consider the specific issue of moral rights for performers.

(5) **THE** ROME CONVENTION

17. The following briefly examines the scope and operation of those provisions of the Rome Convention which operate in respect of performers.

**Article 3 'Performers'**

18. For the purposes of the Convention, Article 3(a), provides that 'performers' means:

'actors, singers, musicians, dancers and other persons who act, sing, deliver, declare, play in or otherwise perform literary or artistic works'.

Under this definition it **is** immaterial whether the work performed is a copyright work. Further, while the definition clearly includes a very wide category of people who communicate works to the public, it necessarily excludes those who do not. (In this regard it should be noted that the term 'artistic works' is used in the same sense as in the Berne Convention and includes musical and dramatic works). Persons not falling into this category include variety artists and

circus performers. This limitation is addressed by Article 9 of the Convention which provides contracting States with the option to extend protection to such persons. The Committee notes, however, that both the definition in Article 3 and the extension provided by Article 9, could include, for **example**, news readers, game show hosts and television reporters who read from a script as performers of literary or dramatic works, as well as some sportsmen.

19. Article 8 of the Convention leaves it to the domestic law of each contracting State to specify the manner in which performers, as members of a group, may be represented in connection with the exercise of their rights in such cases. It would enable, for example, the introduction of legislation concerning the general position of a performers' collecting society or the manner **in** which a group, such as an orchestra, was to exercise its rights.

#### Minimum Protection for Performers

20. Articles 7, 12 and 19 of the Convention are important articles which determine the scope of protection for performers and the rights they enjoy under the Convention.

21. Article 7 prescribes the particular rights enjoyed by performers and the relations between performers and broadcasting organisations. Article 7.1 provides:

- '1. The protection for performers by this Convention shall include the possibility of preventing:
  - (a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;
  - (b) the fixation, without their consent, of their unfixed performance;

- (c) the reproduction, without their consent, of a fixation of their performance:
  - (i) if the original fixation itself was made without their consent;
  - (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;
  - (iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.'

22. The use of the phrase 'shall include the possibility of preventing' in Article 7.1, prevents, it is suggested contracting States (subject to the qualifications contained in Article 15.2 and Article 19) from introducing a system of compulsory licensing in relation to the broadcasting and communication to the public of live performances, the fixation of live performances and the reproduction of unauthorised fixations or authorised fixations for different purposes.<sup>1</sup> The introduction of a statutory licence by a contracting State in respect of, Article 7.1 rights would abrogate a performer's capacity to prevent.. **those** acts. The Convention does not prevent compulsory licensing in other areas, for example, the communication to the public of fixed performances.

23. This is consistent with the wording of Article 8 which, as discussed above, enables contracting States to regulate the manner of representation of **performers**, but not the conditions of the exercise of their rights. The 1981 WIPO Guide to the Rome Convention and the **Phonograms** Convention suggests that the omission of any reference to conditions in Article 8 was a deliberate attempt to avoid any suggestion that compulsory licensing was permissible.<sup>2</sup> (In the context of the Berne Convention a reference to the right of a contracting State to impose conditions is regarded as allowing compulsory licensing.) The Committee also notes, having regard to Article 19, that this prohibition does not appear to apply in relation to films (see paragraph 26). The position relating to compulsory licensing in respect of secondary uses of sound recordings under Article 12 is dealt with at paragraph 29.

24. It should be noted that the wording used in Article 7 leaves a contracting State complete freedom of choice as to how it implements the Convention. In particular, the Article does not require the introduction of a property right. The means used to protect a performer may be based on any of a variety of legal theories and the rights of performers are included in a variety of national laws. For example, protection may be based on the law of employment, of personality (which links the performance with the personality and individuality of the performer), and of unfair competition. The Convention also allows for protection to be provided under criminal law, as is the case in the United Kingdom.

25. Article 7.2 (see Appendix 3) has the effect of qualifying the minimum protection required for performers under Article 7.1 in their relations with broadcasting organisations. Where performers have given consent to the broadcast of their performance, a contracting State may by its legislation determine the rights of performers regarding **re-broadcasting**, recording for broadcasting purposes and making copies of a recording for broadcasting purposes. However, the legislation must not operate to deprive performers of their ability to control their relationship with broadcasters by contractual means. Accordingly, Article 7.2(3) reaffirms the principle that performers should be free to control their affairs by contractual agreements.

