

The “New Listener” and the Virtual Performer:

The Need for a New Approach to Performers’ Rights

Mira T. Sundara Rajan

A. INTRODUCTION

Performances are not what they used to be. A century ago, when international copyright law first came to prominence with the adoption of the *Berne Convention on Literary and Artistic Works*,¹ a performer was the mouthpiece of the composer; his *raison d’être* was to disseminate and promote the underlying work of a true creator. It was for this reason that classical composers of the nineteenth century viewed performance with considerable ambivalence. To cite two well-known examples, German giant Johannes Brahms refused outright to pursue a career as a performing pianist, while Hungarian Franz Liszt ultimately felt that the unprecedented glamour of his tenure as a piano virtuoso — his audiences notoriously filled with swooning women, his concert tours punctuated by ruinous love affairs — led to the tragic sacrifice of his true promise as a composer.² A half-century later, the spread of recording technology brought a new dimension to the art of the performer; yet records documented performances without bringing fundamental change to the status of performers in Western culture. Performers were not acknowledged as authors in their

1 *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as revised at Paris on 24 July 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986), <www.wipo.int/treaties/ip/berne/index.html> [*Berne Convention*].

2 Jan Swafford, *Johannes Brahms: A Biography* (New York: Vintage, 1999).

own right, creators of a lasting cultural artefact in the form of sound recordings. Instead, a recording industry was built around performers who could only benefit from the second-class copyright which has since come to be known as a “neighboring right”— the traditional term by which the rights of performers and others engaged in activities promoting the dissemination of true works of authorship are known. There were lucrative possibilities for the producers who invested into the making of sound recordings, but performers themselves could only enjoy a royalty as a percentage of sales.³

The technological revolution of the Digital Age debuted early in the 1970s, and it earns its name from the development of digital recording technology. At that time, few people in the cultural industries — whether composers, performers, sound engineers, or producers — could be expected to grasp the potential for radical cultural transformation inherent in the new technologies. A great genius, however, could: in the last decade before his death, Canadian pianist Glenn Gould, widely acknowledged as one of the great minds of twentieth-century music, predicted the end of the concert experience as we know it, to be largely replaced by digital creations from the recording studio.⁴ Thirty-odd years later, of course, concert halls and live performances continue to exist. Yet Gould was prescient in recognizing the potential in digital technology for a new kind of creativity — artistry that would take the raw material of a performance and make it into a lasting work of art, a permanent testimonial constructed from an ephemeral moment in time. Indeed, in his eyes, not only was the performer poised to become a creator of full standing in his own right, but sound engineers and technicians would also attain the status of creators of culture in a society emerging from an unprecedented technological revolution.

In the context of modern copyright reforms, it is telling that, for Gould, the ultimate measure of success by which the Digital Revolution must be judged was the transformation of the public that listened to music — or, in modern copyright parlance, “consumed” or “used” it. Like the performer, composer, engineer, and technician, the “user,” too, must evolve. To

3 It may be worth noting that performers have traditionally earned a percentage of revenues from the sales of sound recordings, but not from every reproduction or public performance of their original rendition; ss. 15 & 16 of the Canadian *Copyright Act*, R.S.C. 1985, c. C-42 illustrate this point: <<http://laws.justice.gc.ca/en/C-42/39253.html>>.

4 Geoffrey Payzant, *Glenn Gould: Music & Mind*, 1st ed. (Toronto: Van Nostrand Reinhold, 1978).

the archetypal member of the digital-era listening public, our present-day User, Gould assigned the name, “The New Listener.” The “New Listener” would be no mere passive recipient of music; rather, he would be an active participant in every stage of his own musical experience.⁵ Gould primarily meant involvement in the manipulation of sound through a listening device — for example, a Graphic Equalizer. Present-day experience shows us that the involvement of the listener in the musical performance may occur in innumerable ways, from his choices about what to listen to and when, to the virtually infinite realm of possibilities for manipulating sound by genre musicians wanting to re-mix existing music into new forms,⁶ composers of electronic music, or skilled DJs.⁷ In the very act of “listening,” these “New Listeners” have themselves become something closely akin to performers and creators.

The result of these technological developments is a profound cultural transformation — though it is interesting to note that these changes to the modern way of thinking about creativity will already be familiar to representatives of non-Western cultures, many of which have long recognized the interchangeability of authorial, performance, and audience roles.⁸ Even the concept of jazz, with its mixed African and American roots, is based on intuitions about the mutual inspiration and shifting identity of composer, performer, and — at least in the form of musicians accompanying a soloist — listener.⁹ From the perspective of copyright law, this cultural shift has also generated fundamental uncertainties within

5 *Ibid.*

6 For an interesting example of a recent case involving one mixing technique — called by the rap music group who developed it, “Crisp Biscuit,” see *Confetti Records v. Warner Music UK Ltd.*, [2003] EWCh 1274 (Ch) [*Confetti Records*].

7 Electronic music and the role of DJs in its creative development was recently the subject of an eight-part CBC radio programme, “The Impact of Electricity on Music” *The Wire*, <www.cbc.ca/thewire>, (broadcast February 2005, to be re-broadcast July 2005).

8 This theme is explored in Mira Sundara Rajan, “Moral Rights in the Digital Age: New Possibilities for the Democratisation of Culture” (2002) 16(2) *Int’l Rev. Law, Computers & Tech*; an earlier version of the paper, presented to the 16th Annual Conference of BILETA (British & Irish Law, Education & Technology Assn, April 2001), <www.bileta.ac.uk/Document%20Library/1/Moral%20Rights%20in%20the%20Digital%20Age%20-%20New%20Possibilities%20for%20the%20Democratisation%20of%20Culture.pdf>.

9 For example, see Bill Evans’ discussion of “simultaneous improvisation” in the context of the jazz trio: Peter Pettinger, *Bill Evans: How My Heart Sings* (New Haven: Yale University Press, 1999).

the concepts underlying the accepted legal framework. In particular, technological change has radically altered the interrelations of creator, performer, user, and intermediaries like recording companies, broadcasters, and Internet service providers (ISPs).¹⁰

Against this background, how has the copyright community responded to the changing cultural status of performers? In view of international developments, do current plans for copyright reform in Canada — much celebrated as Glenn Gould's country of origin — offer the promise of an effective balance among the rights of performers, record companies, and listeners?

