

# PERFORMERS' RIGHTS IN NEW ZEALAND

On 30th December 2018 new provisions on performers' rights came into effect in the Copyright Act in New Zealand.

The new provisions give certain rights to every person who performs on a recording in New Zealand from 30th December 2018 onwards. These rights are separate from the copyright in the recording.

The new provisions mean it is even more important than before for performers and record companies to have written agreements in place covering the arrangements for dealing with recordings, before the recordings are made.

This information sheet provides general information for record companies and recording artists on how the provisions affect their commercial dealings, and their dealings with Recorded Music. It is necessarily general and cannot be relied on as legal advice for any specific situation. Recorded Music is not able to advise on specific commercial arrangements. If you require this type of advice, we suggest that you consult a lawyer.

**For further information on the topics covered in this note, please contact Recorded Music's member services team at [memberservices@recordedmusic.co.nz](mailto:memberservices@recordedmusic.co.nz).**

## KEY POINTS

Performers, including featured artists and session musicians, now have the right to give or withhold consent before recordings are copied or communicated to the public, eg where recordings are played on the radio, or released and made available on digital services like Spotify. These rights are separate from the copyright in the recording.

If you plan to exploit recordings, whether you are a record company or self-releasing artist, you will need to obtain a written assignment or consent from each and every performer for each and every recording. This includes session musicians or other performers who appear on a one-off or casual basis.

The new rights are not retrospective and apply only to recordings made in New Zealand on or after 30th December 2018

The new rights also affect Recorded Music's licensing. Recorded Music cannot license recordings to third parties such as broadcasters and venues unless assignments or consents have been obtained from each and every performer for all the relevant recordings. It is the responsibility of the Master Rights Holder to obtain these assignments/consents as per the Master Rights Agreement (*see next page*).

The Direct to Recording Artist Scheme is not affected by the new performers' rights and will continue to operate in the same way as before.

## THE BASICS: COPYRIGHT, PERFORMERS RIGHTS AND SOUND RECORDINGS

Under New Zealand law, the default position is that the owner of copyright in a sound recording is the person who made the "arrangements necessary for the making of the recording", usually the person who paid for the studio time and other costs associated with making the recording. This could be a record company or a self-releasing artist. The default position can be changed by written agreement, for example two artists in a band might agree in writing that they jointly own copyright in the recording even if only one of them paid the studio costs.

In the absence of an agreement to the contrary, a performer does not own copyright in his or her performance or a recording of it, by virtue only of being a performer. However performers do have performers' rights in recordings of their performances.

In respect of recordings made before 30th December 2018, performers have certain rights to object to their performance being recorded and to prevent distribution of unauthorised recordings. These rights enable performers to object to "bootleg" recordings, for example.

Under the new provisions, performers on recordings made on or after 30th December 2018 are entitled to give or withhold their consent to subsequent uses of authorised recordings. There is a breach of performers' rights if consent is not obtained for communicating recordings to the public (eg via on demand streaming or broadcast), copying recordings or issuing recordings to the public (eg on a CD). This means that it is even more important than before for performers and record companies to have written agreements in place before the recordings are made.

The new provisions also give moral rights to performers. These moral rights include the right to be identified, and to object to derogatory treatment.

### **Do the rights mean performers are entitled to get paid?**

No. New Zealand law does not give performers a right to remuneration as such. Performers may be entitled to remuneration by contract (eg through a recording contract with a record company), or they may be able to negotiate payment in return for giving consent to subsequent uses of a recording.

### **Can performers' rights be assigned to a third party?**

Yes. A performer may assign his or her performers' rights to another person provided that the assignment is in writing and signed by or on behalf of the performer. The law does not require a particular form of wording. Any assignment may be partial (eg for some of the rights or a portion of the term of the rights) and may concern future performances. If a performers' rights are assigned then there is no need to obtain consent from the performer in future.

### **How can performers give consent?**

If a performer retains his or her rights and does not assign them, it will be necessary to obtain consent from the performer before exploiting the recording.

The Act states that consent may be given in relation to a specific performance, a description of performances or performances generally and may relate to past or future performances. For example:

"I consent in relation to my performance of X on [date]"

"I consent in relation to all my performances while working with Band Y"

"I consent in relation to all my performances for the term of the contract"

The law does not require a particular form of wording, but we strongly advise that any consent be obtained in writing.

### **I am a record company or self-releasing artist – how will the new provisions affect me?**

Record companies and self-releasing artists that intend to license and exploit recordings will need to obtain a written assignment of rights or consent from each and every performer on each and every recording.

In the case of session musicians, it is common industry practice to obtain an assignment of performers' rights in return for a one-off payment. In the case of featured or principal artists, different arrangements may be more appropriate.

The details of what to include in a written contract are a matter for individual commercial negotiation and Recorded Music cannot provide advice beyond the general guidance given in this information sheet.

### **Who counts as a performer?**

Performers include principal and/or featured artists as well as session musicians. Engineers and studio producers are not included.

### **What about performances recorded overseas?**

This information sheet applies to recordings made in New Zealand. If you are recording overseas, you may be entitled to different rights as a performer. For example in some countries performers are entitled to claim a share of remuneration directly from collecting management organisations, by virtue of having recorded in a relevant country. However the situation varies between countries, the rules are complex and outside the scope of this information sheet.

## HOW DO THE RIGHTS AFFECT RECORDED MUSIC'S LICENSING??

Recorded Music NZ provides blanket licences of repertoire to commercial users such as radio and television broadcasters, and via **OneMusic**, public performance venues such as cafes, bars, gyms and restaurants. These licences enable us to collect royalties which we then distribute to the relevant right holders. The right holders whose repertoire we license are called "Master Rights Holders".

Master Rights Holders will be either copyright owners, or certain licensees of copyright. In order for us to represent Master Rights Holders, we need them to register with us and sign the Master Rights agreement. Under the Master Rights Agreement, the rights holder grants us the rights we need to license repertoire and collect royalties. More information can be found via our website at: [www.recordedmusic.co.nz/portfolio/membership-for-labels/](http://www.recordedmusic.co.nz/portfolio/membership-for-labels/)

For recordings made on or after 30th December 2018, we are unable to license repertoire on behalf of a master rights holder unless an assignment or consent has been obtained from each and every performer on each and every recording. If one performer has not assigned their rights or given consent, Recorded Music cannot license that recording, even if all the other performers and the copyright owner have given permission.

It is the responsibility of the Master Rights Holder to obtain the necessary consents or assignments from performers, and to keep Recorded Music updated with all the information required to license recordings including the performer line-up. Right holders agree to this under the Master Rights Agreement. If Recorded Music becomes aware that performer consents have not been obtained, we will not be able to license the affected recordings until the consents or assignments are obtained. The new rights do not affect how we distribute funds, as the provisions do not entitle performers to remuneration.

The new rights do not impact on the **Direct to Recording Artist Scheme**. The Scheme is operated by agreement and is not based on a statutory right of performers. Recorded Music will continue to accept registrations from featured recording artists that are New Zealand citizens or residents, and as a default, pay them 50% of the revenues received from registered recordings with the master rights holder receiving the other 50%.

If the master rights holder and registered artist(s) wish to change this percentage they can do so via an **Amended Distribution Payment Percentages** form.