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The Moral Rights of Performers
from a Human Rights
Perspective

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There was a language in the world that everyone understood... It was a language of ENTHUSIASM, of THINGS ACCOMPLISHED, with LOVE and PURPOSE, and as part of a search for SOMETHING BELIEVED IN and DESIRED...

Those are the words of Paulo Coelho, author of the highly acclaimed “The Alchemist.” These words encapsulate the best lesson I will carry home with me to the Philippines. The Raoul Wallenberg Institute, WIPO Worldwide Academy and SIDA gave me an opportunity I never thought I would ever have – to study in the “other part of the world.” Before the start of the Academic Program, my entire student life was spent inside the boundaries of the Far East. I would always imagine people from the West would not only look and talk differently, but also think differently. Hence, it entailed a perfect mix of faith and courage to immerse myself into another totally unpredictable current in life. But after the experience, and now that nothing more is left to be done, I realised that each and everyone of us are just parts of one world, that all our histories are connected, and that it is extremely possible to understand one universal language.

Inspired by the wisdom and wit of my father, my mother would always remind my two brothers and I of the importance of education. My heart has always clutched this valuable lesson as I struggled through the lonesomeness and remoteness of my physical circumstances. Is it worth it? After everything, what do I have? Let’s see...An abundance of knowledge, books and materials on both International Human Rights and Intellectual Property Law, a picture of the whole class which I will definitely frame and hang inside my humble bedroom, and a handful of special lifetime friends (with pictures too, of course!). Just for this three, I am already grateful. But God’s generosity knows no bounds that he gave me more than what I expected. I met down-to-earth professors, who appreciated our individual selves without need of any pretensions. I mingled with the staff, librarians, personnel of the Institute who are more than willing to assist us even with our most petty needs. I was able to wear winter jackets and other fashion paraphernalia that responds to the demands of the cold atmosphere. But above all, it was through this experience that I was able to acquire the serenity to accept the things I cannot change, as well as the strength to change the things I can. But for the wisdom to know the difference, credit goes to the Lord.

As I am preparing to move forward with my life, and expose myself to another of its currents, I am confident that I will succeed. Not because of what I have achieved so far, but because I know I have the blessings and support of God, my family, and all my friends and loved ones. Thank you very much to all of you. Most of all, thank you, Joben, for sharing your forever with me.

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Abbreviations

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

American Broadcasting Company (ABC)

British Broadcasting Company (BBC)

Compact disc (CD)

Digital Video Disk (DVD)

European Union (EU)

General Agreement on Tariffs and Trade (GATT)

Global Internet Liberty Campaign (GILC)

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social, and Cultural Rights (ICESCR)

International Federation of Actors (FIA)

International Federation of Library Associations and Institutions (IFLA)

International Freedom of Expression and Exchange Network (IFEX)

International Labor Organization (ILO)

Mechanical Copyright Protection Society (MCPS)

Motion Picture Association of America (MPAA)

National Writers Union (NWU)

Parents Music Resource Center (PMRC)

Screen Actors Guild (SAG)

United Kingdom (UK)

United Nations Educational, Scientific, and Cultural Organization (UNESCO)

United Nations General Assembly (UNGA)

United Nations High Commissioner for Refugees (UNHCR)

UN Human Rights Committee (HRC)

United States of America (US or USA)

Universal Declaration of Human Rights (UDHR)
U.S. Federal Communications Commission (FCC)
Video Home System (VHS)
Visual Artists Rights Act (VARA)
World Intellectual Property Organization (WIPO)
WIPO Audiovisual Performances Treaty (WAPT)
WIPO Performances and Phonograms Treaty (WPPT),
World Trade Organization (WTO)

1 Introduction

1.1 Protection of Performers' Rights

Who is a performer? To be highly technical, a scholar once wrote that “a performer is an individual who takes part in a performance, brings conventional or modern potential into action that act on his behalf, or otherwise artistically fulfils by means of personal achievement the operative facts that constitute a performance, if there is an existing possibility for him to artistically influence the actual and temporal course of the performance.”¹ In layman’s parlance, performers are actors, musicians, singers, dancers, and other persons who perform, usually artistic or literary works. They are the ones who grace the television screens, cinematographic houses, cultural venues, theatrical stages, and even ordinary streets in order to entertain, educate, and enliven different types of audiences.

Intellectual property law generally adheres to the principle that performers shall be given rights in relation to their performances. Performers shall have the right to control not only the performing event, but also any other form of further exploitation of such performances. This particular need to accord considerable protection to the rights of performers came about with the development of technology that enabled performances to be recorded and broadcast. Gone were the days when each performance would end with its public presentation in front of an audience. Prior to the introduction of these technological breakthroughs, access to performances was restricted to the spectators who were present in the immediate vicinity where the performance took place. This almost face-to-face arrangement has provided the performer with a relatively comfortable system of collecting payment for their work.

At the dawn of the twentieth century, technical systems were developed not only to enable performances to be recorded, but also to broadcast these live and recorded performances and communicate the same to the public. Henceforth, the world has been a witness to a variety of sound and recording techniques, as well as modern possibilities of ‘reviving’ or ‘representing’ performances – thereby creating a wide gap between the performers and their audience.

The eventual divergence of performers from the live public due to the introduction of recording and broadcasting mechanisms, made it more difficult for performers to control the exploitation of their performances. Performers, primarily from European countries, complain that they needed specific legal protection against the use of their performances in ways that they had not authorized.

¹ Ansgar Firsching, *The Protection of Performers from a European Perspective with regard to the “Phil Collins” Case*. Stockholm (1997), p. 7.

1.2 Related Rights in General

The rights of performing artists in their performances of literary and artistic works are in general covered by the concept of “related rights.” If the rights provided by copyright apply to authors, “related rights”, also known as “neighbouring rights” concern other categories of owners of rights, other than the author.

In intellectual property law, ‘neighbouring rights’ cover three kinds of rights: the rights of performing artists in their performances; the rights of producers of phonograms over such phonograms; and the rights of broadcasting organisations in their radio and television programs. These holders of related rights make use of literary or artistic works in order to make the same publicly accessible to others.

Related rights belong to its owners who are regarded as intermediaries in the production, recording or distribution of works. They are considered to be auxiliaries in the intellectual creation process in acknowledgement of their valuable assistance to authors. The public can only access the creation by virtue of these ‘middle-men.’ As such, the broadcasting organisations broadcast works and phonograms in their stations, the record industry records and produces songs and music written by musical writers and composers, and actors perform roles in plays written by playwrights.

Given their significant part in the intellectual property system, owners of related rights likewise need protection against the illegal exploitation of their respective contributions.

1.3 Performers as Holders of Related Rights

The contribution of performers as related rights holders is more crucial in musical or dramatic works than in literary works. Novels, essays, and other literary works are made available to the public through print media – that is, the final manuscript will be reproduced by a publisher without need for any additional expression aside from that created by the author. Hence, all the author has to do is to assign his copyright to the publisher of the print media.

In contrast however, the performing arts demand that the created work be communicated to the public with the aid of performers. It is the performer who gives shape and form to the work. The success or failure of a musical or dramatic work will significantly depend on the efforts exerted by the performing artists. They are not merely reproducing an already existing work but rather they are interpreting said work, and in the process, creating something novel. The performers themselves have a valid interest over any subsequent adaptations of their own work. Undoubtedly so, there is a need to safeguard the interests of singers,

musicians, dancers, actors or other persons who sing, dance, act or otherwise perform musical or artistic works against certain unlawful uses of their performances.

1.4 Moral Rights

The interest of every performing artist is not limited to purely monetary compensation for the work he or she has undertaken. One's economic rights over his or her work exist independently of his or her personal rights. It is the protection of the creator's personal expression and spiritual embodiment within the work which constitutes his or her moral rights.² These rights are based on the recognition that the work of a creator reflects his character.

The term "moral rights," was taken from the French term "*droit moral*", which means non-economic or personal rights. This concept dilutes the pure economic approach to copyright with alien personality rights.³ These rights protect the personal, rather than purely financial, value of a work to its creator.⁴ Preservation of an artist's "natural rights," as opposed to his or her rights to economic compensation, is the primary reason why many states seek to establish adequate means of protection for the moral or "spiritual" aspects of an artist's work product.⁵

Countries such as France, Japan, and others in Latin America and francophone Africa adhere to the principle that a creator's work product is an extension of his or her personality. Thus, the creator is given, among others, the right to have his work attributed to him, and the right to prevent others from tampering or altering said work in a manner that he did not authorize. In the moral rights context, whoever attacks a particular work, is actually attacking the honour and the reputation of its creator.

1.5 Moral Rights of Performers

Actors, singers, comedians, dancers and musicians come into the

² Colleen Creamer Fielkow, *Clashing Rights under United States Copyright Law: Harmonizing an Employer's Economic Right with the Artist-Employees Moral Rights in a Work Made for Hire*, DePaul-LCA Journal of Art and Entertainment Law, 7 DePaul-LCA J. Art & Ent. L. 218 (Spring 1997), as viewed from <http://cyber.law.harvard.edu/metaschool/fisher/integrity/Links/Articles>

³ Paul Goldstein, *International Intellectual Property Law: Cases and Materials*, University Casebook Series, Foundation Press, New York (2001), p. 295.

⁴ Michael Seadle, *Copyright in the Networked World: Moral Rights*, Library Hi- Tech, Volume 20, Number 1, pp. 124-127.

⁵ Adler Bernard, *The Proposed New WIPO Treaty for Increased Protection of Audiovisual Performers: Its Provisions and Its Domestic and International Implications*, Fordham Intellectual Property, Media and Entertainment Law Journal, 12 FDMIPMELJ 1089 (Spring 2002).

public's eye by virtue of their work. But with utter confidence, many performers would declare that financial rewards are not their paramount motivation for doing what they do best. There is still a world of sacred honour, where name and reputation precedes money in terms of importance. Their performances are seen as extensions of their personality and thus, they need to be assured that they exercise a certain degree of control over their respective works. They must at least be assured that their names are properly recognized in relation to the performances they have made. And more importantly, since their name and reputation is at stake, they must be given the right to prevent others from modifying their performances in a way which will offend their integrity.

At present, many jurisdictions confer moral rights on performers. In France for example, performers are given rights to respect their name, their authorships and their interpretations. The German Copyright Act protects the rights of performers against distortion or alteration of their performances, which are likely to injure their prestige or reputation.⁶ Through international and national legislations, several countries have tried to ensure that the rights of the men and women whose talents have enlightened, challenged, and entertained their audience for centuries are protected.⁷

1.6 Scope of the Study

This paper will discuss the moral rights of performers under the present international intellectual property system. More particularly, the primary legal subject will be Article 5 of the WIPO Performances and Phonograms Treaty (WPPT), dealing with moral rights of performers. Additionally, a historical account of how the present framework in international law developed will be given in respect to the protection of performer's moral rights.

The subject of intellectual property rights of performers has long been very controversial internationally. On logical grounds, it is mind-boggling why performers should be treated differently from authors and other creators. Especially so, when it comes to moral rights protection. This paper will present a comparative analysis of the moral rights of performers and the so-called *droit auteur*, or the moral rights given to authors. The rationale behind the differences and similarities will likewise be explored. This exercise is relevant in light of the intensifying clamor from performers movements demanding for equal rights and benefits as authors under copyright law.

⁶ Article 83, German Copyright Act (1965) as cited in Brad Sherman and Lionel Bently, *Performers' Rights: Options For Reform* (1 October 1995) as viewed from the homepage of the Department of Communications, Information Technology and the Arts of Australia, <http://www.dcita.gov.au/download/0,6183,4_113577,00.doc>

⁷ Bernard, *supra*. See Footnote 5.

The moral rights of authors will be discussed, only as a basis of comparison and other valid implications applicable to performers. Thus, it can be useful to distinguish between performing arts in which the author of a musical or dramatic work is not the same as the person performing the works (e.g. operas, musicals, etc.) and those in which the authors and the performers are identical (e.g. popular music, etc.).⁸ So as not to engender confusion, this paper will never regard the performer as the author of the same work. For purposes of this paper, ‘performer’ shall mean ‘performer only.’ And ‘author’ shall mean ‘author only, unless clearly modified.

There is actually good reason to believe that performers need stronger moral rights protection in the international sphere. With the advent of the internet and other demonstrations of highly-advanced technology, performances have become susceptible to a host of exploitation methods, which are more often undertaken without the performer’s permission and knowledge. The economic loss for the performers (as well as producers and copyright owners) may be indescribably devastating. But it is truly the moral loss that creates a more daunting impact on the performer.

Moral rights preserve the performer’s name, reputation, and general credibility as an artist. No doubt, performers are rightful holders of human rights. This paper will assess whether the moral rights doctrine deserves due legislative consideration, both in the local and global level, in compliance with the fundamental dictates of international human rights law. Also using a human rights approach, this paper will evaluate if the moral rights of performers are indeed worthy of protection. And in line with human rights objectives, this paper will likewise deliberate if moral rights will benefit the community in general, as opposed to catering exclusively to performers’ interests. Hence, the intermingling of moral rights of performers with other specific human rights will be explored and analyzed.

Due to space and time constraints, this paper will not tackle intellectual property or human rights law in the regional level (i.e., European Union). The scope will be international, in as much as the WPPT covers a wide base of member countries. However, a closer look on the protection schemes of the United States, the United Kingdom, and to a limited extent, France, with regard to moral rights over performances, will be presented.

Since this paper will focus on moral rights as human rights, the economic rights of performers will not be dealt with. Except for the economic aspects of performers’ moral rights, this paper will not discuss their economic rights. (Although this is another controversial subject matter in the international intellectual property arena.) Finally, the principles of copyright law will be used in the present study, to the exclusion of all other fields of intellectual property law, except for

⁸ Firsching, *supra*, p. 4. See Footnote 1.

specified areas of trademark law, which are directly linked to moral rights of performers.

2 International Protection of Moral Rights of Performers

2.1 Berne Union for the Protection of Literary and Artistic Works

The concept of moral rights was first introduced into the international copyright system at the 1928 Rome Revision Conference of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as the 'Berne Convention'). The requirements in relation to moral rights appear in Article 6 bis. It was further revised in 1949 and 1967. The current form of Article 6 bis represents a compromise position reached among the member-states at the time of its inclusion in the Convention and maintained at subsequent revision conferences.

Article 6bis of the Berne Convention reads as follows:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

(2) 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 the Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Critics often refer to Article 6 bis as the 'weakest statement of moral rights likely found in an international convention.' This is because of the minimalist approach adopted in the Berne Convention whereby participating countries were allowed to comply, without the need of enacting any separate legislation. All that is required by the Berne rules

is observance of the minimum standards set by Article 6bis. Hence, the common law countries believed that they have already fulfilled the requirements through a combination of their existing legislative and common law actions such as passing off, contract and defamation.⁹ Of course, the article would best be interpreted in a manner that member countries will be free to offer greater protection than the minimum required, rather than seeing the provision as the ultimate compliance target.

The Berne Convention restricts its moral rights protection to the "author" of a work or film. The text indicates that authors shall have moral rights "in their literary and artistic works." Although the text provides protection for most works, it also contains language, which gives individual states the discretion to narrow down the scope of works covered by moral rights.

The single most significant Article of the Berne Convention in relation to the present study is Article 6bis. Although said article does not directly address the moral rights of performers, it nevertheless provided vital guidance to the drafters of later international agreements specifically dealing with the subject matter.

2.2 International Labour Organization (ILO)

During the first half of the twentieth century, and perhaps due to several lobbying activities by performers, the International Labour Organisation took an interest in the status and rights of performers as employed workers.¹⁰ Although it was generally conceded that performers should be given adequate international protection, author's groups consistently opposed the grant of such protection under the copyright regime. In 1948, discussions were held in Brussels, where it was internationally settled that performers should be protected but not through the auspices of copyright law but through a distinct system of performers' rights protection. Thus, the pressure exerted by performers groups eventually led to the conclusion of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) in 1961.

⁹ Mary Wyburn, The Attorney-General's Department's Moral Rights Discussion Paper: Background and Proposals, Australian Business Law Review, Sydney (Oct 1995) as viewed from <<http://proquest.umi.com>>

¹⁰ International Bureau of the WIPO, *Introduction to International Protection of Copyright and Related Rights*, distributed in the Intellectual Property Law lecture by Prof. Mpazi Sinjela, Raoul Wallenberg Institute, Lund University Faculty of Law (2002).

2.3 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)

The Rome Convention is generally believed to be a pioneer convention because it recognized for the first time, the rights not only of performers, but also of producers of phonograms and broadcasting organizations. The Convention is the earliest international agreement which essentially defines the standards of protection for neighboring rights. The World Intellectual Property Organization (WIPO), the International Labor Organization (ILO) and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) jointly administer the Rome Convention.

Article 3 lit.a of the Convention provides a legal definition of the term ‘performers,’ referring to “actors, musicians, dancers, and other persons who act, deliver, declaim, play in, or otherwise perform literary and artistic works.” This provision follows the proposals of Austria and the United States.¹¹ Here, performers shall be given minimum protection, through the “possibility of preventing” certain acts done without their consent. However, instead of enumerating the minimum rights of performers, this expression was used in order to allow countries like the United Kingdom to continue to protect performers by virtue of penal statutes, determining offenses and penal sanctions under public law.¹²

But in Article 7, certain acts requiring the advance consent of the performer were enumerated, as follows:

- (i) ***broadcasting or communication to the public of a live performance***
- (ii) ***recording an unfixed performance***
- (iii) ***reproducing a fixation of the performance, provided that the original fixation was made without the consent of the performer or the reproduction is made for purposes not permitted by the Convention or the performer.***

Thus, under the Rome Convention, the performer is given the opportunity to prevent the completion of the above specific acts, if his or her consent was not obtained prior the use of the performance.

It is regrettable though that ever since its adoption in 1961, the Rome Convention has not been revised. Fewer countries are members of the Rome Convention compared to the number of signatories to the Berne

¹¹ Nordemann, Vinck, Hertin, and Meyer, *International Copyright and Neighboring Rights Law*, p. 355 as quoted in Ansgar Firsching, *The Protection of Performers from a European Perspective with regard to the “Phil Collins” Case*. Stockholm (1997), p. 5.

¹² International Bureau of the WIPO, *supra.*, see Footnote 10.

Convention.¹³ The guarantees under the Rome Convention cover only the basic protection for fixations made by the recording of sound and audiovisual works. Several issues have emerged due to the unimaginably swift pace of technological development the world over. Moreover, there is a visible increase in the lobbying power of performers' movements in their respective countries, as well as shifts in opinions on how the contracting nations viewed their cultural products.¹⁴ Hence, if the international community will rely solely on the provisions of the Rome Convention, questions of vital significance -- like moral rights, transfer of rights and protection of performers' contributions to the recording of their performances -- will be left unanswered.

Moral rights of performers are seen to be particularly pressing because of the growing presence of new recording techniques, like digital sampling allowing the re-use of their fixed performances.¹⁵

2.4 The Phonograms Convention

The Phonograms Convention was concluded as a response to the phenomenon of record piracy, which had attained epic proportions by the end of the 1960s. Technological developments made it possible for multinational pirate enterprises to flood many of the world's markets for recorded music with cheap, easily transported and easily concealed copies of protected phonograms.¹⁶ Under the Convention, each contracting state shall enact legislation, which will determine the scope of protection afforded to performers whose performances are fixed on phonograms, and the conditions of enjoying such protection.¹⁷

2.5 Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") and WIPO-WTO Cooperation

The TRIPS Agreement was concluded in December 1993 as part of the Uruguay Round of negotiations under the former General Agreement on Tariffs and Trade (GATT), now World Trade Organisation (WTO). It

¹³ Only 76 states are parties to the Rome Convention as of 15 July 2003, while 151 states are members of the Berne Convention as of 24 September 2003. as viewed from the WIPO website <<http://www.wipo.org/treaties/documents>>

¹⁴ Bernard, *supra*. See Footnote 5.

¹⁵ Brad Sherman and Lionel Bently, *Performers' Rights: Options For Reform*, (1 October 1995) as viewed from the homepage of the Department of Communications, Information Technology and the Arts of Australia, <http://www.dcita.gov.au/download/0,6183,4_113577,00.doc>

¹⁶ International Bureau of the WIPO, *supra*., see Footnote 10.

¹⁷ Article 7 (2), Phonograms Convention; in addition, Article 7 (1) provides that the Convention shall in no way be interpreted to limit or prejudice the protection secured to authors, to performers, to producers of phonograms or to broadcasting organizations.

also contains provisions on the protection of related rights.¹⁸ Such related rights shall be provided to performers, producers of phonograms and broadcasting organisations. These, along with other rights in the TRIPS Agreement, are generally regarded as separate from those guaranteed under the Rome Convention.¹⁹ Thus, if one country acceded to the TRIPS Agreement, but not the Rome Convention, it need not comply with the requisites of the latter.

The Agreement contains detailed provisions on enforcement of intellectual property rights, including related rights as well as mechanisms for settling disputes among member countries concerning compliance with the obligations under the Agreement. The TRIPS Agreement makes the provisions of the Berne Convention enforceable between nations through the dispute-resolution procedure of the WTO, with a single exception: **Article 6bis**.²⁰ Unfortunately, the Berne Convention's Moral Rights provisions are specifically excluded from the Treaty.²¹ Article 9 of the TRIPS Agreement provides:

“... Members shall not have rights or obligations under this agreement in respect of the rights conferred under Article 6 bis of that Convention or of the rights derived therefrom.”

Marshall Leaffer, author of *Understanding Copyright Law*, wrote that this omission was due in large part to the insistence by the United States that it be left out of TRIPS. It was persuasively argued that the GATT/TRIPS is intended to regulate economic rights, and since moral rights are not economic rights, they have no place in the negotiation.²²

2.6 WIPO Performances and Phonograms Treaty (WPPT)

The WPPT is the latest internationally recognised standard for the protection of performers' rights. With its adoption, musicians, and other audio performers were granted enhanced protection and control over their contributions to sound recordings, plays, motion pictures and other

¹⁸ It covers both the European Community and the North American Free Trade Association (NAFTA), and binds all member nations individually. Source: International Bureau of the WIPO, *supra.*, see Footnote 10.

¹⁹ For instance, no rights in respect of broadcasting and communication to the public of fixed performances are provided in the TRIPS Agreement, unlike in the Rome Convention.

²⁰ Tyler Ochoa, *Introduction: Rights of Attribution, Section 43 (a) of the Lanham Act, and the Copyright Public Domain --Amicus Brief*, Whittier Law Review, 24 WTLR 911 (Summer 2003).