B. THE WPPT: AN UNCERTAIN FUTURE?

As in other areas of copyright law, reform of performers' rights in Canada, and elsewhere, is almost entirely driven by international developments.¹¹ In the case of performers' rights, the primary impulse towards reform comes from the *WIPO Performances and Phonograms Treaty (WPPT)*, prepared by the World Intellectual Property Organization (WIPO) in 1996, and entering into force in 2002.¹² The Treaty deals exclusively with performances of sound, or "audio" performances; the notable exclusion of audiovisual works, particularly film, reflects the politics surrounding its adoption.¹³ With the

10 Mira T. Sundara Rajan, above note 8.

11 Notably, the desire for membership in the World Trade Organization (WTO) has been the primary drive behind intellectual property reform in less-developed jurisdictions: noteworthy examples of countries involved in copyright reform based on the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights of the WTO include Russia, China, and India. See "Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights," *Marrakech Agreement Establishing the World Trade Organization*, 15 April 1994, (1994) 33 I.L.M. 1197, <www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> (entered into force 1 January 1996), [TRIPs Agreement].

12 *WIPO Performances and Phonograms Treaty (WPPT)*, 20 December 1996, WIPO Treaties and Contracting Parties, <www.wipo.int/treaties/en/ip/WPPT/trtdocs_woo34.html> [WPPT].

13 The bitter debate between the US and European Union countries over the possibility of including audiovisual works is summarized by Pamela Samuelson, "The U.S. Digital Agenda at WIPO" (1997) 37 *Va. J. Int'l L.* 369, 371–72. The role of the US film industry in international copyright negotiations, more generally, is described by David Nimmer, "Conventional Copyright: A Morality Play" (1992) 3 *Ent L Rev* 94; the issues receive a detailed treatment in Stephen Fraser, "Berne, CFTA, NAFTA, & GATT: The Implications of Copyright *Droit Moral* and Cultural Exemptions in International Trade Law" (1996) 18 *Hastings Comm. & Ent. L.J.* 287.

WIPO Copyright Treaty, the *WPPT* constitutes a pair of instruments known collectively as the *WIPO Internet Treaties*.¹⁴

1) *WPPT and the Digital Millennium Copyright Act*¹⁵

Implementation of the *WPPT* is of primary concern to the Canadian government, but its task is greatly complicated by the contradictions inherent in the Treaty’s own approach to performers’ rights. In the world of international copyright and “neighboring” rights law, the *WPPT* has a complex and mixed significance. At least in part, its multi-faceted character is a reflection of ambivalent US policy in relation to the development of international copyright rules.

On the one hand, by bringing Internet downloading of performances into the copyright fold and making it a restricted activity to be controlled by the copyright-holder, the Treaty represents a major step forward on the international scene for the United States copyright lobby. The attempts of the Recording Industry Association of America (RIAA), in particular, to extend copyright protection to virtually every use of recorded music represents a highly specific conception of copyright.¹⁶

To a layperson, knowledge would appear to fall naturally into an intellectual commons — all the more so in the environment of digital technology, where works of knowledge have become widely available to the public with unprecedented ease.¹⁷ Copyright law seeks to assure the livelihood of authors; in practice it increasingly acts to maintain the economic viability of the industries which invest in the publicizing of works, notably, those

14 *WIPO Copyright Treaty*, WIPO Treaties and Contracting Parties, <www.wipo.int/treaties/en/ip/WCT/>. The *WCT* entered into force in March 2002, the *WPPT* in May of the same year. Reinbothe & von Lewinski provide a detailed introduction to the two treaties in Jorg Reinbothe & Silke von Lewinski, *The WIPO Treaties 1996: The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty — Commentary and Legal Analysis* (London: Butterworths, 2002).

15 *The Digital Millennium Copyright Act*, Pub L No. 105-304, 112 Stat 2860 (28 October 1998); see overview of the legislation “The Digital Millennium Copyright Act of 1998,” United States Copyright Office, <www.copyright.gov/legislation/DMCA.pdf> [DMCA].

16 The role of the RIAA is discussed in detail in subsequent sections of this chapter: see below note 32 and accompanying text.

17 The idea of an intellectual commons that should remain beyond the reach of private ownership in the form of copyright law is at the heart of the Creative Commons movement founded by Lawrence Lessig. See Creative Commons, <<http://creativecommons.org/>>.

involved in the giant industries of book publishing and recorded music. As such, copyright is a package of rights carved out of the public domain for the benefit of copyright industries, with the original authors of creative and intellectual work, for their part, deriving a benefit that is deeply rooted in copyright theory.¹⁸ This exception to public access may be justified to a greater or lesser degree, depending on a wide variety of circumstances — historical, cultural, and personal.¹⁹ Moreover, in the Digital Age, the nature of these rights as an artificial legal construct is more clearly apparent than ever before: where virtually no technological limits to access exist, the success of copyright restrictions is almost entirely dependent on moral imperatives, and a sense of obligation among the general public that it “should” respect copyright limitations. However, this concept of copyright as an exception to public access finds direct opposition in the position advocated by the RIAA and like-minded interest groups: for them, copyright is the point of departure, extending inevitably to all uses of a work of knowledge, with the public interest an exception carved out of the sphere of private ownership.

Clearly, the concept of overarching copyright control for all “uses” of a performance greatly extends the scope of copyright. This tendency is

18 The traditional justification for copyright, particularly in the common-law world, is its role in providing economic incentives to create works. In practice, however, the author’s right is exercised through licensing contracts with publishers. The majority of the economic benefit from copyright protection therefore flows to the publisher, while a percentage returns to authors in the form of royalty payments. Typically, the proportion of earnings from copyright works that are paid as authors’ royalties is exceedingly small — 2.5 to 5 percent.

