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Are We Serious About Performers' Rights?

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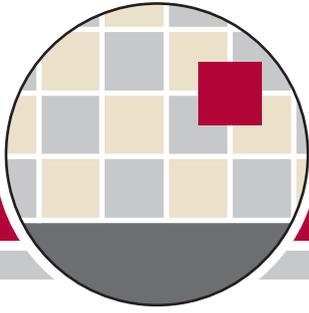
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Are We Serious About Performers' Rights?

*Mary LaFrance**

INTRODUCTION

Do performers have rights in the expressive works they help to create? Historically, the rights of performers have received far less attention than the rights of traditional authors. The law has been reluctant to recognize performers as authors and, to the extent that performers' rights are recognized, they are secondary to, and more limited than, the rights of traditional authors. Recent developments, however, have brought performers' intellectual property rights to the forefront. For a number of reasons, performers in the United States have increasingly begun to assert authorship rights in the works they help to create. In addition, recent international treaties to which the United States is a signatory have set minimum standards for the protection of performers' rights, separate from rights of authorship. Because of these developments, Congress and the courts will soon face greater pressure to clarify the rights that performers enjoy in the products of their creative efforts. It is not clear, however, whether they will be up to the task.

I. PERFORMERS' INTELLECTUAL PROPERTY RIGHTS UNDER DOMESTIC LAW

A. Performers as Performers

Currently, domestic law provides only limited protection for performers' creative rights. In most states, privacy or right of publicity laws give individuals the right to object to any unauthorized commercialization of their identity. In their contracts with producers, professional entertainers routinely grant broad waivers of this right, which limits their right to object to the way in which their performance is presented to the public.

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Neither state nor federal law provides formal protection for the moral rights of performers. Because the federal moral rights statute applies only to certain types of pictorial, graphic, and sculptural works,¹ it does not address performance-based works such as sound recordings and motion pictures.

Section 43(a) of the Lanham Act,² which creates a federal cause of action for false designation of the origin of goods or services, provides the closest approximation to the moral rights of attribution and integrity for performers.³ The most famous example of this application of section 43(a) is *Gilliam v. American Broadcasting Cos.*,⁴ where the Monty Python comedy troupe successfully sued ABC for unauthorized editing of its television program. Monty Python, expressly retaining creative control in its contracts, sued in two capacities: as copyright owner and as a group of performers⁵. Rarely do performers pursue section 43(a) claims purely in their capacity as performers, and when they do, the claim is usually based on a misrepresentation other than an actual alteration of their performance.⁵ In contemporary contracts for recorded entertainment, performers are generally required to waive their moral rights as well as any similar legal rights.⁶ Thus, even if they object to the way in which they are portrayed in the finished work, most performers will have no cause of action for the violation of their moral rights.⁷

The only federal laws that specifically address performers' creative rights are (1) the 1994 anti-bootlegging provision codified as section 1101 of the copyright statutes,⁸ and (2) the section 114 statutory license for digital music transmissions.⁹ Section 1101 allows performers engaging in a "live musical performance" to obtain copyright infringement remedies against anyone who, without their consent, (1) makes an aural or audiovisual recording of the performance, (2) communicates to the public the sounds, or sounds and images, of the performance,

1. The Visual Artists Rights Act (VARA), codified at 17 U.S.C. § 106A (2012), applies only to "works of visual art" as defined in 17 U.S.C. § 101 (2012).

2. 15 U.S.C. § 1125(a) (2012).

3. State unfair competition laws may, in some cases, provide comparable protection.

4. 538 F.2d 14 (2d Cir. 1976).

5. See, e.g., *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) (film actor's successful 43(a) claim against distributor that replaced his name with a completely different name in film credits and advertising); *Rich v. RCA Corp.*, 390 F. Supp. 530 (S.D.N.Y. 1975) (singer's successful 43(a) claim against record company that released his old recordings with a current picture of him)

6. In one case, *Autry v. Republic Prods.*, 213 F.2d 667 (9th Cir. 1954), an actor brought a 43(a) claim because he objected to the editing of his film for insertion of commercial advertising. The court rejected his claim, finding that the editing fell within the scope of the license he granted to the producer, but it left open the possibility that such a claim might succeed if the editing were to "so alter or emasculate the motion pictures as to render them substantially different from the product which the artist produced." *Smith*, 648 F.2d at 670. Performers' contracts today typically include broader waivers than those at issue in *Autry*.