#### Article 19

26. Article 19 narrows the operation of Article 7. It provides that, once a performer has agreed to the use of his or her performance in a visual or audiovisual fixation, Article 7 no longer applies. However, performers need not be given the right to prevent use, including different uses, or reproductions, including reproductions for different purposes,

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of a fixed (film) performance. For example, where a **videogram** is made using sequences from a film and a performer has agreed to the making of the film, the Convention does not require that the performer be entitled to remuneration for that use. The sole possibility contemplated for a performer to claim remuneration in such circumstances is for it to be expressly stipulated and included in the contract. However, as the Convention prescribes only the minimum rights to be afforded to performers a contracting State could, if it wished, introduce a statutory licensing scheme to remunerate performers in respect of the commercial use of films.

Article 12: Secondary Uses of **Phonograms**

27. The purpose of Article 12 is to set out the principle (subject to certain 'qualifications) that both performers and **phonogram** producers have a right to remuneration in respect of the secondary uses made of their phonograms. It is an optional right (see Article 16) which provides that, where a phonogram, published for commercial purposes, or a copy of it, is used directly, **for broadcasting** or communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of **phonograms**, or to both. Where remuneration is provided jointly for both groups domestic law may, in the absence of agreement between the parties, govern the way remuneration is shared.

20. The operation of Article 12 is limited in two important respects. First, it applies only to **phonograms** published for commercial purposes - it does not include films. Secondly, reservations contained in Article 16 provide, amongst other things, that a State may declare it will not apply the provisions of Article 12, in full or in respect of certain uses, or with respect to **phonograms** produced by specified classes of producers.

29. The right granted by Article 12 is a right to remuneration only - not (as in Article 7) a right enabling the possibility of preventing certain acts. Nothing in Article 12 would give performers or producers of phonograms the right, for example, to withhold the broadcasting of sound recordings in respect of which remuneration may be payable. Accordingly, it is clear that Article 12 rights are not subject to the same restrictions as Article 7 rights and may be the subject of compulsory licensing as to use.

#### (6) PERFORMERS" PROTECTION IN OTHER COUNTRIES

30. The Rome Convention does not have to be accepted by parties in its entirety. Article 16 provides that States wishing to adhere to the Convention have the option of entering a number of reservations as regards certain provisions or the conditions under which those provisions will be applied. The range of possible reservations and the absence of any prescription as to the particular manner by which performers' rights are to be protected has resulted, at the international level, in a number of different approaches being adopted". (A table summarizing the rights and systems for the protection of performers in a number of other countries is at Appendix 6.)

#### The Copyright Approach

31. In the Nordic countries, namely Denmark, Finland, Iceland, Norway and Sweden, a copyright approach has been adopted. The copyright legislation of these countries contains provisions which grant performers rights under private law to authorise or prohibit the use of their performances. Each individual artist has the right to control the use of his performance (i.e. to authorise or prohibit the fixation and reproduction of his performance). Like the authors of musical works, it is often impossible for

performers to rely on individual agreements with the people using the performance. As a result, performers in these countries have formed representative organisations which have concluded agreements of a collective character on their behalf with users.

32. Certain other European countries have legislation conferring various forms of copyright protection on performers (see Appendix 6) Most recently, France adopted a copyright style protection for performers (which entered into force on 1 January 1986) in its "Law on Authors' Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises'.

#### **The 'Non Copyright' Approach**

33. Unlike the civil law countries, common law countries have not adopted the same approach to performers' protection. The copyright legislation in **the** United States, Canada and the United Kingdom does not prescribe a separate copyright in a performers' performance.

34. As noted above, the United Kingdom is a party to the Rome Convention. It has expressly adopted criminal law sanctions in respect of unauthorised fixations and unauthorised uses of authorised fixations. The Committee also notes that in the recently reported case of Rickless v United Artists Corporation [1987] 1 ALL ER 679, the United Kingdom Court of Appeal held that in addition to imposing criminal sanctions, the Dramatic and Musical Performers' Protection Act 1958 (section 2) operated for the benefit, of performers. The Court thus held that the provision conferred a right to civil remedies at the suit of a performer whose performance was exploited by others without his or her written consent. The United Kingdom Government had previously announced its intention to supplement the criminal provisions with express

legislative rights for performers to bring civil actions in this area (see Part II of Report). However, the Committee notes that the question whether a copyright in performances should be provided was not addressed in the proposals for copyright reform contained in the United Kingdom Government's White Paper entitled \*Intellectual Property and Innovation' (April 1986) and does not appear to be a matter of major concern in the United Kingdom.