19 There are also a number of interesting historical examples of the opposite phenomenon — refusing to restrict any aspect of access to a work because public availability is overwhelmingly important. The policy of declaring state ownership of important works in the interest of making them accessible to the public was a feature of post-Revolutionary Russia; the concept of actually giving copyright ownership to the public was experimented with in post-Independence India, in the case of an Indian National Poet. On Russia, see Mira T. Sundara Rajan, “Copyright and Free Speech in Transition: The Russian Experience” in Jonathan Griffiths & Uma Suthersanen, eds., *Copyright and Free Speech: Comparative and International Analyses* (Oxford: Oxford University Press, 2005) at ch. 13, paras. 13.27–13.32.; C. Prins, “Emile Zola Receives an Answer: The Soviet Union Is to Join the Berne Convention” (1991) 13 (7) *European Intel. Prop. Rev.* 238, 239–40. The Indian case is described in Mira T. Sundara Rajan, “Moral Rights in the Public Domain: Copyright Matters In Works of Indian National Poet C. Subramania Bharati” (Jul 2001) *Sing. J. Leg. Stud.* 161, <<http://law.nus.edu.sg/sjls/sjls2001j.htm>> (Abstract).

supported by *WPPT*’s emphasis on the legal sanctity of technological measures for the protection of copyright control,²⁰ and “digital rights management” information (DRMs), which helps to trace the true provenance of a work.²¹ In these elements, *WPPT* closely reflects the measures for copyright enforcement in the United States *Digital Millennium Copyright Act* (1998), itself a direct achievement of the powerful American copyright lobby.²² Indeed, many observers argue that *WPPT* is effectively an extension of American copyright ideology into the international sphere.

On the other hand, *WPPT* also represents an important departure from US copyright practice. While it is true that *WPPT* introduces unprecedented restrictions on the use of performances, this tale tells only part of the Treaty’s story. *WPPT* also introduces new rights for performers, some of which particularly seem to seek the improvement of conditions of life for the individual performer. In particular, *WPPT* takes the unprecedented step of creating a so-called “moral right” for performers, a first in the history of international copyright law. However, it does so with a nod towards US concerns by limiting the scope of moral rights in certain ways.

2) Moral Rights in the *WPPT*

Moral rights, an awkward translation of the French *droit moral*, bring a new dimension to copyright law. The term refers to rights which stand in contrast to the economic benefit offered to authors by much of common-law copyright, and instead, protect the non-economic interests of authors in their work.²³ Through the *Berne Convention*, they have become a

20 *WPPT*, above note 12 at Arts. 18 & 19. “Anti-circumvention measures,” including encryption and watermarking, that allow us to identify, trace, and possibly restrict access to a work are explained in David Balaban, “The Battle of the Music Industry: the Distribution of Audio and Video Works via the Internet, Music and More” (Fall 2001) 12 *Fordham IP, Media & Ent LJ* 235, <www.lindabury.com/resources/Battle%20of%20the%20Music%20Industry.pdf> at 259–65.

21 See David Balaban, *ibid.*

22 *DMCA*, above note 14.

23 This does not mean, however, that the impact of moral rights is “non-economic”; indeed, their economic impact, in the form of lost sales revenues, investments, and rights, may be substantial. Though not emphasized in copyright debates, their economic dimension is probably among the most important reasons why the rights remain so controversial. For an interesting economic approach to moral rights, see Henry Hansmann & Marina Santilli, “Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis” (1997) 26 *J. Legal Stud.* 95, <<http://cyber.law.harvard.edu/propertyoo/respect/hansmann.html>>.

standard part of the bundle of authors' rights recognized in international copyright agreements. Notably, in Article 6*bis* of the *Berne Convention*, an author's right to the attribution of his own work, and his right to protest actions that violate the integrity of his work — for example, by modifying it in a way that is “prejudicial to his honor or reputation” — have been included in the bundle of rights available to authors under international copyright agreements since 1928.²⁴

The ancestry of an international moral right for authors lies in the civil law systems of Continental Europe, and the rights have long been viewed with suspicion by common-law countries. Indeed, the *Berne* provisions include some important concessions to common law pragmatism. Subsection 2 of Article 6*bis* makes allowances for countries to protect moral rights through either statutory or non-statutory means, and also, to limit the protection of moral rights to the lifetime of the author. The provision was designed to accommodate the legal traditions of the common-law world, by deeming the protection of moral rights through common-law torts sufficient to satisfy the requirements of Article 6*bis*. For most of the twentieth century, the UK has relied on this provision to justify the absence of moral rights from its legislative scheme, opposition that was confirmed by a British government report during the 1950s.²⁵ Interestingly, a later review of the approach to moral rights led to an assessment that, in fact, the UK did not meet *Berne* requirements in this regard. The Whitford Committee Report of 1986 helped to pave the way for the historic provisions on moral rights adopted in the *Copyright, Designs, and Patents Act* of 1988, the first in British copyright legislation.²⁶

In its provisions on performers' moral rights, the *WPPT* follows an identical formula to that set out in *Berne*. Article 5 of the Treaty provides for the “Moral Rights of Performers.” Article 5(1) grants to a performer the right to be “identified as the performer of his performances,” and “to

24 Art 6*bis* of the *Berne Convention*, above note 1, on moral rights, was adopted in the 1928 Rome revision conference. For details of the proposals, see Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (London: Kluwer, 1987), paras. 3.28 & 8.96–8.99.

25 Report of the Copyright Committee, 1952 (UK) Cmnd 8662, paras. 219–26, <www.bopcris.ac.uk/bopall/ref9312.html> (Abstract) [*Report of the Gregory Committee*].