7. These waivers will not necessarily be respected outside of the United States. See, e.g., *Turner Entm't Co. v. Huston*, Cour d'appel [CA] [regional court of appeal] Versailles, civ. ch., Dec. 19, 1994, ENT. L. REP., 3 (Fr.).

8. 17 U.S.C. § 1101 (2012). The corresponding criminal provision is 18 U.S.C. § 2319A (2012).

9. 17 U.S.C. §§ 114(f), (g)(2) (2012).

or (3) traffics in unauthorized recordings of the performance.¹⁰ Section 114 establishes a limited right to public performance royalties for recording artists.¹¹

Other than these sources of legal protection, performers' economic and moral rights in the works they help to create depend almost entirely on the contracts they negotiate with producers.¹² Due to their relatively weak bargaining positions, most performers are unable to obtain significant rights beyond the minimums guaranteed by collective bargaining agreements. For non-union performers, even these minimum protections are unavailable.

B. Performers as Authors

If performers lack intellectual property rights in their capacity as performers, can they obtain such rights by making authorship claims? In the domestic recording industry, producers have generally been able to exclude authors and secure sole authorship of their works. However, this may be changing.

For decades, large businesses dominated the recorded entertainment industries in the United States because production and distribution costs, and the risk of failure, were high. Producers needed significant borrowing power to finance their productions, plus a large pipeline of products to serve as loan collateral in order to ensure that there would be enough hits to balance out the flops. Sound recordings, while less expensive than films, still required large expenditures for recording studios, marketing, and tour support.

Because creative and financial control over recorded entertainment was vested in large businesses that incurred significant financial risks, these businesses sought maximum legal control over their products. This had the effect of squeezing out almost any consideration of performers' rights.

The legal mechanism that made it possible for producers of recorded entertainment to obtain complete control over their creative products was the "work made for hire" doctrine. If a work was created as a "work made for hire," then the individual performers (and other contributors) had no authorship claims. For decades, film studios and record companies have incorporated the "work made for hire" doctrine into their contracts with creative participants in order to ensure that the latter enjoy no rights of authorship. First codified in the Copyright Act of 1909, the doctrine was retained and revised in the Copyright Act of 1976. Producers prefer to use "work made for hire" contracts rather than obtain copyright assignments from performers because copyright assignments are subject to termination, while works made for

10. 17 U.S.C. § 1101(a)(1)-(3) (2012).

11. When sound recordings are publicly performed by certain digital transmission services such as satellite radio or non-interactive Internet streaming (e.g., Pandora), the performers on those recordings are entitled to receive a statutory royalty. 17 U.S.C. §§ 114(f), (g)(2).

12. Some of those contractual rights, such as the right to receive residual payments, arise from collective bargaining agreements in the case of unionized performers. *See, e.g.*, 2005 Screen Actors' Guild Basic Agreement, § 5.

hire are not.¹³

Under the 1976 Act, an employer is the author of *any* copyrightable work created by employees acting within the scope of their employment. In contrast, in the case of works specially commissioned from independent contractors, the hiring party is the author only if (1) the contractor signs a written instrument stating that the work is made for hire, and (2) the subject matter falls within certain listed categories of copyrightable works. The listed categories expressly include contributions to motion pictures, but there is no mention of sound recordings. Despite this omission, record studios continued to register their recordings as works made for hire under the 1976 Act, just as they had done under the 1909 Act, either assuming or hoping that they were still protected by the amended statute. From 1989 through the late 1990s, however, a series of court rulings cast doubt on the record companies' assumption that they were the sole authors of the recordings they produced.¹⁴ After a disastrous attempt to amend the copyright statutes retroactively to ensure that sound recordings would qualify as works made for hire,¹⁵ the record companies entered a waiting period, which continues to this day, during which the authorship of their sound recordings remains unsettled. If courts decide that the record companies are not the sole authors of their sound recordings, then the recording artists are probably joint authors. As joint authors, they will eventually have the right to terminate their grants to the record companies, and reclaim their copyrights.¹⁶

Today, the production of films and sound recordings no longer requires the involvement of major studios. Advances in recording and distribution technology make it possible for smaller entrepreneurs, and even individual artists, to produce and disseminate recorded entertainment at a much lower cost. In the music industry, readily accessible computer technology makes recording, mixing, editing, and distribution cheaper than ever before. In the film industry, digital recording equipment has replaced more expensive film and camera equipment and

13. Authors can terminate copyright assignments and licenses under 17 U.S.C. §§ 203 and 304(c). Until 2005, another distinction was that the copyright owner of a work made for hire owned the renewal term outright; in the case of other works, the assignee of the copyright could lose the renewal term to the author's statutory heirs. 17 U.S.C. § 304 (a)(1)(B)-(C) (2012); *Stewart v. Abend*, 495 U.S. 207 (1990); *Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc.*, 99 U.S.P.Q.2d 1735, 2010 WL 3564258 (S.D.N.Y. 2010).

