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Center Stage: Performers and Their Moral Rights in the WPPT

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CENTER STAGE: PERFORMERS AND THEIR MORAL RIGHTS IN THE WPPT

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I would like to begin by offering a word of thanks to the organizers for this opportunity to discuss the WIPO treaties today, ten years after their creation. And, of course, it is a special privilege for me to be on a panel that is led by Professor Vaver, my copyright professor and later, the generous supervisor of my doctoral work in copyright at Oxford.

My talk will discuss the themes of this panel in a slightly different context: I will consider the moral rights of performers as included in the WIPO Performances and Phonograms Treaty.[1] To introduce this subject, I would like to return to first principles for a moment, and say a few words about the general goals of the WIPO Internet Treaties.[2]

The avowed purpose of the documents that we are discussing today is to adapt copyright law to the digital environment. In practice, what does this mean? Two factors should be taken into consideration. First, we are talking about a situation where, of course, there is considerable scope for new methods of reproducing and disseminating works through the growth of digital technology. Secondly, it is important to notice the unprecedented scale on which these activities are now occurring, thanks to the potential of technology.

Although I make this statement with great care, I believe there is a level of consensus that the reproduction and communication of knowledge in a digital environment should, at least to some extent, be

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[1] WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76, *available at* http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html [hereinafter WPPT].

[2] *Id.*; WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, *available at* http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm [hereinafter WCT].

brought within the scope of copyright control.[3] Our key policy questions then become the following.

First, which activities need to be controlled by copyright law? In this area, we find ourselves confronting a number of purely technical questions about the operation of digital technology that may be complicated to resolve from a copyright perspective. For example, do both downloading and uploading need to be controlled by copyright?[4] Is caching something that should be restricted? This particular issue has proven to be surprisingly controversial, and making caches for the purposes of Internet transmission is an issue that has been considered widely by courts in France and Canada, as well as the United States.[5] Canadian courts have debated the interesting problem of whether caching constitutes a "reproduction" of a work within the meaning of copyright, or if it is in fact "necessary" for the effective functioning of Internet technology.[6]

The second logical question then becomes, how much control do we want? In other words, do we want to control all uses of a work, or only some uses? This question raises the fundamental problem of what constitutes fair use of a work, or fair dealing in the terminology of Canada or the United Kingdom. It can also be expressed as a need to find an appropriate balance, in copyright terms, between right-holders and users of a work.[7]

It is interesting to consider the approach of the WIPO Internet Treaties to this fundamental problem. In policy terms, the Treaties represent a fairly straightforward attempt to extend copyright restrictions globally over digital uses of works. The legal means of doing so, as adopted by the drafters of the Treaties, are interesting in

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[3] I make this statement with a respectful nod towards those who have more extreme views about copyright. A consideration of their position is, however, beyond the scope of this brief discussion.

[4] The issue has been debated in Canada, where the most recently proposed amendments to the Copyright Act, Bill C-60, suggest that uploading would become illegal while downloading would not be addressed. Bill C-60, *An Act to Amend the Copyright Act,* House of Commons of Canada, 1st Session, 38th Parliament, 53-54 Elizabeth II, 2004-2005, *available at* http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C60_1/C-603E.html, §§ 8 [new § 15 (1.1) (e)] and 10 [new § 18 (1.1) (b)].

[5] *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U. S. 913 (2005); Ligue contre le racisme et l'antisemitisme et Union des etudiants juifs de France v. Yahoo! Inc. et Societe Yahoo! France, T.G.I. Paris, May 22, 2000, *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm.; Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 379 F.3d 1120, 1122 (9th Cir. 2004).

[6] *See, e.g.*, Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers, 2004 SCC 45 at ¶¶ 113–19, [2004] 2 S.C.R. 427, 240 D.L.R. (4th) [hereinafter SOCAN].

[7] The theme of Professor Dinwoodie's remarks. Graeme Dinwoodie, *A Comment on Professor Vaver*, 57 CASE W. RES. L. REV. 751 (2007).

their own right. The Treaties seek to define digital uses of works as copyright-protected uses, and then to place these uses outside the scope of fair use or fair dealing exceptions to copyright. Key copyright concepts, such as authorization of use (or infringement), and communication of the work to the public, are redefined in this context.