²¹ Simon Newman, *Rights, Freedoms and Phonograms: Moral Rights and Adaptation Rights in Music and Other Copyright Works*, Computer Law and Security Report, Vol. 13 No. 1 (1997).

²² Bernard, *supra.* See Footnote 5.

works that use music.²³ The treaty sought to broaden performers' rights by:

- (1) *including performers of folklore within the scope of the treaty;*
- (2) *granting audio performers rights with respect to the communication of their work via the broadcasting of their recordings;*
- (3) *calling for a fifty-year minimum term of protection.*
- (4) *establishing moral rights for performers; and*

The WPPT provision on moral rights is extremely limited in scope, that it only applies to performers in the audio industry and categorically excludes those in the audiovisual area. As in the TRIPS Agreement, the moral rights under the WPPT are restricted to the sound elements of live performances and those other performances embodied in sound recordings.

Article 5 of the WPPT vests in the performer the right to be identified as such performer in relation to his or her "live aural performances" and performances in sound recordings, "except where omission is dictated by the manner of the use of the performance". This right shall apply regardless of any transfer of economic rights from the performer to another party. Also, the performer shall have the right to object to any distortion, mutilation or other modification of his or her performances, but only if that treatment would be prejudicial to his or her reputation.

²³ *Ibid.*

3 Comparative Analysis: *Droit d'Auteur* and Moral Rights of Performers

During the Diplomatic Conference for the adoption of the WPPT, it was agreed that Article 5 should follow Article 6bis of the Berne Convention save only for *mutatis mutandis*²⁴ changes. This means that as a general rule, the moral rights of performers should be the same as those provided for authors. Save for the paramount differences recognised between authors and performers concerning their peculiar activities and circumstances, there is no other justification for giving less protection to only one group, and more moral privileges to the other. This chapter will analyse if Article 5 of the WPPT complies with the standard for the only possible exception -- *mutatis mutandis* changes. Additionally, a comparative presentation of the particular moral rights of both authors and performers will be given, in order to prove that the moral rights provisions for performers has gone beyond mere *mutatis mutandis* changes.

3.1 In General

3.1.1 Relation Between Moral Rights and Economic Rights

The economic rights and moral rights of creators and performers may be approached in two different ways. Proponents of the dualistic view, see the two rights as separate, and thus exist independently from one another. Economic rights, they say, are attributes of the copyright proper, introduced during the Renaissance as a largely pragmatic response to technological change. Distinctly placed from it, are moral rights, stemming from the rationalist philosophy that a creator's intellectual creation is an emanation of his very soul.²⁵

On the other hand, those who support the monistic idea, opine that moral rights and economic rights are parts of one copyright whole.²⁶ For creators to reap the full benefits of their individual intellectual endeavours, the protection must at all times be complemented by the guarantee of moral rights. One is a necessary consequence of the other and vice versa.

But the two blocs do not entirely disagree. Both monistic and dualist

²⁴ *Mutatis mutandis* - with the necessary changes having been carried out. Source: Real Dictionary website as viewed from <<http://www.realdictionary.com>>

²⁵ Newman, *supra*. See Footnote 21.

²⁶ Wyburn, *supra*. See Footnote 9.

theories adhere to the basic premise that moral rights are 'non-economic' rights. This is so because moral rights do not have direct monetary advantages for the creator. In lieu of the financial returns for the creation, the benefits from moral rights are in the form of honour, prestige, a good reputation, and abstract inner fulfilment for the creator.

3.1.2 Alienability of Moral Rights

Considering the highly personal character of moral rights, does it follow that it cannot be traded, sold or otherwise waived in favour of persons other than the creator?

Legally, there is no provision in both the Berne Convention and WPPT governing the issue of inalienability or *inter vivos* transfer of moral rights. Article 6bis of the Berne Convention is silent as to whether moral rights of authors are alienable or waivable.

For authors, it is argued that any waiver provisions will substantially undermine their moral rights. Some of them claim that their weak bargaining positions in the publishing industry would only compel them to agree to informal waiver arrangements, unless of course, if an author is of award-winning calibre or extremely popular, like J.K. Rowling and her famous Harry Potter series. On the side of the publishers, a waiver provision is a practical necessity and thus, inevitable for the effective commercial exploitation of the works. Commentators supporting this view emphasise that the argument that 'moral rights cannot be waived because they are extensions of the creator's personality,' ignores the social and economic context in which these rights have come to be asserted. It maybe distasteful to equate artistic endeavour with trade in goods or services, but the analogy is nonetheless appropriate for the many authors who rely on their creative talents for their livelihood.²⁷

Notwithstanding the absence of any specific language in this respect, the ability to waive or alienate moral rights appears in legislation in the United Kingdom and the United States.²⁸ Perhaps the silence in international law gives each Berne member state the discretion to provide whatever it deems justifiable.

The same essence applies to moral rights of performers. During the Diplomatic Conference adopting the WPPT, it was provided that performers have the option whether to exercise their moral rights or not. Corollary to this, they may waive these rights. To take an example, a performer may, in a contract, agree to refrain from identifying himself as the performer of a given performance.²⁹

²⁷ Vaver (1987) pp. 753-754, as quoted in Michael Rushton, *The Moral Rights of Artists: Droit Moral ou Droit Pécuniaire?* Journal of Cultural Economics 22: 15-32, Netherlands (1998) Kluwer Academic Publishers, Department, as viewed from <<http://ipsapp.lwwonline.com/content/getfile/4832/5/9/fulltext.pdf>>

²⁸ Wyburn, *supra*. See Footnote 9.

²⁹ Records of the Diplomatic Conference, p. 264, par. 5.07.

In this material world, many would concede that voluntary exchange of any kind of property is indeed, wealth enhancing. However, a strong case can be made for restricting the alienability of moral rights, because a third person cannot, in reality, step into the shoes of the original owner of moral rights. Perhaps the most logical approach is to differentiate between waivability and alienability. In light of the intimate personal character of moral rights, it is often provided in domestic legislation that the rights can be waived but never to be transferred except on the death of the creator.

3.2 Specific Moral Rights

3.2.1 Right of Attribution

3.2.1.1 Attribution Right of Authors

Article *6bis* of the Berne Convention imparts the creator's right to attribution or right to paternity. This means that the author can cause his or her authorship to be made known to the public. For example, the composer of a musical work may demand that his name be printed on a record cover.³⁰ It generally extends to the right to prevent others claiming authorship of the work, the right to prevent attribution to the author of works that are not hers or his and to prevent attribution where there is an unauthorised altered version.³¹ Hence, the right of attribution may also work on the reverse because the creator can opt for anonymity or to utilize a pseudonym.

In some jurisdictions however, this right does not seem to be an absolute one. The right will be exercisable where it is "reasonable in all the circumstances." The nature of the work, the purpose or character of its use or any existing industry practice relevant to such use may dictate if attribution is indeed reasonable. For example, naming hundreds of authors who have contributed to the making of a computer database may be unreasonable in certain circumstances. In the United Kingdom, the paternity rights are not infringed by acts permitted under copyright in relation to news reporting, incidental use of works, examinations,

³⁰ One significant case is *Lamothe v. Atlantic Recording Corp.* Lamothe, Jones and Crosby were co-authors of two songs, "Scene of the Crime" and "I'm Insane", composed while they were in the band Mac Meda. After the band broke up, Crosby joined another group, RATT, and licensed the two songs to Time Coast Music which sublicensed them to Atlantic Recording. In 1984 Atlantic released an album by RATT which included the two songs. Sheet music was also released. On the album and sheet music authorship of the music and lyrics of the two songs was attributed to Crosby in the case of one song and Crosby and a third person in the case of the other. No mention was made of Lamothe or Jones. Lamothe and Jones successfully brought an action in the United States against Atlantic and Crosby under s 43(a) of the Lanham Trade-Mark Act, a provision dealing with false designation of origin, false description and false representation in commerce. *Source*: Wyburn, *supra*. See Footnote 9.

³¹ *Ibid.*

parliamentary and judicial proceedings, and statutory inquiries.³² Also, in several moral right schemes, employee authors are not able to exercise their respective rights of attribution, under the context that the work was “made for hire,” thus not considered as an individual intellectual creation but merely a “work product” in the technical sense.

3.2.1.2 Attribution Right of Performers

As to performers, the right of attribution denotes the right to be identified as the performer of a performance. Article 5 of the WPPT signifies that the performer can claim to be named as such performer in relation to his or her "live aural performances" and performances in sound recordings. This particular right translates easily enough into existing practice in the entire entertainment industry, although international law's protection is restricted to audio-only performances. For instance, the casts of a play or a film are identified, and regularly the members of an orchestra or a choir are named in a programme.

In the performing arts, the placement of the performer's name or the so-called ‘credits’ establishes his or her acceptance in the public eye. In the movie arena, for example, the star actor usually requires that the credits prominently display his or her name on all prints of the motion picture, and in all advertising and promotional trailers.³³ Credit provisions in the motion picture and television industry are often heavily negotiated, and may specify in detail where in a film the credit is to appear. Examples include: opening or closing credits, before or after the film title; the size type in which the credit is to appear; in either absolute or relative terms, and other particulars.³⁴

Following the import of Article 5 of the WPPT, the right would only arise when the aural performance was broadcast live and when a sound recording of the performance was reproduced, commercially distributed, broadcast or played in public. By implication, not only can the audio performer claim to be named, but he or she should also be given the opportunity to assert this right if such name was falsely announced during a live broadcast of the performance, or when it was falsely inserted on a copy of a sound recording. Additionally such converse rule will also be applicable when the sound recording was broadcast or played in public but deliberately announced the performer's false identity.

³² Copyright Directorate of the Patent Office, *Moral Rights for Performers: A Consultation Paper on Implementation in the U.K. of the WIPO Performances and Phonograms Treaty - Obligations on Performers' Moral Rights and on Further Developments in WIPO on Performers' Moral Rights*, Department of Trade and Industry of the United Kingdom, (January 1999) as viewed from the UK Patent Office website <<http://www.patent.gov.uk/copy/notices/pdf/morcon.pdf>>

³³ Peter Muller, *Showbusiness Law: Motion Pictures, Television, Video*, Connecticut, USA (1991), p. 39.

³⁴ Allen Grogan and Sam Mandel, *Hollywood Online*, Practising Law Institute Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series (January 1998, 505 PLI/Pat 375).

In the early sixties, the right against false attribution was invoked in France. Wilhelm Furtwängler, a well-known conductor, wanted to prevent his name from being associated with the inferior phonorecords produced without his consent from an authorised broadcast of his performance of Beethoven's Eroica Symphony. The *Cour d'appel de Paris* upheld his right not to be named as such conductor. However, the defendant proceeded and relabelled the recording as conducted by an 'anonymous' person. The *Cour de Cassation* later granted him the broad right to prevent the utilisation of his performance in a manner other than that which he had authorised.³⁵ The ruling of the French High Court was rooted on an all-encompassing tort provision (Section 1382 of the French Civil Code), which provides redress for harms suffered by an individual due to another's fault.

If the paternity rights of authors are subject to certain exceptions, the moral rights of performers are likewise not absolute. When pertinent to their situation, performers cannot at all times assert their right to be named. It would be very difficult, for example, for a radio announcer to announce the names of all the members of an orchestra that performed on a CD broadcast by the station.³⁶ Perhaps it would be reasonable to restrict the right of attribution to the name of the orchestra and probably to any soloists.³⁷ For reasons of practicality and economy, exceptions to the performers' right of attribution are essential.

If sound recordings were played in public, it would be particularly difficult to identify performers in several instances. Recorded music is often played in places which are open and accessible to the public, like shops, malls, discos, or other venues of similar nature. It would be problematic to require the owners or managers of these public places to mention the names of every person who performed each song that was played. Record producers, cinema exhibitors, theatres and music users felt that the right should not apply at all in this area, seeing this as impossible or impractical.³⁸

The situation gets more complicated where a live performance is given in public, as in a theatre, but is not further communicated.³⁹ Article 5 of the WPPT seems to have a very comprehensive scope that it extends to each and every circumstance of performance. Hence, it would be

³⁵ Bonnie Teller, *Toward Better Protection of Performers in the United States: A Comparative Look at Performers' Rights in the United States, Under the Rome Convention and in France*, *Columbia Journal of Transnational Law*, 28 CLMJTL 775 (1990).

³⁶ Competition and Enterprise Branch of Ministry of Economic Development (MED) of New Zealand, *Performers' Rights: A Discussion Paper* (July 2001) as viewed from the MED website <http://www.med.govt.nz/buslnt/int_prop/performers>

³⁷ During the Diplomatic Conference adopting the WPPT, the impossibility of identifying a large number of performers in an orchestra was acknowledged. Source: Records of the Diplomatic Conference, 692, par 409.

³⁸ Summary of Responses to the Consultation Paper on Moral Rights for Performers, as viewed from the United Kingdom Patent Office website, <<http://www.patent.gov.uk/copy/notices/pdf/summary.pdf>>

³⁹ Copyright Directorate of the Patent Office, *supra*. See Footnote 32.

reasonable to contend that the performers' right of attribution can be asserted in so far as it concerns the sound aspects of their live performances. At hindsight, it would not at all be difficult to comply with this because performers are usually identified when performances take place in entertainment venues like concert stages or theatre halls. But if one desires to be consistent and takes the same rule to the extreme, the right of attribution might be abused and be demanded even in relatively private occasions like social functions and parties. This is because Article 5 does not distinguish and thus, a 'performance' may cover a mere reading or recitation during a public gathering.

Another practical complexity regarding paternity rights of performers is in the broadcasting or cable transmission of performances (whether live or recorded). If a radio station desires to play uninterrupted music, it would not have any opportunity to express the names of the performers responsible, given the limited airtime. But this argument is being contested by several performers' organisations, suggesting that where radio stations wish to play uninterrupted music, information on the identity of performers could be given before or after playing a batch of recordings.⁴⁰ Hence, for performers, attribution is essential to protect their interest.

Majority of broadcasters would of course, support the contrary view. For them, especially problematic is the playing of signature or theme music, or background music in programs, as well as the use of portions or extracts in trailers. Hence, as a general rule, the right should be confined to prominent or 'featured' performances, rather than to mere background pieces. This group realised that to identify the performers in these cases will hinder the normal course of broadcasting and media transmission. Also, bodies representing advertisers considered it impractical to name performers in advertisements and therefore most of them are not in favour of applying the right in this sector.⁴¹ To have clear exceptions is important for producers. They demand for the privilege to omit a performer's identity in an effort to preserve the integrity of a work. But since WPPT is worded in very general terms, it grants contracting nations some flexibility in incorporating Article 5 and possible exceptions to it, into their domestic law.⁴²

Therefore, the obligations under the WPPT to grant paternity rights do not extend to all circumstances of use of performances. Article 5 provides that the rights need not be observed where the "omission is dictated by the manner of the use of the performance." Stemming from this context, this basic moral right is somewhat distinct from the wording and probable implication of Article 6*bis*(1) of the Berne Convention.

Under Article 6*bis* (1), an author has a right to claim authorship of his

⁴⁰ UK Patent Office, *supra*. See Footnote 38.

⁴¹ *Ibid.*

⁴² Bernard, *supra*. See Footnote 5.

work, period. While Article 5 (1) of the WPPT is unequivocal in its terms such that the performer's name may be omitted if 'dictated by the manner of the use of the performance.' As discussed, there would also be circumstances when the author's name cannot be mentioned. To indicate one's authorship in all occasions may at certain times prove to be impossible or highly impractical. This notwithstanding, the absence of any proviso in Article 6bis may technically imply a limitless paternity right for authors.

3.2.2 Right of Integrity

At the heart of the moral rights doctrine is every creator's right of integrity. Sometimes also referred to as the "right of respect," this right prohibits any alterations of a creator's work that destroys the spirit and character of that work. Thus, Article 6bis of the Berne Convention and Article 5 of WPPT provide authors and performers respectively, with the right to object to any distortion, mutilation, or other modification of the work or performance that would be prejudicial to their reputation.

3.2.2.1 Integrity Right of Authors

For authors, Article 6bis of the Berne Convention also protects against "other derogatory action" which affects the work and results in prejudice to the creator's "honour or reputation." If the author strongly believes that his work has been changed in a manner that is disagreeable to him, he can maintain that his moral right of integrity has been violated. But Article 6bis qualifies the right in the sense that it only arises where the distortion, mutilation or other modification would prejudice the author's honour or reputation. Hence, it would be necessary that a drastic change be made to the spirit of the work. In some jurisdictions, there are certain allowable actions that may be technically treated as 'changes,' but nevertheless non-derogatory to the author's reputation and honour.

Since the parameters provided by the Berne Convention may be very subjective, courts or administrative tribunals will have to decide on a case to case basis if an action is indeed an infringement of the author's moral right. An author's right to integrity is violated if a book is published with an offensive cover or if severe typographical mistakes and reckless imperfections in reproduction were committed, causing embarrassment and humiliation to the author. Also, a substantial change of words in a novel or movie script will more likely result in a successful claim. Here, the court need not concern itself with the quality of the work or the writing style of the author, all that is required is that the work has been modified, and such modification has tainted the author's honour and reputation.

In Germany, an author's right to integrity is infringed only if there is a 'gross distortion' of the work. The decision as to whether there has been a distortion will depend upon what can be gleaned from the work -- an

internal idea or avowed intention of the author, which is not apparent or expressed in the completed work, will not suffice.⁴³ Additionally, the courts acknowledge that in transition from one medium to another, alteration is indispensable, and such is not tantamount to ‘gross distortion.’

3.2.2.2 Integrity Right of Performers

Performers are likewise given the moral right to integrity with regard to their live aural performances or performances fixed in phonograms. Article 5 of the WPPT allows them to object to any distortion, mutilation or other modification that would be prejudicial to their reputation.

Similar to the integrity rights of authors, alteration or modification is not infringement per se. The performer’s reputation must be substantially damaged by the alteration in order to prove infringement of his or her moral right. For example, John Lennon once sued Big Seven Music Corporation for the poor editing and unartistic cover design, which amounted to mutilation of the singer’s work.⁴⁴ The singer-composer was able to prevent the distribution of the recording, which otherwise would have caused damage to his reputation.

But then again, there is no clear cut standard as to what kind of modification can be considered reasonable, or what can be regarded as derogatory to the performer’s reputation. Whether the treatment of a performance constitutes a distortion is a subjective matter in which the performer may have quite different views from the director or producer of the performance (for example, a performer might object to any reengineering or remixing of a recording).⁴⁵ Problems have arisen as a result of the practice of dubbing (the addition of sounds or images that are different from the performance as recorded) and playback (imitation of a performance with the simultaneous playing of a record).⁴⁶ Nowadays, recorded performances are ordinarily manipulated, as a result of digitised technology, and such manipulation may be tantamount to a distortion or mutilation, which may possibly prejudice the reputation of the performer. Digital sampling of recorded performances is being utilised to chop-off audio works into several portions. For instance, the drum and bass section may be separated from the voice or the strings part, and merge it to another recording, which is commonly being undertaken in certain music genres like in rap or hip-hop.

Nevertheless, the integrity rights of performers are likewise subject to exceptions, most often based on practicability. Article 5 of the WPPT clarified the right as excluding such alterations, which are necessary to

⁴³ Simon Newman, *Part II – The Moral Right of the Author: The View from France, Germany, and the United Kingdom*, Computer Law and Security Report, Vol 13. No. 2 (1997), pp. 1-2.

⁴⁴ *Big Seven Music v. Lennon*, as cited in Wyburn, *supra*. See Footnote 9.

⁴⁵ MED New Zealand, *supra*. See Footnote 36.

⁴⁶ INR/CE/III/2, para 30. as quoted in Sherman and Bently, *supra*. See Footnote 15

the normal exploitation of sound performances. The moral right of integrity contemplates substantial damage to the performer's reputation. There would be no violation in the absence of serious prejudice to the performance. Hence, mere alteration or modification, such as abridgement, condensing, or editing *per se*, does not concern moral rights especially because it has been accepted as standard industry practice. The same goes for new or changed technology, media, formats and methods of distribution, etc. Technological platforms or carriers are content neutral.⁴⁷

In the United Kingdom, record producers support the view that not all modifications of performances are violations of the right of integrity. They opined that ordinary industry steps like editing or remixing of audio works alter the prominence of individual performances and thus, might fall to be regarded as derogatory treatment, which it did not consider to be the case.⁴⁸ Hence, they emphasise the significance of setting limitations to the integrity right of performers especially with regard to the use of extracts from individual recordings or albums, which they consider to be part and parcel of the normal exploitation process in a sound performance.

Also from a practical standpoint, the right of integrity may possibly not apply to live public performances. This is because the performance is mostly, if not entirely within the control of the performer. Although in some cases, technical difficulties like a defective microphone, or sound system will definitely cause embarrassment and humiliation to the performer.

When it comes to audiovisual performances, the issue is even more controversial. Q. Todd Dickinson, the former Director of the U.S. Patent and Trademark Office, stated that "certain modifications are part of the normal exploitation of the work, including modifications necessary in reducing the cinema-sized work to the television-sized work or editing the work to exclude scenes considered inappropriate for certain audiences."⁴⁹ The representatives of the European Union unequivocally opposed this opinion during the negotiations for an international treaty to govern audiovisual performers (to be discussed in Chapter 4). They lobbied for stronger protection of performers' moral rights. This means that before the producer can undertake to modify or alter any existing performance, the consent and approval of the performer must first be secured prior to any form of modification.

Thus, as the explanatory notes to Article 5 of the WPPT point out,

⁴⁷ Chairman of the Standing Committee on Copyright and Related Rights, *Basic Proposal for the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances*, Diplomatic Conference on the Protection of Audiovisual Performances (Geneva, December 7 to 20, 2000) as viewed from the WIPO website, <http://www.wipo.org/eng/document/iavp/doc/iavp_dc3.doc>

⁴⁸ UK Patent Office, *supra*. See Footnote 38.

⁴⁹ Bernard, *supra*. See Footnote 5.

‘alteration or modification *per se* does not concern moral rights.’⁵⁰ There is another additional requirement for an infringement to exist. Under the WPPT, there has to be some prejudice to the performer’s reputation. While under the Berne Convention, prejudice must be caused either to the author’s honour or his or her reputation.