26 *Copyright, Designs, and Patents Act*, 1988 (UK) c 48, <www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm> [CDPA]. White Paper on Intellectual Property and Innovation, 1952 (UK) Cmnd 9712, [*Report of the Whitford Committee*]. Moral rights were, however, known to the common law: see the seminal early case of *Millar v. Taylor* (1769), 4 Burr. 2303, 98 Eng. Rep. 201 [K.B. 1769].

object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.” In doing so, the Article provides for the rights of attribution and integrity granted in the *Berne Convention* to be extended to performers; like Article 6*bis*, it also limits the performer’s right to make an integrity-based claim to situations where changes to the work can be shown to have a negative impact on the performer’s reputation.²⁷ Similarly, Article 5(2) parallels Article 6*bis*(2) of the *Berne Convention* in allowing common-law countries, at least in relation to some part of the rights, to substitute tort protections for statutory moral rights.²⁸

In recent years, the United States has become the chief opponent of recognizing authors’ moral rights, bringing a somewhat schizophrenic quality to its quest for leadership in the drive to realize dramatic improvements of copyright standards in the international community.²⁹ If it is true that the WIPO Internet Treaties are primarily a vehicle for the expansion of American practices relating to the implementation and enforcement of copyright, how have moral rights found their way into this scheme?

While the American position on moral rights is far from settled, it is possible to make at least two noteworthy observations about the approach to performers’ rights in the *WPPT*. First, performers’ moral rights do not apply to all types of performances: in the words of the Treaty, they apply only to “live aural” performances. Clearly, this terminology excludes at least one major category of performances, that of audiovisual performances. The exclusion of performers’ moral rights from audiovisual works responds to the concerns of America’s powerful film industry, voiced by the Hollywood lobby at the time of the United States’ accession to the *Berne Convention* in 1988.³⁰ In some sense, therefore, the moral rights provisions in the *WPPT* respond to US concerns about the expansion of moral rights. Moreover, they do so in a way that is consistent with an appar-

27 Not every country in the world limits the moral right of integrity in this way, but some consider any change to work that is carried out without the author’s consent and approval to be a *prima facie* violation of the integrity right. For example, see France’s *Code de la propriété intellectuelle*, Art L121.1, <www.celog.fr/cpi/lv1_tt2.htm> [CPI].

28 Sam Ricketson, above note 24 at paras. 3.28, 8.94–8.99.

29 The ambiguous US position is discussed by David Nimmer, “Conventional Copyright: A Morality Play” (1992) 3 Ent. L. Rev. 94.

30 The voice of the American film lobby in the debate surrounding Berne accession is described by Nimmer, above note 13. Fraser, above note 13, analyzes in detail the specific issue of moral rights in film.

ent US trend towards greater specialization in the area of moral rights, achieved by making them available to specific types of authors and works, but not others, as in the case of the federal *Visual Artists' Rights Act* and its extensive implementation in California.³¹

Second, the perception of US industry about the significance of performers' moral rights in the *WPPT* is not entirely clear. In particular, the Recording Industry Association of America (RIAA) is interested in expanding the rights of copyright-holders in sound recordings as far as possible.³² It may perceive the adoption of moral rights for performers as being in its advantage. For example, in moral rights, it may sense a new opportunity to expand copyright protection, either through the co-operation of the performers whom it represents, or, very controversially, through the potential ability of record labels to assert moral rights on their behalf. The theory of moral rights should make the latter eventuality impossible, since moral rights are always personally linked to the author and, therefore, may only be exercised directly by him. Only after the author's death may they be asserted by anyone else — in this case, his descendants, or a personally-designated representative. However, copyright theory and practice are in a state of flux, and there is no guarantee that moral rights will continue to be applied in a pure, or even conceptually consistent, manner in the modern copyright arena. Nowhere is this uncertainty greater, with respect to moral rights, than in the United States, where the idea of a moral right for authors is relatively underdeveloped.

3) The New WIPO: A Mouthpiece of American Copyright Policy?

In the world of international copyright law, the *WIPO Treaties* represent an experiment in progress. Since 1967, WIPO has been the specialized agency of the United Nations charged with administering the major international treaties on intellectual property law, including the *Berne Convention* on copyright and related to rights, and, as in the case of successive revisions to *Berne* throughout the twentieth century, with the development of substantive law in this field. When the World Trade Organization

31 For a detailed discussion of US lobbying at negotiations for the *WPPT*, see Samuelson, above note 13. *Visual Artists Rights Act of 1990*, 17 U.S.C. §106A (amendment to the US *Copyright Act of 1976*), <www.copyright.gov/title17/92chap1.html#106a> [VARA, *Visual Artists Rights Act*].

32 See text accompanying above note 16.

was founded in 1994, the WTO attempted to take over at least part of this mandate as its own, particularly in relation to the development of substantive copyright norms and their enforcement. The WTO approach to intellectual property rights was crystallized in the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)*, one of the founding agreements of the Organization and, in combination with a powerful international trade-dispute settlement mechanism which allows the imposition of trade penalties across any area of trade covered by the WTO, a keystone of its revolutionary architecture.³³ Not surprisingly, the shift from WIPO to WTO has had a number of controversial implications. It signifies a movement from what was arguably a public-policy oriented approach to copyright through a system of conventional treaties, to a private law framework that would emphasize the international economic profitability of copyright industries, including sectors at both the technological and cultural ends of the copyright spectrum. Moreover, in the light of the ongoing revolution in digital technology, the WTO attempts to modernize both the substance of copyright law, and approaches to its implementation and enforcement. In doing so, it has left many questions unanswered about the significance of the proposed changes for economic, social, and cultural issues in the developing world.

Great uncertainty about WIPO's continued role in the international regulation of intellectual property followed the adoption of the *TRIPs Agreement*. The genius of *TRIPs* is that the Agreement, rather than attempting what would surely have been a futile effort to dislodge WIPO from its position of preeminence, instead supercedes the Organization, ironically enough, by appropriating its own expertise. *TRIPs* incorporates all of the substantive provisions of the *Berne Convention* by requiring its members to adhere to those provisions.³⁴ As a result, the knowledge accumulated by WIPO in its decades of activity now supplies the foundations

33 *TRIPs Agreement*, above note 10. Rochelle Cooper Dreyfuss & Andreas Lowenfeld are even stronger in their assessment of *TRIPs*; they argue that “... completion of the Uruguay Round was a miracle, a package deal with so large an agenda that no state or group of states, and no professional community, could fully grasp the significance of everything that was finally subsumed within the new General Agreement on Tariffs and Trade (GATT).” They go on to identify the inclusion of intellectual property in the WTO as one of “two major breakthroughs” achieved by the system.” See Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, “Two Achievements of the Uruguay Round: Putting *TRIPs* and Dispute Settlement Together” (1997) *Va. J. Intl. L.* 275, 276–77.

