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Related rights in United States law

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This article explains the origin of the rights of performers, sound recording producers, audiovisual producers and broadcasters in the United States. As US law does not formally recognize a category of 'related rights', some of those rights exist under copyright law and are, therefore, subject to copyright rules such as the originality requirement, the possibility for authors to claim rights back 35 years after a transfer by contract, and the work-made-for-hire doctrine. Other rights are protected under different statutes.

Are there related rights in the United States?

Some readers might believe that this is an article about a null subject, as the common belief is that there are no related rights in US law. That belief is incorrect.

Let us agree at the outset that rights are not just neighbouring on, or related to, copyright because a statute or other legal instrument says so. Neither the 1961 Rome Convention nor the 1996 WIPO Performances and Phonograms Treaty (WPPT) refer to related or neighbouring rights by name, yet they are widely viewed as instruments that regulate those rights. Which begs the question, what exactly are related (or neighboring) rights?

There is no universally agreed conceptual definition of related rights.¹ They are often 'defined' as rights belonging to certain categories of persons or entities whose work involves literary and artistic works *but who are not authors* – or are considered in their non-authorial role if they are also authors. The usual categories are performers in respect of their performances, producers of phonograms in respect of their phonograms, audiovisual producers, and broadcasting organizations in respect of their broadcasts.² Some would add book publishers in respect of typographical arrangements of their published editions to this list.³ In this article, I leave aside this, less common type of right and focus instead on the more traditional categories of related rights.

The International Context

Yehudi Menuhin's version of J.S. Bach's sonatas or Brahms' violin concerto in D minor op. 77 is creative. It exhibits "creative choices". Is it not thus not original in a copyright sense? To quote Eric Taver:

'It is of course in the 1949 recording with the Lucerne Festival Orchestra [of the above-mentioned Brahms Concerto] that one must listen to Menuhin throw himself at the notes while taking every imaginable risk. It is here that the Menuhin we will later come to know shows his colors, the Menuhin whose left hand climbs into the stratosphere while pulling at each note, catching it at the end of a finger and vibrating it to limit the risk of going astray. Menuhin is establishing his own style, a lively sound snatched from the string...'⁴

As Professors Ricketson and Ginsburg explain, the argument that performers use "technical skills" is no excuse to deny full copyright protection to at least certain performances.⁵ After all, "the inclusion of photographs and cinematographic films within the scope of the Berne Convention undermines an argument that tries to distinguish the kind of skill applied in the creation of these various works."⁶ Indeed, "[t]he truth is that there is no logical reason, based on the need for literary or artistic creation, why [performers] should not be protected under the Berne Convention."⁷ *The Guide to the Rome*

1 This article will not discuss the change in terminology from 'neighbouring' or 'related'. A generally accepted view is that those terms are synonyms, as indicated, for example, in the *Guide to Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and related Rights Terms*, Geneva: WIPO, pp. 298 and 307.

2 See *ibid.*

3 See *ibid.*

4 Eric Taver, 'Yehudi Menuhin (1916-1999): Three Stages in the Life of a Violinist', *Culture Kiosque* (7 May 1999), available at http://www.culturekiosque.com/klassik/features/rhemenuhin_e.html. See also J.A.L. Sterling, *Intellectual Property Rights in Sound Recordings, Film and Video: Protection of Phonographic and Cinematographic Recordings and Works in National and International Law*, London: Sweet & Maxwell 1992, p. 324.

5 S. Ricketson and J. C. Ginsburg, *International Copyright and Neighbouring Rights*, Oxford: Oxford Univ. Press 2006, vol. 2 at p. 1206.

6 *Ibid.*

7 *Ibid.* at 1206-07.

Convention goes a step further, in declaring that “performances of artistes are of their nature acts of spiritual creation.”⁸ Despite this interesting possibility (that certain performances could be considered copyright works), international law norms crafted in the 1950s and 1960s to protect performers chose to create a separate legal regime known as neighbouring rights – what we now call related rights.

