Performers as Authors?

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Why It Matters

At least three reasons:

1. Today, anyone can make and disseminate movies and sound recordings – even people who’ve never heard of works made for hire.

2. Terminations by recording artists.

3. International treaties giving author-like rights to performers.
What is an author?

• No statutory definition of “author”

• Most judge-made definitions implicitly assume one author:
  – “he to whom anything owes its origin”
  – “person who causes something to come into being”
  – “the party who actually creates the work”
  – “the person who translates the idea into a fixed, tangible expression”

Some more so than others, due to focus on “control”:
  – “person with creative control”
  – one who “superintends’ the work by exercising control”
  – “the inventive or master mind”

• But most situations raising “performer as author” questions don’t involve sole authors:
  – Exc: When a performer is the only possible author (e.g., self-recording by sole performer)
Joint Work Concept

• “A ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101.

• Assumes we know what an “author” is. But most definitions of author have little application to collaborative authorship.

• Judge-made requirements for joint work “authors” include:
  – Make independently copyrightable contributions (majority view)
  – Mutual intent to be joint authors. (CA 2, 7, 9) (CA 9 requires “objective manifestations”)
  – Creative control (CA 9)
  – “Whether audience appeal turns on both parties’ contributions and their respective shares cannot be apprised” (CA 9)
Which Performers?

- Audiovisual performers (intentional)
- Recording artists (musicians & vocalists)
- Models & other intentional photo subjects
- Athletes
- Unintentional subjects
How the Issue Arises

• Not a work made for hire, and either:
  – No copyright assignment, or
  – Termination rights

• When is it not a work made for hire?
  1. Created by non-employee, and
  2. No valid work made-for-hire contract
Little case law . . . yet

• Few cases have addressed authorship claims by performers.
  
  – Morrell v. Smashing Pumpkins (C.D. Cal. 2001) – musicians and videographer were joint authors of music video.
  – Natkin v. Winfrey (N.D. Ill. 2000) – Oprah was not joint author of photos taken of her.
  – Garcia v. Google (9th Cir. 2014) – Actress was sole author of her performance in film because it satisfied minimum standard of creativity. (Dissent: she was not an author at all).

• More will come, as recording artists attempt to terminate transfers.
Employee WMFH

• Created by common law employee within scope of employment.
  – Restatement of Agency § 220 factors can be hard to predict.
  – NLRA test mirrors Restatement factors more accurately than copyright cases.
Employees?

- Audiovisual performers (intentional)
- Recording artists (musicians & vocalists)
- Models & other intentional photo subjects
- Athletes
- Unintentional (candid) subjects
Common Law Agency Factors

Copyright
“hiring party's **right to control the manner and means**” plus **nonexhaustive** “other factors” including:

- skill required
- source of tools
- location
- duration of work relationship
- payment method
- relation to hiring party’s regular business
- whether hiring party is in business
- right to assign additional projects
- when and how long to work
- hiring and paying assistants
- employee benefits;
- tax treatment.

NLRA
“all of the incidents of the relationship ... with no one factor being decisive.” **Nonexhaustive** factors:

- right to control manner and means
- skill required
- who supplies tools
- who supplies place of work
- duration of employment
- payment method (time vs. project)
- relation to hiring party’s regular business
- employer is “in the business”
- parties believe it’s employment?
- entrepreneurial risk/reward?
- individual engaged in distinct occupation or business?
Labor Law Classification

• Labor law classifies some musicians and directors as independent contractors and other as employees, depending on the specific arrangement with the employer.

• Labor law disregards loan-out entities, treats performer as direct employee.

• Should copyright law track labor law?

• Labor law’s paternalism favors employee status; copyright’s paternalism disfavors it.
Issues with Non-Employee Performers

• Absence of signed, written, explicit WMFH.
  – Inexperienced filmmakers (*Morrill, Garcia v. Google*).

• Ineligible category of work.
  – Congress decided not to decide about sound recordings.
  – Photographs?
Copyrightable Contribution?

