

LEGAL CASE ANALYSIS

Live Production Recording Copyright Issues

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TABLE OF CONTENTS

INTRODUCTION	3
ANALYSIS	4
CONCLUSION	7
REFERENCES	8

FACT PATTERN

Natasha is a live sound engineer who has recently bought herself a Pro Tools rig. She sets the rig up at gigs and makes a multi track recording of bands performance via the direct outs of the front of house console. She then takes the recordings home, mixes them down and sells them back to the bands. She also places the recordings on her website and offers them for sale for \$5 a gig.

Discuss how Natasha can best comply with performer's rights legislation so as to not run into any issues with the bands in the future, also Natasha has learnt that Bob has used a sample from one of her recordings in a track that he has produced. Discuss whether copyright law makes it necessary for Bob to obtain Natasha's permission to use the sample.

INTRODUCTION

The following pages is a short essay outlining legal considerations on topics of performer's rights, rights to audio recording of live performances, rights to works and subject matter other than works and contractual law as can be found to have occurred within the context of the fact pattern. This essay makes references to current Australian Contract Law, as well as the *Copyright Act 1968* (Cth) and its 1989 amendment and the subsequent provisions and extensions made in 2005 by the US Free Trade Agreement Implementation Act 2004 (USFTA Act) concerning performer's rights.

Copyright has always been concerned with protecting the expression of an idea in material form and is "largely based on the notions of property and property ownership" (Davis, 2010). The very nature of performance is not embodied but rather temporal as it happens, generally, impulsively. There were no protection in place for performers until 1989 when an amendment was made to the Act which gave the performer/s entitlement to either allow or disallow any audio recording to be made of any live performance. If an unauthorised audio recording of the performance was made, then by default, the performer/s are deemed to be the makers of the recording and therefore own its copyright. However if a recording was allowed to be made then the person/s who makes the recording is deemed to be maker and subsequent copyright owner.

In 2005 a new piece of legislation was introduced which states that if an audio recording was made of a live performance with the full consent by the performer/s a joint ownership of the audio recording shall exist between the performer/s and the person/s who made the recording. This gives the performer/s a vastly improved scope of protection, now having "an equal share in the exclusive rights" (Davis, 2010) of the sound recordings as well as the capacity to implicitly require permissions from other parties before any form of use was to occur with any audio recorded material of their performance. These performers' rights extensions do not apply to commissioned audio recordings, performance under employment contract or audio-visual recordings of performances.

ANALYSIS

The first determinant criteria is whether copyrightable materials exist in the aforementioned scenario and secondly whether the parties involved are persons qualified to create copyright for that particular expression therefore satisfying necessary conditions to be afforded protection under the Act.

The *Copyright Act 1968* protects three types of subject matter:

Part III: **Works:** (literary, dramatic, musical and artistic etc.);

Part IV: **Subject matter other than works:** (sound recordings, films, broadcasts, published editions of works);

Part XIA: **Performances.**

To be protected the expression must come within one of these three categories of subject matter (Davis, 2010).

The performance of the band of which Natasha had recorded is assumed to have met the requirements of a **performance** as defined under the new performers' provision of 2005 in Part XIA of the Act,

s248A(1) a performance (including an improvisation) of a musical work or part of such a work;

and that it also meets the requirements of having been performed in Australia and/or was performed by a **qualified person**

s248A(1) an Australian citizen or a person resident in Australia.

It is also held in assumption that consent was given by the band to Natasha to make an audio recording of the performance and that she was in no way commissioned or employed by the performer/s or any other party to undertake the recordings.

As of 2005, under the performer's rights extension of the Act (made by the USFTA Act), a **maker** of a sound recording of a live performance is defined as:

s100AD(1)

(a) the person or persons who, immediately before the commencement of this section, owned the copyright subsisting in the recording; and

(b) the performer or performers who performed in the performance

where the person mentioned in **1(a)** is "the person or entity who, at the time of the recording, owns the recording medium on which the recording is made e.g. the person who owns the tape or disc" (Davis, 2010).

The copyright owner/s of the audio recordings of a live performance as stated under the Act are the makers of the recording;

s100AE(2) all makers of a sound recording of a live performance are owners of any copyright subsisting in the recording.

Therefore ownership of the audio recordings lie equal parts with Natasha being deemed as **former owner**,

s97(2) the maker of a sound recording is the owner of any copyright subsisting in the recording;

and the band members (the performers) being deemed as **new owners**,

s100AB(a) a person who becomes a maker of a sound recording under paragraph **100AD(1)(b)**;

where the band members collectively

s100AE(4) own their half of the copyright as tenants in common in equal parts.

