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Dear Matthew

Moral Rights – requirement to assert and what this means in practice

I write for the British Equity Collecting Society Limited (BECS).

Introduction

British Equity Collecting Society (BECS) is the only United Kingdom based collective management organisation for audiovisual performers. It represents the interests of its members, who comprise over 23,000 actors and other performers, in the negotiation and administration of performers' remuneration. Rights administered via agreements with other European collecting societies include rental, private copying, cable retransmission and communication to the public rights. Since its incorporation in 1998, BECS has distributed in excess of £12 million to performers in British film and television productions.

BECS also acts as an agent for processing and distributing lump sum payments negotiated between Equity and a number of UK broadcasters to individual qualifying performers in accordance with Distribution Rules drawn up by BECS. The Distribution Rules are drawn up in conjunction with the agreements reached between the relevant principals to the agreements (Equity and the UK broadcaster(s)).

Such payments have been particularly important to support the principle of audio-visual performers being entitled to receive payments for the use of their performances within new catch up television and other video on demand services operated by UK broadcasters.

The exclusive right of performers to consent to the making available of their performances on demand within such services is relevant under s 182CA of the CDPA (Copyright, Designs and Patents Act 1988 (as amended)).

Micro payments and the digital future

The services which BECS provides for its members involve the mass processing of data to ensure that individual cast members receive recognition and payment for the use of their work.

The success of this work relies upon those responsible for the making of films to ensure that information about the performers involved in the film is properly and accurately kept.

BECS works to gather data about all the audio-visual performers involved in a film or television programme from a number of sources.

Sources include:-

- (a) the programme as completed forms/data compiled by the producer of a film or television programme;
- (b) the cast lists provided by broadcasters linked to the transmission of a television programme;
- (c) the details of narrators provided by those involved in the rental of audio-books;
- (d) the casts lists published on DVD or other physical copies of films released to the public;
- (e) data held on internationally accessible databases concerning the performers involved in films and television programmes;
- (f) data supplied by foreign collecting societies with whom BECS has entered into reciprocal agreements (including agreed levels of data exchange to give effect to the terms of such agreements but within the areas for which BECS has registered its data processing activities with the Information Commissioner within the UK);and
- (g) data compiled from members and their representatives.

All these sources are helpful to ensure that BECS' database is as accurate and up to date as possible.

If full cast list and performers' contributor data is not easily available for a particular film of television programme, it is very often a slow and painstaking process to compile the data after the event.

Without the information, performers may not receive the increasingly varied list of secondary payments to which they are entitled. These payments may derive from application of rules governing payments of equitable remuneration due for differing secondary uses under national laws, or as a result of use of their performances within new electronic services.

In short, the practical importance of performers being identified in the ways provided for by section 205 C of the CDPA is increasing.

The identification does not now simply benefit the people who see or hear a public performance or broadcast, or receive access to an electronic communication to the public of a film or television programme. The identification also enables both statutory and other forms of secondary payment to be processed and paid to performers in an efficient manner.

Current lack of recognition for the moral rights of audio-visual performers

BECS and Equity welcomed the opportunity to respond to the Consultation issued by the Patent Office on regulations implementing performers' moral rights in the UK resulting from WIPO Performances and Phonogram Treaty obligations, back in 2005.

That Consultation noted that the WIPO Diplomatic Conference held in 2000 with a view to concluding a treaty on the protection of audio-visual performances did not result in a treaty being adopted. However, the Consultation went on to recognise "Although we hope that this situation may change in the future, there is no immediate prospect of any significant change on the audiovisual protocol".

Despite arguments from Equity, BECS and other performers' representatives making the case for UK law to apply moral rights to all performers, The Performances (Moral Rights, etc.) Regulations 2006 did not address audio-visual performers in general.

BECS would submit that a number of subsequent developments now make it important that the case for applying moral rights to audio-visual performers be revisited.

These are:-

(a) revival of the discussions at WIPO on the proposed Treaty for the protection of audio-visual performers;

(b) the provisions of Article 1(b) of the proposal recently approved by the European Parliament amending Directive 2006/116/EC on the term of protection of copyright and related rights.

The relevant Article provides:-

“The Commission shall carry out an assessment of the possible need for an extension of the term of protection of rights of performers and producers in the audiovisual sector and it shall report on the outcome of such an assessment to the European Parliament, the Council and the Economic and Social Committee...”

It is submitted that this assessment could sensibly include consideration of the importance of moral rights recognition for audio-visual performers and reconciling the term of protection for such rights with changes to the term of protection recognised for other performers.