Essentially, the difference with regard to the right integrity of authors and performers is more considerable than the other moral right of attribution. Unlike in Article 6 bis of the Berne Convention, Article 5 does not cover ‘other derogatory actions in relation to the work.’ Moreover, as pointed out in the preceding paragraph, not only may the author object to an action, which may prejudice his or her reputation, but also against any action which may prejudice his honour. The word “honour” which appears in the Berne Convention in conjunction with “reputation,” has been omitted in WPPT.⁵¹ This disparity is very significant and it remains a puzzle why the latter right is not given to performers. Nevertheless, during the informal negotiations, reference was made to parodies – being more frequent in respect of performances than in respect of works – and it emphasised that it would not be appropriate to allow performers to oppose parodies citing possible prejudice to their honour.⁵² Realistically though, once the reputation of the performer is damaged, seldom does it happen that his or her honour is spared from suffering any strain.

No less than the Beatles fell victims to this unfortunate experience. Polydor intended to issue a sound recording incorporating interviews with the Beatles.⁵³ The taped interviews were shot fifteen years before the planned release of the recording. Polydor owned the copyright over the taped interviews under a statutory license provision in a contract with the singing group. Polydor arranged the interviews in such a way that they would be played in between music segments. The Beatles did not want the recording released because they see that it may potentially damage their reputation. Considering that a long period had passed when the interviews were recorded, the singing sensations alleged that they no longer hold similar personal opinions and circumstances as before, and to include the interviews will cause them significant embarrassment. But their action regrettably failed.

If the performers are simultaneously the composers of their own songs, the protection of moral rights appears to be stronger. In the United Kingdom, George Michael was successful with his legal request for an injunction to prevent release of “Bad Boys Mega Mix,” a medley recording of five songs that he composed wholly or jointly.⁵⁴ George Michael, as composer, brought an action against Lightbond Ltd. (IQ

⁵⁰ Records of the Diplomatic Conference adopting the WPPT, para. 5.06.

⁵¹ Standing Committee on Copyright and Related Rights, *supra*. See Footnote 47.

⁵² Mihaly Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation*, Oxford University Press, Oxford (2002), p. 618.

⁵³ *Harrison and Starkey v. Polydor*, as cited in Wyburn, *supra*. See Footnote 9.

⁵⁴ *Morrison Leahy Music Ltd v Lightbond Ltd*, as cited in Wyburn, *ibid*.

Records) and BMG Records to prevent the release of the album, alleging that some of his songs' lyrics were altered, and other musical works were interspersed in between his songs. George Michael invoked his right of integrity claiming that the finished record product is nothing but a derogatory treatment of his compositions. Notwithstanding the fact that the record company had a license from the Mechanical Copyright Protection Society (MCPS), such license explicitly prohibited any adaptation, alteration, or modification of a work without the approval of the MCPS member. Hence, the acts of the record company fell beyond the scope of the license. Consequently, the court granted an injunction against the release of the recording. In this case, the final determination whether the musical works were exploited in a manner that altered the character of the work, or whether the right of integrity of the composer was violated, was left to be decided at the final hearing. Nevertheless, the court mentioned that George Michael had an arguable case on both grounds.

In essence, 'derogatory treatment' in Article 6 bis of the Berne Convention, is any addition to, deletion from or alteration to or adaptation of a work, which amounts to distortion or mutilation of the work *or* is otherwise prejudicial to the honour or reputation of the author.⁵⁵ The absence of a similar phraseology in Article 5 provides a huge room for suspicion and ambiguity. For performers, the distortion or mutilation must exist side by side with the damaged reputation. The absence of one defeats any action for infringement. If a singer records a song, but the record company released the recording with the voice of the singer being lowered by one musical octave, this may be tantamount to a derogatory treatment of a performance. However, it would be difficult to assume that it automatically prejudices the performer's reputation, because it may happen that the altered recording will elicit undeserved acclamations and praises for the performer. The performer's reputation in this instance is not thereby tarnished, but he knows in his conscience that the voice being played is not his own.

3.2.3 Other Moral Rights

There are other forms of moral rights that are yet to be recognised in the international scale. Both the Berne Convention and the WPPT failed to provide for the rights of divulgation and withdrawal. For the purpose of attaining maximum ratification of both international agreements, the minimalist approach was adopted by the drafters for moral rights protection. These two other moral rights are already afforded to authors by some domestic jurisdictions like France, Germany, Italy and Spain. Perhaps it will take a long time before authors can enjoy such rights internationally. This only means that it will take an even longer time for performers to have the similar new rights (either locally or internationally) as authors.

⁵⁵ Copyright Directorate of the Patent Office, *supra*. See Footnote 32.

3.2.3.1 Divuligation

The right of divuligation is the right of the author to determine whether and in what form the work is to be released to the public.⁵⁶ The author has the final say if the work is completely finished and ready to be shared with the readers or the general audience. This moral right can be exercised regardless of any transfer of copyright ownership, which may have occurred in favour of a third person (usually the publisher).

Corollary to the divuligation right of authors, is the right to withhold the disclosure of the work. Since he or she is the creator of his own work, he or she shall enjoy the right not to divulge it. In cases where the creation of a work is an obligation under an existing contract, the right to refuse its release will have to be exercised with some corresponding monetary compensation to the other contracting party.

The WIPO Guide to the Berne Convention expressed some examples to the exercise of the divuligation right. The composer of a symphony, for instance, may "wish to give his work exclusively to an orchestra of world-wide reputation before it is launched upon the sea of commercial records." Also, a dramatist may intend to "try out his work in book form before submitting it to the glare of the footlights."⁵⁷ Notwithstanding this implied acknowledgement in the WIPO Guide, the proposal for the inclusion of this moral right in the Berne Convention in 1928 was later dropped.

For performers, current industry practice does not usually vest the control of divuligation of a performance to the performer alone. Usually, the producers or directors (if appropriate) decide how, when and where to disclose, except of course, in cases of spontaneous live performances, where independent performers often determine where and when they can sing, dance, act, or otherwise. Performance venues, whether live or recorded, are ordinarily stipulated in written agreements between the producers and the performers. Hence, performance contracts will, by and large determine, how the divuligation shall be undertaken.

3.2.3.2 Withdrawal

A creator of a work has the moral right to withdraw his or her creation from the public. The author may no longer hold the same views and beliefs. Or it may be as simple as he changed his mind and does not want to share his past work anymore. For the creator, to continue having the work publicly circulated will likely damage his reputation. Anatole France, for example, wanted to withdraw the manuscript that he delivered to his publisher twenty five years earlier when he was still 'unknown.' Because he later disliked his own work and did not want to publicly distribute it, his right to withdraw was upheld by the French court in 1911.

⁵⁶ Wyburn, *supra*. See Footnote 9.

⁵⁷ *Ibid*.

Many experts tend to be very sceptical with regard to this right. If an author does not want to continue to be associated with his past work, all he has to do is to publicly express his latest opinions or even have the contrary but later view reflected in his new works. If a contract or some other agreement binds an author, but he nevertheless wanted his work withdrawn from the public, fairness would dictate the payment of ample compensation to the other party affected.

For performers, it would be difficult to invoke the right to withdraw with regard to live performances, because once a performance is made in front of a live audience, there is no way it can be retracted in the practical context. But when it comes to recorded performances, performers are liable to pay astronomical damages once they demand to withdraw the recordings, which are already being publicly circulated. Not only because they are bound by contracts, but distributors, record companies and producers are the main decision makers concerning the issue of whether or not to withdraw a recorded performance from public access. If performers no longer want to be associated with the recording, the best approach would just be to express their view in a public fashion since most of the current intellectual property regimes do not grant them the right to withdraw.

4 Gaps in International Intellectual Property Law

4.1 Less Protection for Performers

Article 5 follows Article *6bis* of the Berne Convention (on the moral rights of authors) but it requires a somewhat lower level of protection. In respect of the right to be identified as performer, the element of practicability is built in, and the scope of “the right to respect” is also narrower.⁵⁸ However, the last two paragraphs of the article concerning the duration of protection and the means of redress for safeguarding the rights are *mutatis mutandis* versions of the second and third paragraphs of Article *6bis*.

4.1.1 Outdated Rome Convention

The international community has recognised the importance of neighbouring rights protection ever since the adoption of the Rome Convention. The pioneer treaty is not a codification of state practice, but rather it is representative of compromise positions among the drafters. The objective is not to impose a set of inflexible standards among the member-states, but rather to accommodate as many systems as possible in order to obtain a high number of ratifications.

The soft attitude and modesty implied from the goals of the Rome Convention concerning the protection of performers’ rights were brought about by the vehement objections of authors’ and broadcasters’ organisations. The provisions were tempered so the positions of many countries will be accommodated. In the early nineties, there was a resurgence of national adherences to the Rome Convention. Today, as neighbouring rights provisions in national laws become more common, these compromises unnecessarily mar the effectiveness of the treaty.⁵⁹ It did not cover issues, which are of contemporary significance like music videocassette, digital sampling, cable services and satellite broadcasting. The agreement has never been revised and the standards it has set are no longer relevant at present. The world has witnessed the emergence of technological and scientific breakthroughs that renders the Rome Convention obsolete and out-of date.

⁵⁸ International Bureau of the WIPO, *The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, as viewed from the WIPO website <http://www.wipo.int/copyright/en/activities/wct_wppt/pdf/wct_wppt.pdf>

⁵⁹ Teller, *supra*. See Footnote 35.

4.1.2 Shorter Term of Protection

The protection of copyright generally lasts longer than related rights. It is quite difficult to deduce the reasons behind the discrimination. It may be implied though that the contributions of performers to intellectual creativity will never be treated as equal to the efforts exerted by authors. Sorry to say, this point clearly discounts the noble involvement of the greatest performers of all time, like Nat King Cole, Barbra Streisand, Elvis Presley, or the Beatles. It was said that Hart and Rodgers may have authored "Lady Is A Tramp," but Frank Sinatra made the piece part of our musical vernacular.⁶⁰ It would be too insulting for the performer if he is given the second class seat, while the composer or lyricist will be flying first class. Almost every performer gives her best shot to rightfully deserve to be the musical equivalent of the composer's creation. Hence, the interest of authors (or composers) and performers (or singers) inherently intertwine, and it would be highly inequitable to give less protection to one and more to the other.

When a performance is so extraordinary that it still appeals to the masses of audience decades after its release, should not society--as a trade-off for the enjoyment such a work brings--continue rewarding the performers who brought the recording to life?⁶¹ It would be truly unreasonable to stop protecting the performer while still providing the composer or author the same privileges and benefits for the copyright he or she holds. To quantify the efforts exerted by each contributor in a particular intellectual creation is simply impossible. But international law seems to have computed the same, and concluded that the bulk of the rewards must be given to the authors of works. It is suggested that market forces should be credible enough to determine whether a definite creation continues to be in demand. Prices will ultimately reflect if consumers are still patronising a given work. If prices diminish, then society probably deems the work unworthy of continued protection.

Hence, the term gauge should not be dependent on the fact that a person who is invoking his or her moral right is a performer or an author. The disparate treatment, furnished to authors and performers by intellectual property law, is highly inequitable. At present, authorship primarily determines who deserves greater protection. This is quite problematic, especially when it comes to collaborative works (e.g., musical songs, stage concerts and performances, movies, and dramatic plays), it will be exceedingly tedious to recognise each and every contributor as the author of the entire work. If creative contribution lies at the heart of authorship, the playwright, director or major performers all have some

60 Alisa Roberts, *Lack of Copyright Term Harmony with the European Union Strikes a Sour Chord for Performing Artists and Labels*, Vanderbilt Journal of Entertainment Law and Practice 5 VNJELP 33 (Spring 2003).

61 *Ibid.*

claim to an authorship right.⁶² And to recognise every single claim of authorship will be naturally chaotic because each will be given some right to veto or control the future aspects of a work.

4.1.3 Difficulties in Enforcement

The moral rights of performers does not encompass all cases of infringement, the coverage of which is more restricted than the moral rights of authors under Article 6 bis of the Berne Convention. International intellectual property law only intended to cover the ‘obviously serious cases where application of the right is clearly justified.’⁶³

As to the attribution right, the WPPT is worded in such a way that performers are required to assert their right to be named as performers in their audio performances. The paternity right is expressed in the WPPT as a right to claim to be identified rather than as an unconditional or absolute right of identification.⁶⁴ The WPPT, however, did not specify the form by which the identification is to be accomplished. Normal ‘billing’ practices ordinarily call for ‘prominent’ identifications of popular performers. But those in the background or the ‘not-so-famous’ ones are frequently left with minute fonts in a record cover or print advertisements. Bodies representing theatres felt that identification in programmes is already sufficient to satisfy the paternity right.⁶⁵ Since this aspect was not provided in the WPPT, equity and fairness dictate that the name of the performer be in a form and manner that is sufficient to be identified as the performer of a particular performance.

The integrity right of performers is even more at risk, especially in the digital era, when alterations and mutilations are increasingly discovered and done everyday. When it comes to these kinds of modifications, the performer does not have the standing to pursue the corresponding protective action for violation of moral rights. Instead, the option is given to the copyright holder, i.e., in the case of sound performances, for example, the composer or the lyricist. This creates a situation in which the only party that has the status to act (the copyright holder), lacks a reason to act, and the party with a reason to act (the performer), does not have any legal capacity.⁶⁶

An extremely problematic and unstable situation befalls audiovisual performers, who possess dreadfully limited rights under international law. If a performer appears in a movie, which is not only shown in film theatres but also distributed in VHS form or on digital video disk (DVD)

62 Anthony D’ Amato and Doris Estelle Long, eds. *International Intellectual Property Law*, Kluwer (Great Britain, 1997), p. 192.

63 INR/CE/III/2, para 33.

64 UK Copyright Directorate of the Patent Office, *supra*. See Footnote 32.

65 UK Patent Office, *supra*. See Footnote 38.

66 Richard Masur, *Right of Publicity from the Performer’s Point of View*, DePaul-LCA Journal of Art and Entertainment Law, 10 DPLJAE 253, (Spring 2000).

her image is at risk of being cropped and stolen, then later exploited in a way she never consented to. Her reputation is undoubtedly damaged under this context, but the copyrighted creation itself, is not at all prejudiced.

Broadcasters and producers of audio and audiovisual fixations fear that too much emphasis on integrity rights of performers may give the latter a right to inhibit even the 'necessary' editing of their particular performances. Producers and broadcasting organisations considered it essential to take account of the collaborative nature of film or sound productions, and suggested that it should subsist only from the point where the finished product is transmitted or distributed.⁶⁷ This may appear to be a reasonable point, since damage to one's reputation cannot be assessed unless and until the performance is complete or ready to be presented to the general public. However, the WPPT failed to pinpoint the exact stage at which the moral right of integrity will commence to be applicable in the process of producing or reproducing a given performance.

4.1.4 Case of the United States of America and the United Kingdom

The WPPT was the first international instrument granting moral rights to performers. However, the growing number of state parties to the treaty does not mean that all of them have incorporated such protection into their domestic laws. Current international intellectual property law protects the moral rights, not only of authors (under the Berne), but of performers as well. Contracting nations of the Berne Convention and the WPPT, must comply by putting up protection regimes covering both areas of intellectual creativity.

In the United Kingdom, paternity right is already granted to authors of music and lyrics. But this right does not generally extend to public performances.⁶⁸ This double standard is prevalent even in a regional context. The rights of authors, composers, visual artists, and film directors are protected under the European Union's copyright scheme for the life of the author plus seventy years. However, "related rights" -- which include sound recordings--receive protection for a term of only fifty years.⁶⁹ Nonetheless, at least most of the European performers are given the minimum moral rights of attribution and integrity. Ordinary copyright law more broadly protects moral rights, in most of the region's domestic systems.⁷⁰

67 UK Patent Office, *supra*. See Footnote 38.

68 S.77(3) of the CDPA. Source: UK Copyright Directorate of the Patent Office, *supra*. See Footnote 32.

69 Roberts, *supra*. See Footnote 60

70 Betsy Rosenblatt, *Moral Rights Basics*, Harvard Law School (March 1998), viewed from the website of the Berkman Center for Internet and Society at Harvard Law School <<http://cyber.law.harvard.edu/property/library/moralprimer.html>>

In the United States, performers are technically deprived of their moral rights. The country became a party to both the Berne Convention and the WPPT without having to adopt any additional federal legislation explicitly complying with the moral right provisions of the international agreements. American law relies solely on judicial interpretation of several copyright, trademark, privacy, and defamation statutes. Except for one area. Under the federal scheme, visual artists are recently granted the rights of integrity and attribution under the Visual Artists Rights Act (VARA). But the limited protection under VARA does not cover the works of audiovisual and audio performers.⁷¹ VARA exclusively applies to visual art.

4.2 Waivability of Moral Rights

No language is included in the existing treaties regarding inalienability or *inter vivos* transfer of moral rights.⁷² But definitely, these rights exist "independently of the performer's economic rights, and even after the transfer of those rights."

In much of Europe, *droit moral* is a right inherent to any artistic or creative work.⁷³ Hence, the right cannot be transferred in favour of another. The United States system is the direct opposite. The producer generally requests the performer to waive his or her moral rights. This arrangement frequently occurs in the television, music and film industries. By inserting a waiver clause into the contractual agreement, the producer is assured that there would be no moral rights infringement actions in the future. By denying the actor any moral rights, the producer generally avoids any subsequent claims that the actor's rights have been violated and his or her creative work has been altered.⁷⁴ Unless explicitly agreed upon in a contract, moral rights of performers are not given their deserved relevance. The waiver, a gesture on part of the performer, would more than likely be granted in return for financial remuneration.⁷⁵ Ultimately, the performer, by signing these contracts, has amply provided the producer with the exclusive right to change, arrange, modify, or alter the performance, even if such actions will prejudice the performer's reputation. Also, he is then left without recourse in the event that his name will not be credited as the performer of his own performance, because he bound himself to agree on the waiver.

71 Bernard, *supra*. See Footnote 5.

72 Standing Committee on Copyright and Related Rights, *supra*. See Footnote 47.

73 Peter Muller, *Showbusiness Law: Motion Pictures, Television, Video*, Connecticut, USA (1991), p. 40.

74 *Ibid*.

75 Bernard, *supra*. See Footnote 5.

4.2.1 Advantages of Waivability

But waivers are not oppressive under all circumstances. As a holder of moral rights under the WPPT, the performer may, through his own volition and free will, opt not to exercise his moral rights. A performer may even voluntarily agree to waive his moral rights.

4.2.1.1 Essential for Normal Exploitation of Performances

Broadcasters, film and record producers, advertisers, music publishers and theatres all considered that consent and waiver of moral rights are essential to protect their ability to exploit the material effectively, such as by editing, permitting use of extracts or otherwise meeting the requirements of domestic or foreign customers.⁷⁶ Several distributors and investors, both domestic and overseas, would require that the integrity rights, not just of authors, but also of performers, be waived. For practical purposes, films, sound recordings, and other fixations of performances are often edited or slightly altered from the original. Many would justify the introduction of modifications as being called for by the local rules in the territory where the recordings will be distributed. Censorship standards, language demands, mode of distribution (i.e., films may be shown in theatres, television, restaurants, hotels, schools, etc.) are all crucial issues which need to be addressed for a performance to be effectively communicated to the target audience.

From a capitalist perspective, absolute and unwaivable moral rights for performers will actually conflict with the commercial realities of production and exploitation of performances. The idea poses a threat of unexpected expense of potential litigation and exposes the fixation to the possibility of being withdrawn from circulation in case the performer objects to any modification or alteration done to the performance. In the commercial context, strict integrity rights are tantamount to additional costs.

However, it would be irrational if a performer will be compelled to give up his or her moral rights in favor of the producer, investor, or broadcasting corporation. This will only stifle creativity, and for all intents and purposes, will only cause havoc, instead of any benefit. For some performers, respect and reputation are more important than economic gain. But certainly, if through the performer's passion and craft he could earn financial rewards, it would be a most welcome package. Hence, if a particular change in the performance is indispensable for its productive exploitation, the performer may choose to waive his moral rights (which practically entails the payment of just compensation). It should be emphasised though, that all modifications should be done in a manner which preserves the integrity of the performer, and should not in anyway prejudice his reputation. It therefore calls for responsible editing or managing of the finished

⁷⁶ UK Patent Office, *supra*. See Footnote 38.

product, so that the moral rights of the performer remains sheltered.

The silence of the WPPT on the issue of waivability may be interpreted as allowing each contracting state to decide on what is fair and equitable under the circumstances in their respective territories. Performers cannot be utterly prohibited from waiving their moral rights. They will only lose the opportunity to exploit the full value of their performances once recording and broadcasting companies refuse to market their shows or recordings.

4.2.1.2 Avoidance of Possible Barriers to Trade

In fairness, producers would explain that they are merely caught in the middle of the deal and do not have any choice but to require a waiver from the performer. Unless they secure the necessary waivers of performers' moral rights, they claim that they will not be able to attract investors and distributors for the creative works.⁷⁷ In the recording industry for example, 'user'-companies (such as those involved in marketing, promotion, broadcasting or advertising) do not directly transact with the performer, but utilise music publishing agents, talent managers, or record producers, as intermediaries.

In the United States, there is no specific legislation providing for moral rights of performers, more so any waiver rules on such rights. Requests for waivers are ordinarily directed to record producing companies or business managers dealing with the performer. In practice, this kind of request is implemented with very minimal bargaining or negotiation. Perhaps it is because the waiver of moral rights presents an element with which an American has relatively little familiarity.⁷⁸ If a potential distributor contacts the performer directly, the performer would normally refer the matter to the music publisher or producer because the latter is managing the song or work. If the user-company is dealing with a large, experienced publisher, it may actually receive the waiver back already signed by the appropriate parties.⁷⁹ At hindsight, there seems to be no problem with this arrangement, because the performer is compensated for waiving his or her moral rights. This may be the case only in the domestic sphere.

Internationally, however, the situation may be more complicated, especially if the United States engage in trade relations with another country with a system of moral rights for performers. For instance, if a Canadian company desires to use a song performed by an American in a television commercial to be broadcast in Canada.⁸⁰ The company in

77 Screen Producers and Directors Association of New Zealand (SPADA), *Performers Rights Submissions to the Ministry of Economic Development* (12 October 2001), as viewed from the SPADA website, <<http://www.spada.co.nz/documents/Sub-PerfRights.pdf>>

78 Paul D. Paton and Christine J. Prudham, *Barriers to Trade or Culture's Last Stand: Copyright Issues under the NAFTA*, Canadian Review of American Studies (1997) as viewed from <http://elin.lub.lu.se/cgi-bin/ftxt/ebSCO/00077720_1997_27_3/530108>

79 *Ibid.*

80 Patterned after the analysis made on the waiver of moral rights of American songwriters and authors in favor of Canadian broadcasters. Source: *Ibid.*

Canada will contact the music publisher in order to obtain a waiver from the performer. This 'permit' is needed from the performer, under the copyright laws of Canada, before the Canadian company can use the song in association with its product or institution. If the American performer is fairly familiar with the existing moral rights provisions in Canada, then it is feared that he or she may slow down the process, or demand for additional charges or royalties. Nevertheless, the tendency for Canadian companies to proceed without the waiver is huge since there are very few infringement actions being brought in Canada by American performers for the violation of their moral rights. If it was a Canadian performer who wish to have his performance distributed in the United States, everything will be determined by a contract between the parties. Thus, either through a publisher or producer, the performer may opt to stipulate definite or selective waivers of his moral rights, in addition to granting the American user-company the right to exploit his performance for commercial purposes.