34 *Ibid.* at Art. 9.1.

for the WTO. WIPO's future was envisioned in rather uninteresting terms — at least, as far as intellectual property legislation was concerned — with its activities to be concentrated in very narrow and specialized areas. For example, WIPO was thought to be well-positioned for the provision of advice and assistance to the developing world in need of modernizing its copyright law, a role which it had been increasingly required to assume since the 1960s, as post-colonial jurisdictions emerged into independence on copyright-related matters in their own right.³⁵

By assuming a new role in the development of technologically-oriented legal instruments, WIPO has successfully reinvented itself for the Digital Age. What is unclear, however, is what price will be associated with this successful reincarnation. In certain key measures, the WIPO Internet Treaties closely resemble the United States *Digital Millennium Copyright Act* (DMCA) — in particular, its controversial provisions creating special offences for interfering with copyright protection technologies and “digital rights management” information that identifies the provenance of products in digital format.³⁶ Far from being an advocate for the rights of developing countries — another form in which public interest concerns arise in copyright law, given that the vast majority of the world's population lives in “developing” areas — WIPO seems to be profoundly influenced by American law and politics related to the copyright industries.³⁷ If the organization has indeed made a “Faustian bargain” with the US copyright lobby, how is this reflected in the WIPO Internet Treaties?

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- 35 Rosemary Coombe describes some of WIPO's recent activities on this front, especially those involving the issues surrounding traditional knowledge in developing countries: see Rosemary Coombe, “Fear, Hope, And Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property” (2003) 52 *DePaul L. Rev.* 1171, 1177–79.
- 36 DMCA, above note 13 at s. 1202; WPPT, Arts. 18 & 19 require legal protection for anti-circumvention measures, and legal remedies against the removal of rights management information (which includes identification of the performer/producer, information about terms and conditions of use, “numbers or codes that represent such information”): Art. 12 of WCT addresses the protection of rights management information.
- 37 Indeed, concerns about the “Americanization” of WIPO are at the heart of the controversy surrounding a possible new WIPO Broadcasting Treaty: for example, see IPWatch, “WIPO Broadcasting Treaty Discussions end in Controversy, Confusion,” APC Africa ICT Policy Monitor (14 December 2004), <www.apc.org/english/rights/africa/index.shtml?apc=21868ie_1&x=29384>; opposing countries included India, Brazil, Argentina, Egypt, and Iran.

Through the Internet Treaties, the international copyright community has made a first attempt at providing a workable framework for the modernization, in the technological context, of copyright and neighboring rights. Given the opportunity to focus on technology and copyright, the Treaties had the potential to respond to a critical need. Indeed, many of their features point to a new approach to copyright, grounded in pragmatism, timeliness, and economy: in contrast to earlier international documents, these instruments are concise and concentrated. Moreover, entry into force was determined, unconventionally, by requiring a minimum of thirty signatories, a target that was not reached until five years after the Treaties were first drafted, in March and May of 2002 respectively.³⁸

However, the Treaties have proven to be controversial in a number of respects. Most importantly, rather than venturing into the full complexity and range of technological issues, their focus remains extremely narrow. The primary focus of the *Internet Treaties* is, indeed, the Internet, but they are particularly concerned with one fairly specific problem: how copyright law should be modified to cope with the ready availability of copyright-protected materials for download from the Internet. At the same time, the vast range of questions surrounding the new importance of performances, and the role of performers in a “digital” society, remain largely unanswered by the *WPPT*.

Countries which have signed onto the *WPPT* with a view to ratifying the Agreement thereby face a formidable challenge. There is an undeniable need to recognize the changing face of culture in the Digital Age, and this undoubtedly includes an exploration of the new significance of performers’ rights. The *WPPT* brings this question into focus. However, it provides for the expansion of performers’ copyright while offering limited guidance on the broader social policies which the new rights aim to implement and enforce. It is left to national governments to attempt to justify these rights in the context of their own policy needs at the domestic level, whether or not they are compatible with either the legal framework or cultural context of the country in question.

38 See “30th Accession Paves Way for Entry into Force of *WPPT* in May,” WIPO Press Release (21 February 2002), <www.wipo.int/wilma/pressinfo-en/200202/msg0003.html>.

C. CANADA'S PROPOSED RESPONSE: AN OPPORTUNITY MISSED?

The *WPPT* introduces a number of major innovations in the treatment of performers' rights that are not currently reflected in Canadian legislation. It does so in two ways, further developing the copyright benefits enjoyed by performers to mirror the rights traditionally held by true "authors," as well as creating new infringement offences derived from the technologically-based creation and dissemination of copyright works.³⁹ Changes to performers' rights in Canada will be accomplished through the creation of a new right of "making available" performances, specifically directed at Internet file-sharing; the extension of the term of protection for performances; and the introduction of moral rights for performers.⁴⁰ On infringement issues, if the government continues with its current plans, Canadian law will significantly extend the consequences of copyright infringement beyond situations of "classical copying," to include the availability of "all remedies ... that ... may be conferred by law for the infringement of a right" to the circumvention of technological measures designed to protect copyright, and the removal of rights management information which confirms the authenticity of a work.⁴¹

Of this range of new measures, the expansion of performers' rights signifies an important transformation of copyright concepts, while the proposed technological protection measures reflect purely practical concerns. However, both types of changes are equally significant in expanding the scope of

39 See "Government Statement on Proposals for Copyright Reform," Canada, Intellectual Property Policy Directorate, <<http://strategis.ic.gc.ca/epic/internet/incrp-prda.nsf/en/rp01142e.html>> [Government Statement].