(c) developments in the provision of on-line services involving films, television and other audiovisual services since 2005.

These developments have been coupled with increasing relevance and importance of the distribution and payment systems for audio-visual performers, operated through collecting societies such as BECS. Please see points made above concerning micropayments and the digital future.

A copy of the Equity response to the 2005 Consultation is enclosed with this letter. The concerns raised in the response over lack of recognition for moral rights for audio-visual performers are even more significant today, when read in the light of the above developments.

Requirement that the right to be identified as a performer be asserted

(a) The current provision in s 205 D CDPA whereby performers are required to assert their right to be identified is becoming increasingly anachronistic (when the practical benefits of assertion for both audiences and industry administrative functions are taken into account).

(b) In practice, Equity (in conjunction with the Personal Managers' Association) are seeking to provide for the following stipulation to be included in all standard contracts :-

“The Artist hereby asserts his/her moral right to be identified as a performer, conferred by section 205D of the Copyright, Designs and Patents Act 1988 as amended by the Performances (Moral Rights etc.) Regulations 2006”.

(c) Whilst the cost of providing for such a standard clause is only very small (in the context of the costs incurred in the full negotiation and application of artist's contracts), the ensuing benefits for the efficient administration of rights and the systems for secondary payments are considerable.

Compilation and uses of comprehensive cast and audio-visual performer data linked to a film or television programme has increasingly direct value for producers, distributors and collecting societies within the digital world.

(d) Collective bargaining agreements have traditionally addressed the importance of credit recognition for performers in films and television programmes. The importance of the issue to performers has supported this, despite the current lack of legal recognition for the rights for audiovisual performers to be identified.

Despite these long running agreements for credit recognition, pressure on airtime has resulted in some broadcasters arguing that an obligation to broadcast a full cast list at the end of a television programme is a burden. But this fails to recognise increasingly important benefits that cast information provides for the general public.

The consumer benefits that good cast information provides for interested viewers, particularly in an increasingly “red button” world which facilitates the provision of back up information linked to film and television broadcasts, should not be underestimated.

These red button opportunities provide inexpensive options for full credit lists to be broadcast or made available on line (by way of back-up and in addition to a broadcaster meeting contractual obligations to accord on screen credits to all main artists and contributors).

In addition, it must be remembered that cast list recognition for performers provides practical recognition of work within the film and television industries, enabling all those working within these industries to more easily pick up on and recognise the work of performers. More widely, the availability of cast data in sensible, readable form would help to redress the current frustration of viewers who see credits being run in a size and at a speed within many transmissions which defeats both the professional and the public service principles behind the provision of cast data.

(e) BECS operates a database to enable cast lists of television programmes and films to be logged and used as the basis for distributing secondary payments to performers (including its 23,000 + members).

BECS has encouraged the adoption of identifiers for films and television programmes such as ISAN. It also holds membership identifiers for individual performers.

BECS believes that the market must be allowed to develop new rights identifiers that help to support both use and distribution of copyright works and performances in the digital world.

However, BECS has argued against any form of hurdle or registration barrier before copyright is recognised.

Article 5(2) of the Berne Convention makes it clear that the enjoyment and the exercise of authors rights is not to be the subject of any formality (such as registration).

BECS believes that removal of the current requirement for assertion of performers’ right to be identified is consistent with this. The rights should apply automatically unless agreement is reached to the contrary.

Right to object to derogatory treatment of a performance

Debates over appropriate application of copyright law to “user generated content” highlight the importance of revisiting application of this right for audio-visual performers.

S 205G provides for an exception to the right (where currently recognised) when modifications are made to a performance “which are consistent with normal editorial or production practice”.

Increasingly use of material that is compiled with the consent of performers is subsequently being adapted by third parties who argue that rights exceptions should apply to such adaptation.

In reality such adaptation can increasingly involve subjecting the original performance to derogatory treatment. The importance of performers having the right to object to such derogatory treatment is therefore increasing in the digital world.

Duration of rights

Section 205I CDPA currently provides for the moral rights of performer's that are recognised subsist for the same 50 year term as is relevant under Section 191.

BECS submits that this should be revisited in conjunction with changes under consideration within the European Parliament Proposal to amend the term of protection for the rights of certain performers to subsist for a term linked to 70 years.

BECS is happy to provide further information and background concerning any of the above points, should this be helpful.

Yours sincerely

Andrew Yeates
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