Under this scenario, American performers will be less compensated for their works broadcast in Canada. This means cheaper American music for Canadian broadcasters. For Canadian performers, on the other hand, they will be paid more than their American counterparts, if their performances were used in the U.S. But this will certainly have a negative impact on Canadian culture, if the Canadians will hear more of American music than their own home-grown performances.⁸¹ Both sides will suffer from setbacks because of the disharmony in the domestic implementation of international intellectual property law.

While moral rights might appear to be a barrier to trade, in reality, they are rarely enforced not only because of the cost associated with bringing such a lawsuit, or an absence of awareness of the existence of these rights, but also because they are often initially waived.⁸² Hesitations to engage in trade are usually influenced by the fear that performers may exercise their veto privileges against the use of their performances, which they may claim to be infringing on their moral rights.

4.2.2 Arguments Against Waivability

For some, inequalities in bargaining power with producers and others have resulted in wide-ranging and unwarranted waivers of moral rights becoming the norm.⁸³ Except in the case of extraordinarily big personalities, the dispensable negotiation table, with a corporation on one side and artists on the other, often produces pro-forma agreements, which will most likely eliminate the moral rights of performers.

A waiver agreement, once concluded, is considered the law between the

81 Canada has responded to this problem by requiring radio and television broadcasters under regulation and pursuant to the terms of their licenses to play a minimum amount of Canadian content. Source: *Ibid.*

82 *Ibid.*

83 UK Patent Office, *supra*. See Footnote 38

parties that it would be very difficult for one party to derogate from its terms. Unless the contract is challenged because the consent of one party is vitiated, through force, fraud, intimidation, undue influence or restraint of trade, the waiver shall stand. This arguably defeats the gravamen of the moral rights doctrine as an emanation of the very soul of the performer. Since a performer's moral rights are extensions of his personality, it should not be given up in any manner whatsoever.

In order to avoid further confusion, it would be best to distinguish which among the moral rights of performers can be waived, and which must be absolute. The right of a performer to be named as such should be inviolable, because only the performer himself can claim to be identified as the performer of his performance. But the right of integrity can be waived so long as any alteration of the performance is necessary for its normal exploitation (most often for commercial purposes), and will not unreasonably damage the performer's reputation. Therefore, retaining the right of paternity means that artists shall continue to have the right to require that a work bear their name, or conversely, that artists may have the right to disclaim an altered work, and announce that it has been changed from the original.⁸⁴

In Continental Europe and in Canada, a broad-brush generalisation would be that in practice one cannot waive rights against modifications to work that are not yet known, although one can waive rights for specified modifications.⁸⁵ So even waivers to the right of integrity should be treated with utmost vigilance. Although not all modifications are prejudicial to the performer's reputation, the latter still deserves enough assurance that his moral rights over his performances are protected.

4.2.3 Inalienability

The position of a performer as the performer of a given performance cannot, of course, be transferred; no one can step into his shoes in this sense.⁸⁶ An assignment of moral rights means that a performer is offering a portion of himself not only in favor of the producer or broadcaster, but also in favour of the investor or distributor. Moral rights are not merely goods that anyone can easily surrender for valuable consideration. It is the performer's personality that is at stake.

Hence, even waiver provisions should not be abused. The WPPT failed to explicitly provide for safeguards against deliberate misuse of waivers of moral rights. Notwithstanding any waiver, which a performer may have executed, if his reputation is prejudiced as a result of mutilations done to his performances, he must still retain the right to object to these offensive activities.

84 Patric Hedlund, *Artists Rights in the Digital Universe*, Digital Media, (14 May 1996), as viewed from <http://elin.lub.lu.se/cgi-bin/ftxt/ebSCO/10567038_1996_5_12/9605234708>

85 Rushton, *supra*. See Footnote 27.

86 Standing Committee on Copyright and Related Rights, *supra*. See Footnote 47.

4.3 Protection of Sound Recordings vis-à-vis Audiovisual Recordings

4.3.1 Limited Coverage of the WPPT

The coverage of the WPPT is restricted to the rights of performers over the sound recordings of their performances. It failed to address the audiovisual aspects of performances save for very limited exceptions. As expected, many were disappointed by this omission.⁸⁷ At the end of the first session of the Diplomatic Conference that adopted the WPPT, there 'was a consensus in favour of the broadest possible interpretation.' This means 'nothing in the terms of reference precluded a discussion of the question of possible provisions on the rights of performers in audiovisual productions.'⁸⁸ As a result, the WIPO prepared a document specifically addressing the rights of audiovisual performers. Even if there was no agreement reached as to what rights should be prescribed for the protection of performances fixed in films, videos, and other audiovisual fixations, a resolution was nevertheless passed which expressed concern to ensure that the matter be continually and fully pursued at the international level.

During the Diplomatic Conference that adopted the WPPT, the United States already proposed a system of protection for the rights of audiovisual performers, which essentially allows its current contract law to remain intact. This was highly criticised by other countries, mostly from the European Community, Africa and Latin America, and thus the attempt to include audiovisual performers' rights in the WPPT foundered.⁸⁹ One of the main points of divergence in opinion is on

⁸⁷ Richard Arnold, author of *Performer's Rights, A Comparative Study of European and U.S. Audio Performers' Copyright Protection*, wrote that "[T]his [omission] was at the insistence of the U.S." One could only assume that U.S. trade representatives were somewhat influenced by the political clout possessed by Hollywood producers who have long opposed setting universal standards for the protection of audiovisual performers other than those provided via labor law, the Screen Actors' Guild representation, and individual personal service contracts. Source: Bernard, *supra*. See Footnote 5.

⁸⁸ INR/CE/IV/3, para. 5 from the WIPO website <<http://www.wipo.org>>

⁸⁹ Unlike the WPPT, the omission of audiovisual performers protection in TRIPS was not solely the United States' doing. Thomas Murray, author of *The U.S. - French Dispute over GATT Treatment of Audiovisual Products and the Limits of Public Choice Theory: How an Efficient Market Solution was "Rent-Seeking"*, writes that, "France and the other European Community nations wanted the audiovisual sector to be excluded from the services section (General Agreement on Trade in Services) of the General Agreement on Tariffs and Trade (GATT) talks; the U.S. wanted the sector included. The American entertainment industry, which lobbied heavily for inclusion, was seen as the 'big loser.'" The debate centered around a proposal put forward by France and other European nations that would have placed a quota on the number of audiovisual products that they would allow to be imported into their territories, particularly products emanating from the U.S. Source: Bernard, *supra*. See Footnote 5.

whether the moral rights provisions of the WPPT should simply be extended to the audiovisual area, or whether different circumstances in this sector require additional limitations or conditions on the rights, and this is reflected in the proposals.⁹⁰

4.3.2 Proposed WIPO Audiovisual Performances Treaty

While most countries have proposed that the international instrument should be a Protocol to the WPPT, as indicated in the resolution passed at the 1996 Diplomatic Conference, it was deemed to be more appropriate that it should take the form of an independent treaty as it covers new matter.⁹¹ Hence, the proposed instrument was entitled, the WIPO Audiovisual Performances Treaty (WAPT).

Despite three weeks of intensive negotiations, it was not possible to conclude the WAPT. One of the major stumbling blocks was the prospect that actors could block the television broadcasts of their movies based on a 'moral rights' complaint over editing decisions.⁹² It was pointed out that certain modifications are part of the normal exploitation of the work, including modifications necessary in reducing the cinema sized work to the television-sized work or editing a work to exclude scenes considered inappropriate for certain audiences.⁹³ So there was tension primarily between the United States and the European Community on this issue. The United States adopts the view that minor alterations on audiovisual performances should be permitted without requiring any prior consent from the performer. The European Union, on the other hand, felt that a stronger commitment to the protection of moral rights demands more than what the United States proposed.

The Diplomatic Conference nonetheless resulted in an ad referendum adoption of the title, the Preamble, and nineteen articles (out of twenty) of the new Treaty concerning substantial aspects of audiovisual performers' rights. Provisional agreement was unanimously reached on the articles concerning national treatment, moral rights, and economic rights covering the right of reproduction, right of distribution, right of rental, and the right of broadcasting and communication to the public. It would be the first time that audiovisual performers were accorded recognition of their moral rights against any distribution or modification of their performances, which would be prejudicial to their reputation.

90 Copyright Directorate of the Patent Office, *supra*. See Footnote 32.

91 WIPO Pressroom, *Negotiators Meet to Finalize Pact on Performers Rights*, Press Release PR/2000/248, Geneva (27 November 2000), as viewed from the WIPO website <<http://www.wipo.org/pressroom/en/releases/2000/p248.htm>>

92 *Patent and Trademark Office: Public Comments Sought on Proposals for Treaty on Performers' Audiovisual Rights*, BNA's Patent, Trademark & Copyright Journal, 61 PTCJ 111, (December 1, 2000).

93 As declared by Q. Todd Dickinson, Director of the US Patent and Trademark Office at the start of the Diplomatic Conference. Source: *WIPO Members Fail to Agree on Performer's Rights for Audiovisual Treaty*, BNA's Patent, Trademark and Copyright Journal (January 5, 2001), as viewed from <<http://international.westlaw.com>>

Provisional agreement also covered protection against circumvention of technological protection, which is used in the digital environment, such as encryption. It further provides remedies against any act of unauthorised removal or alteration of electronic rights management information.⁹⁴

The WAPT maps out the minimum standard of protection for audiovisual performers' rights. Its provisions grant enough flexibility and limitations to ensure that those systems granting a higher level of protection to their audiovisual performances can continue to do so without fear.⁹⁵ Hence, upon its effectivity, the WAPT entitles performers to claim at least the basic compensation for whatever derogative actions done on their performances which have caused or likely to cause damage to their reputation.

The pertinent provision of the most recent draft of WAPT, states in part:

ARTICLE 5. MORAL RIGHTS.

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live performances or performances fixed in audiovisual fixations, have the right

(i) 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

(ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.

4.3.3 Difficulties in Implementation

While the world awaits the eventual outcome and prospective effectivity of the WAPT, are performers in the audiovisual field temporarily proscribed to invoke their moral rights? There will be no doubt that film and television producers, film distributors, cinema exhibitors, broadcasters, theatres and producers will insist that the rights be limited to the WPPT requirements.⁹⁶ Audiovisual performers will have to rely

⁹⁴ WIPO Pressroom, *Member-States Keep Up Momentum for Performers' Rights*, Press Release PR/2002/327, Geneva (27 September 2002), as viewed from the WIPO website <<http://www.wipo.int/pressroom/en/releases/2002/p327.htm>>

⁹⁵ International Federation of Actors (FIA), *The Future of the Audiovisual Negotiation at WIPO: Statement by FIA*, viewed from the FIA website, <http://www.fia-actors.com/new/wipo_statement2_oct02_eng.pdf>

⁹⁶ UK Patent Office, *supra*. See Footnote 38.

on their ‘bargaining’ capabilities (or that of their talent managers and agents) for the protection of their moral rights. If an audiovisual performer is just at the commencement stage of his career, ordinarily, he would be asked to sign a standard agreement which effectively waives his moral rights in favor of the other party.

If a country is a party to the WPPT, but have yet to pass legislation on the rights of performers, it can restrict the coverage of its protection exclusively to the audio elements of performances. This may result in practical absurdities, and may provoke a lot of substantial objections from performers’ groups especially from those in the audiovisual industry. All aspects of performances must be treated in the same way. To discriminate among the members of the same group with similar interests would not only be unfair in the economic sense but also inequitable in the legal sense.

At this preposterous stage, states (parties to the WPPT) are required under Article 5, to grant moral rights to performers, but only with respect to the sound elements of their live performances and to their sound recordings. This leaves audiovisual performers in oblivion. Optimistically though, when the WAPT comes into fruition, then the contracting nations will have to adopt domestic legislation in compliance with the new treaty’s moral rights provisions. But in the meantime, there is no international obligation for states to establish local mechanisms to protect the moral rights of performers over their audiovisual performances.

4.4 Availability of Enforcement Mechanisms

4.4.1 Lack of International Standards

The means of redress for safeguarding the moral rights granted under Article 5 of the WPPT will be governed by the legislation of the contracting state where protection is claimed.⁹⁷ But the international agreement did not provide for a clear-cut standard upon which the domestic laws shall be based. There is enough leeway given to a participating country to set up its own legal requirements for compliance to the moral rights provision of the WPPT. This arrangement may be democratically sound, but it is nevertheless highly criticised. The non-existence of definite legal standards for the moral rights question imposes an arduous burden on the local courts and the country’s media industry.⁹⁸ Unless the legislation of the country explicitly provides for its own unambiguous interpretation of the WPPT, reliance on judicial and administrative tribunals or self-regulatory mechanisms implies continued disharmony of protection standards. This scenario will eventually be problematic in the international context.

⁹⁷ See Article 5, par. 3, WPPT.

⁹⁸ D’ Amato and Long, *supra.*, p. 148. See Footnote 62.

For paternity rights, the WPPT provides that the performer shall be identified except “where omission is dictated by the manner of the use of the performance.” To determine whether or not the “manner of the use” justifies a particular omission of a performer’s name is but a subjective matter. Perhaps the media industry will have to succumb to the burden of establishing the borderline, by means of codes of conduct or internal rules, and exclusively cite specific cases when omission may be allowable. Better yet, it should also enumerate the particular instances when the right of attribution must be absolutely respected. The courts, however, despite the fact that most lack the necessary expertise, are left to decide the legal issue with finality.

The exact dilemma is expected in the implementation of the performer’s right of integrity. There are no qualifying criteria or factors such as ‘reasonableness’ applicable to the exercise of the right, apart from the requirement of effect on the reputation of the performer.⁹⁹ The courts will resolve if a certain alteration or modification has materially prejudiced the performer’s reputation. Personalised assessment is necessary in order to ascertain if the changes made to the performance are indeed derogatory. Similar to moral rights regulations in France and Germany, such an assessment would be conducted using a subjective standard, with close attention paid to the rights of additional right holders in the production.¹⁰⁰ The uncertainty and threat of inconsistent judicial outcomes, due to the lack of legal standards, will only destroy the editing process.¹⁰¹ Frenzied prospects will likely hinder the development of intellectual creativity, because the tendency is to broadly restrict all forms of modifications, even the minor and completely justifiable ones. Under the proposed WAPT, it was explained that alterations or modifications to a production (including standard editing and abridgement) would not qualify as material distortion, and thus are not to be considered as violating the performer’s moral rights. The absence of firm world-wide standards will pave the way to an increased number of possible causes of action, regardless of merit, available to a performer under moral rights legislation.

The sanctions to be applied in the event of breach to the performer’s moral rights are likewise not set out in the WPPT. Again, this matter is therefore left to the domestic law of member states.¹⁰² Under the proposed WAPT, a judge could appropriately undertake an equitable balancing of the rights of multiple right holders in his judgement.¹⁰³ This implies that in order to ascertain if the moral rights of one performer is violated, it is crucial that the interests of the other right holders i.e., producer, investor, manager, as well as all the other performers, be taken into account.

99 Wyburn, *supra*. See Footnote 9.

100 Bernard, *supra*. See Footnote 5.

101 D’ Amato and Long, *supra.*, p. 148. See Footnote 62.

102 Wyburn, *supra*. See Footnote 9.

103 Standing Committee on Copyright and Related Rights, *supra*. See Footnote 47.

4.4.2 Problem with National Treatment Principle

Article 4 of the WPPT dictates the manner upon which performers can benefit from the national treatment principle. Contracting nations must afford the nationals of other countries such protection and privileges equivalent to that enjoyed by their own citizens. However, a participating state may choose to limit the degree of uniform protection, with regard to the exclusive and economic rights provided under the WPPT. The language dealing with 'rights' and 'exclusive rights' in Article 4 is intended to also encompass moral rights protection.¹⁰⁴ The WPPT can be seen as a pioneer in the field of protection for performers' rights, because for the first time a performer can assert a claim for infringement of his intellectual property rights, in another state-party.

Performers enjoy no protection under the Rome Convention for a performance that takes place in a non-contracting state, and if the performance is recorded there secretly or if the recording is derived from a broadcast of a broadcast organisation situated in a non-contracting state.¹⁰⁵ A sample case involving composers may illustrate the effects of not having the national treatment principle in the intellectual property system. In the soundtrack of the film "The Iron Curtain," music composed by Soviet citizens Shostakovich, Prokofieff, Khachaturian and Miaskovsky were included in the film.¹⁰⁶ The filmmakers used the compositions without seeking the approval of the composers simply because it was not required by American legislation. Despite the absence of any permission from the Soviet composers, the names of the latter were still in the film credits. When the film was about to be exhibited in the United States, the composers objected on the ground that they do not approve of the film's content since it was about the suspected spying by the Soviet Union in Canada. The film's uncomplimentary depiction of Russia prompted the composers to vehemently protest to the inclusion of their music and names in the film credits. They argued that to tolerate the incorporation of their respective creations in the movie could be interpreted to mean that they adhere to the messages it conveyed. Unfortunately, at that time, Soviet citizens did not have moral rights protection in the United States, a country where there was no moral rights legislation. Hence, their application to stop the exhibition of the movie failed. In contrast, when they submitted a similar application before a French court, they succeeded since there is a strong moral rights regime in France.

At present, if it were a Russian singer who objected to the inclusion of his song in the American movie, he would have been victorious. But under the WPPT, not all performers can invoke their moral rights in the territories of other contracting states. The limited coverage of the WPPT

104 Bernard, *supra*. See Footnote 5.

105 Firsching, *supra*., p. 18. See Footnote 1.

106 Citing the case of *Shostakovic v Twentieth Century Fox Film Corp.* Source: Wyburn, *supra*. See Footnote 9 and Table of Cases for citation.

renders the national treatment principle futile especially for audiovisual performers because the treaty is only applicable to live aural performances and sound recordings.

4.4.3 Resort to Existing Domestic Legislation

In some countries, moral rights are a part of the copyright statutes, while in others, notably in the United States, they have traditionally been protected by common law traditions, in the laws regarding privacy, or in tort law.¹⁰⁷ Due to the desire of attaining a large number of ratifications to the WPPT, a resolution was made by the participating nations, to the effect that it is no longer obligatory to adopt separate moral rights provisions in their domestic laws. This resolution was made to accord the United States as well as other countries, the opportunity to become parties to the treaty.

The Rome Convention and the WPPT laid down a set of minimum standards of protection of performer's rights. The Rome Convention characterised such minimum protection as the possibility of preventing certain acts enumerated in the agreement. Instead of delineating the minimum rights of performers, the expression "possibility of preventing" was used in order to allow states like the United Kingdom to continue to protect performers by virtue of the penal statutes.¹⁰⁸ Thus, contracting states are not barred from enacting separate legislation, which provide for stronger protection of moral rights of performers. Likewise, they have the option to leave their existing local regimes intact, so long as the minimum level of protection is consistently guaranteed. This kind of arrangement has been criticised by some as being too lenient, at the expense of performers who are mostly unfamiliar with the laws of general application.

4.4.3.1 Section 43 (a) of the U.S. Lanham Act

Since the present state of United States copyright system does not provide moral rights for performers, a myriad of different legal principles are being used by various American courts to resolve cases of moral rights violations. Section 43 (a) of the Lanham Act is one of the noticeable legal bases for moral rights actions.¹⁰⁹ This provision prohibits any use of a false or misleading description or representation in commerce that "misrepresents the nature, characteristics, qualities, or geographic origin of . . . goods, services, or commercial activities."¹¹⁰ Any person who believes that he is or is likely to be damaged by the unauthorised use may file a civil action. It is used in order to assert

¹⁰⁷ Rushton, *supra*. See Footnote 27.

¹⁰⁸ Firsching, *supra*, p. 18. See Footnote 1.

¹⁰⁹ The United States Congress originally enacted the Lanham Act, including Section 43(a), as codified at 15 U.S.C. Section 1125(a), in 1946 and amended it in 1988.

¹¹⁰ Jennifer McKenna and William Manning, *Lanham Act Also Applies to False Advertising Claims*, as viewed from the Robins, Kaplan, Miller & Ciresi website
<<http://www.rkmc.com/article.asp?articleId=200>>

moral rights, although the provision is actually within the sphere of trademark and unfair competition laws.

One example is the case of actor Paul Smith.¹¹¹ Smith agreed to perform in a film by an Italian production company on the condition that he will have star billing in the film credits as well as in other promotional materials. When the film was about to be distributed in the United States, the Italian company assigned its distribution rights in favour of Montoro. The latter subsequently replaced Smith's name with a name of another actor in both the film credits and advertisements. Using section 43 (a), Smith sued Montoro claiming that his name as the performer in the film was maliciously removed from the film's credits. The court found that there was indeed a violation of section 43 (a), since in the movie, there was a false designation of origin and false description. The unauthorised removal of the performer's name was considered as "reverse passing off" in trademark parlance. Under this legal framework, the original 'trademark' was removed or obliterated, and thus contrary to section 43 (a) of the Lanham Act.

The exact provision was utilised again by the famous Monty Python comedy troupe.¹¹² According to their contract with the British Broadcasting Company (BBC), the group agreed to write the scripts and perform in a comedy series, entitled the "Monty Python's Flying Circus." The BBC acquired the licensing rights over the programs, but the Monty Python still has optimum control over the scripts, especially with regard to material changes to their works. Later on, the BBC licensed its own rights over some segments of the show in favour of Time-Life Films, on the condition that Time-Life will not edit the same except for insertion of commercials, applicable censorship or governmental rules and regulations, and National Broadcasters and time segment requirements. Time-Life concluded a contract with the American Broadcasting Company (ABC) to air the Monty Python series in two special shows, each running for ninety minutes.

During the airing of the first ninety-minute special, certain portions were edited out. A total of twenty-four minutes of performance were deducted from the original program. Monty Python was appalled by the mutilation. The group filed an action for injunction to restrain ABC from broadcasting the second ninety-minute show plus damages for impairment of the integrity of their work. The lower court denied injunctive relief. On appeal however, ABC was finally enjoined to air the second special because there was a likelihood that ABC's actions constituted infringement of Monty Python's right of integrity over their creation. In the absence of an explicit permission from the owner of the copyright, ABC does not have a right to make substantial changes to the work, more so, if the alterations are extensive and thus already harms the

111 *Smith v. Montoro*, as cited in *Play it Again Samantha? Another Argument for U.S. Adherence to Article 6bis of the Berne Convention*, Duquesne Law Review, 27 DUQLR 609 (Spring 1989).

