

# IP In Review

## A primer on performers' rights—for the sixth time

Péter Mezei\*

### *Performers' Rights (6<sup>th</sup> Edition)*

Richard Arnold

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Richard Arnold, currently serving at the Court of Appeal, also known as one of the most experienced judges of IP cases in UK, published the first edition of his seminal monograph on performers' rights in 1990. Since then, the system of copyright law and related/neighbouring rights has gone through enormous changes. On the one hand, this is due to the rapid advancement of technologies, especially the internet (which coincidentally emerged around the time the first edition of Arnold's book came out). On the other hand, this field of law went through significant harmonization both at the regional level (especially in the European Union) and at the international forum (mainly via the Trade-Related Aspects of Intellectual Property Rights Agreement and the World Intellectual Property Organization [WIPO] Internet Treaties). Well, the *original* WIPO Internet Treaties (namely, the Copyright Treaty and Performances and Phonograms Treaty) did not provide a complete coverage of performers' interests though. Until the conclusion of the Beijing Treaty, performers' rights were lagging behind copyright holders' and related rightholders' (other than performers') rights. Needless to say, they are still several steps behind those stronger rightholders, but more on this later.

These factors have made it inevitable to update Arnold's book on a regular basis throughout the past three decades. But what prompted Arnold to review the fifth edition (published in 2015)? Arnold clarifies in the preface to the sixth edition that there are limited novelties in the present version of the book. More precisely, he declares Brexit to be the sole major reason to necessitate the publication of the present edition, even if Arnold regards the effects of Brexit on performers' rights as 'fairly slight'.<sup>1</sup> As of now, the EU law related to this field seems to be the 'retained EU law'. Nevertheless, these 'fairly slight'

novelties are accurately presented in the relevant sections of the book on the duration of protection, the nationals of the UK, exhaustion and the like.<sup>2</sup>

As such, readers of the former editions might find limited novelties in the text of the latest version. For first-time readers, however, it works like a treasure chest. The book focuses primarily on the UK with a significant outlook on the EU law (which, for some decades, was, and, for who knows how long, will continue to remain relevant for the UK) and other common law countries' substantive norms. Although the latter part (Chapter 11)<sup>3</sup> might be truly useful for people—like the present reviewer—having interest in comparative perspectives on the given subject matter, the main value of the book lies in the preceding 10 chapters. They provide for a systematic analysis of the UK's substantive norms (both civil and criminal law), civil procedure and contractual aspects of performers' rights. Even more, the book's logic, structuring and focused and straightforward analysis of performers' rights in relation to as well as independent of the main copyright rules mirror its author's robust and practical knowledge of this field. This approach makes the book mandatory reading for both academic and practising lawyers.<sup>4</sup>

What makes this book so important for readers? Apart from the mere fact that there are a limited number of academic monographs on performers' rights alone, Arnold gives a bright-line answer for that when he argues, as part of the 'proposals for reform' section of Chapter 1 that '[t]he first task is to bring performers into the copyright fold proper, rather than to continue to pretend that performers' rights in some way different to other copyrights'.<sup>5</sup> I completely share Arnold's view that performers' achievements are somewhat underestimated, they are under-protected and, consequently, they are marginalized by the substantive norms of copyright law and, more importantly, by the contractual practices of other rightholders. Performers are not necessarily authors: they do not (necessarily) 'invest' into the interpretation of pre-existing works, but they are extremely creative

2 Ibid. Those who are interested in the key takeaways of Brexit, written by the same author, shall read R. Arnold, 'Divergence of UK law from EU law after Brexit: the example of intellectual property. The 22nd Burrell Lecture' (2022) 12 *Queen Mary Journal of Intellectual Property* 172–184.

3 Arnold (n 1), 325–375.

4 This is further supported by the fact that the massive, close to 700 pages long book includes ca. 100 pages on references and index, as well as 200 pages on norms to provide for the broadest available collection of analysis and metadata on the topic at hand.

5 Ibid, 51, para 1–116.

\*Professor of Law, University of Szeged (Hungary); adjunct professor (dosentti), University of Turku (Finland). Email: [mezei.peter@szte.hu](mailto:mezei.peter@szte.hu)

1 R. Arnold *Performers' Rights* (6th edn Sweet & Maxwell 2021) v.

when communicating commercially and culturally valuable expressions to the public. Like authors, they work typically for a living, but, unlike authors, they are more vulnerable to ageing: performing on stage after a certain age becomes much harder. The partially limited economic rights or the shorter (though certainly not extremely short) term of protection show therefore some imbalance in the copyright system.

It is equally important to flag how differently they are treated at the contractual level. Take the example of performers who are most in limelight: musicians. Musicians, especially session musicians, usually contract out their rights to recording studios. This system is not wrong *per se*, as the chain of commerce necessitates gatekeepers (or bottlenecks). The problems stem from the inequalities coming from such contracting. Look at the example of the relevant EU legislation: various norms were introduced in the last 10+ years to somehow recalibrate the interests of performers of both 'old' music and more recent performances (including longer term of protection, contract termination, contract adjustment mechanisms, etc.). In a perfect world for performers, such updates to the copyright regime would be completely unnecessary.

Or look at streaming revenues. Streaming thrives, it has posed new, interesting legal challenges,<sup>6</sup> and it has changed the organization of business for recorded music for good.<sup>7</sup> Many creatives are happy with this business model, but performers are typically under-compensated in this respect again. This is perfectly evidenced by some

(rare) cases regarding revenues shared with performers. For example, in the Hungarian *Deezer* case, reported in this very journal by the present reviewer,<sup>8</sup> Deezer argued that it had paid the necessary royalties for the streaming of performances to Hungarian audiences to the recording companies per the global agreement with those companies. Although this practice might look logical, the Hungarian substantive law prescribes an individual right of remuneration for the benefit of performers, who can, in turn, exercise the said right solely via collective rights management. Consequently, performers under the Hungarian law shall be remunerated for the streaming of the recordings embodying their performances via the competent collective rights management organization rather than by the phonogram producer. This judgment is great for musicians, but the same norm (or case law) is not present in all countries of the world. It is therefore completely understandable if the streaming ecosystem is closely followed by the legislation. Whether the inquiry of the UK Parliament's Digital, Culture, Media and Sports Committee's into the 'economics of music streaming' will lead to results that are beneficial for performers in the UK is not clear yet.<sup>9</sup>

In sum, Richard Arnold's seminal monograph offers an excellent chance to dive deep into the topic of the highly interesting and practical field of performers' rights.

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6 Unsurprisingly, the streaming industry's legal aspects have been addressed by the General Congress of Comparative Law as well. Topic X of the 2022 event covered the 'Legal Perspectives on the Streaming Industry'. The general rapporteur was Séverine Dusollier. Cf. Available at <https://aidc-iacl.org/snr/> (accessed 15 January 2023).

7 Cf R Towse, 'Dealing with digital: the economic organisation of streamed music' (2020) 42 *Media, Culture & Society* 1461–78; B Sisario 'Musicians say streaming doesn't pay. Can the industry change?' *The New York Times*, 7 May 2021. Available at <https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html> (accessed 15 January 2023).

8 P Mezei, 'Get a licence or do not stream! Interlocutory judgment against Deezer in Hungary' (2018) 13 *Journal of Intellectual Property Law & Practice* 690–1.

9 See more on that at. Available at <https://committees.parliament.uk/work/7041/economics-of-music-streaming-followup> (accessed 15 January 2023).