It used to be the case that related rights were substantively inferior to authors’ rights. Some see this confirmed by the Rome Convention, which provides in its very first article that “[p]rotection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.”⁹ However, a careful study of the negotiating history of the Rome Convention demonstrates that seeing this provision as creating a hierarchy is incorrect; what the Convention drafters meant to declare is that the rights of authors, on the one hand, and those of related rights owners, on the other hand, are independent but not in a hierarchical situation vis-à-vis one another.¹⁰ This does not mean that the protection of related rights cannot have economic effects on authors, the so-called cake theory according to which there is “only one ‘cake’ to be divided between the increased number of right owners.”¹¹

The last drops of the hierarchical argument have now evaporated in the normative sunlight of more recent related right protection: at international law, related rights owners have rights similar to those of authors, including moral rights.¹² They have full or close to full economic rights – in contrast the older Rome Convention famously allows countries to implement only a right to remuneration, not a full exclusive right.¹³

Analysis by category

Performers

The TRIPS Agreement incorporates the Berne Convention (minus the moral right) but not the Rome Convention.¹⁴ Interestingly, however, TRIPS provides that *exceptions* contained in the Rome Convention may be applied to the related rights it contains.¹⁵ What the TRIPS Agreement and Rome Convention provide as rights for performers is, first and foremost, a right in respect of the *fixation* and *unauthorized broadcasting* or other communication to the public of a live performance. The TRIPS Agreement specifically provides:

1. A right for (music) performers in respect of fixations of their performance on phonograms, to the fixation of their unfixed performance and the reproduction of such fixation; and
2. A right for (music) performers in respect of the broadcasting by wireless means and the communication to the public of their live performance.

These rights exist in US law for music performers and, just as related rights legislation typically does, the rights are not contained in the Copyright Act proper.¹⁶ This protection is contained in chapter 11 of Title 17 (the same title of the United States Code that contains the Copyright Act).¹⁷ Chapter 11 was added, not surprisingly, to comply with TRIPS.¹⁸ The unauthorized fixation of performances may also be captured under the right of publicity, at least in certain US states.¹⁹

As to audiovisual performers, their contributions are not protected under US law. Audiovisual works are typically produced as *works made for hire*, defined in part in section 101 of the Copyright Act as including “a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work”. Under the work made for hire doctrine, *the hiring party is the author* of the work, thus having full copyright rights under the statute but leaving no rights for others such as authors or performers. A number of audiovisual performers (especially those who are working with major studios) are members of *guild agreements*, however, according to which authors and performers can share in revenue generated by the exploitation of their works and performances fixed in audiovisual works (the case of so-called ‘residuals’, which may be defined as sums paid by studios for reruns, syndication, DVD release, or online streaming release of their films). Contracts between the major studios and the Screen Actors Guild (SAG/AFTRA) and the Writers Guilds of America (East and West) then apply to determine the sharing rules for certain uses of the film and the splits of receipts from foreign collective management organizations that collect private copying levies.²⁰ Here, audiovisual performers and authors (screenwriters and directors) are treated on more or less equal footing.

Performers have no statutory moral rights in the United States, but here again they are at par with authors who, except for authors of certain works of fine arts, have no such moral right either – unless they hold derivative work rights in which case they have an economic right that provides a rough equiv-

8 *Guide*, note 1 at 12.

9 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, October 26, 1961, art. 1.

10 WIPO *Guide*, note 1 above, at 135-36. See also Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights*, Oxford: Oxford Univ. Press 2006, vol. 2 at 1222.

11 Ricketson and Ginsburg, vol. 2 at 1221.

12 WIPO Performances and Phonograms Treaty, 36 I.L.M. 76 (Geneva, 1997) (S.Treaty Doc. No. 05-17) [hereinafter WPPT].

13 Rome Convention, art. 12.

14 TRIPS Agreement, art. 9.1.

15 *Ibid.*, art. 14.6.

16 Though it is contained in the same Title of the US Code, namely Title 17.

17 The United States Code is a consolidation and codification by subject matter of the general and permanent laws of the United States. See <http://uscode.house.gov>.

18 Namely by the 1994 Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4974. For a discussion, see David and Melville Nimmer, *Nimmer on Copyright*, vol. 3 at paras 8E.02 and 8E.03[C][1]. See also Marshall A. Leaffer, *Understanding Copyright Law* (2d ed. 1995), New York: LexisNexis, at paras 12.04[A], at 375-76 and n.20.

19 *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (applying the Ohio right of publicity).