112 Citing *Gilliam v. American Broadcasting Companies. Ibid.*

integrity of the original. According to the contract between the group and BBC, the Monty Python shall maintain control over the script of the program. This implies that editing shall be highly restricted to those portions as authorised by the group. The ABC cannot go beyond the limited consent given by the group in favour of the BBC, since the former is merely the assignee (licensee) of the latter.

Under Section 43(a) of the Lanham Act, the court held that the presentation of a distorted work, if accompanied by the name of the Monty Python's group, amounts to misrepresentation that could injure their reputation, and thus violates Section 43(a), even where no registered trademark is concerned.¹¹³ Since ABC affixed the name of Monty Python to the program even after it incorporated its own edits, the court held that this is tantamount to a "false designation of origin or false description or representation." This effectively tarnished the integrity of Monty Python's work, and represented the show to the public as a "product of appellants that was actually a mere caricature of their talents."

In a legally compartmentalised sense, moral rights must be provided by the state's copyright legislation. In the case of the United States, the Copyright Act does not afford any protection to moral rights. The Monty Python (Gilliam) court recognised this, but nevertheless upheld the group's moral right of attribution by finding ABC liable for infringement.

One may tend to be sceptical with the manner by which the court used a trademark statute in protecting a common law copyright. Outside of the United States, the principle of moral rights usually falls within the realm of Copyright law. In his concurring opinion, Judge Gurfein¹¹⁴ posited:

"So far as the Lanham Act is concerned, it is not a substitute for droit moral which authors in Europe enjoy. If the licensee may, by contract, distort the recorded work, the Lanham Act does not come into play. If the licensee has no such right by contract, there will be a violation in breach of contract."

Perhaps the American courts, motivated by the spirit of fairness and equity, found section 43(a) as a valuable ammunition to defend the moral rights of artists in the absence of an express legislation. The Lanham Act was deliberately given a broad interpretation and used as an inventive and creative remedy to fill in the gaps existent in the U.S. copyright system. Even the very drafters of the Lanham Act probably did not contemplate this situation while they were originally framing the law. Section 43 (a) is supposed to address any form of misuse of trademarks or trade names. The district court in the Smith case, even mentioned "that the Lanham Act is limited in its scope and intent to merchandising practices in the nature of, or economically equivalent to, palming off one's goods as those of a competitor, and or misuse of

113 *Ibid.*

114 *Ibid.*

trademarks and trade names."¹¹⁵

Despite the absence of a specific moral rights provision, in most instances, courts implicitly recognise the importance of these rights by using a multitude of legal theories.¹¹⁶ But this is akin to forcing an erroneous piece to fit in a jigsaw puzzle. Performers must be assured that they will have means of redress in case their moral rights have been violated. To squeeze out and stretch 'incidental' legal bases will practically render their moral rights useless and unenforceable.

The international agreements leave it to national law to specify the manner in which performers are to be protected in connection with the exercise of their rights.¹¹⁷ As a matter of fact, there is no legal obligation for member states to enact separate moral rights legislation. In the United States and several other countries, even if moral rights are not provided in their respective copyright laws, resort is being made to a combination of other laws, like defamation, contract, labour,¹¹⁸ or 'passing-off' trade practices. Obviously, the haphazard manipulation of these 'other' legal principles is a manifestation that there is indeed a silent recognition of moral rights, not just of authors, but of performers as well. At the end of the day, there will be practical problems in the implementation of moral rights. This is because of the lack of identification of the "theoretical basis" in common law systems.¹¹⁹ Conceivably, the negative impact of this lacunae in international law have yet to be felt by the contracting nations because moral rights infringement actions are rarely pursued at present.

4.5 Duration and Application of Moral Rights

4.5.1 Same Duration as Economic Rights

Article 5 of the WPPT provides that moral rights are to be maintained at

¹¹⁵ *Ibid.*

¹¹⁶ It should also be noted that contract law is likewise utilized as a viable recourse to protect moral rights in the United States. In *Geisel v. Poynter Products, Incorporated*, the United States District Court for the Southern District of New York recognized that moral rights could be asserted through contract law. The court went on to state that although the civil law doctrine of moral right is not recognized by American law, parts of the doctrine exist as specific rights, such as copyright, libel, privacy and unfair competition. Source: *Ibid.*

¹¹⁷ Firsching, *supra*. See Footnote 1.

¹¹⁸ In France, before July 3, 1985, the protection was bolstered by the relatively strong French labor laws. Section L762.1 of the French Labor Code contains a presumption that all agreements with performers are employment contracts, thus allowing collective bargaining through unions and performers' societies. Moreover, the terms of these collective bargaining agreements bind all employers who are in a "class" or category, thus including even those with whom the performer has no direct contractual privity. Finally, no work for hire doctrine operates in France to alienate performers from their works, although compulsory licensing systems may cut off their ability to control usage. Source: Teller, *supra*. See Footnote 35.

¹¹⁹ Wyburn, *supra*. See Footnote 9.

least until the end of the economic rights – that is, fifty years from the recording of the performance. In the event of the performer’s death before the expiration of fifty years, the persons (heirs or assignees) or institutions that are eligible to exercise the moral rights in behalf of the deceased performer, shall be determined in accordance with domestic legislation. The danger with this arrangement is that some states may not have both moral rights for performers (paternity and integrity rights) in their respective national laws. If this is so, then upon the performer’s death, one of the two moral rights may cease to apply. Furthermore, attention shall be given to the detail that not all countries have explicit moral rights provisions. Hence, if a state relied on defamation statutes, which will be unavailable after the death of the person defamed, then the heirs or legal representatives can no longer enforce the performer’s moral rights.

In France, moral rights of authors (*droit d’auteur*) are perpetual. The country continues to have the strongest moral rights legislation. Its Copyright Law of 1957 states:¹²⁰

“The author shall enjoy the right to respect for his name, his authorship, and his work. This right shall be attached to his person. It shall be perpetual, inalienable, and not subject to prescription.”¹²¹

Following this notion, when Samuel Beckett prevented a performance of *Waiting for Godot* with women cast as tramps, he was able to place this proscription in his will.¹²² Given the dualist approach adopted by the French intellectual property law system, the performers may perchance, also enjoy the same perpetual moral rights as that of authors. Since enough emphasis is given to the spiritual side of an intellectual creation, then moral rights should remain distinct from economic rights. If the latter expires, the rights of attribution and integrity should still linger on. If the ultimate objective of the moral rights regime is to preserve the good name and reputation of the performer, then it is but logical that this non-monetary advantage be eternally respected. Although the global majority does not adhere to this reasoning, it can be taken as a continuing option for legal framers, in line with the desire to reward the performers for their contribution to intellectual and creative development in general.

4.5.2 Transitional Provisions

The coverage of moral rights under the WPPT is unclear whether

¹²⁰ As cited in Rushton, *supra*. See Footnote 27.

¹²¹ The milestone against which moral rights was measured was the French law that states, “*L’auteur jouit du droit au respect de son nom, de sa qualité et de son oeuvre.*” This means that the author enjoys the right of respect of his name, his professional standing, and his work. This right is “perpetual, inalienable and imprescriptible.” Source: Leslie Ellen Harris, *Moral Rights Laws Must Be Harmonized*, Billboard Magazine (20 August 1994), as viewed from <http://elin.lub.lu.se/cgi-bin/ftxt/ebsco/00062510_1994_106_34/9409013061>

¹²² Citing Cornish (1995) in Rushton, *supra*. See Footnote 27.

performers can invoke moral rights with regard to the whole or part of their performance. Some performers realise the relevance of this matter in view of developments in the digital field such as 'sampling.' For example, can a performer claim to be identified as the singer of a song, with its chorus being played as background music in a radio program? Broadcasters considered that the application of moral rights to parts of performances would pose difficulties in relation to programs using clips or extracts.¹²³ The question is left for individual states to decide.

Moreover, under Article 22 (2) of the WPPT, member countries may limit moral rights to future performances. This provision was included in the WPPT since it was recognised that the application of moral rights to existing performances might lead to considerable difficulties in practice, and one option therefore would be to provide that the new moral rights would not apply at all to such performances.¹²⁴ One of the basic principles in legal construction is that retroactivity should never be presumed. Unless expressly provided, a law should not be taken as being applicable retroactively. This would be intended to afford protection to those using performances in consequence of previous contracts, but would mean that the new rights would be exercisable against other parties.¹²⁵ Logically, no one shall be held liable for infringement of a right introduced by a new law, for an act which was done before that law's effectivity.

For instance, the current contractual transactions in the music industry do not provide for moral rights, although it is stipulated that the agreements remain in full force and effect for several years. If the performer, before the country's accession to the WPPT, freely and voluntarily agreed to waive his right to paternity over a given performance, he cannot thereafter assert his right to be identified. In fair and equitable arrangements, the performer has already received proper compensation in exchange of this concession. Contracting nations should therefore take this matter into account as they establish sufficient safeguards in order not to put the performer in a disadvantageous light.

123 UK Patent Office, *supra*. See Footnote 38.

124 Copyright Directorate of the Patent Office, *supra*. See Footnote 32.

125 *Ibid*.

5 From a Human Rights Perspective

The fact that performers are humans needs no further highlighting. The Universal Declaration of Human Rights (UDHR) in essence, provides that every human being deserves to have rights. Article 2 reads “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” For all intents and purposes, the rights under the intellectual property laws shall be considered human rights.

But the international agreements are not quite definite in universally recognising “related rights” as human rights. Actually, the social and economic aspects of neighbouring rights may fall within the realm of specific rights as embodied in the human rights treaties, but not explicitly so. Particularly, performers do not share the same privileges as authors, in terms of human rights protection. Article 27.2 of the UDHR states:

“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

The paradox in the phraseology of the article is that “authors” are sifted out from the comprehensive “everyone.” It must be noted that authors are not the only holders of ‘moral and material interests’ over literary and artistic works. For the purposes of this study, what ever happened to the protection due to the performers?

To intensify the irony, the cited article is technically a part of a cluster of provisions introduced by the motherhood statement found in Article 22 of the UDHR, which provides that:

“Everyone, as a member of society, has the right to social security and is entitled to the realisation, through national effort and international cooperation and in accordance with the organization and recourses of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

Sufficient relevance must be accorded to this provision because it is centred on both types of rights in the copyright regime – economic rights and moral rights. The words ‘dignity’ and ‘personality’ are critical components of the moral rights doctrine. But as to whom these rights should be vested, the law plainly says ‘everyone.’ This implies an all-encompassing coverage for moral rights, giving each and every human being the opportunity to the ‘free development of his

personality.’ In simple words, this privilege shall be given to authors, writers, artists, producers, broadcasters, singers, dancers, actors, and musicians alike.

However, the framers of the international human rights treaties seem to have restricted their interpretation of these rights only to authors, as evident in Article 27.2 of the UDHR. A similar approach is adopted in the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Article 15.1 (c) recognised the right of everyone to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the *author*.” Thus, comparable and specific human rights provisions do not cover other holders of intellectual property rights, such as performing artists.¹²⁶ It may be deduced that authors are the only rightful beneficiaries of international protection with regard to their respective intellectual creations.

At hindsight, Article 27 of the UDHR and Article 15 of the ICESCR are worded in such a manner that suggest that intellectual property rights must be interpreted in light of the international human rights obligations of the contracting states. However, the union of intellectual property to the human rights discourse gives the impression that the universal character of the latter must also be applied to intellectual property. Thus, if the rationale behind all these international norms is to protect the human rights of all humans, then there is no point in excluding performers as beneficiaries of such protection. This must be so, notwithstanding that in strict copyright sense, performers merely possess ‘related rights.’

Ideally under conditions of democratic sovereignty, intellectual property rights should fundamentally serve the interests and needs, which the citizens identify through the language of human rights.¹²⁷ Hence, the human rights approach relevantly dictates that intellectual property is not exclusively an economic tool. Both the moral and material interests of intellectual creators are taken into crucial account.

One of the cornerstones of human rights law is the expression of creativity and human dignity. The UNESCO Declaration of the Principles of International Cultural Cooperation (1966) underscores the importance of broad dissemination of knowledge based on the freest exchange of ideas and discussion. Article VII.1 states that it is “essential to creative activity, the pursuit of truth, and development of the personality.” The protection of moral rights is therefore indispensable, not only for individual personal development, but also for collective cultural growth.

¹²⁶ Silke von Lewinski, *Intellectual Property, Nationality and Non-Discrimination*, Intellectual Property and Human Rights, WIPO/ UNHCR, Geneva (1998), pp. 175-199.

¹²⁷ Peter Drahos, *The Universality of Intellectual Property Rights: Origins and Development*, Intellectual Property and Human Rights, WIPO/OHCR (1998), p 32.

The manner by which intellectual property regimes are implemented must be consistent with the realisation of the other human rights.¹²⁸ A state which respects and implements the moral rights of performers, also protects the latter's "other human rights." Thus, the process of effectively vesting its performers with the rights of attribution and integrity may actually be considered as compliance by the state of its human rights duties under international law.

5.1 Freedom of Expression

The right over an individual's thoughts and the method of their disposition is a basic human right. Article 19 of the UDHR guarantees everyone's freedom of expression, and states that:

"Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

Likewise, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) guarantees freedom of expression, again in terms similar to those found in the UDHR.¹²⁹ The (first) Optional Protocol to the ICCPR, adopted at the same time, grants a right to individuals to appeal directly to the UN Human Rights Committee (HRC).¹³⁰

Resolution 59 (I) of the United Nations General Assembly stressed that "freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nations is consecrated."¹³¹ Freedom of expression is therefore indispensable in order that all the other rights can be successfully fulfilled. Corollary to this reasoning, freedom of expression is essential if violations of human rights are to be exposed and challenged.¹³² Democracy has paved the way to the creation of a free marketplace of ideas. It is through this spontaneous flow of ideas that individuals learn about the rights that they legitimately possess. Through voluntary exchange of wisdom and information, individuals gain the necessary confidence to actively seek to enforce and protect their rights.

Performers must be given ample freedom to impart and share their

¹²⁸ Audrey Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (1) (c)*, UNESCO Copyright Bulletin (Volume XXXV, No. 3), p. 14.

¹²⁹ Article 19 paragraphs (1) and (2) respectively provide that: "Everyone shall have the right to hold opinions without interference." And "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

¹³⁰ International Centre Against Censorship (London) and International Freedom of Expression and Exchange Network (IFEX), *Legal and Constitutional Guarantees of Freedom of Expression*, as viewed from the UNESCO website, <<http://www.unesco.org/op/eng/3may98/art-19.htm>>

¹³¹ Resolution 59 (I) was passed by the UNGA in 1946. Source: *Ibid.*

¹³² *Ibid.*

works with others, in a manner that is freely chosen and controlled by them. On the flip side, they may also opt not to reveal their talents to others. Considering that the contribution of performers to a nation's cultural life plays a vital role in the evolution and development of society, the freedoms they enjoy are actually not absolute. Thus the enjoyment of creative inspiration and freedom of expression is predicated upon the assumption of a certain degree of intellectual responsibility and maturity.

In this context, intellectual property rights and free expression are inextricably linked.¹³³ Particularly, moral rights and freedom of thought and expression are relevantly intertwined in terms of 'spiritual' objectives; and violations of the performer's moral rights shall be tantamount to violations of his freedom of expression.

What if the moral rights of performers clash with the enjoyment of freedom of expression by others? Every practical complication in human rights law involves the exercise of one human right at the expense of another. The answer lies in proper balancing -- an arrangement which is not only fair and equitable, but also reasonable and workable for both sides.

At the heart of this derby, moral rights and freedom of expression are actually unified in thrust. Both exist for the promotion of free flow of ideas. The WPPT, may convincingly be a representation of the desired balance, as codified. However, there are way more individuals longing for moral rights protection than those covered by the existing intellectual property treaties. Under the framework of freedom of expression, the present legal regime in the field of copyright and related rights needs some tedious overhauling to cover those who are so far neglected (*i.e.*, audiovisual performers) in order to substantially comply with the dictates of international human rights law.

5.1.1 Censorship

Censorship entails the suppression of freedom of expression. In the field of moral rights, the performer's right of integrity is more affected when a particular performance is censored. This is so, even if the paternity right may also have a share in the negative impact caused by a restraint imposed against one's freedom, because a performer can no longer claim to be identified as such if what is being concealed from the public is the very performance itself.

As a manifestation of the fundamental freedom, the artistic expression of the performer must be respected. In UDHR parlance, such right to free expression shall be exercised "without interference." *Interference* may be interpreted to mean any change, modification, or alteration done on a

¹³³ Church of Scientology International, *Freedom of Expression: Providing a Forum and Preserving the Right to Communicate*, Freedom Magazine, as viewed from the Freedom Magazine website <<http://30th.freedommag.org/page29.htm>>

specific performance, which materially derogates from the original, and in the process, harms the performer's reputation. This is the quintessence of the integrity rights doctrine vesting utmost importance to the character and personality of the performer as opposed to his purely economic interests. There are several possible forms of interference that may hinder the effective exercise of a performer's right to integrity and freedom of expression. Foremost from a multitude of possibilities is the interference by regulatory movements or institutions, whether public or private, in the form of censorship rules, regulations, and actions.

The WPPT limits the applicability of the integrity right of performers to their live aural performances and sound recordings. Although this connotes a colossal hole in international intellectual property law, at least this signifies an important step in realising the need to uphold the moral rights of performers. The function of music in educational and cultural progress may appear obvious, but must still be conferred with due emphasis. Having the music industry as initial choice of target beneficiary under the WPPT, is quite commendable. Timely enough, the plethora of musicians today is highly susceptible of being affected by rampant censorship activities.

It has been held in many jurisdictions that freedom of expression is not absolute. Obscenity and defamation lie beyond the scope of the basic human rights guarantee. Obscene and degrading music are censored as being destructive and thus, do not deserve a place in a civilised environment. A line must be vividly drawn in order to distinguish what type of music is allowable, and what is not, taking into account the need to observe the musician's moral right and freedom of expression.

The situation is complicated when it comes to popular music. Performers from the Beatles, Bob Dylan and Aretha Franklin to Arrested Development and Madonna, have often celebrated change and challenged "the establishment."¹³⁴ The moral right of integrity entitles the singer to sing what he wants to sing, the actor to act according to his own instinctive talent, and the dancer to dance and show off her personal dancing prowess without any interference from anyone. Should censorship hinder the free outpouring of musical talents under the guise that a particular music is obscene or immoral? Should the government ever have the authority to dictate to its citizens what they may or may not listen to, read, or watch?¹³⁵

Rap and heavy metal music are the leading targets of censorship nowadays. In the United States, censorship groups like the Parents Music Resource Center (PMRC) demonstrate their outrage and disgust toward these types of music. Censorship organisations demand that

¹³⁴ S.M.G. (real name not provided), *Censorship and Pop Culture*, as viewed from <http://www.collegetermpapers.com/TermPapers/Social_Issues/Censorship_and_Pop_Culture.shtml>

¹³⁵ *Ibid.*

performers like Ice-T and NWA become banned from the radio and their music be labelled as indecent and explicit in order to protect America's youth from listening to this so-called "filth."¹³⁶ They claim that continued exposure to rap music that portrays explicit violence, sex, and misogyny will adversely affect the behaviour and character of the youth. They also see heavy metal songs as advocating devil worship, which influence the listeners to resort to violent activities. Several performers and musicians had to face lawsuits for the alleged ill-effects of their kind of music. In 1987, Ozzy Osbourne was sued by the parents of a nineteen-year old who committed suicide after listening to one of Osbourne's songs.¹³⁷ The parents blamed Osbourne for recording a song which promotes violence and thus subliminally affected the way their child behaved. Also, during the late eighties, a record storeowner who sold an album by the rap group, 2 Live-Crew, had to face a criminal obscenity charge, for putting on sale music with obscene lyrics. As expected, the musicians in these cases were acquitted. To establish a causal relationship between the music and the violent or vicious activity involves the difficult, if not impossible task of guessing what goes on inside the minds of the individual listeners. No one has the right to accuse a particular type of music as immoral or bad. The aesthetic value of music depends on the appreciation one puts to it. What may be 'noise' to one's ears, may be good music for another.

Performers should not be hindered from promoting their songs and sharing pieces of their personalities to their audience. No one should curtail their freedom to sing, dance, play music or just express their artistic talents. Without freedom of expression, speech will become commodified thereby increasing the threat of censorship.¹³⁸ Many musicians have been extremely vocal about their fight against unreasonable censorship that does nothing except to encourage public ignorance. The singer, Ani Di Franco, powerfully uttered her sentiments, and said:

"I speak without reservation from what I know and who I am. I do so with the understanding that all people should have the right to offer their voice to the chorus whether the result is harmony or dissonance. The world song is a colorless dirge without the differences that distinguish us, and that it is that difference which should be celebrated not condemned. Should any part of music offend you, please do not close your ears to it. Just take what you can use and go on."¹³⁹

The final choice of what type of music should or should not be supported must be left to the public. In a pro-choice world, it is best to 'let the audience decide.' Performers should be given the freedom to enhance their own art because this is how the peculiarities of a culture

¹³⁶ (No author identified) *Music Censorship*, viewed from the 'Music - The song of the soul' website <<http://www.roguetelepath.com/contact.html>>

¹³⁷ *Ibid.*

¹³⁸ Masur, *supra*. See Footnote 66.

¹³⁹ Quoting Ani Di Franco, Source: *supra*. See Footnote 136.

grow and develop. Performers who are passionate about their works comprise one of the major forces that shaped the television, movie and music industry.¹⁴⁰ However, for motives centred on money and power, some sectors gradually thin down this passion of performers. In the T.V. industry for instance, a study conducted by the U.S. Federal Communications Commission (FCC), shows that the increasing network monopolisation of program production has resulted in "homogenised" television that lacks creativity and originality.¹⁴¹ The corporate bureaucracies that pay the performers, revel in the self-declared free-hand they have over the performances, and they take pleasure in editing, mutilating, modifying, and altering the performances to the detriment of the performer. Clearly, performers should be given the opportunity to prevent and object to any alteration or modification of their performances, which degrades their reputation. Otherwise, to dictate the manner and type of 'permissible' performances attacks the very integrity of the performers, clearly contrary to WPPT.