This approach leads to powerful results. For example, by simply providing the means of communicating a work to the public, we may be deemed to authorize the infringement of copyright in the work, as in the *Grokster* case.[8] Similarly, enabling Internet downloading for private use, traditionally allowed within fair use exceptions to copyright, may now amount to an infringement of copyright law, also suggested by the United States Supreme Court in *Grokster*. Among other things, the reasoning in *Grokster* seems to support the controversial view that the sheer volume of private use may be sufficient to transform it into a public use within the terms of copyright law.[9]

Apart from these conceptual techniques, we also have practical means that come into play when bringing activities within the scope of copyright restrictions. Most powerful among these is the idea of reformulating the enforcement of copyright to address digital issues. The WIPO Internet Treaties contain legal provisions in support of

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[8] *Grokster*, 545 U.S. 913. The Supreme Court re-examined the so-called "safe harbor" principle from the 1984 *Sony* decision, which would exempt technology from liability if it lends itself to "substantial non-infringing uses." In *Grokster*, the Justices were divided in their opinion, with one group arguing that the defendants failed because of insufficient evidence of non-infringing use, while the other said that the proportion of current lawful use in this case approximated the facts of *Sony*. The safe harbor principle itself did not need to be settled, as the Justices were agreed that the defendants had induced infringement of copyright, and decided the issue accordingly. *See* Pamela Samuelson, Legally Speaking: *Did MGM Really Win the Grokster Case?*, http://www.ischool.berkeley.edu/~pam/papers/CACM%20SCT%20decides%20MGM.pdf.

[9] *Id.* For example, in a concurring judgment, Justice Ginsburg comments:

> Even if the absolute number of noninfringing files copied using the Grokster and StreamCast software is large, it does not follow that the products are therefore put to substantial noninfringing uses and are thus immune from liability. The number of noninfringing copies may be reflective of, and dwarfed by, the huge total volume of files shared. Further, the District Court and the Court of Appeals did not sharply distinguish between uses of Grokster's and StreamCast's software products (which this case is about) and uses of peer-to-peer technology generally (which this case is not about).

Grokster, 545 U.S. at 948 (Ginsburg, J., concurring). This opinion was further supported in the Tenenbaum case, where the idea that downloading could be fair use was firmly rejected. For an update, see Jaikumar Vijayan, *Lawyer in Tenenbaum Music Piracy Case to Seek Retrial*, COMPUTERWORLD, Dec. 8, 2009, http://www.computerworld.com/s/article/9141971/Lawyer_in_Tenenbaum_music_piracy_case_to_seek_retrial_?taxonomyId=16&pageNumber=2.

anticircumvention technologies and digital rights management, treating interference with these technologies illegal.[10] As provided by the WIPO treaties, the answer to the fundamental problem of how to strike a proper balance between copyright owners and the public in a digital environment appears to be to give more rights to copyright owners. Practically speaking, the Treaties provide right-holders with more tools for their use in restricting access to works that copyright law says they "own."

This is our starting point when we talk about the WIPO Treaties: they tell us that the best way to adapt copyright to a digital environment is to increase the scope and power of the rights held by copyright-owners. Given this overall approach, the WIPO Performance and Phonograms Treaty then goes on to do something quite unexpected. It creates a moral right for performers. Depending on your point of view, you may see this either as a pleasant or an unpleasant surprise. As a scholar of moral rights, for whom they signify a more humane approach to the law, I will permit myself to call it a pleasant surprise.

In doing so, the WPPT—to invoke Star Trek now, in addition to the earlier Star Wars reference—boldly extends moral rights where they have never gone before. What are the implications of creating a moral right for performers in the context of the digital environment? In particular, what is their purpose in the light of the overall objectives of the WIPO Treaties, which I have briefly described above?

The WPPT scheme for moral rights is innovative and important in a number of ways.[11] First and foremost, at a time when conceptual discussion of copyright issues has become distressingly rare, it is certainly worth noting that this new moral right represents a highly significant innovation in the theory of the law.[12]

In fact, the WPPT represents the first international progress on moral rights since they were first adopted in the Berne Convention in 1928.[13] The new rights signify a new status for performers. Copyright

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[10] *See, e.g.*, WCT art. 11, 12, & 14, and WPPT art. 18, 19, & 23.

