

## FACT SHEET

### US FREE TRADE AGREEMENT IMPLEMENTATION ACT 2004

#### NEW PERFORMERS' RIGHTS IN SOUND RECORDINGS FROM 1 JANUARY 2005

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##### *How has the Act been changed?*

The Copyright Act (as amended by *US Free Trade Agreement Implementation Act 2004* (USFTAI Act) and the *Copyright Legislation Amendment Act 2004* (CLA Act)) establishes performers as makers of sound recordings of their performances. As such, they are first owners of the copyright in the recordings along with the owners of the master recording – usually the record company. Because this new performers' interest is a share of the sound recording copyright, it is transferable like other interests in copyright. When this fact sheet talks about the performers' share of the copyright in a recording it should be read as including reference to the holder of that share where the performer has transferred it.

##### *Which recordings are subject to performers' rights?*

Recordings in which performers hold a share of the copyright are those directly made of the performers' performances. The copyright in a recording comprising a mix of pre-existing recordings of performances will not be shared by the performers. However, through having a share of the copyright in the direct recording of their performance, the performers would be able to exercise control over use of the recording in the mix.

##### *Who is a performer?*

Performers who benefit from the new rights in a recording are those who can be heard in it. A participant in a performance who dances silently does not have a share of the copyright in the recording. However, the conductor of a musical performance is specifically treated as an entitled performer.

##### *Who owns copyright in sound recordings of employed performers?*

Where a recorded performance was given in the course of employment, the performer's employer is the first holder of the performer's share of the recording copyright. This is a default position in the absence of any agreement between the employer and employee to allocate copyright ownership to the performer or a third party. The existing rule that the copyright in a commissioned recording vests in the commissioning party continues to apply so that, in default of any agreement to the contrary, performers do not hold any share of the copyright in commissioned recordings.

##### *How are pre-2005 recordings affected?*

The copyright in recordings made before 1 January 2005, if it has not expired, will also be shared by the performers. However, the owner of the copyright immediately before that date will be able to go on exploiting the copyright as he or she expected to do when contracting the performers to make the recording. Nor will the performers, by virtue of their new rights, be entitled to stop the pre-2005 owner from licensing the use of the recording by third parties, nor will they be able to sue

for damages or recover infringing copies or receive remuneration for use of the recording under statutory licences.

However, the pre-2005 copyright owner would have to comply with any restriction on exploitation in the recording contract or in a later agreement with the performers. Importantly for the performers, their new share of the copyright will enable them to stop third party infringements of the recording. For instance, the performer could take action to stop the making, distribution or importation of pirate copies of their recording where the original owner of the copyright was in no position to do so, eg, because of insolvency.

*What happens if one copyright owner can't find the other owners?*

There are new rules covering the case where there two or more owners of a copyright in sound recording that has been published and one or some of them wish to further exploit it but cannot, after making reasonable efforts, find the other owner(s). They may now proceed to exploit the recording further without the permission of the untraceable owner(s). However, they must hold the relevant share of proceeds from the further exploitation on trust for the untraceable owner(s).

*How have performers' rights against bootleg recordings, broadcasts and other communications to the public changed?*

A performer's right to prevent use of their performance without their permission, ie, 'bootlegging', has been strengthened. A performer can now take action against an unauthorised non-broadcast transmission to the public of their performance, eg, Internet streaming of the performance.

The scope of exceptions to the performer's right against bootlegging has been reduced. Notably, the exception allowing the making of an unauthorised sound recording from a live broadcast for private and domestic use has been narrowed, so that the recording must be a 'fair dealing' for the purpose of research or study. Other exceptions that have been narrowed concern unauthorised recording for educational use and use for news reporting.

*More information*

For copies of the USFTAI Act and the CLA Act (and Explanatory Memoranda) visit:  
[www.comlaw.gov.au](http://www.comlaw.gov.au)

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