Of course, everything taken to the extreme is dangerous. Performers should likewise employ maturity and reasonableness in the exercise of their moral rights. Some anti-moral rights segments fear that legislatively mandating such a broad "aesthetic veto" placed in the hands of the artist, especially in the context of multiple artists engaged in collaborative works, would mean that moral rights could be used as a charter for "private censorship."¹⁴² Especially in the case of broadcasters, producers, and program editors, it is crucial that they maintain editorial control taking into consideration practical factors such as airtime, sizing, content, advertising and promotions. The industries, according to them, will cease to remain economically viable because of the moral right prohibition of distortion without the performer's consent. One expert opined that,

*"Scenes must be edited to conform to specified viewpoint, context or space requirements. This process is undertaken within tight deadlines that demand instantaneous decisions. Thus, editors can afford neither the time to obtain consent for specific uses of works nor to hesitate on decisions out of concern that they may subsequently be second-guessed in litigation."*¹⁴³

5.1.2 Criticism and Imitation

To overstretch the moral rights doctrine of performers may also appear problematic. For instance, to criticise a work is not automatically an

¹⁴⁰ Writers' Guild of America, *Freedom of Expression, Quality, Creativity in Television Harmed by Concentrated Corporate Ownership*, Washington (2 January 2003), as viewed WGA website <<http://www.wga.org/pr/0103/coalition.html>>

¹⁴¹ *Ibid.*

¹⁴² Peter Jaszi, "Toward a Theory of Copyright: The Metamorphosis of Authorship," (1991 Duke L.J. 455), as quoted D' Amato and Long, *supra.*, p. 149. See Footnote 62.

¹⁴³ D' Amato and Long, *supra.*, p. 148. See Footnote 62.

attack upon the performer's integrity. Freedom of speech, freedom to criticise, to ridicule the ridiculous, even freedom to do what one likes with one's physical property – these can be moral rights too.¹⁴⁴ A performer does not have an iron hand over the reaction, which his audience is more or less inclined to make. The performance should not be immune from public scrutiny in as much as it should not be shielded from public appreciation and praise.

What about imitations of performances? Under the moral rights regime, is a performer entitled to object to an imitation of his performance on the ground that it is a derogation and mutilation of his work, which may possibly destroy his reputation?

It seems probable that given this recognition of moral rights, the unauthorised imitation and appropriation of a performance for the sale of a product would be found objectionable.¹⁴⁵ In France, courts have already acknowledged a performer's moral right over his voice and accord it with professional and economic value. In California, voice misappropriation, i.e., the imitation of the distinctive voice of a well-known performer for commercial purposes was held to be an actionable tort under the California law. Singer Bette Midler once sued Ford Motor Company for using her hit song "Do You Want to Dance" for the company's advertising campaign. Midler refused to perform the song for Ford, so one of her back-up singers was contracted to imitate her voice as closely as possible.¹⁴⁶ The Court decided in favour of Midler based on Section 3344 of the California Civil Code, which prohibits the use of "another's name, voice, signature, photograph or likeness" for commercial purposes, and under a common law theory based on the right of publicity and unfair competition.

But what if the imitation was not made for purely commercial purposes? The preferred approach is that such works should not be suppressed, but should be freely subject to the fiercest criticism.¹⁴⁷ To censor such works will only curtail freedom of expression, which essentially must be enjoyed by all, performers and imitators alike.

Note: A further discussion on imitations as possible violations of the moral rights of performers will be discussed in Part 5.5 on the "Right of Publicity."

¹⁴⁴ Newman, *supra.*, pp. 1-2. See Footnote 43.

¹⁴⁵ Teller, *supra.*, See Footnote 35.

¹⁴⁶ *Midler v. Ford Motor Company*, 849 F.2d 460 (9th Cir. 1988) See also *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) upholding \$2.6 million verdict in favour of singer Tom Waits for imitation in a Doritos commercial of Waits' voice, described as "like how you'd sound if you drank a quart of bourbon, smoked a pack of cigarettes and swallowed a pack of razor blades Late at night. After not sleeping for three days." As cited in Allen R. Grogan and Sam Mandel, *Hollywood Online*, Practising Law Institute Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, 505 PLI/Pat 375 (January 1998).

¹⁴⁷ Newman, *supra.*, pp. 1-2. See Footnote 43. .

5.1.3 Parody

A parody by definition is a deliberate distortion of a work in order to give it an irreverent and comical treatment. It would be nonsensical to ban all parodies based on the performer's right of integrity because this would be tantamount to an unfair restriction on another's freedom of expression. Only those parodies that cause damage to the reputation of the performers should be subject to objection. The secondary work must not elicit any disrespect for the original in such a manner that it unduly prejudices the name and reputation of the performer.

Adopting the moral rights approach, only parodies that harm the reputation of the original performer must be restrained. Otherwise, parodists would be given free reign to make the best parodies possible – something hitherto denied them by the economic rights approach which does not discriminate between different kinds of parodies.¹⁴⁸ Similar to authors, a parody is not an attack on the performer's ability to profit from, or exploit commercially, the performance.¹⁴⁹ Rather, its main focus is on the hilarious portrayal of the performer's personality, his manner of expression and distinctive characteristics as reflected in his performance.

Actually, parodies may even boost the performer's economic rights because of the bonus exposure given to the original work. This added exposure even leads to a higher demand for the original work. At any rate, seldom does it happen that a parody competes in the same market as the original performance. An expert once observed that:

“Parodies and burlesques usually use serious works to make their humorous criticism more effective and more biting. But since they perform a comical and critical design – of lampooning or sending up the original – they will necessarily distance themselves from the primary works and thus appeal to a different audience (although of course there may be those who both enjoy the original and the parody). Only exceptionally will a parody satisfy the same market as the original – unless it is a parody of parody, in true postmodernist style.”¹⁵⁰

So the issue is not about how much money the performer lost, but whether or not his reputation was damaged by the parody done on his performance. This is a relative matter, and the determination shall be made on a case-to-case basis. Finding an objective standard to apply may be quite difficult, because the success of a certain performance primarily depends on the individual appreciation of audiences, as well as on the contextual circumstances existent when the performance was presented.

¹⁴⁸ Based on the reasoning applied to authors in D' Amato and Long, *supra.*, p. 193. See Footnote 62.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, p. 194.

Since parodies poke fun at the foibles of the performer, the latter may consider the same to be derogatory especially if he is not in the mood to reveal his sense of humour. But performers should not be given the absolute right to destroy the ability of others to satirise their works. To give them the power to remove these parodies from the public domain will greatly affect the community's cultural heritage. What was disavowed before by the performer himself, may turn out to be an object of praise later on. As such, care should be taken to ensure that if moral rights were granted to performers, these rights would not be used to inhibit educational and entertaining parodies.

Hence, the dilemma is not an economic one, it is a moral one which necessitates adjudication between conflicting public interests – the freedom of expression, creativity and humour represented by parodies and burlesques on the one hand, as opposed to the protection of the personality or integrity of performer's original works.¹⁵¹ Again, this calls for proper balancing. The need to ensure that performers will still continue to hone their creative talents through the assurance that the integrity of their performances will be preserved, must be tempered with the promotion and encouragement of derivative artistic endeavours inspired by other existing performances.

5.2 Access to Justice

5.2.1 Enforcement of Moral Rights: Burden on Performers

The moral rights of performers arise at the time the performance is made. No registration requirements or costs whatsoever are necessary for moral rights to exist. Unfortunately, however, there may be costs involved in exercising or enforcing the rights.¹⁵²

As to the right of attribution, performers will obviously desire that this right apply automatically as a matter of principle. Some performers organisations say that assertion requirements are an unjustified and unnecessary burden on them as right holders, and thus reduce the value of the right.¹⁵³ In the United Kingdom, the right must be asserted before any action may be brought.¹⁵⁴ *Inter alia*, this was seen as desirable, especially for broadcasters, film and record producers, and advertisers, in view of some practical difficulties in identifying some performers, and as consistent with the right being expressed in the WPPT as a right to 'claim to be identified.'¹⁵⁵

A more complex scenario is seen with regard to the integrity rights of performers. The performer must first establish that a modification,

¹⁵¹ Implied from reasoning applicable to authors. *Ibid.*

¹⁵² Copyright Directorate of the Patent Office, *supra*. See Footnote 32.

¹⁵³ UK Patent Office, *supra*. See Footnote 38.

¹⁵⁴ Wyburn, *supra*. See Footnote 9.

¹⁵⁵ UK Patent Office, *supra*. See Footnote 38.

alteration or mutilation was done to his performance, and that such modification, alteration, or mutilation was substantial and material enough to damage his reputation. Whether a particular treatment on a performance is derogatory or not depends on several factors -- the nature of the performance, the purpose of its use, the industry practice relevant to the performance or the use of the performance, and a lot more.

Performers' organisations feel that there should be efficient and low cost means of obtaining redress for infringement.¹⁵⁶ Article 8 of the UDHR vests in everyone "*the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*" Hence, a performer is entitled to seek redress from administrative, regulatory or judicial bodies for violations of their moral rights. He can do this, for example, if users of the performance fail to identify the performer when the right of attribution applies or if users modify the performance in a manner that taints the reputation of the performer. Sanctions like injunctive relief and damages are often available for performers. Realistically though, from the massive number of omissions, mutilations and substantial modifications done everyday on different performances, rarely does it happen that the moral rights are invoked by performers.

Considering that moral rights of performers are also their human rights, an action based on moral rights must not affect any right of action or other remedy available to the performer, whether civil or criminal, under other forms of law, like libel in respect of acts infringing moral rights.¹⁵⁷

5.2.2 Infringement Action

The normal remedies available for performers in case of infringements of paternity and integrity rights would be injunction, damages, a declaration that there was a violation of the performer's moral right, order a public apology addressed to the performer, or order that any false attribution or derogatory work be removed or reversed.¹⁵⁸

Performers may seek an injunction order from a court against the infringer. In case of the performer's paternity right, he or she may demand that no record of his songs be released unless and until his name is included in the cover of all albums to be distributed in the market. Or in case of violations of the integrity right, a performer may demand that a modified version of his work be banned from being sold or distributed to the public.

Some producers are concerned that injunctions could be disproportionate in many cases since they might inhibit exploitation and

¹⁵⁶ *Ibid.*

¹⁵⁷ Copyright Directorate of the Patent Office, *supra*. See Footnote 32.

¹⁵⁸ Guide to the Moral Rights Act, as viewed from the website of Australian Department of Communications, Information Technology and the Arts (DCITA)
<http://www.dcita.gov.au/Printer_Friendly/0,,0_1-2_1-4_15599-LIVE_1,00.html>

deny earnings to others involved in a production.¹⁵⁹ That is why a number of them resort to the use of disclaimers whereby they issue statements or reminders dissociating a certain product from the performer. However, a performer may still pursue an action for injunctive relief notwithstanding any disclaimer, if he or she feels that his reputation is tarnished nevertheless, or if he feels that his name deserves to be credited. The discretion is given to the courts for proper disposition.

An injunction order or a cease and desist ruling based on a finding of infringement, may however lead to negotiations between the parties and payment by the infringer to the performer in return for allowing the exploitation of the work.¹⁶⁰ But since there are only a handful of legal actions all over the world involving infringement of performers' moral rights, it would be very difficult to determine at this stage if injunctive relief is indeed an effective remedy.

In the case of authors, actual cases where an author has recovered substantial damages from the French courts for infringement of his moral rights are scarce to non-existent. But the courts have been willing on occasion to grant injunctions in enforcement of those rights, the financial effects of which may considerably be more severe.¹⁶¹ In certain occasions, damages may be awarded to the performer based not on infringement of moral rights but rather on breach of contract. For example, if an agreement between a singer and producer provides for credit provisions, and the producer failed to comply.¹⁶² In this case, although the particular stipulation is with respect to the performer's moral right of attribution, the performer still opted to take the traditional legal route – a civil action for breach of contract.

But the question of how much in damages should be awarded to a performer in case of infringement of his moral rights have yet to be settled either by jurisprudence or by law. Moral rights are said to be of limited economic value and any awards for damages will tend to be minimal.¹⁶³ Moral rights do not have a particular price because they are centred on the preservation of integrity and personality of the performers, which is very hard to quantify. Purely economic rights, on the other hand are easy to monetize because they merely correspond to the payment they should receive for the exploitation of their works.

Using a different approach, moral rights may be utilised by performers

¹⁵⁹ UK Patent Office, *supra*. See Footnote 38

¹⁶⁰ Newman, *supra*. See Footnote 43.

¹⁶¹ Newman, *supra*. See Footnote 21.

¹⁶² When a jury awarded damages for breach of contract and punitive damages in a California case involving the failure of a producer to furnish to a television actor the credit set forth in his agreement, the defendants made a motion for a judgment notwithstanding the verdict and for a new trial. The decision of the judge denying those motions has been upheld on appeal. Source: Michael I. Rudell, *Behind the Scenes: Practical Entertainment Law*, New York (1984), p. 53.

¹⁶³ Newman, *supra*. See Footnote 43.

in support of their claim for economic rights. Moral rights can be used as an additional cause of action if the evidence needed to prove violations of the performer's economic rights is inadequate.

5.2.3 Criminal Actions

If the violation of the performer's moral rights was done with malicious intent for personal gain of the user, the performer may choose to file a criminal action before a court of competent jurisdiction. Intellectual property law does not criminalize a violation of moral rights. Instead the performer must seek recourse from penal provisions on libel, defamation or slander, and in some instances, unfair competition.

For a specific act to qualify as a crime, the law (usually penal statutes) defines essential elements that must be present when the act was committed. In libel or slander, for instance, there must be wilful injury inflicted on the performer, which caused prejudice to his reputation.¹⁶⁴ Fame of the performer is immaterial for libel to exist. For instance, there may be libel if the name of the performer is retained on a work in which the changes made are such as to reflect adversely upon his reputation.¹⁶⁵ Similar to authors, and in the absence of any moral rights provision applicable and enforceable in his country, a performer may opt to file a criminal action for libel.

Considering that presumption of innocence is likewise a human right, the performer must first prove wilful injury beyond reasonable doubt. Malicious intent is actually very difficult to establish under criminal procedure. Libel and slander theories fail to acknowledge that the performer's integrity may already be prejudiced by some material changes made on his performance, whether intentionally done or not.

As in the case of authors, for a great number of performers, preserving personal integrity is the fuel and primary source of motivation behind creative works, regardless of any economic worth in the public eye.¹⁶⁶ But since performers do not have a specific legal basis for suing, they assume the burden of proving what goes on inside the minds of those who infringe their moral rights.

¹⁶⁴ In *Shostakovich v. Twentieth Century-Fox Film Corporation*, a composer from the Soviet Union charged the defendant with libel when it used the composer's music in a film having an anti-soviet theme. The composer argued that the film implied his approval and gave the impression that he was being disloyal to his country. The court noted the lack of any moral rights protection in the United States and found in favor of the defendant after concluding that the composer had failed to show the requisite infliction of a willful injury. Source: Julie Levy, *Creative Works as Negotiable Instruments: A Compromise Between Moral Rights Protection and the Need for Transferability in the United States*, *Vanderbilt Journal of Entertainment Law and Practice*, 5 VNJELP 27 (Spring 2003).

¹⁶⁵ Based on *Edison v. Viva International Limited*, citing a decision of the New York Supreme Court, Appellate Division. Source: *Duquesne Law Review*, *supra*. See Footnote 111.

¹⁶⁶ Levy, *supra*. See Footnote 164.

Unlike libel law, however, with clearly delineated, judicially mandated tests, practitioners will have no basis for determining moral rights violations and will rely on ad hoc subjective interpretations.¹⁶⁷

Performers and editors alike will then have to venture into risky endeavours because outcomes will be unpredictable. Performers will hesitate to invoke their moral rights because of the difficulties and intricacies posed by the criminal process. Editors and producers, on the other hand, may refuse to exercise editorial freedom knowing that they may be exposed to possible litigation for moral rights violation. Either way, creativity is hampered, and cultural development is threatened.

Additionally, an action may lie for unfair competition if one passes off a work of another as the performer's own work. In countries, where there are no specific moral rights provisions, unfair competition cases may be brought against violators of the attribution right of performers.

5.3 Right to Property

Nowadays, the artist is compelled to sacrifice personal integrity to earn a living or live in poverty to preserve it.¹⁶⁸ The international copyright system may have provided economic incentives to artists so they will continue to hone their individual creativity and talents but still, it did not accord due emphasis on the fact that the final product is actually a reflection of the creator's personality. Hence, one can buy and sell a creative work just like any other commodity. If a certain creation is sold for a price, the artist not only surrenders the concrete object, but he also gives up part of his being, his spirit, and his integrity. Upon relinquishing his work in favour of another person, the artist loses material control over such creation although he still has a continuing interest in the treatment of the subject property.

For performers, no less than the WPPT recognised the distinction between economic rights and moral rights. Article 5 says 'even after the transfer' of economic rights, the performer shall still have the moral rights of attribution and integrity over his live aural performances and sound recordings. For easier disposition and allocation of property rights, it would be best to treat economic rights and moral rights of performers separately.

Ideally though, moral rights should be given greater importance than pecuniary rights.

In most of Europe, economic rights are merely secondary to moral rights. Some countries fear that without guarantee of artists' moral rights, something really important about creativity will be diminished.¹⁶⁹ The essence of moral rights is the preservation of the significant aspects

¹⁶⁷ D' Amato and Long, *supra.*, p. 148. See Footnote 62

¹⁶⁸ Based on reasoning applied to authors in Levy, *supra.* See Footnote 164.

¹⁶⁹ Quoting a statement on moral rights of authors by Pamela Samuelson, professor of intellectual property law at Cornell University. Source: Hedlund, *supra.* See Footnote 84.

of culture, which bind a nation together. At the same time, moral rights seek to safeguard the reputation of the performer, in the course of which, his pecuniary interests are likewise served. Moral rights in themselves, may not possess any pecuniary value but the reputation of an artist can influence the exploitation and price of his work.¹⁷⁰

In the United States, authorship has only an economic definition, and once artists relinquish that, they have surrendered all claim and control to their own creations.¹⁷¹ For American performers, moral rights are usually governed by contract provisions, which often take the form of waivers – *i.e.* a performer waives his moral rights in favour of the producer, broadcaster, or advertiser. Under this arrangement, the controlling right of the performer over his performance is treated as property that is susceptible of being bought and sold for a price. If the artistic conditions are good and thus respect the art of the performer, it is rare for a performer to refuse recording based on unreasonable remuneration.¹⁷² The right of control supposedly provides the performer, among others, an opportunity to negotiate equitable remuneration for the use of his performances.

The concept of *droit moral* for performers was introduced as a *mutatis mutandis* version of *droit d' auteur*. The history of *droit d' auteur* in the civil law world may be traced from the Roman Law concept of ownership, embodied in the Institutes of Justinian, as an essentially absolute right over property, inviolable and good against the world.¹⁷³ Article 17 of the UDHR provides:

“(1) Everyone has the right to own property alone as well as in association with others; (2) No one shall be arbitrarily deprived of his property.”

The right to own property is also acknowledged in several regional human rights instrument.¹⁷⁴ In some countries, and fortunately more and more, the performer is recognised as the creator and owner of his own performance.¹⁷⁵ Such ownership over the performance is established either by national legislation (as in the case of Norway) or by contract. However, there are still some countries that do not provide the performers with proper credit in this respect.

Perhaps there is yet no international declaration of ownership of performers of their performances because of the long-standing significant opposition from investor interests in the entertainment

¹⁷⁰ Rushton, *supra*. See Footnote 27.

¹⁷¹ Hedlund, *supra*. See Footnote 84.

¹⁷² Ragnhild Nygaard, *Performers Rights in Respect of the Recording of Live Performance*, as viewed from the Norwegian Actors Equity Association website <http://www.theatrelibrary.org/sibmas/congresses/sibmas90/sto_21.html>

¹⁷³ Newman, *supra*. See Footnote 21.

¹⁷⁴ See Article 14, African Charter on Human Rights; Article 21, American Convention of Human Rights; and Article 1, First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁷⁵ Nygaard, *supra*. See Footnote 172.

industry, especially in the audio-visual area. Unless the director, production company and producer specifies another party, the individual producer is ordinarily presumed to be the owner of the performance. Arguably, the producer is believed to have made the most decisive contributions in the work.

Theoretically, the ownership of moral rights is often based on authorship. Since under current international law, only the owners of copyright have the right to protect the work in question, the issue of authorship becomes critical in determining who has the right to control the use of such works.¹⁷⁶ For instance, in the United Kingdom, directors own the moral rights in a film. But in other jurisdictions the "authorship" of the film is held by all the contributors as joint owners – the director, producer, scriptwriter, cinematographer, and of course, performers.

In the United States, strong moral rights advocates stress their dissatisfaction on the existing practice whereby "an artist's moral rights are irrelevant, and corporate holders of economic copyright, not the flesh and blood humans that created the work, will be designated as the authors."¹⁷⁷ The Motion Picture Association of America (MPAA), representing studios owned by the world's largest media conglomerates, including 20th Century Fox, Buena Vista (Disney), Warner Brothers, Paramount, Sony, Turner Entertainment and Universal, observes that it is possible to make large investments in producing, promoting and distributing American film and ancillary products "because of the certainty that the [product] will be able to move freely and flexibly throughout the marketplace, without any interruption in the marketing sequence."¹⁷⁸ This uninterrupted process is made possible by the policy that a performer's contribution to a production is simply a work made for hire. This means that the performer is merely an employee of the producer, and their relationship is governed by labour and employment laws. Unions such as the Screen Actors Guild (SAG) represent performers and negotiate performers' economic rights and general employment terms with respect to their participation in any performance.¹⁷⁹ The entertainment and cultural industries in the United States have historically been regulated through elaborate contractual arrangements, voluntarily negotiated, and often renegotiated on behalf of the principal creative contributors by strong and sophisticated labour organisations, like SAG.¹⁸⁰ They may be able to collect excellent economic advantages for the performers, but still the latter will have to

¹⁷⁶ D' Amato and Long, *supra*. See Footnote 62.

¹⁷⁷ A statement by Arnold Lutzker, Washington, DC-based counsel for Artists Rights, citing Cornell's Samuelson notes that the Clinton administration's NII (National Information Infrastructure) White Paper (see Vol. 5, No. 5, p. 15), which announced an intention to make moral rights waivable by contract on a worldwide scale. Source: Hedlund, *supra*. See Footnote 84.

¹⁷⁸ *Ibid*.

¹⁷⁹ Bernard, *supra*. See Footnote 5.