[11] WPPT, *supra* note 1, at art. 5.

[12] Note the points made by Professor Okediji about the lack of conceptual discussion in relation to copyright. Ruth Okediji, Keynote Address at the Case Western Reserve Law, Technology, and the Arts Symposium: The WIPO Copyright Treaties: 10 Years Later (Nov. 10, 2006) (Web cast available at http://law.case.edu/Lectures.aspx?lec_id=128).

[13] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221, revised most recently by Paris Act relating to the Berne Convention, July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention]. Ricketson describes the process of their adoption at the 1928 Rome revision conference, and subsequent improvements and amendments at the Brussels Conference of 1948 and the Stockholm Conference of 1967. *See* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC

law has traditionally understood performers to be engaged in the dissemination of information or culture, rather than creating works of art in their own right. Accordingly, their status has been distinctly inferior to that of true authors—a situation that has historically been reflected in lower levels of protection for performers' rights, usually known as mere "neighboring" rights to copyright, and delayed recognition for them at the international level.[14]

A moral right inaugurates a new status for performers by recognizing that they may, in fact, be as deeply implicated in their work as authors. Like authors, performers, too, may be vulnerable to harm from the failure to acknowledge them as the creators of their own performances, or to preserve the integrity of their interpretations. Practically speaking, this reflects a cultural adaptation of copyright law to the digital environment. Moral rights for performers suggest a recognition of the growing cultural importance of performers and their creative activities in our digital age.

A second point worth noting about this innovation in the WPPT is the affirmation that it provides overall for moral rights in a digital environment. The moral rights in the WPPT are specifically adapted to digital age activities—for example, directly addressing the possibility of having access to performances through sound files that may be obtained via the Internet.[15] In many situations involving the communication of performances through digital technology, a moral rights dimension could now be involved.

From the general perspective of practical impact, this is a controversial approach. In an environment where copyright controls have become increasingly difficult to enforce, the approach taken by the WPPT is to create further rights and further layers of rights, specifically in the introduction of moral rights for performers.

This leads to a third interesting feature of the WIPO Treaties: the moral rights of performers in the WPPT bring additional complexity to the problem of "layers" of rights that we frequently encounter in copyright, and which is pronounced in relation to performances.

WORKS: 1886-1986 ¶¶ 8.93–8.101 (1987). The changes in 1967, in particular, were significant, but they scaled back moral rights by tacitly allowing common-law protection to take the place of statutory law. For a detailed discussion of this issue, see MIRA T. SUNDARA RAJAN, MORAL RIGHTS AND NEW TECHNOLOGY (Oxford Univ. Press, forthcoming 2010).

[14] The leading international instrument on performers' rights before WPPT was the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

[15] *See, e.g.*, WPPT, *supra* note 1, at art. 10 on the "making available . . . by wire or wireless means" of fixed performances.

Layering of rights is a complex question when dealing with performances because of the number of interests that may be involved in creating, "fixing," and publicizing a performance. When dealing with performances, we may be concerned with the interaction of a performer, a composer, possibly a lyricist, a sound engineer, a producer, the owner of the sound recording and, of course, the public that ultimately receives, enjoys, and "uses" that recording. We are talking about interests that may be shared and overlapping in some instances, but in conflict at other times, leaving copyright law to devise rules for resolving these conflicts effectively.

Having considered the presence of moral rights in the WPPT as a significant innovation in international copyright law, I would like to discuss three deeper questions. First, why does the WPPT develop the idea of a moral right for performers? Secondly, in doing so, how exactly has the WPPT chosen to frame the moral right of the performer? And thirdly and finally, what are the conceptual and practical implications of the WPPT provisions for copyright in the digital age? The answers to these questions can lead us to a better understanding of whether the WPPT has accomplished what it set out to do in the scheme for the protection of performers' moral rights and, if not, what the provisions actually do achieve.

