CHAPTER SIXTEEN

Culture Matters:

Why Canada's Proposed Amendments to its Copyright Law Should Revisit Moral Rights

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A. INTRODUCTION

Copyright law has not entirely lost its ability to surprise. Canada's latest round of proposed copyright reforms, the third "new" bill in five years, reminds us of one area in which international copyright rules have taken an unexpected twist: performers' rights.[1]

Since 2002, performers have enjoyed more rights than ever before in the history of copyright law. In that year, a Copyright Treaty and a Performances and Phonograms Treaty, prepared by the World Intellectual Property Organization (WIPO) and known collectively as the WIPO Internet Treaties, entered into force.[2] Of the two, the *WIPO Performances and*

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* For a comprehensive treatment of moral rights, on which this article is based, see Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology*, Oxford University Press (New York) 2010. The author would like to thank Tom Horacek, JD (UBC, 2009) for his assistance with citations. This research was supported by the Social Sciences and Humanities Research Council of Canada.

1 The current Bill C-32 was tabled by the government on 2 June 2010. Bill C-32, *An Act to Amend the Copyright Act*, 3d Sess., 40th Parl., 2010, www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4580265&Language=e&Mode=1. Bill C-60 was introduced in 2005, and Bill C-61 appeared in 2008: www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3570473&file=4. A commentary on Bill C-60 is available at /www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?lang=e&source=library_prb&Parl=38&Ses=1&ls=C60.

2 *WIPO Copyright Treaty*, 20 December 1996, www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html, 36 I.L.M. 65 [WCT]; *WIPO Performances and Phonograms Treaty*, 20

Phonograms Treaty (WPPT) introduced various specific improvements to the international status of performers. Among its innovations, the WPPT counts a new "moral right" that seeks to protect the non-commercial interests of performing artists in their work. In doing so, it focuses on two aspects of the performer's art. First, every performer is entitled to have his or her performance attributed to him or her by name.[3] Second, the integrity of the performance is to be protected by prohibiting distortion, mutilation, or damaging alteration of the work.[4]

In a world where discussion of copyright issues seems fixated on the money to be made, the performer's moral right is a curious stab at altruism — a throwback, perhaps, to a nineteenth-century view of art as a vitally important activity carried on by gifted people. Moral rights such as these, whether for authors or performers, have been strongly opposed by the United States. In particular, an eminently practical copyright lobby in Hollywood apparently sees moral rights as an idea beyond redemption.[5] Among other concerns, the Hollywood film industry views the potential loss of commercial control over the substantial economic investment in films as a disastrous turn for the US film industry.

In response to these concerns, the moral rights of performers mandated by the WPPT do not apply to any situation where a performance is used in the context of a film.[6] But this restriction, though significant, is still a relatively minor one. A much larger issue may be why, and how, moral rights found their way into the international copyright regime at all.

There are at least two interesting ways of responding to this question. The first is to note the preoccupation of the music industry with the expansion of copyright to cover new media activities, such as the downloading of music files from the Internet. The music industry may see any increase of rights as potentially beneficial to copyright-holders — even though performers' moral rights must always remain vested in individual human beings, and, with the limited exception of Japan, can never be exercised anywhere by a corporation.[7] Apart from a few commentators who have

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December 1996, www.wipo.int/treaties/en/ip/wppt, 36 I.L.M. 76 [WPPT].

3 WPPT, above note 2, Art. 5(1).

4 WPPT, above note 2, Art. 5(1).

5 See, for example, David Nimmer's discussion of this issue: **David Nimmer, "Conventional Copyright: A Morality Play"** (1992) 3 Entertainment Law Review 94 at 95–97.

6 Note the definition of "phonogram" in Article 2(b) of the WPPT, above note 2.

7 This peculiarity of Japanese law is accomplished by including corporations within the Japanese definition of authorship. See *Japanese Copyright Act*, available in English translation on the website of the Copyright Research and Information Center

laboured to bring moral rights to greater prominence in the US,[8] moral rights remain rather poorly understood. As a result, the music industry may harbour hopes for how moral rights could be used to support their goals. Those hopes may or may not be supported by the theory behind the law, but they could help to explain a favourable perspective on moral rights for performers at the United States Trade Representative's office.