20 See Adriane Porcin, ‘Of Guilds and Men: Copyright Workarounds in the Cinematographic Industry’, *Hastings Communication & Entertainment Law Journal* 35 2012, p. 33-34.

alent.²¹ There was a theory that trademark law might provide a functional equivalent to the Berne moral right, essentially by considering authors as the 'origin' of their works. The US Supreme Court set that theory aside in *Dastar Corp. v. Twentieth Century Fox Film Corp.*²² There has since been an interesting discussion in the literature about how to fix this gap between US law and the obligations undertaken by the United States in the Berne Convention and the WPPT, to name just those two instruments, including by using the tort doctrines of reverse passing off and misappropriation.²³

Music performers also have a right to receive a set percentage of the monies collected by the collective designated to operate the digital audio transmission compulsory license (for certain non-interactive transmissions), namely SoundExchange, Inc.²⁴

There are a number of constitutional law issues concerning the protection under federal law of objects that may not be copyright works that this article does not address, including whether the anti-bootlegging statute is in fact validly adopted under the Copyright and Patent Clause.²⁵

Sound recording (phonogram) producers

The Rome and Phonograms Convention contain a reproduction right for owners of rights in phonograms.²⁶ The TRIPS Agreement does as well (namely, a right "in respect of the direct or indirect reproduction of their phonograms").²⁷

US law defines the terms 'sound recording' and 'phonorecord' (not phonogram) differently. A sound recording is a (copyright) work that results "from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such

as disks, tapes, or other phonorecords, in which they are embodied."²⁸ By contrast, a phonorecord is a *material object* in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed.²⁹ Thus the term phonogram as used in international instruments is similar to what US law defines as a sound recording.³⁰

Federal law protects sound recordings only since 1972. Previously, some protection was available under state law.³¹ Since 1972, sound recordings are copyright(ed) works under US law.³² So no related right here? Not so fast: In practice, there are three levels of copyright in the US statute: (1) a full (Berne level) copyright for authors of certain works of the visual arts, which benefit from the rights in 17 U.S.C. §§ 106 and 106A, that is, economic and moral rights³³; (2) a set of economic-only copyright rights for all works not affected by section 106A (that is works other than certain works of visual arts) and other than sound recordings;³⁴ and (3) a set of economic rights for sound recordings with section 106 rights minus public performance, but with the addition of a right in digital audio transmissions (subject to certain modalities), contained in section 114(b).³⁵

The public performance right in US law is an umbrella right that covers acts that would be called communication to the public in most other jurisdictions. This means that sound recording owners do not get paid (and neither do performers) or have a say when music is broadcast or otherwise publicly performed. The idea of establishing a full(er) right in sound recordings has been part of many bills tabled in Congress, but opposition has been fierce.³⁶

A second major difference between US law beyond the absence of payment for sound recordings used in broadcasts, is that they are *protected as copyright works*. This implies that they must be

21 Section 106A, added by the Visual Artists Rights Act of 1990 (Pub. L. No. 101-650, 104 Stat. 5089, 5128) applies to certain paintings, drawings, prints and sculptures.

22 539 U.S. 23 (2003).

23 See Justin Hughes, 'American Moral Rights And Fixing The *Dastar* Gap', *Utah Law Rev.* 2007 659-714; and David Nimmer, 'The Moral Imperative against Academic Plagiarism (without a Moral Right against Reverse Passing Off)', *DePaul Law Review* 54 2004, p. 2-77.

24 SoundExchange administers the performer and producer rights in *non-interactive* digital transmissions of sound recordings under a compulsory license (17 U.S.C. § 114(e)(1) (2006).) and rates fixed by royalty judges, a system administered by the Copyright Office of the United States with an exemption from antitrust rules. For a discussion, see Daniel Gervais, 'The Landscape of Collective Management Schemes', *Columbia Journal of Law & the Arts* 34 2001, p. 423-449.

25 The fact that the protection applies to unfixed performances and is not limited in time led one court to question its validity. See *United States v. Martignon*, 346 F.Supp. 2d 413 (S.D.N.Y. 2004) at 424-25; vacated and remanded by 492 F.3d 140 (2d Cir. 2007). The Second Circuit vacated and remanded, finding the anti-bootlegging provision validly adopted under the Commerce Clause. The Eleventh Circuit upheld the constitutionality of the provision in *United States v. Moghadam*, 175 F.3d 1269 (11th Cir. 1999).

26 Rome Convention, art. 10.

27 TRIPS Agreement, art. 14.2.

28 17 U.S.C. § 101.

29 *Ibid.*

30 In the Rome Convention, a phonogram is defined as 'any exclusively aural fixation of sounds of a performance or of other sounds.' Rome Convention, art. 3(b).