• Against:
  – Voice and image are not copyrightable.
  – Performers and models just follow instructions.
  – Not “masterminds.”
  – Final cut edits their performances.

• For:
  – Performers (and models?) make significant creative choices.
  – Script is just the raw material, like sheet music.
  – Directors that let actors improv.
  – Sound recordings are directed to a lesser degree.
Other requirements met?

• Intent to merge contributions? Yes.
• Intent to be joint authors? Dubious requirement is more problematic.
  – Photographer or film/record producer often lacks intent to share authorship.
  – Credit and billing would be persuasive.
• Contribution to audience appeal?
  – Would favor some performers, especially “stars,” popular models, and recording artists (session musicians?).
  – Would disfavor some performers in smaller roles.
Exclude Involuntary Performers?

- People who didn’t consent to be recorded would not be authors.
  - No intent to create copyrightable contribution and to merge it with those of others. § 101
  - Create authorship by subsequent ratification? Creates risk of chilling political speech, criticism, news, commentary. But only if sole authorship.
Summary: Requirements For Performer Authorship

• Copyrightable expression.
• Prior consent to fixation.
• If collaborative work, intent to merge contribution with those of others to create unitary whole.
• Most will be joint works
Treaties Extending Author-like Rights to Performers

- WIPO Beijing Treaty on Audiovisual Performances (2012) – audiovisual performers
- U.S. is non-compliant but laying low.
WPPT Art. 5

– Requires protection for performers’ moral rights of attribution (limited) and integrity
– Fixed aural performances
– Inalienable
– Waivable? And routinely waived?
– No U.S. legislation
– No discernable effect on recording artists’ rights
WPPT Art. 7

- Protects performers’ exclusive reproduction right in their sound recordings.
- Contradicts producers’ exclusive reproduction right under Art. 11.
WPPT Arts. 8 & 10

• Protects performers’ exclusive “making available” rights.

• Contradicts producers’ exclusive rights under Art. 12 & 14.
WIPO Beijing Treaty on Audiovisual Performances (2012)

- Counterpart to WPPT for audiovisual performers.
- Economic rights – Art. 6-11
- Moral rights – Art. 5
Art. 5

• Requires protection of performers’ moral rights of attribution and integrity.
• Integrity right much narrower than in WPPT.
• Inalienable.
• Waivable?
Economic Rights

- Exclusive reproduction right (Art. 7)
- Exclusive distribution rights (Arts. 8 & 10)
- Transferable.
- National law can presume economic rights are transferred to producer, but U.S. law does not.
Performers’ Communication Right—Art. 11

Art. 11: Exclusive right to authorize:

(i) Broadcasting and communication to public of their fixed AV performances.

(ii) Signatories can opt out of Art. 11 (or make rights transferable to producer).
Reproduction – Art. 7

• “Direct or indirect reproduction” of their performances fixed in audiovisual fixations.
Making Available—Art. 8

(1) Exclusive right of “making available to the public” the original and copies of their fixed performances “through sale or other transfer of ownership”

(2) Subject to national laws on exhaustion after first transfer authorized by performer.

Fn. 7 – “original and copies . . . refers exclusively to fixed copies that can be put into circulation as tangible objects.”
Making Available – Art. 10

• Exclusive right to authorize the making available to the public of their fixed AV performances “by wire or wireless means” such that members of the public may access them at individually chosen places and times.

• No clarifying fn.

• Same as Art. 14 of WPPT.

• Copyright “making available” right still unsettled in U.S.
Rental Right – Art. 9

• Commercial rental right as determined by national law.
• Applies only to fixed copies that circulate as tangible objects.
Who are “performers”?

• Beijing Art. 2 definition:
  “performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.

• Does this include “extras”? (records of Diplomatic Conference say no)

• Does it include unintentional performers – e.g., persons unwittingly captured on news footage, amateur videos on YouTube?
Extras? Incidental Performers?

