

Free Trade Agreement Introduces Performers Copyright



Information for PPCA Licensors

From 1 January 2005, the copyright in many sound recordings will be owned jointly between the record label and the recording artists who appear on the recording (unless the recording agreement specifies a different arrangement). As such, it is now more important than ever that recording agreements clearly address the issue of ownership of copyright and, if appropriate, licensing.

The following is a brief summary of the effect of the new amendments. This summary is provided to PPCA's licensors for their information and is necessarily general in nature. It should not be relied upon as legal advice in relation to any particular circumstances. We would strongly urge all licensors to take legal advice on the effect of these amendments on their individual recording and licensing agreements.

In what circumstances will copyright be created for recording artists?

The provisions that introduce "performers copyright" (as the right is typically known) are somewhat complex. However, in brief, the changes mean that each performer who appears on a recording will be deemed to be a "maker" of that recording. The Copyright Act provides that the copyright in a recording is owned by anyone who is a maker.

Under the terms of the law in effect prior to 1 January 2005, the "maker" of a recording is deemed to be the person or company who owned the first copy of the recording (ie. typically the master tape of the recording). This is, in the overwhelming majority of cases, the record company who pays for the making of the recording. However, that is not always the case - certainly there are many examples of recording artists who pay their own recording costs and, as a result, own the copyright in the recordings.

From 1 January 2005, the class of people who are deemed to be makers will expand to include not just the record company who pays for the recording, but also the performers on the recording, even if they did not contribute to the costs of making the recording. By virtue of that, each performer will jointly own the copyright in the recording with each other maker (typically including the record company) at the time the recording is made.

Have any other rights been created for performers?

Yes. The amendments also introduce moral rights for performers in their performances. Specifically, performers will have:

- A right to be identified as the performer in respect of that performance (right of attribution) and right not to have a performance falsely attributed;
- A right to not have the performance subject to derogatory treatment (right of integrity).

The provisions are quite detailed, but in general terms should not cause licensors any practical difficulties. By way of example, the right of attribution will be satisfied by use of the band name if the performers perform under that name.

What share of the copyright does a performer receive?

The Copyright Act provides that, in the absence of any agreement to the contrary, all makers of a recording (ie. all performers and, typically, the record company) will own the copyright jointly in equal shares. By way of example, if a recording was made by a four piece band and the record company paid for the recording, then (subject to any agreement to the contrary) there would be five makers (ie. four performers and the record company) and each would own a 20% share in the copyright.

Do the rights extend to all performers on a recording including session musicians?

Yes. Every person who performs on a recording (including session musicians, guest vocalists and conductors) will be deemed to be a maker of the recording and thereby entitled to copyright ownership jointly with other makers. Importantly, no distinction is drawn between featured performers and others who appear on the recording. The only exception is a performer who appears on a recording in his or her capacity as an employee of another person or entity (eg. an employed member of an orchestra). In those circumstances, the copyright of that performer will be owned by the employer.

What about producers or engineers?

No. Performers copyright does not extend to anyone other than the actual performers on the recording.

Do the new rights only apply to recordings made after 1 January 2005?

No. The new rights will apply to all recordings which are still the subject of copyright protection.

The new amendments also have specific provisions dealing with pre-existing recordings which, in effect, preserve the status quo. As such, the terms of existing contracts and arrangements (for example, recording agreements) dealing with rights of exploitation, licensing, royalty payments and the like will continue to apply even though the performers who appeared on the recording may, as a result of these changes, acquire a share of the copyright in the recording. By way of example, if an artist performed on a recording made by you in, say, 1975 AND the recording agreement did not contain an assignment of copyright from that artist, then the artist will own a share of the copyright in the recording from 1 January 2005. However, the recording agreement will continue to govern the rights and obligations of both you and the artist (including royalty and other income entitlements).

In short, any rights acquired by performers will not change the contractual arrangements (eg. the terms of recording agreements) under which those recordings were made. In particular, the creation of performers copyright will not, of itself, result in any right to remuneration or increased remuneration.

Is performers copyright assignable?

Yes. Performers copyright is the same as any other form of copyright and may be assigned under contract.

In order to be an effective assignment of copyright, the Copyright Act requires that it be in writing and be signed by or on behalf of the person assigning the copyright. So, if it is intended that all copyright in a recording would be owned by a record company, for example, everyone who appeared on the

recording (ie. not just featured artists who might have signed the recording agreement) will need to sign an effective and binding copyright assignment. You should speak to your legal advisors concerning the terms of an appropriate assignment of copyright for your circumstances.

Is there any link between copyright ownership and income entitlements?

No. Copyright is only a right of ownership in the recording. The extent of that copyright ownership bears no relationship to income or revenue entitlements. By way of example, if a performer owns 20% of the copyright in a recording, it does not automatically follow that the performer is entitled to 20% of the revenue or income earned in respect of that recording. The income and revenue entitlements are governed entirely by the terms of the agreement under which the recording is made (a recording agreement, for example).

Will recording artists be required to enter into separate arrangements with PPCA as a result of these changes?

