

# **RELATED RIGHTS IN COMPARATIVE PERSPECTIVE, AND A BIT MORE**

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# OUTLINE

- Definition
  - Related rights: What the heck are they and where do they come from
  - Are related rights sui generis?
- Related rights in music
  - Music & IP law
  - US law
  - Normal law
- The future of related rights  
& the future of the human species

# DEFINING RELATED RIGHTS

- **Is there a definition?**
  - **Not officially**
  - **Neither the 1961 Rome Convention nor the 1996 WIPO Performances and Phonograms Treaty (WPPT) refer to related (or neighboring rights) by name, yet they are widely viewed as instruments that regulate those rights**
- **Traditionally: rights belonging to 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.**

## MOST COMMON RELATED RIGHTS

- **The usual categories are**
- **(a) performers in respect of their performances,**
- **(b) producers of phonograms in respect of their phonograms, audiovisual producers, and**
- **(c) broadcasting organizations in respect of their broadcasts.**
  - **Also book and newspaper publishers**

# BRIEF HISTORY

- <https://www.youtube.com/watch?v=LumWzJ4zTN8>
- <https://www.youtube.com/watch?v=lo4kzhJaT4U>
- <https://www.youtube.com/watch?v=XkZvyA69wCo>

## BRIEF HISTORY

- “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...”
- § Eric Taver

# AS OUR SYSTEM STANDS

- Menuhin's contribution is not viewed as creative
- But this is
- <https://www.youtube.com/watch?v=KYgK97aioNA>

# THE 1950s

- Proposal to protect music performers
- Under authors' rights
- How many performances pass the originality test?
  - Not high, but still
  - Issues with background musicians and orchestras
  - Exclusive rights competing with this of authors
  - Lobbying against proposal by author societies and phonogram producers
  - Leads to 1961 Rome Convention
    - One of the few IP instruments that was more locomotive than caboose (*tilhengeren*)



# ROME

- Rights of performers
  - Music only after consent
  - Not exclusive (“possibility of preventing”
    - Attributed to UK opposition but very convenient
- Phonogram producers
- Performers and producers share “equitable remuneration” for broadcasting of sound recordings
- Broadcasters’ right in signal

## THE MISUNDERSTOOD ARTICLE 1

- “Protection 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 .”
- This provision was not meant to create a hierarchy
- 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

- Cake theory image

# ROME AND COMMON LAW COUNTRIES: NOT A LOVE STORY

Country	Date of accession
Australia	June 30, 1992
Canada	March 4, 1998
Jamaica	October 27, 1993
Nigeria	July 29, 1993
United Kingdom	October 30, 1963

# POST ROME

- Rome described as “rights neighbouring on copyright”
  - i.e., neighbouring rights
- US opposition leads to phonogram producers rights being carved out and added to new treaty
  - 1971 Phonograms Convention (also known as Geneva Convention)
- TRIPS (1994)
  - Bootlegging right for performers
  - Reproduction right and rental right for sound recordings
  - No right for broadcasters
    - US opposed
    - Not very active lobbying by broadcasters (unlike IFPI)
  - TRIPS follows EU in moving” neighbours” inside the house of copyright

# POST TRIPS

- Beijing Treaty
  - Rights for audiovisual performers
  - But still subject to national law after consent

# RELATED RIGHTS V SUI GENERIS RIGHTS

- **Sui generis has become difficult label to bear**
  - **Mostly useless EU right in databases**
  - **Discussions in DSM directive for press publishers**
  - **One can argue that because they are related to an existing right, they are not "sui generis"**
  - **BUT**
    - **Some say the sui generis right in databases is related to copyright**
    - **And that the sui generis right in plant varieties is "related" to patents**
    - **Still, better to be in the house**

# RELATED RIGHTS IN MUSIC

- IP law sees music as having three layers:
  - Composition (musical work)
  - Performance
    - Itself with possibly two layers (featured and background performers)
  - Recording
    - Investment and "technical skill"



OH BUT HAS THE WORLD CHANGED SINCE 1961!

# CHANGE ISN'T ALWAYS PROGRESS



Ich bin ein Berliner

I don't have a hotel in Berlin



# WHY DO THESE RIGHTS EXIST

- Authors and performers usually do not exploit directly
  - Empowers contracts and licensing
  - Can help with enforcement
    - Better “face” on lawsuit than record co.
- Broadcasters and record companies exploit and license
- Some transactions are too hard to negotiate (Coase theorem)
  - Cable
  - In US: “covers”

Now we can compare

# NORMAL LAW

- Author's rights in musical work Original/creative
  - With moral right since 1928
- Performer with exclusive but related right
  - Now with moral right
- Producer has exclusive related right technical
- Broadcaster has mostly exclusive related right

“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” (Ricketson and Ginsburg)

# US LAW

- **Musical works protected by copyright**
  - So far, so good
- **Sound recordings**
  - Full reproduction rights as a copyright right
  - No right in broadcasting
  - Compulsory license for noninteractive digital transmission (CMO)
  - Full exclusive right for interactive digital transmissions
- **Performers**
  - Since TRIPS: anti-bootlegging right BUT NOT as a copyright right
  - Receive half of compulsory license for noninteractive digital transmission
  - That's it! The rest is left to market forces (aka contracts)
- **Broadcasters: crickets**
  - (signal theft may be actionable under other laws)

SO....