Why does the WPPT develop the idea of a performer's moral right? The moral rights are undoubtedly a product of European Union and United States synergy at the WIPO discussions leading to the Treaties, described in some detail by the other panelists. The Europeans, having a strong tradition of protection for authors' moral rights, would probably have seen a moral right for performers as the logical extension of a well-established and largely useful doctrine.

The U.S. position is more complex and ambivalent. On the one hand, there has been great resistance to moral rights at home, largely because of the Hollywood film industry. On the other hand, there appears to be an awareness on the part of industry that moral rights offer an additional layer of protection for performances, and a consideration or hope that they could thereby help the film and music industries in their fight for copyright control in a digital environment. The overall impact of the right is to create an additional layer of rights in performances. The question then becomes, what does this mean in practice?

Moral rights are set out in Article 5 of the WPPT. The article is drafted to be exactly parallel to Article *6bis* of the Berne Convention, which sets out two fundamental moral rights for authors: a right of attribution and a right of integrity. Turning to Article 5 of the WPPT,

we see that the same two rights are protected in relation to performers.

The WPPT provisions include one significant limitation: the language of the treaty specifies that moral rights only apply to "aural" performances,[16] so that performances used in audiovisual works, as mentioned by Professor Dinwoodie, would be specifically excluded.[17] Interestingly, though, within their application to aural performances, the moral rights in the WPPT are quite broad, extending both to live performances and to recorded, or "fixed," performances. Once again, this feature of the WPPT is technologically responsive: we see the emergence of an idea of relative freedom in relation to the orthodox copyright precept of fixation in order to accommodate the realities of the performer's art in the digital context.

If we go on to paragraph 2 of Article 5, this provision, like the moral rights provisions in the Berne Convention, seems to maintain some interesting flexibilities in relation to the statutory enactment of moral rights.[18] In particular, the idea that common law protection, or torts, may suffice as a substitute for statutory provisions on performers' moral rights is derived directly from Article 6*bis*, subsection 2 of the Berne Convention.[19]

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[16] Article 5 states:

> (1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

[17] Dinwoodie, *supra* note 7.

[18] WPPT Article 5(2) states:

> The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, *those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.*

(emphasis added).

[19] Article 6*bis* (2) provides:

> The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding

However, I should add that, as in the case of Berne, a careful reading of this section suggests that *some* protection beyond tort law, some kind of statutory enactment, however minimal, is required for performers' moral rights.[20] But it is far from clear what the extent of this obligation might be, originally in Berne and now, equally, in the WPPT.

In terms of the practical implications of the new moral right for performers, the benefit of introducing this moral right is to be found in relation to the issue of balancing rights within copyright law, a persistent theme of this panel. When I talk about balancing rights, however, I am not only referring to the usual copyright balancing act, that of weighing the public interest against that of copyright owners, which was so powerfully addressed by Professor Vaver.[21] I am talking about a third element in this balancing act: the introduction of the performer as a creative individual into the copyright equation. And this is a surprising yet important achievement of the WPPT in an environment where copyright is generally thought of, as emphasized by Professor Dinwoodie, in terms of right-owner versus public.[22]

The benefit of introducing a moral right for performers—or indeed, introducing performers into the world of copyright—raises some practical concerns. First, where moral rights are involved, we have an additional level of rights in relation to which clearance will have to be obtained by anyone who wants to use the work. In the case of the WPPT, permissions or consent may have to be obtained from the performer. This issue is complicated by the fact that moral rights are generally inalienable, so that a "user" may have to obtain dual permissions from both the copyright owner and the actual performer of the work.

The consideration of inalienability leads to a second point: in addition to introducing another layer of complexity in the use of performances, moral rights may reveal the potential for antagonism between the creator of a work and those involved in its exploitation. Moral rights may not create this hostility, but they may give legal expression to the divergent interests of creator and publisher for the

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paragraph may provide that some of these rights may, after his death, cease to be maintained.

[20] Article 5(2) states that "some" rights may cease to be maintained after the author's death; presumably, "some" therefore must be protected even after his or her death. Personal torts cease to operate once an individual is deceased. *See* WPPT, *supra* note 1.

[21] David Vaver, *Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties?* 57 CASE W. RES. L. REV. 751 (2007).