35. The United States has a long history of attempts to introduce performers' protection legislation. The first, unsuccessful efforts were during the 1930s through bills introduced in Congress . More recently, the issue of performers' protection has become closely linked with the issue of the introduction of performers' rights in sound recordings. Broadcasters have strongly opposed performers' rights on economic hardship grounds and the United States has neither a performance right in sound recordings in its copyright legislation, nor any legislation which specifically provides Article 7 or Article 12 rights for performers. The United States Copyright Act provides protection for 'authors' of sound recordings and audiovisual works including motion pictures. However, while rights for performers are not granted specifically, it appears that performers are recognised as authors<sup>3</sup>, at least in the case of sound recordings.<sup>4</sup>

36. Like the United States, the Canadian legislature has not introduced legislation to provide performers' protection. However, the issue of performers' protection has been examined as part of a general review of the Canadian Copyright Act conducted by a Sub-committee of the Canadian House of Commons Standing Committee on Communications and Culture.<sup>5</sup> The Canadian Sub-Committee's recommendations, contained in its report of October 1985, were as follows:

- '71. The performances of performers should be a new category of subject matter with the necessary regime of protection.
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72. The protection of performers' performances should be extended to nationals of those foreign countries which provide similar protection to Canadians.
73. Performers should be the first owners of the copyright in their performances.
74. Performers' Performances should be protected for a term of at **least** 20 years from the time of fixation of the performance.'

The Canadian Government response to these recommendations,<sup>6</sup> made in February 1986, is set out below:

'The government agrees with these recommendations in principle.

As with sound recordings, however, the Act will assign performances to a separate category from that of traditional creative works as such.

The rights to be granted to performers under the Act will be defined at a later date as will the conditions and mechanism for extending these rights to nationals of foreign countries as suggested in recommendation 72.

Recommendation 73 will be subject to **recommendation** 15, on which we have already commented. '

Recommendation 15, with which the Government response agreed, provides:

'First ownership of copyright should be vested in an employer in the case of works created by employees in the course of employment subject, as now, to any agreement to the contrary.'

As far as the Committee is aware no legislation has yet been introduced in Canada to give effect to the Government response.

Remuneration for **Secondary** Use in Countries **Party** to the Rome Convention

37. In the United Kingdom the producers of phonograms, but not performers, have broadcasting and public performance rights. However, performers share in the remuneration collected by producers of phonograms by contract and practice. The collecting society for the producers of phonograms is the 'Phonographic Performance Limited' (PPL). PPL collects remuneration from broadcasters on the basis of 'needle time' use. The money collected by PPL is distributed as follows. Administrative expenses account for approximately 10%, and a further 8% is paid to the Mechanical Copyright Protection Society (on a voluntary basis). **Of** the remainder, 12.5% is paid by contract to the performers\* union, 20% is distributed to the individual performers as a matter of practice and 67.5% to the producers of phonograms. (Moneys collected for public performance are distributed in the same proportion as that calculated for broadcasting.)

38. By way of illustration of the position in the Nordic countries further information on secondary use is provided below on the position in Sweden. The rights of performers in Sweden are prescribed in the COPYright Act (law of 30 December 1960) Chapter 5 Neighboring Rights. Swedish performing artists are represented by 'The Interest Organisation of Swedish Artists and Musicians' (SAMI), which collects and distributes remuneration from the Swedish Broadcasting Organisation to artists and musicians for the use of their recordings in radio and television broadcasts. SAMI was **formed by** the two Swedish trade unions which represent performing artists, namely the Swedish Actors' Union and the Swedish Musicians' Union. Membership of SAMI can be granted to **all** performing artists who are members of either of the two trade unions and also appear on a recording giving a right **to** remuneration for use in broadcasting by the Swedish

Broadcasting Organisation. Pursuant to the membership contract, **SAMI** acquires the right to **enter**, on **behalf** of performers, into agreements for remuneration. In return, the remuneration received is distributed to performers in accordance with the organisation's distribution rules. Through these arrangements performers are secured Article 12 remuneration for the secondary use of their performances.