Natasha as a former owner may continue to do any act in relation to the copyright of the recordings as is stated in the following section:

s100AB(1) On and after the day on which this section commences, a former owner of the copyright in a sound recording of a live performance may:

- (a) do an act comprised in the copyright; or
- (b) do any other act in relation to the copyright;

as if each new owner of the copyright had granted a licence or permission (however described) to the former owner to do the act.

However, in order for Natasha to legally sell the recordings on her website and not infringe on any other rights that may be contained within the recordings, she must obtain necessary permissions from owners who own the rights to those that may be contained within the recordings. Depending on the songs and/or content, rights may be present within several expressions of original works and/or subject matter other than works in the recorded material as is defined in Part III of the Act.

In all probability, Natasha may need to obtain consent from several authors of which could include the author (lyricist) who wrote the original lyrics (owner of original literary work) and/or the author (arranger/composer) who arranged the songs (owner of original musical work) and the author (songwriter) who wrote the original songs (owner of original musical work).

Regardless of whether the aforementioned owner/s are part of the performer/s (the band), Natasha need to separately obtain proper licences for each of the individual rights in written form as stated under,

s196(3) an assignment of copyright (whether total or partial) does not have effect unless it is in writing signed by or on behalf of the assignor;

in order to legally distribute her recordings online. This usually takes on the form of several contracts which are “legally enforceable promise or obligation undertaken by two or more parties” (Davis, 2010).

A contract needs five distinct elements in order to be formed.

- I. **Offer.** “A clear statement of the terms by which the person making the offer is prepared to be bound...it must be a clear unequivocal, unambiguous statement” (Davis, 2010). This is where the necessary licensing terms are outlined in order for Natasha to legally reproduce, sell and use her audio recordings.
- II. **Acceptance.** “The expression, by words or conduct, of assent to the terms of the offer in the manner prescribed or indicated by the offer” (Davis, 2010). This is the unequivocal agreement of the author/s of the original works to grant the licenses to Natasha in accordance to the terms and conditions outlined in the offer.
- III. **Certainty.** “There can be no contract unless the parties agreed upon can be determined objectively with a reasonable degree of certainty” (Davis, 2010). Details of the contract must not be in any way ambiguous or unclear to either Natasha or the author/s. All parties must have mutual understanding of the contract’s implications.
- IV. **Intention.** “Parties to an agreement must intend to be bound by that agreement for it to be legally binding” (Davis, 2010). Both Natasha and the author/s must intend to enter into business and commercial arrangements in order for the parties to enter legal relations.
- V. **Consideration.** “The price paid for the other’s promise, or; what the promisee is doing (or not doing) in return for the promisor’s promise” (Davis, 2010). In most cases where a license is needed for commercial purposes, a license fee is incurred which serves as consideration, allowing for the contract to be enforceable.

In the case of Bob having found to have used a sample from one of Natasha's recordings, the Copyright Act states that:

s14(1) In this Act, unless the contrary intention appears:

(a) a reference to the doing of an act in relation to a work or other subject-matter shall be read as including a reference to the doing of that act in relation to a substantial part of the work or other subject-matter; and

(b) a reference to a reproduction, adaptation or copy of a work shall be read as including a reference to a reproduction, adaptation or copy of a substantial part of the work, as the case may be.

Therefore the law will determine whether Bob has used a 'substantial part' by examining the **quality** and **quantity** of what has been taken. "Case law clearly states that the qualitative aspect is more important than the quantitative aspect" (Davis, 2010).

If deemed that the sample Bob had used contains a substantial part (a distinctly recognisable part) of Natasha's recordings, then he would need to obtain the necessary license from Natasha and the band who are joint makers and therefore joint owners of the recordings. He may also need to obtain other relevant licenses from owners of rights that may be existing within some elements in the sample. As discussed above, these permissions need be effected in writing which generally takes on the form of one or more individual and independent legally binding contracts.

CONCLUSION

For future scenarios where audio recordings of live performances are made by Natasha, clear consent need be expressed and given by the performer/s, otherwise an infringement of the performer/s rights will be made, who are deemed to be makers of the performance and therefore own exclusive rights to the performance. Natasha also need to carefully assess wether other rights are present within her recordings and determine if necessary permissions (licenses) need be obtained to legally sell, copy and make use of the recordings. This generally manifests in the form of legally binding contractual agreements.

In the case of Bob sampling Natasha's recordings, unless he himself was a performer or was the sole performer of the live performance who then subsequently have exclusive rights to the audio recordings of the live performance, would otherwise make certain that portions used in the sample is not of substantial part as can be determined by law. If however, he believes that a substantial part was used then necessary legal action need to be taken to comply with copyright regulations. This may also constitute a series of individual legally binding licensing contracts.

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