14. In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), the Supreme Court held that the question of whether an artist is an employee or an independent contractor for purposes of the "work made for hire" analysis depends on a multi-factor test based on the common law of agency. This was a more stringent standard than courts had applied under the Copyright Act of 1909. In the 1990s, several courts held that sound recordings created by independent contractors also did not qualify as works made for hire. See *Lulirama, Ltd. v. Access Broad. Servs., Inc.*, 128 F.3d 872, 878 (5th Cir. 1997); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999); *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999).

15. At the behest of the Recording Industry Association of America, and without hearings or public debate, Congress enacted a "technical amendment" adding sound recordings to the list of specially-commissioned works eligible for "work made for hire" status. Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113 app. I - S. 1948, 1011(d), 113 Stat. 1501A-521, 1501A-544 (1999) (amending 17 U.S.C. § 101) (repealed 2000). When recording artists protested, Congress repealed the amendment retroactively. Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444.

16. 17 U.S.C. §§ 203, 304 (2012).

processing methods, and amateur videos can be distributed at little or no cost via YouTube and other hosting sites. As a result, collaborative creative efforts can be produced and disseminated without the involvement of traditional studios.

While traditional film studios have generally been fastidious in requiring all creative participants to sign work-made-for-hire contracts, there are occasional lapses that require an analysis of authorship status of creative participants.¹⁷ In the new era of do-it-yourself filmmaking, these lapses may become the rule rather than the exception. Amateur or inexperienced producers of recorded entertainment who lack the legal sophistication of established studios may enter into collaborative creative projects without being well versed in the legal aspects of their undertaking.

Absent a valid work-made-for-hire agreement, under current law, it can be difficult to determine which participants enjoy rights of authorship. This problem can arise in a number of contexts. Recording artists may dispute their record company's claim of sole authorship in their recordings in the context of exercising termination rights. In the case of motion pictures, actors may assert authorship rights in order to share in a film's revenues or exercise creative control.¹⁸

As more performers assert authorship claims, courts will be required to address difficult legal and factual issues. For example, when is an actor or a recording artist considered an "employee" under the work-made-for-hire doctrine? Under the Supreme Court's analysis in *Community for Creative Non-Violence v. Reid* ("*CCNV*"), courts must apply a multi-factor analysis that is highly fact-specific.¹⁹ No single factor is determinative; in addition, the Court implied that the factors are non-exhaustive.²⁰ Thus, the outcome in specific cases will be hard to predict.²¹ It is possible that courts will hold that some actors and recording artists are employees, while others are not.

If a performer is not an employee under *CCNV*, the performer may be a joint author of the

17. *E.g.*, *Aal Muhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000).

18. Other creative participants, such as writers, directors, and designers, could raise authorship claims as well.

19. The Court explained:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

CCNV, 490 U.S. at 751-52.

20. *CCNV*, 490 U.S. at 752.

21. In fact, only a few cases have analyzed employee status after *CCNV*. See *Langman Fabrics v. Graff Californiawear, Inc.*, 160 F.3d 106 (2d Cir. 1998); *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992).

work. The test for joint authorship, however, remains unclear. Courts have developed a variety of tests,²² some of which bear little relationship to the statutory definition,²³ while other courts have not addressed the question at all.

*Garcia v. Google*²⁴ illustrates the difficulties that arise when courts try to assess performers' rights of authorship in a collaborative work. In that case, a film actress who had filmed her scenes without a written contract later objected to the way in which her scenes were exploited, arguing that the producer had misrepresented the nature of the film when they hired her. When the case reached a Ninth Circuit panel the majority treated the actress as the sole author of her "performance," while the dissenting judge argued that she was not an author at all. Although the court may issue a more coherent analysis after a rehearing en banc,²⁵ the disparity between the majority and dissent in the panel opinion suggests that the federal courts are ill-prepared to address the authorship rights of film performers.