40 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, <www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60-3E.html>, ss. 2 [revised s. 2.4 (1) (a)], 23 [revised ss. 23 (1)-23 (3)], and 17.1 & 17.2 [revised ss. 15, 28.2, & 19]. See also Government Statement, *ibid.*, list of proposed amendments.

41 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, <www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-60/C-60_1/C-60-3E.html>, s. 34.01(1) on rights-management information, and ss. 34.02(1) & 34.02(2) dealing with anti-circumvention measures. See also Government Statement, *ibid.*, and "Memorandum Concerning the Implementation in Canada of Arts. 11 & 18 of the WIPO Treaties Regarding the Unauthorized Circumvention of Technological Measures Used in Connection with the Exercise of a Copyright Right," Canada, Intellectual Property Policy Directorate (15 January 2004), <<http://strategis.gc.ca/epic/internet/inippd-dppi.nsf/en/ip01156e.html>>.

copyright protection available for performances. What are the implications of the proposed changes for the four parties potentially implicated in performances — composer, performer, record label, and public?

The stance of Canadian reformers leaves major questions unresolved and, in particular, it may fail to establish an appropriate balance for the Digital Age among these diverse interested parties.

1) “Making Available”: Performer v. User — Or Perhaps, Producer v. Everyone?

The Canadian government has decided to push forward on the new right of “making available” a work via the Internet, set out in Article 10 of the *WPPT*. The right is the very heart of the Treaty: recognizing the reality that much creative work, including musical performances, is now communicated and enjoyed via the Internet. Article 10 grants to performers an “exclusive” right of control over Internet transmission of their performances, expressed as “authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”⁴² Article 14 of the Treaty creates a parallel right for producers of sound recordings.⁴³

The effect of these provisions is to make any unauthorized transmission of a performance via the Internet illegal. In this respect, the provisions seem specifically designed to confront the growing practice of “file sharing.” It has become a common practice in most advanced countries for the general public to obtain music for personal use and enjoyment by downloading and uploading files of musical performances. The technology was pioneered by Internet sites like Napster and Kazaa, with Napster

42 See Bill C-60 (*ibid.*), s. 2, introduces the right of making available “through telecommunication from a place and at a time individually chosen by [members of the public].” It should be noted that the term “phonograms” has long been used to designate sound recordings, though it is no longer current, and it permeates the history of international instruments on neighboring rights. Notably, see the primary international treaty on performers’ rights, the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* of 26 October 1961: <www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html#P71_3633>.

Art. 3(b) of the Convention provides a helpful definition: “[P]honogram” means any exclusively aural fixation of sounds of a performance or of other sounds”

43 See Bill C-60 (*ibid.*), s. 10 [new s. 18(1.1) (b)].

becoming the first to face a major legal challenge from the American recorded music industry.⁴⁴

The development of the file-sharing technology has single-handedly transformed the music industry, generating a panic among industry leaders that their profits will be wiped out, while the public widely perceives this activity to be harmless and easily justified. The recorded music industry, led by the RIAA in the United States, has responded by the unprecedented strategy of launching lawsuits against private consumers. Disturbingly, many of these lawsuits have been settled out of court; they are claimed by the RIAA as a vindication of its legal and moral position, and are certainly the inspiration behind comparable lawsuits undertaken by sister organizations in the UK and Europe, as well as Canada.⁴⁵

The RIAA lawsuits are emblematic of the scope of the conflict between copyright industries and the public. Ultimately, the industry's failure to adapt to changed technological conditions is a major threat to the legitimacy of copyright law, which is increasingly seen by the public as a tool for the repression of public speech and creativity through the legally-sanctioned transformation of the public domain into the private sphere. It is interesting and important to note that major corporations in the recorded music industry have taken the lead in promoting a comprehensive making-available right. However, performers, themselves, are not a widely-heard constituency.⁴⁶ On the copyright front more generally, many writers and

44 Napster case. The United States Supreme Court is currently deliberating a case that promises to be a landmark decision on the issue of file-sharing, *Metro-Goldwyn-Mayer Studios (MGM) v. Grokster* 259 F. Supp. 2d 1029 (C.D. Cal. 2003), <<http://news.findlaw.com/hdocs/docs/mgm/mgmgrokster42503ord.pdf>>. See Katie Dean, "Camping out for the Grokster Case" *Wired News* (29 March 2005), <www.wired.com/news/digiwood/0,1412,67061,00.html>.

45 For details of the Canadian Recording Industry Association lawsuit, see "Appeal Dismissed in CRIA Lawsuit," 19 May 2005, The Canadian File-sharing Legal Information Network: <www.canfli.org/modules.php?op=modload&name=News&file=article&sid=30>; the site includes a number of useful links, including a link to the decision itself. On the activities of the British Phonographic Industry and the International Federation of the Phonographic Industry, see "UK music to sue online 'pirates'" *BBC News UK Edition Online* (7 October 2004), <<http://news.bbc.co.uk/1/hi/entertainment/music/3722428.stm>>; Charles Arthur, "New wave off lawsuits to hit 'illegal song-swappers'" *The Register* (12 April 2005), <www.theregister.co.uk/2005/04/12/new_file_sharing_lawsuits/>.

46 For example, see Performers' Rights Review, *Response to the Discussion Paper*, Ministry of Economic Development, Business Law & Trade, New Zealand: <www.med.govt.nz/buslt/int_prop/performers/cabinet/cabinet-03.html>, para. 36:

scholars in the developed world are standing up to their own publishers in favor of lesser copyright protection and improved access to their work.⁴⁷ One is led to wonder whether performing artists will be equally likely to support a more balanced vision of their rights — one that signifies a relationship of greater openness, co-operation, and trust between performers and their audiences.