From 2000 Diplomatic Conference records:
In general, "extras," "ancillary performers" or "ancillary participants" do not qualify for protection because they do not, in the proper sense, perform literary or artistic work or expression of folklore. Thus, it appears that no explicit provision concerning extras is necessary in the proposed Instrument.

Accordingly, when implementing the proposed Instrument, Contracting Parties may determine in their national legislation the threshold at which a person becomes a performer entitled to protection.

When making this determination, Contracting Parties may take into consideration established industry practice and, inter alia, whether a person has a speaking role or forms a background to the acting.
Presumptive Transfer to Producer (Art. 12)

• National law may allow this for all economic rights except:
  – Fixation, broadcasting or communication to public of unfixed performances.

• Not allowed for moral rights (attribution, integrity).

• Must we now expand sec. 1101?

• Do amateur/casual/secret videos infringe?

• Does fair use apply?
Anticircumvention – Art. 15

- Legal remedies required, but:
- Fn. 10 allows adoption of “measures to ensure that a beneficiary may enjoy limitations and exceptions . . . where technological measures have been applied to an AV performance and beneficiary has legal access to that performance . . . to enable the beneficiary to enjoy the limitations and exceptions. . . ”
- No corresponding proviso in WPPT or WCT.
- Explicit authorization for fair use exception to anticircumvention laws? Who is “beneficiary”??
Moral Rights – Art. 5

(1) “Independently of a performer’s economic rights, and even after the transfer of those rights, the performer shall, as regards his live performances or performances fixed in audiovisual fixations, have the right:

   (i) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and

   (ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.”

(2) – rights continue post-mortem, as long as economic rights.

(3) – means of redress left to individual countries.
Non-transferable

• Beijing Art. 12 allows economic rights, but not moral rights, to be transferred to producer of audiovisual fixation.
• Moral rights may continue post-mortem.
• Beijing Treaty does not address waiver of moral rights, but the rights will be meaningless if they are routinely waived in performers’ employment contracts.
Attribution

• The right “to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance”.

• For SAG/AFTRA members, right to be credited is already covered by union contracts.

• However, the attribution right could affect non-union productions.

• If impact of Beijing is limited to non-union performers, no one will pressure Congress to implement the attribution right.

• “Except where omission is dictated by the manner of the use of the performance” -- How broad is this exception?
Integrity

- The right “to object to any distortion, mutilation, or other modification of his performances that would be prejudicial to his reputation, taking account of the nature of audiovisual fixations.”
- “Taking account of the nature of audiovisual fixations.” -- How broad is this exception?
- Right of integrity is ordinarily waived in performers’ contracts with U.S. producers (union and non-union).
- Should it still be waivable under Beijing?
- Beijing is silent on waiver. Countries vary widely on whether and when moral rights under Berne can be waived.
Footnote 5 Limits on Integrity Right

- Footnote 5 of Beijing Treaty:

“[C]onsidering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer’s reputation in a substantial way. It is also understood that the mere use of new or changed technology or media, as such, does not amount to modification within the meaning of Article 5(1)(ii).”
Will U.S. Domestic Law Change?

• Will Art. 5 necessitate changes in domestic law so that U.S. audiovisual performers will have the moral rights of attribution and integrity?

• Will the U.S. ignore Art. 5?

• Will the U.S. declare itself already in compliance with Art. 5? (as with authors’ moral rights under Berne Art. 6bis)

• Beijing Treaty lacks enforcement provisions, like Berne, WCT, and WPPT, and unlike TRIPs.
Implementation of Integrity Right?

• Because SAG/AFTRA agreements don’t protect the right of integrity, legislation would be necessary to implement the treaty provision for both union and non-union performers in the U.S. Will anyone pressure Congress?

• If SAG/AFTRA cared about this right, they would already have addressed it through collective bargaining.
Audiovisual Cultures

• US audiovisual industries give all creative control and most economic rights to producer (limited only by SAG/AFTRA provisions), allowing producers to borrow large amounts of money to produce big-budget films (collateral).