- Sounds recordings are works
- Works must be original
- Where does the originality come from?
  - Performers?
  - Producers?

# THE FUTURE

- US may some day add a right in broadcasting but I doubt it
- If it does, will performers get anything?
  
- Worldwide:
  - Choice is to push stuff in copyright
  - But then you dilute it
  - Or to create new related right
  - Press publishers
  - AI?



# THE FUTURE OF RELATED RIGHTS & THE FUTURE OF THE HUMAN SPECIES

- When we tinker with copyright, we tinker with art & journalism , among other vital subjects

# COPYRIGHT, RELATED RIGHTS AND INTERMEDIATION

- In practice, copyright and related rights have been more about intermediation than about authors
- Now that performers have a moral right and more or less the same rights as authors, copyright and related rights getting “equal”
- Copyright and related rights are meant to help create value for a broad array of creative works in the marketplace
- Initially, copyright was meant to regulate trade in physical objects (books)
- Now it is a principal regulatory vector for the online environment
  - As are related rights
- Private ordering more difficult, sometimes impossible
- The only question: will a new right, or recast right, lead to human progress

Books matter

“When I get a little money, I  
buy books; and if any is left  
I buy food and clothes.”

(Erasmus)

IN PART BECAUSE...

Change and biological evolution are natural laws;  
human progress is not.

The world we not just inhabit but create, day after day,  
is dynamic but the trajectory we put the world on is not  
necessarily one of progress.

# THE ECONOMICS OF THE FUTURE MAY NOT NEED COPYRIGHT

- *Star Trek*
- *Picard* : 'The economics of the future are somewhat different. You see, money doesn't exist in the 24th century.'
- *Lily Sloane*: 'No money? You mean, you don't get paid?'
- *Picard*: 'The acquisition of wealth is no longer the driving force of our lives. We work to better ourselves and the rest of humanity.'

BUT FOR NOW WE RELY ON MARKETS

## NEOCLASSICAL ECONOMICS (1)

- The market should bring, among other pleasant things, an essential harmony in the distribution of economic activity through space, a kind of Pareto optimum of spatial equilibrium
- A ‘comfortable conclusion’ that has been questioned over the past decades, because the natural tendency is not towards progress but rather ‘towards polarized nation, dominance, and dependence, which [is] likely to become cumulative’
  - (B. Higgins, 1988)

## NEOCLASSICAL ECONOMICS (2)

‘The unfettered pursuit of private interest can lead to inefficient and harmful outcomes.’

(A. O. Hirschman, 1991)



**Viewing the current copyright regime as promoting human progress**

**conflates the welfare gains that come in aggregate from a series of mostly micro-level innovations and improvements,**

**on the one hand,**

**and the broader societal gains that come from human progress viewed more holistically,**

**on the other hand.**

## PUBLIC FUNDING?

‘Orthodox economic analysis has tended to see innovation as an essentially private sector process driven by ‘exogenous’ technological opportunities.

*But the orthodox view is not consistent with the evidence. ...[G]overnments have been widely involved in the innovation process. ...Governments have been critical in determining not only the rate of innovation, but also in shaping its direction.’* (M Mazzucato)

Indeed they are involved, as legislators and as funders

Subsidies v. market-based rights: that is another debate

It is the role of all branches of government to *promote* progress by ensuring that a larger\_ proportion of change is progress.

It is also the role of academics (among others) to illuminate the economic, sociological, philosophical, and historical underpinnings that inform the policies that lead to progress.

## PROGRESS?

Human emancipation through science and the arts is progress.

Which is not the same as saying that all art and all science is progress.

“Progress is best  
achieved through the  
development of ideas”  
(J.S. Mill)

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And it is the role of authors and related rights  
owners to disseminate new ideas

A well-ordered society in  
which informed and morally  
motivated citizens nurture  
rather than thwart the  
appropriate attitudes in its  
members.

(J. Rawls)

We must seek, access and process both formal knowledge and knowledge gained from observing others.

This is what leads to human progress on the individual level, and it is also what can help societies grow.



# CONCLUSION

- I draw two main conclusions
- First, the question of related rights as a label has taken a backseat. It is not what you call it, but whether the right serves a purpose, and that purpose must be human progress
  - Such as AI
  - <https://www.youtube.com/watch?v=6l3aKYyKl68>

# CONCLUSION

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- First, the question of related rights as a label has taken a backseat. It is not what you call it, but whether it serves a purpose
- Second, the United States is a crazy country

THANK YOU