The Authorship Rights of Performers

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Judges are very confused about the notion of performers as authors. Because producers of recorded entertainment have generally used the work made for hire doctrine to secure authorship, federal courts have had few occasions to consider authorship claims by performers. *Garcia v. Google* has drawn attention to the question of whether and when performers enjoy rights of authorship. While the circumstances of that case are undeniably peculiar, the underlying question has much broader application. This issue is likely to become more pressing in the immediate future. As recording technology has become cheaper and more widely available, more works are being created by amateurs or newcomers that fail to use the work made for hire doctrine effectively. User generated content on portals such as YouTube may lead to authorship assertions by willing or inadvertent performers in those recordings. Also, due to the ongoing wave of termination notices in the recorded music industry, courts will be asked to resolve authorship claims by recording artists. Even though the United States is a signatory to recent international agreements that strengthen the economic and moral rights of performers, federal copyright law does not fully comply with those treaties. Because these agreements grant performers certain rights that heretofore were afforded only to authors, enacting legislation to comply with these treaties would give performers at least some of the rights they could otherwise obtain only through litigating their authorship claims or through collective bargaining. However, the recorded entertainment industry is likely to resist efforts to bring Title 17 into compliance, and due to the weak negotiating power of most performers, many of these rights are likely to be left on the bargaining table.

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