¹⁸⁰ D' Amato and Long, *supra*., p. 161. See Footnote 62.

sacrifice their other (even more important) rights under the copyright regime in favour of their respective employers. Hence, performers are left with no choice but to surrender their moral rights because such rights are seen to be the major obstacles in the smooth course of a normal entertainment business.

It would be depressingly unfair if ownership of moral rights over performances is not vested on the performers. It is only by virtue of ownership that the performer exercises control over his work. Control is necessary for him to be able to claim to be identified as the performer of a given performance, and to object to any modification of such performance, which may be prejudicial to his reputation. If ownership is vested on someone else, performers would have to request the owner to assert the moral rights in their behalf. To a large extent, this eventual layout topples the very foundation upon which the moral rights doctrine was built-- no one can step into the shoes of the performer and he alone can invoke his own moral rights. Moral rights are personal to the performer and thus, cannot be enjoyed by anyone else but him.

5.4 Right to Privacy

The modern privacy benchmark at the international level can be found in Article 12 of the UDHR, which specifically protected territorial and communications privacy.¹⁸¹ Article 12 states:

“No-one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks.”

A performer, and any other individual for that matter, has a protectable identity that may be represented by his or her name, nickname, picture, voice, physical attributes or performing style; individually or together they form a "persona."¹⁸² Unlike others who come into the public eye, such as politicians and other public servants, performers are neither on the public payroll nor have they sought and obtained the public's trust in order to get their jobs.¹⁸³ Performers did not agree to serve the public in exchange for payment of public funds. A performer is a member of the society in the precise same way as any other person. Thus, he is entitled to the same human rights as are available to all the rest of the members of the community.

¹⁸¹ Numerous international human rights covenants give specific reference to privacy as a right. The ICCPR, the UN Convention on Migrant Workers (Article 14) and the UN Convention on Protection of the Child (Article 16) adopt the same language. Source: David Banisar and Simon Davies (Privacy International), *Privacy and Human Rights: An International Survey of Privacy Laws and Practice*, as viewed from the Global Internet Liberty Campaign (GILC) website < <http://www.gilc.org/privacy/survey/intro.html> >

¹⁸² Fran Smallson, *Soliciting From a Spectrum of Sources*, as viewed from International Federation of Library Associations and Institutions (IFLA) website,

<http://www.ifla.org/documents/infopol/copyright/smaf1.htm>

¹⁸³ Masur, *supra.*, see Footnote 66.

Realistically however, celebrity status brings with it a certain loss of privacy that is unavoidable.¹⁸⁴ Performers are more or less exposed to the public that they are subjected to various kinds of reactions from different segments of the society. Performers are expected to sacrifice a big percentage of their right to privacy by virtue of the demands of their profession.

The moral rights of a performer, notwithstanding that his performance is still susceptible to everyday scrutiny by the public, still deserves to be protected. Performers cannot be expected to agree to lose their right to protect their ‘persona’ from being misappropriated by anyone. It would be tantamount to an invasion of privacy if the performer is placed in a false light, even if the depiction does not rise to the level of defamation.¹⁸⁵ When it comes to performances, any alteration or mutilation undertaken without the permission of the performer, which damages his reputation, is an attack upon his ‘persona.’ The right to privacy secures the performer that he retains control over his performance, free from any interference from anyone without his prior consent. Thus if the performer’s right of integrity is infringed, more likely than not, his right to privacy is likewise violated.

Even if performers voluntarily assumed fame as celebrities, they still have privacy interests, which need to be protected. Actress Pamela Anderson Lee and rock star Bret Michaels recently sought to restrict dissemination on the web of a video of their more intimate moments.¹⁸⁶ The court held that the “fact that Lee has performed a role involving sex does not, however, make her real sex life open to the public.” As to Michaels, the Court stated that “even people who voluntarily enter the public sphere retain a privacy interest in the most intimate details of their lives.” Having said this, the court ruled to restrain defendants from circulating and distributing the recording as it upheld the privacy interests of both Lee and Michaels.

Performances nowadays are distributed all over the world in a matter of minutes. Digital recording and reproduction can create copies that are identical in content and quality to the original regardless of how many generations of reproductions are made.¹⁸⁷ The continuous development in digital technology will dramatically increase the risk of abuse. The right of privacy is a fundamental right that must be protected everywhere. The degree and manner of protection should be flexible to cover new forms of invasion and infringement especially those introduced by digital technology.

Another important point is the possibility that the moral rights of performers may actually conflict with the right of privacy of users. Any form of intrusion upon an individual’s solitude or private affairs may

¹⁸⁴ Ibid.

¹⁸⁵ Grogan and Mandel, *supra*. See Footnote 146.

¹⁸⁶ *Michaels v. Internet Entertainment Group* (5 F. Supp. 2d 823).

¹⁸⁷ Masur, *supra.*, see Footnote 66.

already be tantamount to a violation of the right to privacy.¹⁸⁸ A performer, for instance, cannot dictate to the end-user of his sound recording, what the latter should do with his own physical property. The performer loses his control over the concrete object, and the user (say, the buyer of his recording) is free to do whatever he wants with the commodity. So long as the reputation of the performer is not prejudiced by the action of the user, then the performer must respect the privacy of the latter, and not intrude into the personal sphere of his individual audience.

5.5 Right of Publicity

Falling under the umbrella of privacy rights is the so-called ‘right of publicity,’ referring to the right to control the use of one’s name and likeness for commercial purposes.¹⁸⁹ In the technical sense, the right to publicity is a combination of right to privacy and right to property. The difference is that the publicity right can also be made applicable to departed celebrities. Where rights exist to cover the use of the personas of deceased persons, the privacy element is consistently excluded, since the dead have no legal status as persons, and therefore no right of personal privacy.¹⁹⁰ The heirs of the deceased, however, can assert both the right of property and right of publicity of the performer, even after the latter’s death

5.5.1 Commercial Gain as a Requirement

The right of publicity initially developed in common law to prevent unauthorized endorsement of products and unauthorized sales of merchandise containing a person’s likeness.¹⁹¹ Statutes later evolved so as to prevent the utilization of the likeness of an individual for advertising or trade purposes, without such individual’s permission.

Regardless of some evident educational or entertainment elements, the performer’s right to publicity may still be violated if the unauthorized use of the performer’s image and likeness was undertaken for commercial gain. In the early eighties, the image of the late Elvis Presley was commercially exploited in a stage production entitled “The Big El Show,” with an impersonator imitating Presley’s voice, singing style and appearance.¹⁹² The court found a violation of Presley’s descendible right of publicity, stating that the blatant parroting by the

¹⁸⁸ Grogan and Mandel, *supra*. See Footnote 146.

¹⁸⁹ *Ibid*.

¹⁹⁰ Masur, *supra*., see Footnote 66.

¹⁹¹ *Memphis Development Foundation v. Factors Etc.*, 441 F. Supp. 1323 (W.D. Tenn. 1977) 616 F.2d 956 (6th Cir.), cert. denied, 449 U.S. 953 (1980) holding it permissible to make and display a statue of Elvis Presley but enjoining sales of miniature replicas, reversed because common law right of publicity found non-descendible) as cited in Grogan and Mandel, *supra*. See Footnote 146.

¹⁹² *Estate of Presley v. Russen*, 513 F. Supp. 1339, 1355 (D.N.J. 1981).

impersonator was only done for purely commercial purposes and lacked its own creative component. However, some courts have found liability based on the commercial purpose of what would appear to be entertaining or artistic uses.¹⁹³

In the United States, the trademark law provides for a remedy in case of misappropriation of a celebrity's persona. This presupposes that a sale is the goal of the misappropriation and does not cover instances in which the value of the property may be diminished or diluted as a result of the unauthorized use.¹⁹⁴ Again, the Lanham Act provision on 'passing-off' one's work as that of another is overstretched. This is because it is not possible to obtain any copyright for one's persona in the country.

Right-of-publicity statutes have been used to protect moral rights, but only to the extent that performers are famous and have a commercial interest in their identities.¹⁹⁵ In the case of popular game-show host Vanna White, her image was used in a series of advertisements featuring robots resembling her physical qualities.¹⁹⁶ The commercial exploitation of her likeness was done without her consent. The court found that there was indeed a violation of White's right to publicity.

5.5.2 Moral Rights and Publicity Rights of Performers

The essence of the moral rights doctrine is the preservation of the good name and reputation of the performer. An injury on the 'persona' of a performer affects his personality interests. If the performance is misappropriated and mutilated by a certain user for his own economic motives, both moral rights and publicity rights of the performer are infringed.

Doctrinally, the two rights are similar in several aspects. The right of publicity safeguards the rights of celebrity personas to control the commercial contexts in which their images are used and allows them to decide how their images are presented to the public. Moral rights, on the other hand, allow creators of artistic works a comparable measure of control regarding the substantive presentation of their works.¹⁹⁷ Moreover, both rights are geared to protect against attacks on the performer's reputation and character. Moral rights are conventionally understood as protecting a creator's personal interests, and the right of publicity is generally viewed as an economic right. But a careful look at right of publicity litigation reveals that many decisions actually are more

¹⁹³ See *Ali v. Playgirl*, 447 F. Supp. 723 (S.D.N.Y. 1978) (right violated by illustration, contained in Playgirl magazine, which resembled Muhammad Ali and was captioned "The Greatest," as cited in Grogan and Mandel, *supra*. See Footnote 146.

¹⁹⁴ Masur, *supra.*, see Footnote 66.

¹⁹⁵ Levy, *supra.* See Footnote 164.

¹⁹⁶ *White v. Samsung Electronics America, Inc.* Source: *Ibid.*

¹⁹⁷ Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, *University of Illinois Law Review*, 2001 UILLR 151 (2001).

concerned with redressing rights of integrity over the images of the celebrity.¹⁹⁸

Since a violation of moral rights always implies some form of material injury on the performer's personality interests, and if this moral rights doctrine were extended to constructed personas, the personal interests of all personas could be treated in a principled manner, consistent with the dictates of copyright law generally.¹⁹⁹ From the moment that substantial damage to the performer's reputation is established, there is no further requisite of proving any commercial purpose – which would otherwise be a vital element under the publicity rights doctrine.

5.5.3 Illustrative Cases

In France, performers are given the right to object to commercial “sound-alikes.” In one case a shoe company used an imitation of the voice of the comedian Claude Pieplu as the voice for a cartoon character in a television commercial.²⁰⁰ The court ruled that there was an infringement of Pieplu's personal right over the sound of his voice, as well as his moral right to control of its commercial use.

A distinction must however be made between imitation of a vocal style and imitation of a distinctive voice. Singer Tom Waits believes that musicians should not do advertisements so as not to undermine their artistic integrity. An imitation of his husky singing voice was nevertheless used in an advertisement of a junk food company.²⁰¹ Waits was awarded \$2.6 million in compensatory and punitive damages for voice misappropriation under his right of publicity.²⁰² Another case previously cited is that of Bette Midler wherein the court clarified that what was invalidly exploited was not Midler's song, but rather her distinctive voice. The Midler decision is a promising sign for performers asserting claims in California in the troubling area of commercial sound-alikes.²⁰³

Comedians Laurel and Hardy were victims of image misappropriation, this time by commercial “look-alikes.” A television series featured two actors imitating the famous comical duo.²⁰⁴ The court enjoined all “characterizations of the comedians, including use of reproductions of their physical likenesses, the impersonation of their physical likenesses or appearances, costumes and mannerisms, and/or the simulation of their

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ Teller, *supra*. See Footnote 35.

²⁰¹ *Waits v. Frito-Lay Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992).

²⁰² see *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 712 (9th Cir. 1970), finding no liability under California unfair competition statute for tire commercial using song "These Boots Are Made For Walking" and imitating Nancy Sinatra's dress (boots) and style of delivery, 402 U.S. 906 (1971), as cited in Grogan and Mandel, *supra*. See Footnote 34.

²⁰³ Teller, *supra*. See Footnote 35.

²⁰⁴ *Price v. Worldvision Enter. Inc.*, 455 F. Supp. 252, 255 (S.D.N.Y. 1978).

voices for commercial purposes, including their use in toys or games."²⁰⁵

5.5.4 A Matter of Urgency

At present, there are a handful of jurisdictions, which provide protection to the reputation and personality interests of performing artists. Most of them are worded in a manner which gives the performer the right to object to any modification or alteration on his performance which would prejudice his reputation. Extending moral rights protection to personas, and thereby protecting the reputational and personality interests often at stake in right of publicity disputes, is a fruitful area for exploration in the new century.²⁰⁶ At this day and age, digital technologies have allowed many forms of abuses on the personas of celebrities. An expert has captured the impact of this contemporary scenario in words. He said:

"It is widely accepted that the use of a persona of a well-known individual in an expressive work is fully protected under the First Amendment. But consider the following example. It is already possible to perform a full body and face scan of an actor, intended for use in one motion picture, and have that scanned persona appear as a newly created performance in an entirely different film. Since that second film would also be an expressive work, this use would be allowed under current law. But the damage to the actor would include not merely the income lost as a result of not having been properly paid to appear in the second film, it could constitute serious further damage to the actors reputation and "good name.""²⁰⁷

This kind of image theft, whether from still photographs or moving videos, is already rampant ever since the introduction of the Internet. It is now completely trouble-free and painless to download an image of performers from the world-wide web and copy, manipulate, crop, modify, or animate the image to the user's delight. Thereafter, an entirely new expressive work is thereby created, but providing neither due credit nor compensation to the performer. This new creation will be released to the public and made available again through the internet so that others may view it, download again, and mutilate the image for the 'nth' time. These incidents have caused serious damage to the reputations of the affected performers, with little or no recourse available to them.²⁰⁸ Some unified resolve must be urgently adopted in the international copyright system to curtail these derogatory activities in order to keep up with the unimaginably swift pace of technological and digital development. Otherwise, performers moral rights and publicity rights will continue to be vulnerable to abuse and unfair exploitation. Since at present, only copyright holders are given the right

²⁰⁵ As quoted in Grogan and Mandel, *supra*. See Footnote 34.

²⁰⁶ Kwall, *supra*. See Footnote 197.

²⁰⁷ Masur, *supra*. See Footnote 66.

²⁰⁸ *Ibid*.

to sue the manipulator for infringement. Performers are yet incapable to do such thing.

5.5.5 Defenses Available

If the performance was used for ‘non-commercial’ purposes, an action for violation of the right of publicity, may not triumph. Concepts borrowed from copyright and trademark law, such as the defenses of fair use and parody, as well as freedom of speech and expression defenses are implicit in some of the reported right of publicity decisions.²⁰⁹ Basically these defenses hinge on the proposition that unless the creation was created exclusively for advertising, trading, or commercial purposes, there will be no violation of publicity right. If the performance was used for informative, artistic, or creative reasons, the right of publicity of the performer must give way to the legitimate exercise of the user’s freedom of expression and information.

It may be difficult to distinguish pure advertising or merchandising uses from uses merely in a commercial context that might be subject to a "non-commercial" exception of a statute, or otherwise protected on freedom of expression grounds.²¹⁰ Neither courts nor legislative bodies have formulated a uniform set of rules on this matter. Hence, more complete protection for damage to a celebrity's reputational and personality interests could be obtained if moral rights protection were to be extended to constructed personas.²¹¹

5.6 Right to Culture and the Public Good

The moral rights regime was aptly described as a way in which artistic integrity was to be protected as part of the means of preservation of a wider national cultural heritage.²¹² Article 27 of the UDHR provides for the right of “*everyone to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits*”. The introduction of moral rights legislation will gradually inculcate in the minds of the public a sense of greater respect for performers. The society will more seriously appreciate every performance, and accord such with value each deserves. Ultimately, both moral rights of paternity and integrity will serve as psychological incentives for performers to offer their best talents in all their performances. If moral rights are fulfilled, performers will have inner self-fulfillment, and this will encourage them to devote more of themselves to the pursuit of creativity and artistic excellence. The

²⁰⁹ Grogan and Mandel, *supra*. See Footnote 34.

²¹⁰ *Ibid*.

²¹¹ Kwall, *supra*. See Footnote 197.

²¹² Taken from the Copyright Law Review Committee (of Australia) Discussion Paper. Source: Wyburn, *supra*. See Footnote 9.

‘Queen of Salsa’ herself uttered words of inspiration, thus:

“If there’s one thing that’s kept me going it’s performing. I’ve never been one for the parties. Why would I be? I am the party!”

-Celia Cruz.²¹³

As a crucial force that shapes a nation’s culture, performers also assume the heavy responsibility of providing the community not only with entertainment, but more importantly with information and additional wisdom. It is therefore unavoidable that the moral rights of performers, in certain occasions, must yield to public interest, to serve the ‘public good.’ In the United States for instance, in the absence of a contract or stipulation, performers may not prohibit subject to adequate elements of identification of the source, dissemination, even in full, for the purposes of current affairs information, of speeches intended for the public in political, administrative, judicial or academic assemblies and in public meetings in official ceremonies.²¹⁴ This is actually based on the same rationale behind the ‘fair use’ doctrine in copyright law, but in some ways but in some ways it more narrowly constricts performers’ rights to control their work.²¹⁵

Article 19 (3) of the ICCPR declares that freedom of expression carries with it special duties and responsibilities. Hence, performances may be restricted by law if necessary “(a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.”

Actually performers, for the purpose of serving public interest, may also invoke moral rights. As one of the prime movers in the cultural field, they also need to safeguard their right against possible alterations of their performances, which if shown to the public, will engender false or misguided attitudes, or even encourage negative behaviour. The International Federation of Actors (FIA) emphasized the importance of moral rights in the following manner:

“It would seem a serious shortcoming if a featured actor starring in a cinema film, would not be given recourse against a producer who decided to insert a number of pornographic scenes in the released motion picture attempting to boost box office appeal.”²¹⁶

As a responsible member of the community, and as an avowed soldier of cultural sovereignty, a performer can use his moral rights to control his performance in a manner that will shield his audience from the ill effects of desperately disastrous productions.

²¹³ “Do’s, Don’t’s, News, and Views,” Glamour Magazine (October 2003), p. 43.

²¹⁴ Teller, *supra*. See Footnote 35.

²¹⁵ *Ibid.*

²¹⁶ Bernard, *supra*. See Footnote 5

5.7 Right Against Discrimination

Performers who have yet to struggle for fame and those who are just starting professionally, would say that they should not be discriminated against those who are already well-known in the business, with regard to their paternity rights. Some musicians felt that no distinction should be made between different categories of performers.²¹⁷ On the other hand, record producers in the United Kingdom believe that the right should only be limited to the main or principal performers if sound recordings are issued to the public.²¹⁸ The producers said that in practice, it is truly difficult to credit or identify all the performers who contributed to the completion of a recording. Especially so in the audiovisual industry, where broadcasters, as well as film and record producers considered that the paternity right should not apply to non-featured performers (such as session musicians or extras) since this would indeed be impractical.²¹⁹ It must be noted that in discrimination cases, the performer's moral right of attribution will be more affected as compared to his integrity rights.

In the spirit of fairness, an all-embracing and absolute paternity right will potentially pose practical difficulties not just for the producers, but also for distributors and investors as well. For example, in the case of a group, orchestra or other ensemble of performers, it should be sufficient to just give the name of the ensemble, rather than tediously enumerating the names of each and every player in the group.

International human rights law includes special provisions on non-discrimination based on race, color, religion, national and social origin, and the like. Additionally, treaties on human rights also provide for the right of equality before the law.²²⁰

Under the proposed WIPO Audiovisual Performances Treaty (WAPT), only marquee audiovisual performers have paternity rights, extras are excluded. In the eyes of the contracting states, "ancillary participants' do not qualify for protection because they do not, in proper sense, perform literary or artistic work."²²¹ The member states are nevertheless given enough leeway to provide sufficient protection in favor of these subsidiary performers.

In performing arts parlance, extras are of different kinds. The Screen Actors Guild of the United States, provided technical definitions for

²¹⁷ UK Patent Office, *supra*. See Footnote 38.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ Some of the provisions on non-discrimination are Article 2 of the UDHR, Article 2.2 of the ICESCR, Article 2.1 of the ICCPR, while equality before the law has been laid down in Article 7 of the UDHR, Articles 14.1 and 26 of the ICCPR. Source: Silke von Lewinski, *Intellectual Property, Nationality and Non-Discrimination*, from *Intellectual Property and Human Rights* (WIPO/ UNHCR, Geneva, 1998), pp. 175-199.

²²¹ Bernard, *supra*. See Footnote 5.

each kind as follows:²²²

“Special Ability Extra” is an extra performer specifically called to perform work requiring special skills such as tennis, golf, choreographed social dancing, etc.

“Stand-In” is an extra performer used as a substitute for another actor only for technical production purposes such as focusing shots or setting lights, and not actually photographed.

“Photographic Double” is an extra performer who is actually photographed as a substitute for another actor.

“Day Performer” is one who delivers a speech or line of dialogue.

“Omnies” are responsible for any speech sounds used as general background noise rather than for its meaning. Atmospheric words such as indistinguishable background chatter in a party or restaurant scene.

The examples above are performers in their own right, and are likewise holders of human rights. Although for purposes of practicality and expediency, not all of them are identified under every circumstance that their performance is exploited. The moral right of attribution can perhaps be tempered in this light, without tolerating other forms of discrimination between established artists and newcomers. Nevertheless, there will be infringement of moral rights in the event that there was a reasonable opportunity to name the performers, and for no apparent and justifiable reason, they were not so named. This is also tantamount to discrimination, in every sense of the word.

5.8 Human Rights and Business

The trend nowadays is for corporations to be socially responsible through the strict observance of norms, which uphold the fundamental human rights of each individual. For a business to survive the challenges of the times, it should not attempt to ignore the sacred rights of the people, to whom said business owes its very existence. As expected, the introduction of performer’s moral rights will affect or has already affected several sectors in the business world, especially those engaged in activities, which make use of the works of performers.

Even at this stage, when international moral rights protection is exclusively limited to audio performances, a wide range of businesses

²²² 1998 *Theatrical Films and Television Digest on Extra Performers*, as viewed from the Screen Actors Guild (U.S.A) website, <<http://www.k-online.com/~leodragon/SAGHandbook.htm>>

are already experiencing the impact of performer's moral rights. As to the right of attribution, there are several venues and occasions when audio recordings are publicly played. Either through direct CD or other audio material or through the service of radio broadcasting stations, music can be heard almost everywhere – in shopping malls, supermarkets, bars, eating places, gyms, stores, buses and in several other places. This also does not discount the fact that even in non-business establishments and situations (like charity balls, or in academic institutions, public libraries, or hospitals), audio performances publicly occur, both live and recorded ones. The instances of public use of sound performances are never-ending, and thus call for the appropriate observance of paternity rights in the business world.