Given the proposed changes to Canadian law, every act of file-sharing or uploading onto the Internet will potentially become illegal in Canada, though the amendments stop short of making the downloading of files, *per se*, illegal.⁴⁸ In adopting this stance, however, the government will be in danger of making poor policy that reflects short-term commercial considerations at the expense of long-term cultural and economic growth. This approach may have three distinct kinds of negative effects. First, by curtailing individuals’ rights of access to media and culture, the government may unwittingly find itself supporting the restriction of free expression, in this case, initiated by private rather than public censorship exercised by the major players in the copyright industries. Second, by supporting the approach of copyright industries towards improving their control of works by means of copyright law, government policy may be helping to suppress much-needed changes in the industry approach to copyright problems. A third, and rather ironic, implication of this approach will be to contribute to the discrediting of copyright law altogether, as the public comes to identify it ever more closely with the unconscionable restriction of free speech and knowledge through the artifice of copyright protection.

It is noteworthy that the Canadian government seems to be moving in the opposite direction to the courts. The Federal Court of Appeal, which has recently provided significant leadership on copyright issues, has now

Nearly all submissions, most of which came from producers or users of performances, commented that New Zealand would not benefit from implementing the additional economic and moral rights contained in the *WPPT* and the proposed *WAPT*. These submissions also suggested that foreign performers would be more likely to benefit than New Zealand performers through a net outflow of royalties that would result from conferring wider economic right to performers. *The small number of submissions from performers supported the extension of additional rights to performers.*

[Emphasis added.]

- 47 The Creative Commons, founded by Lawrence Lessig, is the most well-known of the anti-copyright movements around the world. See Creative Commons, <<http://creativecommons.org/>>.
- 48 For example, see Bill C-60 (above note 41), ss. 8 [new s. 15 (1.1) (e)] & 10 [new s. 18 (1.1) (b)].

made at least a preliminary decision that Internet downloading by individuals for their personal use should remain beyond the reach of copyright restrictions.⁴⁹ Amendments to the law are therefore likely to give rise to the additional problem of how Canadian judges may reconcile existing precedents with uncomfortable new legislative guidance.

2) Term of Protection: Recognizing the Creativity of Performers

Article 17 of the *WPPT* extends the term of protection for performances to fifty years from the time the performance was first recorded.⁵⁰ Previously, the norm for protection of performers' rights was set by the *Rome Convention* of 1961, at twenty years after the date of recording.⁵¹ The movement towards an extended time of protection for performances represents greater equality between performances and other authors who, in accordance with the *TRIPs Agreement*, enjoyed a minimum period of protection for their works of fifty years after their own lifetime.⁵²

49 *BMG Canada Inc v. John Doe*, 2004 FC 488, <www.p2pnet.net/cria/canada.pdf>, aff'd by the Federal Court of Appeal on 19 May 2005, in 2005 FCA 193, <<http://decisions.fca-caf.gc.ca/fca/2005/2005fca193.shtml>>. See also the earlier, landmark ruling on ISP liability in *Society of Composers, Authors and Music Publishers of Canada (SOCAN) v. Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427, <www.canlii.org/ca/cas/scc/2004/2004scc45.html>.

50 In the language of the Treaty, "fifty years computed from the end of the year in which the performance was fixed in a phonogram."

51 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 26 October 1961, WIPO Treaties and Contracting Parties, <www.wipo.int/treaties/en/ip/rome/trtdocs_woo24.html> at Art. 14 [*Rome Convention*]. Canada has been a member of the *Rome Convention* since 1998: for more information, see Copyright Board of Canada: Regulations, *Limitation of the Right to Equitable Remuneration of Certain Rome Convention Countries Statement (SOR/99-143)* 23 March 1999, <www.cb-cda.gc.ca/info/regulations/99143-e.html>. In the case of performances not made into recordings, the right would be calculated from the date of the performance.

52 The international norm of a term of protection has now become seventy years after the death of the author, primarily due to the extension of copyright term by the European Union in its Term Directive: *Copyright (Harmonization Duration of Protection)*, Council Directive 93/98/EEC, 29 October 1993, <www.wipo.int/clea/docs_new/en/eu/eu023en.html#JD_EU023> harmonizing the term of protection of copyright and certain related rights (24/11/1993), OJ L290/9 [*Term Directive*]. The extension of copyright term for twenty years beyond the current practice has been highly controversial in the United States, leading to a constitutional challenge in the case of *Eldred v. Ashcroft*, 537 U.S. 186 (2003), <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=01-618>>.

In its own terms, extension of the term of protection for performances reflects the growing status of performers in the Digital Age, and seems satisfying from the perspective of protecting human rights and promoting artistic equality. However, in conjunction with the other measures proposed by the government of Canada, there is a danger that an extended term of protection could contribute to excessive restrictions on public access to performances. Creative artists may find it particularly difficult to make use of existing works in their own, subsequent creative endeavors.⁵³ For example, the ability of a filmmaker to make use of recorded music in his soundtrack, or the use of musical performances in the production of a dance-drama, could be frustrated. An extension of term, as in the case of other aspects of performers’ rights protection, requires an effective balance with measures to protect the public interest, including, most importantly, an entrenched commitment to public access to knowledge.⁵⁴

3) Moral Rights: A New Democracy?

Like the improvement in term of protection for performances, the introduction of moral rights for performers signifies an attempt to bring greater recognition and status to their creative work. If term represents a quiet revolution, however, moral rights are a noisy explosion of festivities. No aspect of copyright law is more expressive of the special, and somewhat mystical, nature of creative authorship; no aspect is more closely guarded as the exclusive preserve of authors. The rights are inalienable, and, in jurisdictions where they have traditionally enjoyed strong protection, the waiver of moral rights is allowed only with the greatest disapproval, reluctance, and doubt.⁵⁵ The decision to extend these rights to performers means that, if only at a “spiritual” level, they have attained a degree of equality with authors.⁵⁶

53 In relation to recorded music, a person wanting to make use of it may typically face the problem of overlapping rights held by performer, record producer, and even broadcaster. Negotiating this web of rights clearly presents practical difficulties.

54 The proposed amendments specify the extension of term of protection for sound recordings; “the term of protection provided to performers in respect of their recorded performances would be modified in consequence.”