31 See Peter Jaszi, 'Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis' (Sept. 2009), at p. 4; and Eva E. Subotnik & June M. Besek, 'Constitutional Obstacles? Reconsidering Copyright Protection for Pre-1972 Sound Recordings', *Columbia Journal of Law & the Arts* 37 2014, p. 327-378.

32 Under 17 U.S.C. § 101, 'sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied. 17 U.S.C. § 102(a) defines 'works of authorship' as including sound recordings.

33 The 106A rights are often waived by default via contract according to standard industry practice.

34 17 U.S.C. § 106A. The Visual Artists Rights Act of 1990 (VARA) added section 106A. Pub. L. No. 101-650, 104 Stat. 5089, 5128.

35 17 U.S.C. § 106 provides exclusive rights in sound recordings, including a digital audio transmission right, but not a full public performance right due to the exclusion of sound recordings in section 106(4). Under 17 U.S.C. § 114(b), sound recording copyright holders' exclusive rights are defined as including: (1) the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording; (2) the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality; and (3) the right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

36 See William Henslee, 'What's Wrong With U.S.: Why The United States Should Have a Public Performance Right for Sound Recordings', *Vanderbilt Journal of Entertainment & Technology Law* 13 2011, p. 739-765, at p. 749.

original.³⁷ In this, US law differs considerably from EU law. That originality may stem from a studio engineer's work, producer's input and from the performance (of the main performers and possibly also the background performers).³⁸

A producer input may take the form of suggestions but these face a copyrightability problem, or perhaps more precisely an authorship policy issue.³⁹ Some have argued that sound recordings are works specially ordered or commissioned by the record company and thus *works made for hire* created by the performers and possibly also sound engineers but whose *author*, under US law, would be the hiring party, namely in most cases the producer. Let us see whether this argument has wings.

In 1999, the recording industry convinced Congress to add sound recordings to the list of commissioned works that can be made-for-hire. This caused uproar, and Congress quickly withdrew the provision, less than a year later.⁴⁰ As the statute now stands, a work made for hire must be made *by an employee* (performers are rarely employed by record companies) *or a commissioned work*.⁴¹ Some commentators see the simple fact of the 1999 amendment as an admission or at least an interpretive direction, that sound recordings are *not* works made-for-hire despite the careful congressional language of the repeal.⁴² A commissioned work, in turn can be a work made for hire only if (a) the parties *agree in writing*; and (b) if the *work belongs to one of the named categories* in the statute: "collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas."⁴³ As one can readily see, this list does *not* include sound recordings (as discussed above, they made a short-lived appearance on the list in 1999) and, hence, sound recordings would have to fit another category to be considered works-made-for-hire – again except in cases where the performers and sound engineers are employees of the producer (there is no categorical limitation for works created by employees).

The only vaguely credible options that remain on the list of commissioned works in which sound recordings could fit (for cases other than employment) are *collective work* and the previously mentioned notion of *compilation*. Both terms are defined in the statute. A compilation is "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."⁴⁴ A subset of compilations known

as a collective works are defined as works "such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."⁴⁵

Congress seemed to assume the application of the work-made-for-hire doctrine to sound recordings when it passed the current (1976) Copyright Act:

'The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.'⁴⁶

This needs to be unpacked. The performer (if there is one, as a recording of, say, naturally occurring sounds would include no performance) provides a creative contribution and originality. If not, the Report goes on to say, then the "producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording" is the source of originality. That source is, in reality, one or more sound engineers. In all cases, *the need for originality for all copyrighted work, including works-made-for-hire, persists: one must identify the source of the creative choices that generate originality.*⁴⁷ This aligns with the practice of the US Copyright office, which accepts sound recording registrations from both performers and producers.⁴⁸

Performers are an obvious choice when looking for a source of originality.

Sound engineers are highly skilled and often generate 'creative choices'.⁴⁹ There are three types of contributions by sound engineers to be considered.⁵⁰ The recording engineer is responsible for the actual recording session, where she captures the artist's performances. This process involves selecting and placing the microphones correctly. This type of technical work is not likely to make a creative contribution for copyright purposes. The mix engineer is responsible for compiling the recorded

37 See *ABS Entertainment, Inc. v. CBS Corp.*, 2018 WL 5631377, at 9 (9th Cir. Oct. 31, 2018), in which the court referred to the "original sound recording authorship requirement for copyright protection" and found that a remastering would not fulfill this requirement. See also Daniel Gervais, 'Feist Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law', *Journal of the Copyright Society of the USA* 49 2002. p. 949-981.