39. On the information available to the Committee, it is difficult to gauge the precise extent to which States party to the Rome Convention afford performers' rights under Article 12. One reason is that Article 16 (see Appendix 3) allows States to enter reservations in respect of Article 12. As a result four different situations exist regarding the application of Article 12. These are set out below:

- (i) Application of Article 12 is refused altogether (Article **16.1(a)(i)**) by: Congo, Fiji, Luxembourg, **Niger**,. (partly in Finland);
- (ii) Application is limited to certain uses (Article **16.1(a)(ii)**) by: Denmark, Finland, Ireland, Italy, Norway, Sweden, United Kingdom;
- (iii) Application **is** subject to the criteria of the nationality of the phonogram producer being satisfied (Article **16.1(a)(iii)**) by: Austria, Czechoslovakia, Italy, Norway, United Kingdom;
- (iv) Application is subject to the principle of material reciprocity being respected (Article **16.1(a)(iv)**) by: Austria, Czechoslovakia, Denmark, Finland, Federal Republic of Germany, Italy, Norway, Sweden, United Kingdom.

The international position is further complicated by the fact that, although a number of States have not entered any reservations in respect of Article 12, it has been suggested that some of those States' laws contain no detailed or precise provisions concerning the protection of these rights. It has also been suggested that this may be because these countries automatically apply the terms of any international treaty to which they are a party as part of their domestic law. However, while this may be the case for certain of those States, **it is** uncertain for others.<sup>7</sup>

PART II

(7) UNAUTHORISED FIXATION OF PERFORMANCES

40. The interests of performers are affected by two types of unauthorised fixation of their performances. These are 'piracy' and 'bootlegging' .

41. Piracy is the practice of making unauthorised reproductions of copyright materials such as books, paintings, records and films. In relation to records and films, piracy usually involves the making of unauthorised copies of commercially released records or films. The unauthorised copies are placed on the market without the consent of the copyright owner (ie. the maker of the sound recording or cinematography film). Although the consent of any of the non-copyright owners, including the performers whose performances are involved, is not required, piracy may have an indirect effect on their interests as a result of the diminution in value of legitimate material. In this regard the Committee" notes that the Copyright Amendment Act 1986 passed by the Parliament in June 1986 significantly strengthens the anti-piracy provisions of the Copyright Act by increasing penalties, by facilitating the proof of the subsistence and ownership of copyright and by easing the required standard of knowledge in criminal prosecutions.

42. Bootlegging is the practice of making, for commercial purposes, unauthorised sound or film recordings of live performances. This may be done either 'off air', or at concert performances. The recordings are made clandestinely and without permission. Copies of the recorded performance are then placed on the market without the consent of the authors, composers or artists whose works and performance are

involved. Under Australian law only the rights of the owner of the copyright in the work being performed are infringed by the making of an unauthorised recording. Unless the performer is also the copyright owner, the performer has no right to prevent the recording of the performance. (Unless the recording is made from a broadcast which was made from a recording, no **phonogram** producers' rights are involved.)

43.' Those who' engage in" bootlegging, of course, pay nothing at all to either the performers or to the owners of copyright in the works concerned. Furthermore, the illicit product often competes with legitimate product. It is able to be sold at a price below that charged by the legitimate industry because no royalties or fees are paid to the persons whose works and performances are exploited. Its attractiveness to consumers has also been improved by technical advances which have rendered the making of high quality bootleg recordings a relatively simple matter. Although bootlegging has not in the past been a major problem in Australia, there have been recent indications that this may be changing. In any event the Committee is **of** the view that the nature of the practice is such that it is appropriate and desirable for the law to prohibit it.

44. In this regard the Committee believes that two types of activities should be prohibited. First, the Committee considers it should be an offence for a person to make, for commercial purposes, an unauthorised sound recording, cinematography film, broadcast, or diffusion by cable, of a live performance. By analogy with the direct infringement provisions of the **Copyright Act** there should be no requirement for proof of guilty knowledge in relation to these **offences**. The second type of activities which should also constitute an offence is the unauthorised **importation, sale, distribution, public performance, broadcasting or diffusion by cable, for commercial purposes, of bootleg recordings.** These activities

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all make indirect use **of** performances by exploiting unauthorised fixations of them. The Committee is of the view that there should be a requirement for guilty knowledge in relation to these **offences** in line with the test provided for criminal proceedings in the Copyright Act following the amendment of section 132 in the Copyriaht Amendment Act 1986. Thus , a person using a bootleg sound recording or cinematography film commercially for any of the purposes set out above should be fixed with guilty knowledge if \*the **person** knows or ought reasonably to know' that the articles being used are bootlegs.

