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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.
6 Ibid.
7 Ibid. at 1206-07.
Convene goes a step further, in declaring that “performatances of artistes are of their nature acts of spiritual creation.”

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 neighbour 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.” 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. 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.”

The last drops of the hierarchical argument have now evaporated in the normative sunlight of more recent related right provisions. Interestingly, however, TRIPS provides that exceptions contained in the Rome Convention may be applied to the related rights it contains. 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. This protection is contained in chapter 11 of Title 17 (the same title of the United States Code that contains the Copyright Act). Chapter 11 was added, not surprisingly, to comply with TRIPS. The unauthorized fixation of performances may also be captured under the right of publicity, at least in certain US states.

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. 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...
alent. 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. 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.

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. 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.

Sound recording (phonogram) producers

The Rome and Phonograms Convention contain a reproduction right for owners of rights in phonograms. The TRIPS Agreement does as well (namely, a right “in respect of the direct or indirect reproduction of their phonograms”). 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.” By contrast, a phonorecord is a material object in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed. Thus the term phonogram as used in international instruments is similar to what US law defines as a sound recording. Federal law protects sound recordings only since 1972. Previously, some protection was available under state law. Since 1972, sound recordings are copyright(ed) works under US law. 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 rights; (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; 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).

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.

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

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.
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).
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.
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).
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). A producer input may take the form of suggestions but these face a copyrightability problem, or perhaps more precisely an authorship policy issue. 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. 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. 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. 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." As one can readily see, this list includes sound recordings (as discussed above, they do not include sound recordings) as a compilation known as a collective work of authorship. 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." 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, etcetera) where only the record producer's contribution is copyrightable." 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. This aligns with the practice of the US Copyright office, which accepts sound recording registrations from both performers and producers.

Performers are an obvious choice when looking for a source of originality. Sound engineers are highly skilled and often generate 'creative choices'. There are three types of contributions by sound engineers to be considered. 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 the recorded

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39 See Aalmuhammed v. Lee, 202 F3d 1227, 1235 (9th Cir 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 Cmnty. 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.


44 Ibid.

45 Ibid.

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

47 See above n. 37.


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.”

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’. 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 purports to be work-for-hire (commissioned work) agreements. 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.

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? 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.

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 artists), 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.

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. This full right may, however, be limited by a party in respect of analog transmissions and non-active free over-the-air broadcasts, and can be reduced to a right to receive equitable remuneration for non-active digital transmissions, thus allowing the US essentially to maintain its current system.
Second, the Classics Protection and Access Act (part of the Music Modernization Act signed by President Trump on 11 October 2018)\(^62\) 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 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 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).\(^66\) 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.

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62 Public Law No: 115-264.  
63 Aalmuhammad v. Lee, 202 F.3d at 1232-33 (omission added).  
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.  
68 See Rome Convention, art.19.  
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. While performers on both sides of the Atlantic make creative choices that contribute to the originality of the audiovisual production, the two systems 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.

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. 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.

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.”

It is often argued that granting broadcasters an open-ended right in their broadcasts was unnecessary as broadcast and cable revenues kept rising. 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.

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). 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.

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


77 See ibid. at 1307.

78 Ibid. at 1365.

79 Ibid. at 1307 and 1312-1316.