38 See Mark H. Jaffe, 'Defusing the Time Bomb Once Again – Determining Authorship in a Sound Recording', *Journal of the Copyright Society of the U.S.A.* 53 2002, p. 601-659.

39 See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000).

40 *Work Made for Hire and Copyright Corrections Act of 2000*, H.R. 5107, 106th Cong. (2d Sess. 2000).

41 The Supreme Court of the United States has made it clear that normal employment (agency) rules apply to determine whether a person is an

employee for purposes of the work-made-for-hire doctrine. See *Cmtty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

42 See Kathryn Starshak, 'It's the End of the World as Musicians Know It, or Is It? Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings' *DePaul Law Review* 51 2000, p. 71.

43 17 U.S.C. § 101.

44 *Ibid.*

45 *Ibid.*

46 Copyright Law Revision (House Report No. 94-1476) (1976), at 56.

47 See above n. 37.

48 *Compendium of U.S. Copyright Office Practices*, Third Edition, at 4.95.

49 See David and Melville Nimmer, *Nimmer on Copyright*, New York; Lexis-Nexis, looseleaf updated 2018, at para. 2.10 [A](2).

sound into a final product. This involves adjusting volume levels, creating sound effects, etc. Finally, the mastering engineer is responsible for perfecting the sound and making minor improvements to the overall recording by making subtle frequency adjustments and adding effects. The last two categories of engineers may well make “creative contributions.”⁵¹

The Recording Academy defines an engineer for the purposes of Grammy Award as a someone making ‘creative and aesthetic choices in order to realize the sound and concepts the artist and producer envision’.⁵² Interestingly, however, industry practice does *not* generally consider engineers as authors or equates them with producers. If the work made for hire doctrine does not apply to them, the industry faces significant difficulties because non-employee engineers reportedly rarely sign copyright transfer or what purport to be work-for-hire (commissioned work) agreements.⁵³ Recall that the question from a work-made-for-hire standpoint, is whether persons who generated originality are *employees* of the producer, and, if not, whether both the writing requirement and the categorical requirement (fitting within the category of compilation or collective work) are met for their original contributions to be melded in a work made for hire. Unsurprisingly, a number of players in the recording industry and commentators support the view that sound recordings *must be* collective works and/or compilations so as to avoid this problem altogether.⁵⁴

It seems beyond cavil that an album containing a *selection of recordings* could be a compilation and, therefore, also a work made for hire, but then the protected work is the album and copyright applies to the compilation, not individual recordings *per se*.⁵⁵

It boils down to this: performers and/or engineers provide the creative choices that generate the originality required to obtain copyright protection in sound recordings. Are they authors?⁵⁶ If they are *not* authors because they do not generate the type of creative choices required under copyright

law, then *who* produces the *necessary originality* for sound recordings to be protected as works? This implies that, in cases where (in line with the case law) they are *not* covered by the work-made-for hire doctrine (which, again, requires them to be employees of the producer, or creators of commissioned works, which in turn requires a writing to that effect and a determination that the work belongs to the category of collective work or compilation), they would be in a position to obtain the reversion of any copyright transferred to the producer 35 years after any transfer that occurred on or after January 1, 1978.⁵⁷

The work-made-for-hire doctrine could apply in a hybrid fashion: some contributors (of originality) could be in a work-made-for hire situation (e.g. employed engineers or non-featured artists⁵⁸), which would mean the producer owns their share but not the share of the featured performer(s). Termination of transfer (reversion) right would then apply to the non-employee contributors, subject to majority rules contained in the statute.⁵⁹

Two final notes are in order. First, in late September 2018, the United States, Canada and Mexico announced that a new version of what had been the North American Free Trade Agreement (NAFTA), known as USMCA, had been concluded. Its chapter (20) dealing with copyright and related rights contains an obligation to provide *performers and producers of phonograms* the *exclusive right* to authorize or prohibit the broadcasting or any communication to the public of their performances or phonograms, *by wire or wireless means and the making available to the public of those performances or phonograms* in such a way that members of the public may access them from a place and at a time individually chosen by them.⁶⁰ This full right may, however, be limited by a party in respect of analog transmissions and non-interactive free over-the-air broadcasts, and can be reduced to a right to receive equitable remuneration for non-interactive digital transmissions, thus allowing the US essentially to maintain its current system.⁶¹

50 The Author is most grateful to Alandis Brassel (J.D.Vanderbilt, 2014), a sound engineer, for explaining the roles of the various engineers involved in the production of sound recordings.