45. The Committee considers that it would be appropriate for the maximum penalties in criminal proceedings against bootleggers to be consistent with the recently revised level of penalties introduced in relation to copyright piracy.

46. In an action for infringement a copyright owner has the right to seek the delivery up of infringing copies and plates used for the production of such copies (sub-section 133(4) of the Copyright Act). Thus, the pirate risks losing not only the illegal copies **he or** she has produced, but also the materials used to produce them. As a further means of strengthening the protection for performers, the Committee recommends that Courts should have the discretion to order the destruction of bootleg sound recordings and films, as well as recording equipment used to produce them, whether or not a conviction results from their seizure.

47. The Committee notes that in the United Kingdom proposals for legislative reform were recently announced to strengthen anti-bootlegging provisions. The United Kingdom Government's proposals are set out in its 1986 White Paper on 'Intellectual Property and Innovation'. The paper concludes

that the trading in unauthorised fixations of performances substantially diminishes the commercial value of the exclusive contracts between performers and recording companies. It states:

"New legislation will therefore provide that in respect of trading in unauthorised sound recordings and films of a protected performance, civil remedies such as injunctions and damages, will be available, both to the performers and to any person (including a record or film company) to whom the performer has granted an exclusive contract.'  
(Page 63, paragraph 14.4)

So far as the Committee is aware, no legislation to give effect to this proposal has as yet been introduced in the Parliament. (See however the discussion in paragraph 34 of the Court of Appeal decision in Rickless v United Artists corporation [1987] 1 ALL ER 679.)

48. In view of the unfairness of bootlegging to performers, it is **desirable that** performers should be able to take action on their own behalf to protect their interests (rather than 'relying upon law enforcement agencies whose resources are often stretched) . **Accordingly**, the Committee recommends that legislation be introduced in Australia, similar to that proposed for the United Kingdom, to confer civil remedies on performers. Performers would have the right to take action to prevent both types of activities referred to in paragraph 44, as well as a right to recover damages. The requirement for knowledge in these actions should be analogous to that recommended for the criminal **offences**.

49. The Committee notes that the extent of protection afforded to performers may be modified in the circumstances permitted by Article 15 of the Rome Convention (see Appendix 3). Article 15 provides for two sets of exceptions - first, those relating to particular kinds of uses of performances and secondly, exceptions of a more general nature which may be the

same as those provided for in respect of the use of copyright materials. The Committee also notes that the United Kingdom legislation provides similar exceptions (see section 6 of the Dramatic and Musicians Performers' Protection Act 1958). In the Committee's view such exceptions to the protection of performers are desirable in order to permit activities which should be regarded as reasonable and not inconsistent with the protection of performers. Accordingly, it recommends that the civil remedies and offences it has proposed in the preceding paragraphs should be subject to the same kinds of limitations as those which apply to the protection of copyright materials.

50. The Committee is, however, divided as to whether the law should extend a right of action to performers **in** respect of piracy, as well as bootlegging. The minority is of the view that no such distinction is warranted - see Part IV of the Report for discussion of the minority's conclusion that performers should be granted a copyright in their performance.

51. The **majority of** the Committee believes a distinction can and should be drawn between the rights of performers in relation to piracy and bootlegging. This view is based on the fact that piracy is the unauthorised reproduction of a fixation, the making **of** which was originally authorised by the performer. It is the view **of** the majority of the Committee that the appropriate person to take action in these circumstances is the maker of the original fixation. That person has rights under the Copyright Act to prevent the piracy of the fixation. This approach is consistent with Article **7.1(b)** and (c)(i) of the Convention which deals only with the unauthorised fixation of performances and the subsequent use of such unauthorised fixations.