[22] Dinwoodie, *supra* note 7.

first time, shifting the balance of bargaining power between them. Given the number of individual copyright claims that may be implicated in a performance, this issue could be significant in redefining a number of key relationships: performer and composer, performer and sound engineer, performer and producer, performer and record label. And, inevitably, our final consideration is the relationship between performer and public, made more complex by the articulation of moral rights.

The issue of balance is clearly a multidimensional problem, and, in the wake of Professor Dinwoodie's discussion,[23] we may want to take a moment to look at it more closely. First, let us consider the balance between performers, or creators of works, and those who exploit them commercially: performer versus record label.

Given the drafting history of the WPPT—and in particular, the role of the United States in establishing moral rights for performers—it is particularly important to focus on the connection between moral rights and the individual performer. We do not want to find ourselves in a situation where moral rights may be co-opted by industry as one more tool in its struggle for power. In other words, it should not become a standard practice for industry to seek to assert moral rights on behalf of performers.

This would be both inconsistent with the theory of the law and dangerous from a practical point of view. Through moral rights, corporations could acquire the power to restrict freedom of expression. We may be able to justify giving the performer a say in the treatment of his or her own work on humanitarian grounds;[24] what justification can we offer for transferring the exercise of these personal rights to corporations?[25]

In terms of balancing the needs of performer and public, here again, we have a fairly complex issue. The freedom of expression of the public is at stake; so, too, is the freedom and independence of the performer. We may be talking about a net benefit in the long term—a more humane cultural environment for performers—but, as this benefit is more obviously cultural than economic in nature, it may be too difficult to recognize or too imprecise to commit ourselves. The

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[23] Dinwoodie, *supra* note 7.

[24] For a detailed discussion of the human rights rationales for copyright and moral rights protection, see M.T. SUNDARA RAJAN, COPYRIGHT AND CREATIVE FREEDOM: A STUDY OF POST-SOCIALIST LAW REFORM ch. IX (2006).

[25] Japan appears to be unique in offering a moral right to corporations; but the provision exists in a unique corporate environment. *See* Sundara Rajan, *supra* note 13; *see also* Copyright Law of Japan, ch. 2, § 2, art. 15–16 ("Authors"), *available at* http://www.cric.or.jp/cric_e/clj/clj.html.

economic consequences of a moral right for performers, even more than in the case of authors' moral rights, remain largely unknown.

All of these implications of the WPPT remain abstract until the principles in the Treaty find their way into national legislation. The challenge of drafting and interpreting these rights in domestic laws, as I have already indicated and would like to repeat, is to achieve the benefit of including performers in the copyright process. It would be ideally satisfying to be able to acknowledge the creative contribution of the performer as an individual, while developing a workable relationship among the different interests involved in the process of making a performance available to the public.

I would like to consider briefly the Canadian example of the WPPT interpretation and implementation, from which I think something can be learned—at the very least, to jump ahead to my "punch line" about how not to do things. Canada presents an interesting contrast to other common-law jurisdictions, including the United States. Canadian lawyers like to think of their country as having a slightly friendlier, more accommodating approach to moral rights, made possible by their heritage of French law. This is a bit doubtful in practice. For example, we have only had one successful instance of moral rights litigation in the history of Canadian law![26] Nevertheless, Canadian provisions on moral rights offer some advantages in comparison to other jurisdictions—such as the recently enacted provisions in the U.K. Copyright, Designs and Patents Act of 1988[27]—in the sense that they represent a relatively clear and straightforward implementation of the attribution and integrity rights in Article 6*bis* of the Berne Convention.[28] But the Canadian provisions on moral rights are subject to a major practical caveat, namely, that the Copyright Act allows for extensive waivers.[29] In fact, the Canadian Copyright Act seems to sanction so-called blanket waivers of moral rights, which brings into question our overall commitment to the protection of moral rights.[30]

In terms of implementing the WIPO Performances and Phonograms Treaty provisions on moral rights, Canada has a bill with proposed implementation terms. Bill C-60[31] was introduced by the

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[26] Snow v. Eaton Centre Ltd. (1982) 70 C.P.R.2d 105 (Ont. H.C.J).

[27] Copyright, Designs and Patent Act, 1988, ch. 48, ch. IV, §§ 77-89, *available at* http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm.