51 See Donald S. Passman, *All You Need To Know About The Music Business* (8th ed. 2012), New York; Simon & Shuster, at p. 131.

52 *Engineer: GRAMMY® Award Eligibility Crediting Definitions*, at 2, available at http://www.grammy.org/files/pages/Engineer_Definitions.pdf.

53 This is well described in the film *Tom Dowd & The Language Of Music* (2003). Again, as already explained, a work-made-for-hire agreement for a commissioned work must fit one of the statutory categories.

54 See Jerome N. Epping, Jr., ‘Comment, Harmonizing the United States and European Community Copyright Terms: Needed Adjustment or Money for Nothing?’, *University of Cincinnati Law Review* 65 1996, p. 183-224, at p. 198; Stephen Adams, ‘Copyright Issues for Sound Recordings of Volunteer Performers’, *Vanderbilt Journal of Entertainment & Technology Law* 8 2005, p. 119-147, at p. 143-44; and Abbott Marie Jones, ‘Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination Rights in Sound Recordings’, *Hastings Communications & Entertainment Law Journal* 31 3008, p. 127-152, at p. 134-35.

55 The US Copyright Office allows the registration of ‘multiple sound recordings as a ‘collective work’ if they have been assembled together into a collective whole, such as a digital album or compact disc.’ United States Copyright Office, *Registration of Sound Recordings*, Circular 56, at 6, available at <https://www.copyright.gov/circs/circ56.pdf>.

56 Performers and sound engineers cannot be categorically excluded from the type of material protected by copyright because the list of works of authorship in the US statute is open-ended. 17 U.S.C. §102(a) provides that copyright applies to ‘original works of authorship fixed in any tangible medium of expression’, and then provides a nonexclusive list of categories.

57 See Starshak, note 42.

58 Who might then be members of a union (SAG-AFTRA or AFM), which might make them ‘employees’ for this purpose.

59 According to 17 U.S.C. 203(a)(1). Some might read the chapeau (introductory paragraph) of section 203(a) as preventing the application of termination if the part is even in par a work-made-for-hire. That chapeau begins as follows: ‘In the case of any work other than a work made for hire...’. I find the argument unconvincing. I would limit the work-made-for-hire exclusion to the principle of termination/reversion to works or parts of works that are works-made-for-hire.

60 See ustr.gov/sites/default/files/files/agreements/FTA/USMCA/20%20Intellectual%20Property.pdf, art. 20.H.6(3).

61 Digital over-the-air broadcast and transmissions could be exempted if free (and non-interactive), and subject to an equitable remuneration limitation if non-interactive but paid. This discussion leaves aside the fact that the US did not enact a separate making available right when it joined the WCT and WPPT, and is unlikely to do so to implement the USMCA. Whether that right functionally exists in US law is a matter of debate. See David O. Carson, ‘Making The Making Available Right Available’, *Columbia Journal of Law & the Arts* 33 2010, p. 135-163.

Second, the Classics Protection and Access Act (part of the Music Modernization Act signed by President Trump on 11 October 2018⁶²) extended protection to sound recordings fixed prior to 15 February 1972 (the date on which sound recordings were added to the federal copyright law). Like the post-TRIPS anti-bootlegging statute that created a new chapter in Title 17 for performers' rights, the new law creates a new chapter in title 17 (chapter 14) that allows holders of rights under state law in pre-72 sound recordings to bring a suit under the federal copyright act for the remedies that the copyright act provides, with a number of caveats.

Audiovisual producers

A motion picture is a mix of directing and acting and typically many other contributions, all on the basis of a screenplay. As the Court of Appeals for the Ninth Circuit explained, the list of contributors is potentially long, and include the producer, the editor, the author of the screenplay, the director, etc.⁶³ In most cases, the many contributions are melded into a single work made for hire whole upon the execution of an agreement to that effect.⁶⁴ This eliminates the need for a determination of individual authorship.