The second response is exponentially more interesting than the first. It is to consider the possibility that moral rights for performers respond, in some way, to a cultural shift — in particular, to the new culture of music that is developing through the use of digital media. Truly, "[p]erformances are not what they used to be."[9] The moral rights of performers in the WPPT reflect the new status of performers in a society where the performing arts are important in a new way. Without performances, and novelty value aside, digital music media would be fundamentally uninteresting to the public. It may be fair to say that modern musical culture is focused on performance in preference to every other kind of musical experience — including composition — and performers have accordingly graduated to the full spectrum of rights enjoyed by authors since moral rights were introduced into the *Berne Convention*, the world's first and pre-eminent international copyright agreement, in 1928.[10]

These international happenings may seem esoteric at first glance. But nothing could be further from the truth. In fact, virtually every aspect of copyright law in Canada, as in most other countries, is driven by international developments.[11] It is worth noting that this basic reality actual-

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www.cric.or.jp/cric_e/clj/clj.html accessed 28 April 2010 [*Japanese Copyright Act*], Chapter II, Section 2, Arts 14–16. Japanese moral rights receive a detailed treatment in Mira T. Sundara Rajan, *Moral Rights: Principles, Practice & New Technology* (New York: Oxford University Press, 2010) (forthcoming) at c. III.

8 For example, see Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford: Stanford Law Books, 2009).

9 See Mira T. Sundara Rajan, "The 'New Listener' and the Virtual Performer: The Need for a New Approach to Performers' Rights," in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 309, www.irwinlaw.com/pages/content-commons/the--new-listener--and-virtual-perfomances--the-need-for-a-new-approach-to-performers-rights---mira-sundara-rajan.

10 A comprehensive history of the *Berne Convention* is available in Sam Ricketson's now-classic treatise: Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Centre for Commercial Law Studies, Queen Mary College, Kluwer, 1987).

11 Notably, the desire for membership in the World Trade Organization (WTO) has been the primary drive behind intellectual property reform in less-developed jurisdictions: noteworthy examples of countries involved in copyright reform based

ly involves two dynamics, one political and one legal, although they are closely intertwined.

From a political perspective, Canada's membership in international treaties places it under an obligation to enact suitable reforms to domestic law that will allow it to fulfill its international obligations. In relation to the WIPO Internet Treaties, Canada has been a signatory to these international documents since 1997. But it has yet to enact reforms to its outdated copyright law that will allow it to meet its obligations at WIPO. Implementation delays have been strongly criticized by the American government, with the US Trade Representative's office going so far as to place Canada on its list of countries that are deficient in intellectual property standards, the Special 301 Watch List.[12] Where moral rights are concerned, the US position is more than gently tinged with irony. In twenty-one years since the United States joined the *Berne Convention*, the country has done little to introduce moral rights for authors in its copyright law — moral rights in works of visual art are a limited exception, created by the *Visual Artists Rights Act* of 1990[13] — and it seems unlikely that the United States will conform to the WPPT's requirement of moral rights for performers in the visible future.[14]

In legal terms, the content of international copyright laws largely determines the shape and substance of Canadian law. Canadian copyright norms must reflect the requirements of the WIPO Treaties. But this statement is more nuanced than it might seem at first glance. There is certainly room for Canadian leadership on copyright issues, but exercising leadership depends on the Canadian government's ability to do three things. It must show expertise in its implementation of international rules; en-

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on the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights of the WTO include Russia, China, and India. See Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 U.N.T.S. 299 (being Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 3), www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

12 Canada's pharmaceutical patent regime has been another well-known reason for US complaints, although the current report emphasizes copyright enforcement issues. See the summary of the US position towards Canada in the 2010 watch list, www.ustr.gov/webfm_send/1906.