More authorship claims by performers can be expected in the future. Recording artists will assert authorship in order to terminate their grants to record companies and reclaim ownership of their copyrights. In addition, as more works of recorded entertainment are created by amateur and inexperienced producers that do not avail themselves of "work made for hire" contracts, more performers will have viable claims of authorship. As *Garcia* illustrates, Congress and the courts have a long way to go in developing legal doctrines to govern the authorship rights of performers.

II. INTERNATIONAL TREATIES ON PERFORMERS' RIGHTS

Compared to treaties addressing authors' rights, international agreements on performers' rights are relatively recent developments. Multilateral agreements on authors' rights have been around since the Berne Convention was signed in 1886.²⁶ In contrast, multilateral treaties did not address performers' rights until 1961, when the Rome Convention was signed.²⁷ The Rome Convention gave performers the right to prevent unauthorized broadcasting and recording of their live performances.²⁸ In the case of sound recordings, performers could also

22. See, e.g., *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004); *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000); *Thomson v. Larson*, 147 F.3d 195, 206 (2d Cir. 1998); *Seshadri v. Kasraian*, 130 F.3d 798 (7th Cir. 1997); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994); *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1991).

23. See Mary LaFrance, *Authorship, Dominance and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193 (2001). Joint works are defined at 17 U.S.C. § 101 (2012).

24. 766 F.3d 929 (9th Cir. 2014).

25. On November 12, 2014, the Ninth Circuit granted Google's petition for a rehearing en banc, 2014 WL 5840553.

26. The Berne Convention for the Protection of Literary and Artistic Property was signed in 1886, although the United States did not join until 1988.

27. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) [hereinafter Rome Convention].

28. Rome Convention, Art. 7.

prevent reproductions of recordings that exceeded the scope of their original consent.²⁹ While the treaty also recognized a performance right in sound recordings, this right was limited to equitable remuneration payable to either the producer or the performers; the allocation was left up to the signatory countries.³⁰ The United States has never joined the Rome Convention, because it has not yet enacted a general performance right in sound recordings.

It took more than three decades and three treaties for international law to recognize performers' rights more broadly. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was signed in 1994,³¹ the WIPO Performances and Phonograms Treaty (WPPT) in 1996,³² and, most recently, the Beijing Treaty on Audiovisual Performances in 2012,³³ While TRIPS and WPPT have entered into force, the Beijing Treaty awaits ratification.

As discussed below, these agreements require signatory nations to grant a broad array of economic and moral rights to performers. With one exception, however, the United States has not implemented any of these rights in domestic law.

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

The first time that the United States committed itself to recognize performers' rights was in the 1994 TRIPS Agreement. Article 14(1) of TRIPS requires signatories to recognize performers' rights to prevent the unauthorized recording of their live performances in “phonograms” as well as any reproductions of those unauthorized recordings. Because the term phonogram refers only to sound recordings, Article 14(1) does not address audiovisual recordings. Article 14(1) also addresses certain public performance rights, requiring signatories to allow performers to prevent unauthorized wireless broadcasts and other transmissions of their live performances to the public. Article 14(4) calls for signatory countries to grant commercial rental rights—at a minimum, equitable remuneration—to “right holders in phonograms” as determined by domestic law. Article 14(5) requires these protections to last for at least 50 years.

Although Article 14 refers to phonograms, its scope is not limited to musical performances. Some phonograms are recordings of spoken-word performances. In addition, the prohibition against unauthorized broadcasts of live performances does not specify that the performances

29. *Id.* at Arts. 7, 19.

30. *Id.* at Art. 12.

31. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

32. WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203, S. Treaty Doc. No. 105-17 (1997); 36 I.L.M. 76 (1997) [hereinafter WPPT].

33. Beijing Treaty on Audiovisual Performances, World Intellectual Property Organization, June 24, 2012, AVP/DC/20 [hereinafter Beijing Treaty], available at http://www.wipo.int/treaties/en/text.jsp?file_id=295837.

must involve music. Nonetheless, when the Congress implemented Article 14 in the Uruguay Round Agreements Act of 1994, which added section 1101 to the copyright statutes, it recognized performers' rights only with respect to live *musical* performances.³⁴

B. WIPO Performances and Phonograms Treaty (WPPT)

When the United States signed WPPT in 1996, it agreed to recognize a much broader array of performers' rights. WPPT encompasses both moral and economic rights. Many of its provisions, however, apply only to performers on sound recordings.