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(8) OTHER RIGHTS FOR PERFORMERS

52. The ability to prevent the unauthorised filming and recording of a performance does not exhaust the rights of a performer required to be adopted by Article 7.1 of the Rome Convention. In addition, performers are to have the possibility of preventing the broadcasting and the communication to the public, without their consent, of their live performance (Article **7.1(a)**). In the United Kingdom the Performers\* Protection Acts 1958-1972 proscribe (in addition to the unauthorised recording or filming of live performances and associated sales or the unauthorised use of such fixations) the public performance of such recordings or films and their unauthorised broadcast or transmission by cable. The Committee considers that these unauthorised acts should be prohibited. Accordingly, it recommends that they receive the same treatment under the law as bootlegging.

53. The Committee has considered the recommendation contained in the 1977 United Kingdom 'Report of the Committee to consider the **Law on Copyright and Designs**' (**Chapter 7** paragraph 407), **the comment** in the United Kingdom Government's green paper of July 1981 "Reform of the Law Relating to Copyright, Designs and Performers' Protection\*" (Chapter 6 para 1) and the recommendation in the United Kingdom Government's recent White Paper (Chapter 14 paragraph 14.5) concerning protection for variety artists. The Committee agrees with those statements and recommends that protection should extend to performances by variety artists such as jugglers, acrobats and others who do not normally perform literary, musical or artistic works. As mentioned in paragraph 18, this extension is contemplated by Article 9 of the Rome Convention.

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54. There is also a question whether additional provisions are required to implement sub-paragraphs (ii) and (iii) of Article 7.1(c), if effect is to be given to the performers' protection provisions of the Rome Convention. Article 7.1(c) (ii) requires that performers have the possibility of preventing the reproduction without their consent of a fixation of their performance if the reproduction is made for purposes different from those for which the performer gave his or her consent. Article **7.1(c)(iii)** requires that performers have the possibility of preventing the reproduction without their consent if the original fixation was made under Article 15 of the Convention (which provides for exceptions related to fair dealings and similar usages) and the reproduction is made for different purposes.

55. Read in the light of Article 19 of the Convention (which provides that Article 7 does not apply once a performer has consented to the incorporation of his or her performance in a visual or audiovisual fixation), it would appear that Article **7.1(c)(ii)** would be satisfied by a provision which would prevent a performer's performance fixed on a sound recording from being used in a **film**, without his or her consent.<sup>8</sup> The Committee believes that such a provision should be enacted in order to permit adherence to the Rome Convention insofar as the performers' protection provisions are concerned.

56. The Committee also considered whether to recommend the prohibition of conduct analogous to that referred to in the last paragraph eg an unauthorised reproduction of a sound recording of a performer's performances as recorded on the sound track of a film, and an unauthorised reproduction on a cinematography film of a performer's performance in another film. In this context it took into account the decision of the United Kingdom Court of Appeal in Rickless v United Artists Corporation [1987] 1 ALL ER 679. In that case, the

Court upheld a civil claim for damages under section 2 of the Dramatic and Musical Performers' Protection Act 1958, for the unauthorised making of a film from 'out-takes' and **clips** from earlier films.

57. The Committee is divided as to whether the proposals in paragraph 55 should be extended to cover cases of this kind. The **majority** is of the view that no provision should be made at this time. "It considers that the legislation recommended at paragraph 55 should be enacted to enable adherence by Australia to the **Rome Convention** but does not consider it desirable to go beyond that. The majority is not aware that there is any real problem that needs attention. The Committee did not receive any submissions on the matter. It is difficult to foresee all possible ramifications of enacting legislation beyond that recommended in paragraph 55 and, in any case, contractual arrangements will often be sufficient to deal with the matters referred to. (It is noteworthy that the plaintiffs in the Rickless case also succeeded in a claim for breach of contract.) For these reasons the majority considers **that protection for** performers of the kind recommended in this Report should be put in place and any extension of it to cover the matters referred to in paragraph 56, should await further developments. The issue should be kept under review but it does not presently need attention. (See Part IV for minority's views). -

58. The Committee has, in paragraph 49, **accepted that** exceptions along the lines contemplated by Article 15 should be adopted. It also accepts that these exceptions should be subject to the limitation referred to in Article **7.1(c)(iii)**.

59. The Committee notes that the introduction of legislation giving effect to the above-mentioned recommendations would satisfy the requirements of the Rome Convention concerning the minimum rights of performers.