55 See France’s *CPI*, above note 27 at Arts. L121.1–121.9.

56 The term is used by Ricketson, who follows French tradition in his reference to the “spiritual” quality of the relationship between author and his, or her, own work. See Staniforth Ricketson, *The Law of Intellectual Property* (Melbourne: Law Book Co., 1984).

While the move may be generally positive from the perspective of recognition for performers' rights, the new moral right raises a number of difficult issues. The Canadian government's proposed changes may not only lead to practical problems; it also threatens to generate striking legal incongruities. Perhaps more than any other area of performers' rights, moral rights require a highly nuanced legislative treatment.

The first difficulty with the proposed changes is one that is commonly recognized in relation to moral rights: their capacity to restrict unduly the freedom of access and thereby, expression, of the public. It is worth noting that the problem is not necessarily any more pronounced in relation to moral rights than in the case of economic rights. — and indeed, where economic rights allow powerful corporate interests to restrict freedom of expression, moral rights, given their theoretical inalienability, will only allow the author, personally, to do so. However, in an age of rapidly expanding copyright protection, the area of moral rights, particularly in the common-law world, is often perceived as a completely new front on which rights of authorship are expanding at the expense of the public domain. In Canada, as is the case in most common-law jurisdictions, moral rights are problematic because of ambivalent implementation of these rights into national law.⁵⁷ Just as measures to protect public access to works have traditionally been a feature of economic copyright, such as the British and American doctrines of "fair dealing" or "fair use," similar measures should be in place in any regime that attempts to grant serious recognition to moral rights. For example, in the case of authors' moral rights, France includes a specific exception for parody in its copyright legislation.⁵⁸ In the case of performers' moral rights, because of the potential importance of performances in the creation of new artistic works, the development of appropriate safeguards is an important policy question. The moral right of performers should perhaps be balanced by specific limits designed to accommodate the use of performances in subsequent creative works. For example, an intent to derogate the work may be introduced as a requirement of the offence, or access to remedies may be limited, in the case of a moral rights dispute, to measures that favour the continued circulation of the new work.

57 A classic illustration of the situation is the UK *CDPA*, above note 26; in implementing moral rights, the Act establishes such a complex legislative scheme, including extensive exceptions and provisions for waivers, that it is questionable whether the UK is in fact in conformity with its obligations under Art. 6*bis* of the *Berne Convention*, above note 1. See c. IV on Moral Rights, ss. 77–89.

58 See France's *CPI*, above note 27 at Art. L122–5(4).

Similarly, the moral right of performers should be explicitly protected against exploitation by persons other than the original performer — an issue that has not been entirely clear in the case of authors’ moral rights, in the common-law world. The performer’s moral right should specifically remain inalienable, while waivers of the right should be granted minimal scope.

Perhaps the most puzzling aspect of the new performer’s right in Canadian law is, ironically, the fact that it threatens to eclipse the moral rights of authors. If the Canadian government enacts the right in full compliance with Article 5 of the *WPPT*, it will have to do so with clear limits on the ability of performers to alienate or, importantly, waive their rights. However, under Canadian law, similar restrictions do not apply to the author’s moral rights: largely unchanged since their adoption in 1931,⁵⁹ Canada’s moral rights provisions make allowance for comprehensive waivers, lending doubt to their practical impact. Indeed, in the history of Canadian copyright jurisprudence, there has only been one unequivocally successful ruling on moral rights: the celebrated *Snow* case of 1982, in which the artist’s right to protect his sculpture of Canada geese from a festive decoration of ribbons was upheld by an Ontario court.⁶⁰ The creation of a performer’s moral right to meet Canada’s obligations under the *WPPT* could therefore lead to the extremely odd situation where performers’ moral rights would enjoy better and more secure protection in Canadian law than those of traditional authors. From a public interest perspective, a chaotic system of protection for moral rights would lead to unpredictability about the nature and scope of authors’ and performers’ abilities to protest the re-use of their works. Here too, the proposed changes to Canadian law present a great need and a difficult challenge in protecting the public interest.

D. CONCLUSION

More than three decades ago, a Canadian visionary foresaw the transformation of the art of music performance under the revolutionary influence of a new technology, digital sound recording. The Digital Age has since blossomed, and the *Performances and Phonograms Treaty* drafted by WIPO presents Canada with an important opportunity to confront the issues

59 Vaver points out that amendments in 1988 were responsible for “clarifying and expanding [their] operation.” See David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks* (Toronto: Irwin Law, 1997).

60 *Snow v. The Eaton Centre Ltd.* (1982), 70 C.P.R. (2d) 105 (Ont. H.C.J.).

involved in digital-era performances, and undertake the essential labour of modernizing Canadian copyright provisions dealing with performers' rights. However, in its implementation efforts, the Canadian government is at risk of forfeiting its chance to develop policies in an area that is of growing importance from many perspectives — cultural, social, and political, as well as economic. The Canadian government's position will not only affect Canada, but it will send an important signal to the international community, where Canadian law is increasingly influential.⁶¹

In its haste to keep pace with the most advanced international standards, Canadian reform of performers' rights is in rapid pursuit of facial conformity with the requirements of the *WPPT*. Canada is not alone in this approach: copyright reform in most regions of the world, including developing and so-called "transitional" countries whose legal and social systems diverge greatly from current international norms, is proceeding on much the same basis. However, the short-term economic rewards of the rush to implement the WIPO Internet Treaties may be more than outweighed by the longer-term sacrifice of the public interest in creative expression. Glenn Gould saw the Digital Universe as one of endless creative possibilities; without the co-operation of the law, however, it threatens to become an intellectual and creative Wild West. Nowhere is this danger more apparent than in relation to performances — in both the artistic and legal senses, perhaps a last frontier.

61 In some respects, Canadian intellectual property law has not only been trend-setting, but it has also been controversial: see, for example, the Canadian Supreme Court decision in *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, <www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol4/html/2002scr4_0045.html> where Canada has taken a deliberately cautious approach, and one that differs fundamentally from American and European treatment of the issues surrounding the patentability of life-forms.