Article 5 addresses moral rights. Specifically, it requires signatories to protect performers' moral rights of attribution and integrity with respect to their "live aural performances" and their "performances fixed in phonograms." These rights are inalienable. However, the attribution right does not apply where omission of the performer's name "is dictated by the manner of the use of the performance."³⁵

Articles 6-10 of WPPT grant performers a strong bundle of economic rights. Article 6 gives performers the exclusive right to authorize the fixation and public communication of their performances.³⁶ In contrast, Articles 7-10 apply only to phonograms. Article 7 gives performers the exclusive right to reproduce phonograms of their performances.³⁷ Article 8 gives them the exclusive right to make copies of those phonograms available to the public through sale or other transfer of ownership,³⁸ and Article 10 extends the making available right to wired and wireless transmissions that enable the public to access the work.³⁹ Article 9 gives performers the exclusive right to authorize commercial rentals of their phonograms.⁴⁰

Article 15 creates a right for both performers and producers of sound recordings to receive "equitable remuneration" for the broadcasting or public performance of their commercially-released recordings.⁴¹ However, individual signatories are free to opt out of this provision entirely.⁴² Alternatively, they can determine whether the remuneration can be claimed by the

34. 17 U.S.C. § 1101(a)(1)-(2). Congress exceeded the TRIPS requirements in one respect: By failing to specify the duration of protection under § 1101, it appears to have made these rights perpetual.

35. WPPT, *supra* note 32, Art. 5(1).

36. The fixation right is not expressly limited to phonograms or aural performances, and thus it may also extend to audiovisual fixations. The definition of treaty beneficiaries does not resolve the uncertainty, referring to "performers and producers of phonograms." Art. 3(1), WPPT, *supra* note 32. This ambiguity has also been noted by the Association of European Performers' Organizations (AEPO). See AEPO-ARTIS, The WIPO Performances and Phonograms Treaty of 20 December 1996, available at http://www.aepo-artis.org/pages/138_1.html.

37. WPPT, *supra* note 32, Art. 7.

38. WPPT, *supra* note 32, Art. 8(1).

39. WPPT, *supra* note 32, Art. 10.

40. WPPT, *supra* note 32, Art. 9(1).

41. WPPT, *supra* note 32, Art. 15(1).

42. WPPT, *supra* note 32, Art. 15(3).

performers or the producer, or how it is to be allocated between them.⁴³

WPPT also contains some contradictory provisions. Articles 6-10 purport to give performers the “exclusive” rights of reproduction, distribution, commercial rental, and making their performances available by wire or wireless means.⁴⁴ Yet Articles 11-14 purport to give these same “exclusive” rights to producers.⁴⁵ It is simply not possible for both parties to have exclusive rights. Perhaps the drafters fully expected that performers’ rights would be assigned or waived in the majority of cases. However, that expectation is not expressed anywhere in the Treaty or Agreed Statements. Article 1 states that performers’ rights must not “prejudice[e]” copyright,⁴⁶ and the Agreed Statement in footnote 1 observes that “[w]here authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa.”⁴⁷ In other words, one group of rights holders could prevent the other group from exploiting the work. Individual signatory countries will have to find their own solutions for this dilemma, perhaps through a presumptive transfer of performers’ rights to producers.

Despite the commitments the United States made in joining WPPT, the treaty has had no effect on performers’ rights under domestic law. For instance, as was true prior to the WPPT, recording artists can assert rights of attribution and integrity over their recorded material only if they reserve these rights in their contracts with producers. While recording contracts typically call for performers to be credited on their recordings, certain forms of exploitation may be excluded. Similar limits apply to integrity rights; because the record company owns the copyright in the recording, typically, a performer can prevent alteration of the work only by negotiating for this right in the recording contract.⁴⁸ As for the other rights addressed in WPPT, the Article 6 rights are to some extent protected by section 1101 as well as domestic privacy and publicity laws (although some states may limit these protections to commercial exploitations). Performers rarely have the opportunity to exercise the economic rights in Articles 7-10. In contrast to moral rights, these economic rights are fully alienable. As a result, while performers initially possess these rights under domestic law, they are routinely expected to grant these rights to record producers in their recording contracts.