A preexisting screenplay is an easy case: It is a discrete (literary) work. The legal case is harder to consider direction and acting as 'works'.⁶⁵ As with musical performance, there is ample room for creativity in performing a screenplay for lead actors, even while following the director's instructions. The director also makes creative choices. The question, just like with sound recordings, is whether they produce *authorial* creative choices. The matter is usually easy to solve: audiovisual productions squarely fit in the category of commissioned works and (even non employee directors and actors) can thus validly sign work for hire agreements, and they routinely do. The statute defines works made for hire, as including "a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work".⁶⁶

But it may not be that easy. First, a fair reading of the definition of commissioned works above might require that the contributions be "works" thus supporting the view that a motion picture is composed of several different works but then considered as a single integrated work when made into a motion picture. The originality of a motion picture could be said to derive just from separate copyright works, such as a screenplay, but that does not mesh well with the actual role of performers or directors – or with the idea that music

performers produce the originality required for sound recordings to be works. This would mean that performances (like direction) somehow must not just be works, but also *self-standing* ones. A strange conclusion indeed.

A better reading of the statute, in light of the above, is to say that at least featured audiovisual performers (as opposed to 'extras') produce originality (creative choices), as does the director, but not self-standing works. Hence, if a performer and a director were to work on a film that is *not* a work-made-for-hire (for example because no writing to that effect exists) then it should be considered a joint work.⁶⁷

A related rights regime would not have to address those issues because performers have rights that are separate from the underlying copyright in the audiovisual production. Most countries protect musical and audiovisual performances under a related right. For actors, this typically includes a loss of exclusive rights *after consent to the incorporation* of the performance in the audiovisual production (or some other arrangement meant to allow the producer to exploit the work).⁶⁸ In cases where consent is absent or at least dubious, the performer retains her rights.

What happens when the performer did not provide clear consent for a performance to be included in an audiovisual work? Under international law, a performer under related rights regimes must ordinarily consent to the fixation under both the Rome Convention and under the Beijing Treaty.⁶⁹ By contrast, because the only vehicle that seemed available under U.S. law is "copyright," a US court is compelled to apply copyright notions. In a well-known case, a woman named Cindy Lee Garcia "was bamboozled when a movie producer transformed her five-second acting performance into part of a blasphemous video proclamation against the Prophet Mohammed."⁷⁰ Ms. Garcia was subject to severe backlash in her community as a result. She filed a claim against Google to prevent access to the movie on YouTube on copyright grounds: she claimed that her five-second performance was protected by copyright. She initially convinced a three-judge panel of the Ninth Circuit Court of Appeals but an en banc court reversed the decision. The Court agreed with an opinion filed by the US Copyright Office that 'a motion picture is a single integrated work'.⁷¹

In other jurisdictions, such as the EU, this is a simpler equation to solve: Authors of copyrightable contributions (director, screenwriter, etc.) are authors, but their rights (except the moral right) are transferred to the producer. Performers have related rights that can also be transferred for the purpose of exploitation (again, subject to a caveat for the moral right) if consent is given. Ms. Garcia would have had recourse under related rights, including her moral rights.

62 Public Law No: 115-264.

63 *Aalmuhammad v. Lee*, 202 F.3d at 1232-33 (omission added).

64 17 U.S.C. § 101.

65 The border is often unclear. Choreographies are protected by copyright (and named as such in 17 U.S.C. § 102(a)(4)) but the border between unfixed choreographies and the performance is very fuzzy. Though this is for another article, my intuition is that the border can be drawn using the distinction between imitation and reproduction. I can reproduce a choreography while varying stylistically.

66 17 U.S.C. § 101.

67 Accord, see Melville and David Nimmer, *Nimmer on Copyright*, New York: LexisNexis looseleaf, updated 2018, at para 6.07[B][4].

68 See Rome Convention, art. 19.

69 See above and accompanying text. It is unlikely that the United States will ever ratify Rome. As to the Beijing Treaty, see Hannibal Travis, 'WIPO and the American Constitution: Thoughts on a New Treaty Relating to Actors and Musicians', *Vanderbilt Journal of Entertainment & Technology Law* 16 2013, p. 45-102.

70 *Garcia v. Google, Inc.*, 786 F.3d 733, 736 (9th Cir. 2015).

71 *Ibid.*, at 741-42.

Another notable difference between EU and US law is that EU law provides producers a separate related right of first fixation of a film, without any originality threshold. US law only provides copyright protection for the audiovisual work, subject, therefore, to the originality requirement.⁷² While performers on both sides of the Atlantic make creative choices that contribute to the originality of the audiovisual production, the two systems thus differ in the rights they grant, or not, to performers, and in the existence of the separate producer's related right in the first fixation.