13 *Visual Artists Rights Act of 1990*, Pub. L. No. 101-650, 104 Stat. 5128 (codified at 17 U.S.C. § 106A), www.law.cornell.edu/uscode/17/usc_sec_17_00000106---A000-.html [*VARA*].

14 The USA joined the *Berne Convention* in 1988, with effect from 1 March 1989: see www.wipo.int/treaties/en/notifications/berne/treaty_berne_121.html.

courage compromise in the international dialogue on copyright issues at WIPO and beyond; and demonstrate policy directions within Canada that are clear, and clearly legitimate — that is to say, democratically informed. Given these criteria, how successful is Canada's new bill in meeting its legal obligations at WIPO for the protection of performers' moral rights?

B. MORAL RIGHTS HOLLYWOOD-STYLE: THE WPPT

Moral rights, an awkward translation of the French *droit moral*, bring a new dimension to copyright law. The term refers to rights which seek to protect the non-economic interests of authors in their work. As such, they have little to do with the economic benefits generally derived from copyright.[15]

Through the *Berne Convention*, it has become a standard expectation that moral rights will be included in the package of rights accorded to authors by copyright laws. Notably, in Article 6*bis* of Berne, an author's right to the *attribution* of his own work, and his right to protest actions that violate the *integrity* of his work — for example, by modifying it in a way that is "prejudicial to his honor or reputation" — have been included in the bundle of rights available to authors under international copyright agreements since 1928.[16]

But moral rights have always generated controversy at the international level. This is partly due to their origins. The ancestry of an international moral right for authors lies in the civil law systems of Continental Europe. In contrast, moral rights have long been treated as a foreign import by common-law countries, and viewed with a degree of suspicion by them. It is therefore not surprising that the Berne provisions, over some four

15 This does not mean, however, that the impact of moral rights is "non-economic"; indeed, their economic impact, in the form of lost sales revenues, investments, and rights, may be substantial. Though not emphasized in copyright debates, their economic dimension is probably among the most important reasons why the rights remain so controversial. For an interesting economic approach to moral rights, see Henry Hansmann & Marina Santilli, "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis" (1997) 26 Journal of Legal Studies 95, http://cyber.law.harvard.edu/property00/respect/hansmann.html.

16 Art 6*bis* of the on moral rights, was adopted in the 1928 Rome revision conference: see the *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, as last revised in Paris 24 July 1971, and amended 28 September 1979, 828 U.N.T.S. 221, www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html, 25 U.S.T. 1341 [*Berne Convention*]. For details of the proposals, see Ricketson, above note 10 at paras. 3.28 and 8.96–8.99.

decades of evolution, have come to make some important concessions to common-law attitudes.

Notably, subsection 2 of Article 6*bis,* adopted in the *Stockholm Act* of 1967, makes allowances for countries to protect moral rights through either statutory or non-statutory means, and also, to limit the protection of moral rights to the lifetime of the author.[17] This provision was designed to accommodate the legal traditions of the common-law world, effectively allowing the protection of moral rights through common-law torts as a method of satisfying the requirements of Article 6*bis*. For most of the twentieth century, the United Kingdom relied on it to justify the absence of moral rights from its legislative regime, a position that was affirmed by a British government report of the 1950s.[18] Interestingly, a later review of the British copyright law by the Whitford Committee led to an assessment that, in fact, the UK did not meet Berne requirements in this regard. The Whitford Committee Report of 1986 helped to pave the way for the historic provisions on moral rights adopted in the *Copyright, Designs, and Patents Act* of 1988, the first in British copyright history.[19]

In its provisions on performers' moral rights, the WPPT follows an identical formula to that set out in Berne. Article 5 of the Treaty provides for the "Moral Rights of Performers." Article 5(1) grants to a performer the right to be "identified as the performer of his performances," and "to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation." In doing so, the Article provides for the rights of attribution and integrity granted in the *Berne Convention* to be extended to performers; like Article 6*bis*, it also limits the performer's right to make an integrity-based claim to situations where changes to the work can be shown to have a negative impact on the performer's reputation.[20] Similarly, Article 5(2) parallels Article 6*bis*(2) of the *Berne Convention*

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17 See *Berne Convention*, *ibid*.