C. Beijing Treaty on Audiovisual Performances

The 2012 Beijing Treaty is WPPT’s counterpart for performers in audiovisual works, addressing both moral and economic rights. In contrast to WPPT, however, the rights granted in

43. WPPT, *supra* note 32, Art. 15(2).

44. WPPT, *supra* note 32, Arts. 6-10.

45. WPPT, *supra* note 32, Arts. 7-11.

46. WPPT, *supra* note 32, Art. 1.

47. WPPT, *supra* note 32, Art. 1(2), n. 1, Agreed Statement Concerning Art. 1(2).

48. While some performers might be able to object to alterations in their works under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), this strategy works only if they retained this right in their contracts.

the Beijing Treaty are subject to more exceptions. The Beijing Treaty will not enter into force until it is ratified by at least 30 signatories.⁴⁹

Article 6, concerning fixation and transmission of live performances, is identical to Article 6 of WPPT. In order to implement this provision, Congress will have to expand the scope of section 1101 to include non-musical performances. Until Congress does so, non-musical performers can rely only on state privacy and publicity laws for protection. If the bootlegging or unauthorized transmission is not done for commercial gain, however, the performer may have no recourse at all under the laws of some states.

Article 5 provides that audiovisual performers have inalienable rights of attribution and integrity. As in WPPT, the attribution right does not apply “where omission is dictated by the manner of the use of the performance.” Unlike WPPT, however, Beijing limits the integrity right as well, by “taking due account of the nature of audiovisual fixations.” The meaning of this ambiguous limitation is somewhat clarified by the “Agreed Statement Concerning Article 5”:

[C]onsidering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer’s reputation in a substantial way. It is also understood that the mere use of new or changed technology or media, as such, does not amount to modification within the meaning of Article 5(1)(ii).⁵⁰

Although the Article 5 rights are inalienable, Beijing does not say they are unwaivable. Moral rights waivers are already commonplace in the United States film and television industries, and this practice will not change under Beijing.

The Beijing treaty addresses the economic rights of audiovisual performers in Articles 7-10 (reproduction, distribution, making available, and rental rights), which largely parallel their counterparts in WPPT. These rights are fully alienable in the United States, and performers routinely surrender them to producers in their employment contracts.

Article 11 of the Beijing Treaty purports to give audiovisual performers an exclusive public performance right, but implementation is entirely optional. Signatories are free to limit the right or to deny it altogether.

All of the economic rights contained in Articles 7-11 are subject to one additional proviso: Not only are they fully alienable, but also, signatories are expressly permitted to adopt legisla-

49. Beijing Treaty, *supra* note 33, Art. 26.

50. Beijing Treaty, *supra* note 33, Art. 5(3), n. 1.

tion that automatically transfers ownership of these rights to the producer once the performer consents to fixation.⁵¹ Although the Beijing Treaty, like WPPT, grants conflicting “exclusive” rights to performers and producers, by choosing the presumptive transfer option, signatories can eliminate this conflict by, in effect, eliminating the performers’ economic rights. Presumptive transfers, however, do not apply to moral rights, which remain inalienable.

D. Complying with Performers’ Rights Treaties

Congress enacted section 1101 in response to the TRIPS Agreement, but has taken no action to implement WPPT and the Beijing Treaty. For example, there are no moral rights provisions for performers and the copyright statutes still grant exclusive economic rights only to authors.⁵² Compliance with Beijing is not yet mandatory, because that treaty has not yet entered into force. However, the noncompliance with WPPT raises the question whether the United States in fact intends to recognize the performers’ rights it has imposed on itself and its fellow signatories. Of the three agreements, only TRIPS contains enforcement provisions.⁵³

If the United States is to take performers’ rights seriously under WPPT and Beijing, Congress will have to take action. Although the requirements of these treaties are relatively weak, implementation will require amending the copyright statutes in several respects.