Broadcasters

Article 14.3 of TRIPS provides what amounts to a mere wish that WTO members provide broadcasters with "a right the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same." It is a wish because Article 14.3, when read carefully, provides no enforceable obligation to provide a related right to broadcasters. Broadcasters do have rights of course under the Rome Convention. The fact that such rights do not exist under US law (at least not in the same way as we shall see momentarily) is a major reason that explains the US' absence from the list of parties to the Rome Convention.⁷³ Though broadcasters have no right in their signal *per se* under US copyright law, they have protection against *signal theft* by a competitor or manufacturer of equipment usable solely for piracy and the interception of communications, except of those openly sent for the use of the general public and, in the case of cable transmissions, of anti-piracy protections added to the statute in 1984 and again in 1992.⁷⁴ To that extent, US copyright law is different from the law of other countries where signal protection is effected through a related right. Broadcasters often expect owners of copyright in the content being broadcast to intervene. In 2000, for example, a number of professional sports leagues and US film studios brought suit against an entity based in Canada but which could be retransmitting US television signals containing films to which it owned the rights.⁷⁵ Despite these differences with more 'typical' related rights legislation, it is not correct to say that broadcasters have no recourse at all under the US Copyright Act. The Act gives the

"legal or beneficial owner of an exclusive right" the right to initiate an action for infringement, so that "broadcast stations (as licensees or assignees) [are] entitled to initiate actions for infringement against cable systems that retransmitted their signals."⁷⁶

It is often argued that granting broadcasters an open-ended right in their broadcasts was unnecessary as broadcast and cable revenues kept rising.⁷⁷ This reasoning is likely still valid: If those revenues were to decline substantially, it would most likely be due to competition from streaming services not because of an absence of related rights. Hence, from a US policy perspective, given the historical reticence to grant broadcasters a full copyright or something like it, one would have a heavy burden to discharge to demonstrate causation before a new broadcasters' right could be implemented by legislation. Indeed, there are good arguments *against* a full exclusive right for broadcasters. If, for example, a work has been made available to the public only via broadcast, then if the broadcaster has an exclusive right, it can override the copyright owner's decision to allow reproduction or at least require two licensing transactions.⁷⁸

Despite the imperfect alignment of US law with the more traditional broadcaster's related right, the US has been active in supporting the Broadcast Treaty proposed under the aegis of the World Intellectual Property Organization (WIPO).⁷⁹ Perhaps the idea is that, as joining the Berne Convention and becoming a member of the World Trade Organization in 1995 and its TRIPS Agreement both led to important changes to US copyright law, joining the new treaty would allow US lawmakers to reopen this contentious issue and revisit the possibility of granting broadcasters a more complete array of rights in their signal.

Conclusion

To a certain extent at least, debating whether related rights exist in United States law is akin to debating, as the French might say, *le sexe des anges*. One can define related rights in a number of ways and the debate would be futile unless of course the nomenclature can be tied to legal consequences. This article takes the pragmatic view that related rights are those granted by law to the usual categories of holders of related rights.

72 See art. 2 and 3 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Info-Soc); and arts. 3 and 9 of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

73 On the problems that the United States had with the protection of performers under a 'neighboring rights' regime, see David and Melville Nimmer, *Nimmer on Copyright*, vol. 3, New York: LexisNexis updated 2018, at para 8E.01[A]. There have been many calls for the United States to join Rome. See e.g., Bonnie Teller, 'Toward Better Protection of Performers in the United States: A Comparative Look at Performers' Rights in the Uni-

ted States, Under the Rome Convention and in France' *Columbia Journal of Transnational Law* 28 1990, p. 775-800.

74 47 U.S.C. §§325(b)(1) and 553 (1988). Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992). See eg Nicholas W. Allard, 'The 1992 Cable Act: Just the Beginning' *Hasstings Communications & Entertainment Law Journal* 13 1995, p. 305-355.

75 *Twentieth Century Fox Film Corp. v. iCraveTV*, 53 U.S.P.Q2d 1831 (W.D. Pa 2000).

76 Shyamkrishna Balganes, 'The Social Costs of Property Rights in Broadcast (and Cable) Signals' *Berkeley Technology Law Journal* 22 2007, p. 1303-1387, at p. 1345.

77 See *ibid.* at 1307.

78 *Ibid.* at 1365.

79 *Ibid.* at 1307 and 1312-1316.