In the same manner, the performer's right of integrity will likely affect those businesses involved in using the work of performers including, among others, record and film producers, broadcasting organisations, theatre owners, etc. Because it is in these businesses (mostly in the arts and entertainment industry), that the capacity to injure a performer's reputation is potentially greater.

5.8.1 Interruption to the Normal Course of Business

Businessmen would sometimes see the introduction of performer's moral rights as deleterious to business dynamism.²²³ Any change in the performance, is a candidate for a moral rights infringement case, hence, the producer would be required to go back to the performer to seek the latter's approval. The business sector feels that it will be very possible for the performer to demand payment in exchange for his consent, otherwise, he can refuse the alteration altogether.

Considering the collaborative nature of the products released in the arts and entertainment business, some copyright systems vest in the producer the ownership of the work. In film for example, since the producer brings together a director, screenwriter, designers, of sets and costumes, cinematographer, composer, actors, and all manner of technical and creative contributors, he then also takes the economic risks and exercises creative control over the entire production.²²⁴ To enable anyone of the mass of collaborative contributors, specifically performers, to object to a modification or alteration of his contribution will create an atmosphere of uncertainty and instability, not to mention, fear of being exposed to possible litigation. Thus, public access to these works is effectively delayed, and this translates into considerable monetary loss for the businessman.

Arts and entertainment works also go through many forms of subsidiary uses. These uses contemplate all varieties of editing in terms of timeframe and content, commercial interruptions, dubbing in foreign

²²³ Newman, *supra*. See Footnote 43.

²²⁴ D' Amato and Long, *supra*. See Footnote 62.

languages and the like.²²⁵ Several instances of formatting works – music, films, and television – occur from one country to another.²²⁶ The business sector claims that any significant limit upon the ability of producers and publishers to disseminate works in secondary markets runs a substantial risk of chilling investment in the arts and entertainment fields.²²⁷ For them, the concept of moral rights of performers signifies the crucial difference between a losing business and a profitable venture.

Strong moral rights oppositionists, lead by associations of producers, fear that the introduction of moral rights will unsettle the network of contractual agreements that have been developed over many years in the various industries and that appear on the whole to be working quite successfully and fairly.²²⁸ This self-serving statement is even bolstered by the threat to reduce the financial support for innovative creative endeavour once moral rights are declared to be waivable or inalienable. Under the guise of serving public interest, they claim that moral rights will only prevent the dissemination of a host of cultural and entertainment materials that are affordable.

This interpretation of moral rights is undoubtedly misguided and false. Moral rights do not hinder the ability of the producer to disseminate the work. The concept does not even prevent modifications or alterations to performances. The essence of moral rights is the preservation of the good name and reputation of the performer. That is why only those mutilations that are prejudicial to the performer are prohibited. If the change is necessary to the betterment of the performance, no self-respecting performer will dare refuse such change. But without moral rights, the producer may choose to do whatever he pleases with the work, even if the modification tramples on the performer's dignity. In this material world, the successful achievement in sales and market share may be a valid motivation. Yet it should not be so, if the manner adopted to achieve it forces the performer to sacrifice his personal integrity and reputation.

5.8.2 Additional Costs Incurred

In a long established industry where no moral rights previously exist, the incorporation of new rights only means one thing – additional expenses. In one way or another, traditional modes of operations will have to be modified or perhaps discontinued, in order to accommodate the new rights. There would also be costs for users in defending actions brought by performers for infringement of their moral rights, and in payment of damages resulting from successful actions, as well as those which might

²²⁵ *Ibid.*

²²⁶ Newman, *supra*. See Footnote 43.

²²⁷ D' Amato and Long, *supra*. See Footnote 62.

²²⁸ *Ibid.*

arise from insurance against litigation or claims for damages.²²⁹

For the right of attribution, further costs are anticipated in identifying performers if the practice is not to do so at present. For example, radio stations see moral rights are problematic because if they will be required to credit all the performers of every music piece they play, the enormous encroachment on valuable airtime would only impede programming and, at a minimum, irritate listeners.²³⁰ As to integrity rights, additional expenses might be incurred in the process of securing the consent of every performer to any possibly derogatory change done on the performance. This expense might not be anticipated when the budget for the project was initially prepared.

5.8.3 Threat of Possible Litigation

The business sector feels that upon the introduction of moral rights, it will not be long until the system, which developed from years and years of experience, will be disrupted. Editors and other users are required to be extra careful in handling performances especially because certain alterations are vulnerable to objections by performers. The prospect of litigating the highly subjective and volatile issues of what constitutes a moral rights violation is daunting.²³¹ Hence they say, that not only will they face the risk of losing money, but also, they lose valuable time, which otherwise can be devoted to other 'more fruitful' endeavours.

However, at present, even in countries with explicit moral rights provisions for performers, the number of actual moral rights infringement cases is noticeably few. Unfortunately, hardly any performer takes legal action against broadcasters – not because they do not care, but because a lawsuit is always inconvenient and can also be very costly in terms of time and money.²³² Therefore, the fear presented from the side of producers is at this time, immature and unfounded. If there exists a good performer-producer relationship, there is no sufficient cause for alarm. Violations of moral rights only arise if the producer or user of the performance refuse to respect the integrity and personal worth of the performer.

5.8.4 Businessman's Dilemma

Indeed, it is not doctrinally accurate to imply that moral rights interrupt the normal course of business particularly in the distribution and dissemination stage of audio and audiovisual works. Moral rights belong

²²⁹ Copyright Directorate of the Patent Office, *supra*. See Footnote 32.

²³⁰ Anthony D' Amato and Doris Estelle Long, eds. *International Intellectual Property Law*, Kluwer (Great Britain, 1997), pp. 148.

²³¹ D' Amato and Long, *supra*. See Footnote 62.

²³² As viewed from the website of The Swedish Joint Committee for Artistic and Literary Professionals (KLYS), <<http://www.klys.se/2003/03-06-11-brev-europ-org-reklamavbrott.htm>>

to the performer as a guarantee of respect for his name and reputation. For authors, Steven Spielberg has already pledged to make Dreamworks contracts reflect moral rights, concurring with creators who want to know in what ways their work is being contextualized and packaged, and he also believes the public will support that practice.²³³ This may be a commendable move, but whether or not the same benefit will be carried on and shared by performers is still unclear. It is worth repeating that performers shall have the right to be identified with their work, as well as to have their work exhibited in the form in which it was originally created.²³⁴ Despite limitations and weaknesses of its own, international intellectual property law has already laid the foundation for this.

Moral rights are sometimes doubted as being "disguised economic rights" rather than personal rights.²³⁵ This is because moral rights protection will enhance the bargaining power of the performers. The reality is that moral rights may be used for economic reasons and economic rights may be utilised in circumstances where personal interests are at risk.²³⁶ Since there are several jurisdictions, which do not accord moral rights to its performers, then both economic and moral rights can help each other for the performer's benefit. After all, a good reputation is a predicate of economic success.²³⁷ However, performers cannot be misjudged as invoking moral rights only to gain financial advantage. For many committed artists, their reputation and integrity are more important than material wealth.

The ethos of *droit moral* may be thought to encourage the creation of works of high moral value, though limited popular appeal.²³⁸ In France, greater importance is given to a strong *droit moral* system as compared to an economically sound mass-market entertainment with little creative element. Ultimately, the support nobly given by the moral rights policy to the performers will produce fervent cultural benefits. Anyhow, the economic consequences of the introduction of moral rights are merely temporary.

The principle of "truth in marketing legislation," has been applied to authors. This argument asserts that the public is entitled to know who is the author of a work, not to be subject to false attribution and to have the work in the form the author intended it to reach his or her public.²³⁹ Accordingly, this may also apply to performers. The concept of moral rights implies that the public cannot be deceived, and they deserve to know who are the people behind a performance. Likewise, the public must not be deprived of access to the original performance, which the

²³³ Hedlund, *supra*. See Footnote 84.

²³⁴ KYLS, *supra*. See Footnote 232.

²³⁵ Wyburn, *supra*. See Footnote 9.

²³⁶ Quoting Dietz in Wyburn, *supra*. See Footnote 9.

²³⁷ Frederick Abbott, Thomas Cottier and Francis Gurry, *The International Intellectual Property System: Commentary and Materials, Part One* (Kluwer, 1999), p. 1102.

²³⁸ Newman, *supra*. See Footnote 43.

²³⁹ Wyburn, *supra*. See Footnote 9.

performer whole-heartedly intended to share with them.

6 Conclusion and Prospects for Development

6.1 Towards a Workable Moral Rights Scheme

Moral rights safeguard the personality of the performer as reflected through his performance. An artist does more than bring into the world a unique object having only exploitative possibilities; he projects onto the work part of his personality and subjects it to the ravages of public use.²⁴⁰ The performer grooms his talents to build up a name and reputation worthy of every respect. Any form of injury inflicted on his performance affects not only his economic interests, but more importantly his integrity as an artist.

Several states have already acknowledged the crucial role of performers not only as agents of cultural development, but also as significant players in the business community. Advertising, promotions, arts, entertainment, and recreation, are only some of the key industries that engage the services of performers. Thus, different domestic protection set-ups were introduced specifically addressing the rights of performers. However, there are yet many aspects of performer's rights protection, which need to be addressed and improved. Extremely urgent, but still controversial, is the issue of moral rights of performers.

So far, domestic solutions to this issue are very varied. Industry practice goes from way back, and there has been evident tolerance with existing contractual and private transactional arrangements, whereby copyright laws continuously refuse to intrude. The current state of local protection is truly complex considering that even within one jurisdiction, different approaches have been adopted in relation to different categories of copyright works and different uses of those works. The magnitude of the complication cannot be underestimated.

There are only two basic moral rights, attribution and integrity, required by international intellectual property law. These two rights are likewise mandated for authors by Article 6bis of the Berne Convention. However, it seems that authors and other creators enjoy more benefits than performers. In most cases, the performer's moral rights are weaker than the author's, and are subject to conditions, such as contractual arrangements to the contrary and specifications related to the normal operation of the market.²⁴¹ "Weaker" in the sense that when a choice

²⁴⁰ Kenneth P. Norwick and Jerry Simon Chasen, *The Rights of Authors, Artists, and other Creative People: The Basic ACLU Guide to Author and Artist Rights*. Second Edition. Illinois (1992), p. 48.

²⁴¹ WIPO Secretariat, *Survey on National Protection of Audiovisual Performances*, Ad Hoc Informal Meeting on the Protection of Audiovisual Performances, Geneva (November 6

has to be made in case of a clash between the moral rights of the author and that of the performer, the natural tendency is to recognize the primacy of the former, as the original creator of the work. Meager attention is given to the view that the performance per se is a new creation, and the performer is likewise a creator in his own right. Performers, whose personal contribution is essential, are the closest neighbors of authors, so close indeed that the question has arisen in the past of protecting their performances as original works derived from the preexisting work.²⁴²

Many countries, lead by the United States, refuse any more meaningful moral rights protection to performers. Some experts suspect that these nations chronically resist providing additional protection for moral rights because they have not yet figured out how to offer such protection without hindering the transferability of creative products, especially in the case of the United States.²⁴³ Certain jurisdictions have been accustomed to very detailed and complex practices that the introduction of new rights is feared to only lead to a distortion of such practices. In the music industry for instance, the near-traditional industry-wide arrangements regarding the collective licensing of the economic rights may possibly be disturbed by the incorporation of moral rights for performers. Despite the acquired licenses, moral rights are suspected to produce a significant level of uncertainty in business.

The imagined business implications of moral rights may appear to be tremendously hyped. The paranoia of the business sector may largely be attributed to the manifest gaps in the existing international copyright legislation. For one, the scope of the rights of attribution and integrity is by and large, uncertain. The rights are not absolute and there are indeed legitimate exceptions to the exercise of such rights. In a number of instances, moral rights can even be waived. But when and how will the exceptions apply, and when will it be reasonable to waive the rights is quite ambiguous. Critics already say that arriving at a common set of legal standards is politically impossible.

At this point in time, domestic tribunals apply the new rights against the background of a broad framework, courtesy of the only existing international agreement providing for moral rights of performers, the WPPT. This is of course undertaken without the comforts of a locally developed jurisprudence. The courts are nevertheless free to consult the case law of other jurisdictions, but the fact that legislative policies and mechanisms for moral rights differ from one country to another should not be discounted.

and 7, 2003), as viewed from the WIPO website

<http://www.wipo.int/documents/en/meetings/2003/avp_im/pdf/avp_im_03_2.pdf>

²⁴² Jane C. Ginsburg, Morton L. Janklow, and Mr. André Lucas, *Study on the Transfer of the Rights of Performers to Producers of Audiovisual Fixations – Multilateral Instruments; United States of America and France*, Ad Hoc Informal Meeting on the Protection of Audiovisual Performances (Geneva, November 2003), as viewed from the WIPO website, <http://www.wipo.int/documents/en/meetings/2003/avp_im/pdf/avp_im_03_4.pdf>

²⁴³ Levy, *supra*. See Footnote 164.

It would be best for local systems to develop a code of practice for both moral rights. However, this would be difficult for those industries, which have already developed their own systems. Especially with regard to the right of integrity, where a myriad of individual perceptions are possible as to what kind of alterations are allowed so that the resulting effect on the performance will not harm the reputation of the performer. At any rate, a consensus will have to be reached. This calls for a workable scheme of moral rights protection, whereby all the interests affected will be served fairly. The needs of the creators, performers, industry, as well as the community must be balanced, in order to arrive at a realistic win-win paradigm.

A laudable recommendation is to look at moral rights from the human rights perspective. The existing domestic systems are often erratic and insufficient in terms of moral rights protection for performers. This is probably because the focus of the conservative intellectual property policy is on the economic rights of performers. The concern of moral rights is centered on the preservation of the performer's artistic integrity as well as acknowledgement of his individual identity. Fundamentally, moral rights laws seek to vindicate damage to the human spirit, an interest that transcends the artist's concern for property or even reputation.²⁴⁴ This is precisely what human rights is all about.

6.2 Developments in International Law

Today, the minimum required by WPPT covers only moral rights with respect to live audio performances and sound recordings. A WIPO survey reveals that the legislations of 35 countries provide protection for the rights of performers. From this number, moral rights provisions appear in the legislation of 30 countries.²⁴⁵ In another study, it was shown that in 76 member states, legislations reflect that performers enjoy, to some extent, moral rights in respect of their fixed audiovisual performances.²⁴⁶

In the global context, it would completely be illogical not to have a moral rights scheme, which operates across all the categories of performances. The protection and development of rights of audiovisual performers remain to be an idea which is not enforceable, or at most, optional and discretionary. Political pressures and selfish cultural and economic concerns all contributed to the exclusion of provisions that would have guaranteed audiovisual performers minimum standards of

²⁴⁴ Kwall, *supra*. See Footnote 197.

²⁴⁵ WIPO Secretariat, *Survey on the Implementation Provisions of the WCT and the WPPT, Standing Committee on Copyright and Related Rights (Ninth Session)*, Geneva (June 23 to 27, 2003), as viewed from the WIPO website,

<http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_6.pdf>

²⁴⁶ WIPO Secretariat, *Survey on National Protection of Audiovisual Performances*, Ad Hoc Informal Meeting on the Protection of Audiovisual Performances, Geneva (November 6 and 7, 2003), as viewed from the WIPO website

<http://www.wipo.int/documents/en/meetings/2003/avp_im/pdf/avp_im_03_2.pdf>

international protection that were already afforded to audio performers.²⁴⁷ In most cases states adhere to the *laissez faire* concept. This means absolute freedom is given to the parties to define the nature and scope of the obligations they will assume, as well as the benefits they will receive from the exploitation and use of a particular audiovisual fixation. A situation like this has been practically seen by many to be oppressive since the performers are usually waiving their moral rights, which are supposed to be non-assignable and personal to them. Since the domestic protection systems will never be an adequate substitute for a full moral rights provision, the international legal community will have to treat this issue as a matter of priority and urgency.

6.2.1 Activities under the Auspices of WIPO

The possible formulation of provisions concerning audiovisual performances has been discussed for the last ten years or so, under the auspices of WIPO. The Diplomatic Conference on the Protection of Audiovisual Performances²⁴⁸ failed to conclude the WIPO Audiovisual Performances Treaty (WAPT), because two factions of states cannot agree on the best solution dealing with issue of transfer of economic rights from performers to producers. Nevertheless, constructive talks on the prospects of the adoption of an international instrument for protecting the rights of audiovisual performers must still continue.²⁴⁹ During the Diplomatic Conference, provisional agreement was unanimously reached on the articles concerning national treatment, moral rights, and economic rights covering the right of reproduction, right of distribution, right of rental, and the right of broadcasting and communication to the public. It will be the first time that audiovisual performers will be accorded recognition of their moral rights against any distortion or modification of their performances which would be prejudicial to their reputations.²⁵⁰

6.2.2 Call for Proper Balance

At a time when many organisations are trying to promote international projects, different moral rights assumptions can pose a danger to cross-

²⁴⁷ Bernard, *supra*. See Footnote 5.

²⁴⁸ The Conference was held in Geneva on December 7 to 20, 2000, under the auspices of WIPO.

²⁴⁹ An *Ad hoc* Informal Meeting on the Protection of Audiovisual Performances will be conducted in Geneva on November 6 and 7, 2003 to deal with this precise matter, and hopefully that meeting will finally bring forth the solution which will successfully end this pending controversy. Source: *Announcements*, viewed from the WIPO website <http://www.wipo.int/documents/en/meetings/2003/avp_im/index.htm>

²⁵⁰ WIPO, *Member-States Keep Up Momentum for Performers' Rights*, WIPO Press Release PR/2002/327, Geneva (27 September 2002), as viewed from the WIPO website <<http://www.wipo.int/pressroom/en/releases/2002/p327.htm>>

cultural cooperation.²⁵¹ Considerable discrepancies lie among the moral rights legislation of member states, especially between the USA and Western Europe. In the effort to balance the conflicting interests as affected by the incorporation and observance of performer's moral rights, international human rights treaties must be consulted. On one hand, the copyright industries are concerned that moral rights may unduly interrupt their current commercial arrangements. Performers, on the other hand, fear that their artistic integrity and reputation may be sacrificed if they do not have any legal security for their moral rights. It is likewise imperative that the interest of the public be emphasised in line with community goals, such as cultural sovereignty, democracy, and the exercise of fundamental freedoms. Harmonisation can best be achieved if all the interests involved in the regulation of moral rights are served and respected.

6.2.3 Role of Performers Organizations

Coalitions of European artists are now joining with U.S. groups such as the Director's Guild of America, American Cinema Editors, the Screen Actors Guild, the Society of Composers and Lyricists, the Artists Rights Foundation, American Society of Media Photographers, the Author's Guild and the National Writers Union (NWU) to discuss and to educate the public on moral rights issues.²⁵² Indeed, the louder the better. Unions of performers should continue their active fight for recognition of their moral rights. Cross-media contract standards must point toward compliance with rights of paternity and integrity of performers.

Performers organisations may undertake monitoring of observance of moral rights by the permitted users of performances. In the United States for example, the Screen Actor's Guild (SAG) represents audiovisual performers collectively.²⁵³ The SAG Basic Agreement provides the minimum requirements for producers to credit performers, coupled with remedies, including liquidated damages and correction of prints, if such requirements are not met. Also, if a performer waives in favour of the producer any term under that Agreement, including those dealing with screen credit, the waiver will not become effective unless the SAG gives its consent.²⁵⁴ Likewise, these organisations can serve as legal advocates, and participate in judicial and quasi-judicial proceedings as a credible voice of performers. In a recent case, the SAG filed an *amicus*

²⁵¹ Michael Seadle, *Copyright in the Networked World: Moral Rights*, Library Hi-Tech, Volume 20, Number 1, pp. 124-127.

²⁵² Hedlund, *supra*. See Footnote 84.

²⁵³ Bernard, *supra*. See Footnote 5.

²⁵⁴ SAG Basic Agreement, Clauses 25 and 11 (c), Source: Jane C. Ginsburg, Morton L. Janklow, and Mr. André Lucas, *Study on the Transfer of the Rights of Performers to Producers of Audiovisual Fixations – Multilateral Instruments; United States of America and France*, Ad Hoc Informal Meeting on the Protection of Audiovisual Performances (Geneva, November 2003), as viewed from the WIPO website, <http://www.wipo.int/documents/en/meetings/2003/avp_im/pdf/avp_im_03_4.pdf>

brief urging the court not to interpret the Lanham Act in a manner inconsistent with the country's international obligations regarding moral rights.²⁵⁵

6.3 In Closing

The scarcity of case law on moral rights of performers may lead anyone to surmise either that moral rights are not indispensable, or that the rights are too obvious that there is no need to invoke it before a tribunal. Both are irresponsible assumptions that refuse to recognise the exigencies and importance of moral rights protection not only for the benefit of performers but far and wide, for the intellectual growth of every nation. It is rooted not on the financial rewards that come with the profession, but rather the concept of moral rights is based on a powerfully heightened longing to experience artistic fulfilment brought forth by a good name and reputation as a performer.

Litigation may be rare at the moment probably because the extent of damage in the event of moral rights infringement cannot be easily resolved. This is in complete contrast to economic losses with definite monetary equivalents. It is but a tedious task to quantify concepts like reputation and integrity. Moral rights disputes are actually the legal consequences of emotional reactions aroused by a sense of personal mistreatment. After all, the world's greatest artists are not driven by goals of economic stability, but rather by more intrinsic objectives like eminence and credibility as impeccable envoys of art and talent.

There is encouraging evidence that many countries see moral rights as a valid and useful means of protecting culture.²⁵⁶ The time has come for the international community to explore all possible avenues toward cultural development and intellectual property enhancement. In a vast world of cultural diversity, the challenge lies in the guarantee of moral rights for every performer, not just as rightful possessors of intellectual property, but more significantly, as genuine holders of human rights.

²⁵⁵ On January 23, 2003 the Supreme Court of the USA granted certiorari in *Dastar v. Twentieth Century Fox*. The petitioners have contended that application of the Lanham Act as a source of attribution rights is inappropriate as a matter of trademark law, and conflicts with copyright. Argument in the case was heard on April 2, 2003; a decision is expected by the end of June 2003. Source: *Ibid*.

²⁵⁶ Mira T. Sundara Rajan, *Moral Rights and Copyright Harmonisation: Prospects for an International Moral Right*, 17th BILETA Annual Conference, Free University, Amsterdam (April 5-6, 2002), as viewed from the BILETA website <<http://www.bileta.ac.uk/02papers/sundarajan.html>>

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