No. The new amendments create, in effect, two classes of recordings:

- *Those in existence as at 1 January 2005 (pre-existing recordings); and*
- *Those created after 1 January 2005 (future recordings)*

In relation to pre-existing recordings, the amendments preserve the licence arrangements already in place between PPCA and the various record labels as at that date. As such, there will be no need to alter the licensing arrangements for pre-existing recordings. In particular, PPCA will continue to be able to grant licences, and collect licence fees, for the use of pre-existing recordings even though, after 1 January 2005, the record companies or labels may not continue to own 100% of the copyright in the recording. As an example, the copyright on a recording made in, say, 1990 may be owned 50% by the record label and 50% by the recording artist after 1 January 2005. However, because that recording was made prior to 1 January 2005, the record label will continue to be able to license the entirety of the copyright in that recording to PPCA (subject to, of course, its liability to account to the artist under the terms of the recording agreement for a share of any income received in respect of it).

In respect of future recordings, there are different provisions which enable record companies to continue to be able to grant licences to PPCA in respect of the entirety of the copyright, even if the recording artists own a share of that copyright. Specifically, the amendments provide that where a performer consents to the making of a recording for a particular purpose (eg. broadcasting or public performance) the performer will be deemed to have granted a licence of his or her copyright for the use of the recording for that purpose. Nearly all recordings are made explicitly or implicitly for the purpose of broad commercial exploitation (including for the purpose of broadcasting and playing in public, amongst other things). As such, the effect of these provisions is that those performers who are contracted to record companies will be deemed to have granted to the record company a licence to use the recordings for those purposes and to license others to do so. Again, this means that PPCA will be able to continue to take licences from record companies and labels for new recordings without entering into costly and complex arrangements with individual performers to obtain those rights.

By maintaining its current licensing arrangements, PPCA will be able to minimise administrative costs (by avoiding the need to search for, and obtain licences from, all relevant performers on potentially millions of recordings) and thereby continue to maximise returns to licensors and to registered recording artists.

In summary, PPCA:

- Will continue to take licences from record companies and labels in respect of the entirety of the copyright in a recording unless notified by the companies and the performers to the contrary (see below);
- Will continue to maintain direct payments to registered Australian recording artists under the Artists Direct Distribution Scheme, but will otherwise continue to pay revenues to the record company or label concerned – it will then be a matter for the record company or label to make any payments due to performers (as is the case currently);

- Accordingly, will not make direct payments to:
 - *Overseas recording artists; or*
 - *Australian artists who are not registered with PPCA under the Artists Direct Distribution Scheme; or*
 - *Non-featured musicians, session musicians and the like.*

The only exceptions will be recordings in respect of which:

- *The performer or performers have retained copyright; and*
- *The performer or performers have expressly declined to grant a licence of the relevant communication and public performance rights to the record company; and*
- *The performer or performers have entered into a separate licence agreement with PPCA in respect of those rights.*

It is important to remember that PPCA needs a licence of 100% of the copyright in a recording before it can grant a licence of that recording to users and collect licence fees in respect of its use. If you, as a record label, are aware that you do not have the right to grant licences of the entirety of communication or public performance rights in a recording, then you should notify PPCA. If you do notify PPCA of that fact, but the performer or performers who retain copyright decline to enter into an input agreement with PPCA in respect of the balance of those rights, then PPCA will not grant a licence of, nor collect licence fees for, any uses of that recording. In other words, a licence of only a percentage of the copyright will be insufficient for PPCA.

What specific issues should I focus on?

Given the changes being introduced from 1 January 2005, it is very important that licensors give consideration to the following issues both in their contract negotiations concerning the creation of recordings (with recording artists, session musicians and others):

- **Copyright Ownership.** It is very important that the agreement clearly set out who is to own the copyright in the recording. If it is agreed that the record company should own the copyright, then the recording agreement should contain an effective assignment of future copyright from the recording artist(s) who are parties to that agreement (ie. not merely a statement of ownership – there must be an actual assignment). If there is any change in membership of the band, then the new members will also need to execute an effective assignment of copyright, if appropriate.
- **Copyright Licensing.** If it is agreed that the performers will retain copyright, then the recording agreement should contain a grant of an exclusive licence to the record company of the performers copyright to enable the record company to fully exploit the recording in accordance with the terms of the recording agreement (including granting the relevant licences to PPCA). If there are to be any restrictions on the scope of that licence, then they should be clearly spelled out in the agreement.
- **Non-Featured Musicians.** Session musicians, guest vocalists and any other recording artists who are not parties to the recording agreement should not be permitted to perform on a recording unless and until they have executed a written agreement. The agreement should either assign their copyright or grant an exclusive licence sufficient for the recording to be exploited in accordance with the terms of the recording agreement (including granting the relevant licences to PPCA).
- **Transfer of Ownership.** If the copyright is to be retained by some or all of the performers, then the recording agreement should clearly spell out what should happen in circumstances where one or more of the parties wish to transfer their copyright ownership to a third party. For example, if a record company wanted to sell its share to another person or company, the agreement should spell out what should happen in those circumstances.

If you have further queries of a general nature, please do not hesitate to contact us on distribution.mail@ppca.com.au. We will do our best to provide answers for you. However, as mentioned above, we are not in a position to provide legal advice to licensors and if you have any particular queries regarding your circumstances or a specific agreement, then we would strongly urge you to seek qualified legal advice.