Both WPPT and Beijing grant performers the moral rights of attribution and integrity, as well as the exclusive rights of reproduction, distribution, rental, and making available by wire or wireless means. Yet, apart from the uncertain application of section 43(a), United States law does not recognize moral rights in sound recordings or audiovisual works (either for authors or performers). While these rights may be fully waiveable under the treaties, they are nonetheless inalienable. To comply with the treaties, Congress would have to adopt specific moral rights legislation for performers that is at least comparable to the protections that VARA extends to the authors of works of visual art. In most commercial productions of sound recordings and audiovisual works, performers already routinely waive their moral rights by contract. Absent such a waiver, however, performers should be able to enforce their moral rights. Such a provision, for example, would have been helpful to the plaintiff in *Garcia v. Google*. Yet, if Congress provides moral rights for performers, it could face increased pressure to extend those rights to authors as well. Currently, only the authors of works of visual art enjoy moral rights protection;⁵⁴ no such rights apply to literary, musical, dramatic choreographic, or architectural works, or to sound recordings and audiovisual works. It would be ironic if performers were to receive moral rights protection that is unavailable to most authors. In addition, section 106A currently denies moral rights protection to works of visual art that are created as works made for hire. Because most performers execute work-made-for-

51. Beijing Treaty, *supra* note 33, Art. 12(1).

52. 17 U.S.C. § 106.

53. TRIPS Agreement, *supra* note 31, Part III.

54. 17 U.S.C. § 106A(a).

hire agreements, and others may be employees under the *CCNV* test, if the same works-made-for-hire exception is extended to performers then many of them will be completely excluded from the moral rights protections required by WPPT and Beijing.

With respect to performers' economic rights, exclusive or otherwise, federal law is silent except for the rights afforded to live musical performers under section 1101 and to recording artists under section 114. State laws protecting performers' rights of privacy and publicity may, in many cases, be adequate to protect performers against unauthorized exploitation of their recordings. However, state laws are not uniform; for example, some may permit non-commercial exploitations of a performer's recorded performance. In addition, because section 106 of the copyright statutes currently grants the exclusive economic rights of reproduction, distribution, and public performance to the *author* of a copyrightable work, the statute fails to recognize that these exclusive rights must now be shared with the performers who participate in the work.⁵⁵ Even if the economic rights can be waived or assigned, the treaties indicate that the performer retains those rights until taking such actions, unless national law makes such a transfer automatic.⁵⁶ It may be that the only way to reconcile section 106 in its current form with the treaty requirements is to recognize that performers are joint authors of their works. As noted in Part I, however, some courts may not be ready to take this step.

CONCLUSION

Taking performers rights seriously is not an option; it is a necessity. Due to changes in technology and the entertainment industry, performers will increasingly present legitimate claims of authorship under domestic law. Yet Congress and the courts have not developed the necessary guidelines for resolving those claims.

The United States must also address performers' rights in order to comply with our current international treaty obligations, as well as the new obligations that will arise when Beijing 2 enters into force. Yet Congress has made no effort to implement WPPT, raising doubts as to future compliance with Beijing 2. In contrast to the prompt enactment of section 1101 after the TRIPS Agreement, Congress's current inaction suggests that it has no interest in expanding the scope of performers' rights under federal law. Although the economic provisions of the treaties have been drafted with enough flexibility to allow the United States to comply without significantly altering the substance of federal copyright law, at a minimum the moral

55. The 2000 Diplomatic Conference on the Beijing Treaty [hereafter Beijing 2] states that each signatory country may decide who qualifies as a performer for purposes of the treaty. It notes, for example, that a country could deny moral or economic rights to film "extras" or others with nonspeaking roles.

56. It would be difficult for the United States to avail itself of the option under Beijing 2, *supra* note 55, to provide for automatic transfer of the performer's economic rights. In the case of performers who qualify as joint authors, this would conflict with existing copyright law that requires a signed writing for transfers of economic rights under 17 U.S.C. § 201(d), and for the creation of works made for hire by non-employees under § 101. An automatic transfer provision would also conflict with, and preempt, well-established state laws governing the right of publicity. Such significant changes in state and federal law could be controversial.

rights provisions require new legislation.

It is likely, of course, that the United States joined the WPPT and both Beijing Treaties not to advance the rights of domestic performers at all. Each treaty includes provisions on circumvention and digital rights management, and calls for recognition of a “making available” right; these provisions will primarily benefit producers and record labels. In addition, most domestic performers will, in practice, assign their economic rights to their producer or label and continue to rely instead on their rights under collective bargaining agreements (if they are union members) as well as any other rights they can individually negotiate. If other countries fully implement the treaty provisions, this may increase the cost of foreign productions, enhancing the competitive position of U.S.-based productions. Some of these benefits may eventually flow through to domestic performers through increased opportunities. Nonetheless, if the United States expects other nations to comply with the new regime of performers’ rights, it will have to take affirmative steps to update the federal statutes.