[28] Canadian Copyright Act, R.S.C. 1985, ch. C-42, §§ 14.1, 14.2, 28.1, 28.2.

[29] *Id.* §§ 14.1(2)–(4).

[30] *Id.* § 14.1(2). For the controversial provision on implicit waiver of rights where a third party is concerned, see § 14.1(4).

[31] Bill C-60, House of Commons of Canada, An Act to amend the Copyright Act ch. 27, (June 20, 2005), *available at* http://www2.parl.gc.ca/HousePublications/Publiction.aspx?Docid=

previous government and the approach is likely to be revived if the government carries out its promised copyright reforms in 2010. Bill C-60 sought to enact moral rights for performers in more or less the same way as the Copyright Act does for authors, including the extensive provisions on waiver. In the proposed Bill, moral rights for performers, like those of authors and artists, could be waived in whole or in part.[32] This approach to moral rights is a mistake. It represents an opportunity missed. In this respect, other countries should certainly take note of what has happened in Canada.

The drafters of Canada's Bill C-60 simply followed the pre-existing practices of the Canadian Copyright Act on moral rights without thinking about the practical implications of doing so in relation to performers. What the Bill has done is to implement the language of the WPPT, without necessarily taking the rights seriously and giving them true, practical effect. The WPPT offers an opportunity to give some power to the performer in the process of commercializing his or her work—at the very least, some bargaining power when dealing with powerful industry practices. This happens to be the opportunity offered by the WPPT provisions.

Giving practical effect to performers' moral rights would have much larger implications for Canadian law—a fact that has probably frightened the Canadian government in its approach to the implementation process. If we treat performers' moral rights as true rights, rather than merely formal ones, this inevitably leads to the realization that we will also have to reconsider our approach to the moral rights of *authors* in our copyright law. Otherwise, we would find ourselves in the legally and practically incongruous situation where performers might actually enjoy more rights than authors under our Copyright Act.

In conclusion, I would like to suggest that, since we now have moral rights for performers in the WPPT, and irrespective of how they found their way into the Treaty, we should take them seriously. In particular, the moral rights in the WPPT present an opportunity to bring greater rationality to modern copyright practice. We should seek to create rights that we intend to respect and enforce. We should delineate the scope and limitations of those rights clearly, by ensuring that our approach to them is informed by an understanding of the

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[32] *See* Mira T. Sundara Rajan, The 'New Listener' and the Virtual Performer: The Need for a New Approach to Performers' Rights, *in* Canadian Copyright Reform in the Digital Age (M Geist ed., Irwin Law/Creative Commons) (2005), *available at* http://209.171.61.222/PublicInterest/two_8_rajan.htm.

theory of the law in which they are grounded. Moral rights are based on the idea of a personal connection between author and work or, by analogy in this case, performer and performance. Their purpose is to protect this special relationship—not to give entertainment companies an additional weapon to add to their arsenal of copyright enforcement tools. At the same time, the rights represent a promise to creators, that their attribution and integrity interests, to whatever extent is feasible and fair, will be honored.

If we depart from these premises, what we are doing is to create rights without a proper grounding in policy, and without any serious possibility of enforcement. Yet these are precisely the ills which currently afflict the world of culture—copyright laws that are irrational, amenable to political and economic manipulation, and operating in an environment where practical enforcement is a serious problem. The letter of the law and its practical reality are divorced from one another. The problem is truly global in scope: countries like India, Russia, and China are becoming major players in the copyright arena, but they pay lip service to legislation without being willing or able to do what is necessary to give effect to international agreements, as they are now harshly translated into their own copyright laws.[33]

Ultimately, these developments point to a degree of irrationality in our approach to copyright. They have the power to undermine copyright law more effectively than any anti-copyright movement could, threatening both the practical effectiveness and the moral credibility of copyright in the digital age.

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[33] The problems of copyright reform in the era of the WTO and the TRIPs Agreement are beyond the scope of this paper. However, it should be noted that TRIPs-related reform has clearly undermined the moral credibility of copyright law, and intellectual property rights more generally, in large parts of the world. For an example, see the discussion in SUNDARA RAJAN, *supra* note 32, ch. I.