• European films tend to be more artist-driven (especially directors), have smaller budgets, and depend more on government subsidies or mandatory investment (French TV companies).

• These differences in film cultures correspond to the disparate degrees of moral rights protection for authors. But is there cause and effect?
Forecast: A Widening Gap in Film Cultures

- Countries with strong moral rights protections for authors are likely to embrace strong moral rights for audiovisual performers. Benefit or detriment to creativity? (Films by committee?)
- This could further reduce private investment as well as bank lending for audiovisual industries in strong moral rights countries. More government subsidies required?
- The U.S. is unlikely to adopt strong moral rights protection for performers, thus preserving its big-budget, producer-driven, privately financed film culture.
Questions

• Even if performers’ moral rights are not enacted in the U.S., will performers in U.S. audiovisual works be able to enforce their foreign moral rights when the works are exploited outside the U.S.?

• In countries that adopt moral rights for performers, will performers choose not to enforce these rights to avoid damaging their career prospects?

• Can performers’ moral rights claims be manipulated by producers to restrict uses of their works that are otherwise permitted by copyright law? (e.g., “fair use” such as mashups)
End
Two exceptions or one?

“modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer . . . “

Are these two exceptions, or one? In other words --

If performer did not authorize the specific use, does this mean that modifications “in the normal course of exploitation” for that use are not allowed without the performer’s consent?
Moral rights in Audiovisual Works

• US provides virtually no moral rights protections for authors or performers in audiovisual industries.
• All rights to alter the work belong to the producer, except in rare instance where the writer or director retains some creative control by contract.
• Authors (writers, directors, composers) in Europe, India, and many other countries have inalienable moral rights in audiovisual productions.
• Performers typically lack moral rights in audiovisual works, and in many countries lack economic rights as well, largely due to absence of collective bargaining for performers.
“Objectively . . . prejudicial?”

• Art. 5 attribution rights “are concerned only with changes that are objectively prejudicial to the performer’s reputation in a substantial way.”

• Based on U.S. case law on moral rights of artists (VARA, 17 USC § 106A), this will typically involve a “battle of the experts.”
Fair Use?

• Fair use, under 17 U.S.C. 107, qualifies as one of the “limitations and exceptions” allowed under Berne and WCT. (So says the U.S.)

• Fair use applies to artists’ moral rights in works of visual art under section 106A.

• Any implementation of performers’ moral rights in the U.S. should also be subject to fair use.
Moral Rights in WIPO Performance & Phonograms Treaty

• Art. 5 of WPPT recognizes moral rights of performers in their live and recorded aural performances, even after transfer of economic rights:
  – Attribution right “except where omission is dictated by the manner of use of the performance.”
  – Integrity right (‘prejudicial to his reputation’)

• No domestic legislation ever introduced.
• CRS Report to Congress (1998): “The United States argued strongly against coverage of audiovisual performances” in WPPT, and prevailed.
Moral Rights in Berne Convention

• Art. 6bis requires protecting rights of attribution and integrity for all authors.
  – Status in U.S.:
    • Implemented only for creators of works of visual art, and only for originals and limited editions (paintings, drawings, sculptures, lithographs, photographs).
    • Not available for literary, musical, choreographic, or audiovisual works.
    • Does not apply to mass-produced copies.
    • Like Beijing, Berne has no enforcement provisions.
Limitations and Exceptions

• Art. 13:

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.
What are Moral Rights?

• Rights of authors (and, now, performers)
• Separate from economic rights (“copyright”)
• The most widely recognized are:
  – Attribution (right to receive credit for their work)
  – Integrity (right to object to certain alterations in their work)
• Musical performers that do not own the copyrights in their sound recordings cannot prevent their recorded performances from being used in ways to which they object (e.g., political campaigns, commercial advertising) unless they reserved those rights in their recording contracts.

• False endorsement under the Lanham Act unlikely to succeed if there was a valid copyright license.