18 Report of the Copyright Committee, 1952 (UK) Cmnd 8662, paras 219–26, www.bopcris.ac.uk/bopall/ref9312.html (Abstract) [Report of the Gregory Committee] accessed 30 April 2010.

19 *Copyright, Designs, and Patents Act, 1988* (UK), 1988, c. 48, www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm [*CDPA*] accessed 30 April 2010. White Paper on Intellectual Property and Innovation, 1952 (UK) Cmnd 9712, [*Report of the Whitford Committee*]. Moral rights were, however, known to the common law: see the seminal early case of *Millar v. Taylor* (1769), 4 Burr. 2303, 98 E. R. 201 (K.B.).

20 Not every country in the world limits the moral right of integrity in this way, but some consider any change to work that is carried out without the author's consent and approval to be a *prima facie* violation of the integrity right. For example, see

in allowing common-law countries, at least in relation to some part of the rights, to substitute tort protections for statutory moral rights.[21]

In recent years, the United States has become the chief opponent of recognizing authors' moral rights, bringing a somewhat schizophrenic quality to its quest for leadership in the drive to realize dramatic improvements of copyright standards at the international level.[22] While the American position on moral rights is far from settled, it is possible to make at least two noteworthy observations about the American influence on the shape of performers' rights in the WPPT. First, performers' moral rights do not apply to all types of performances: in the words of the Treaty, they apply only to 'live aural' performances. Clearly, this terminology excludes at least one major category of performances, that of performances reproduced in audiovisual works — film. As noted above, the exclusion of performers' moral rights from film responds to the concerns of America's powerful film industry, voiced by the Hollywood lobby at the time of the United States' accession to the *Berne Convention* in 1988.[23]

Second, the perception of US industry about the significance of performers' moral rights in the WPPT is not entirely clear. In particular, the Recording Industry Association of America (RIAA) is definitely interested in expanding the rights of copyright-holders in sound recordings as far as possible. It may perceive the adoption of moral rights for performers as being advantageous, sensing a new opportunity to expand copyright protection. Performers might choose to co-operate with the RIAA; or, very controversially, record labels might potentially seek to assert moral rights on their behalf.

The latter interpretation of moral rights would only be possible through a misunderstanding of the law. Legal theory dictates that moral rights must always be personally linked to the author and, therefore, may only be exercised directly by him. Japanese law presents a controversial and virtually unique exception to this rule.[24] Only after the author's death may they

France's *Code de la propriete intellectuelle,* Art L121.1, www.celog.fr/cpi/lv1_tt2.htm [*CPI*].

21 Ricketson, above note 10 at paras. 3.28, 8.94–8.99.

22 The ambiguous US position is discussed by David Nimmer, above note 5.

23 The role of the American film lobby in the debate surrounding Berne accession is described by Nimmer, above note 5. Stephen Fraser, "Berne, CFTA, NAFTA and GATT: The Implications of Copyright Droit Moral And Cultural Exemptions in International Trade Law" (1996) 18 Hastings Communications and Entertainment Law Journal 287 analyzes in detail the specific issue of moral rights in film.

24 A similar provision may be found in the Korean copyright law, Art 9; an English version, updated to December 1995, may be found in the WIPO Collection of Laws

be asserted by anyone else — in this case, his descendants, or a personally-designated representative. However, copyright theory and practice are in a state of flux, and there is no guarantee that moral rights will continue to be applied in a pure, or even conceptually consistent, manner. Nowhere is this uncertainty greater than in the United States, where the idea of a moral right for authors remains relatively underdeveloped.

C. MORAL RIGHTS FOR CANADIAN PERFORMERS: YET ANOTHER OPPORTUNITY MISSED?

The proposed Canadian bill undertakes the overt step of establishing moral rights for performers in the Canadian *Copyright Act*. The move should be viewed as generally positive, in two senses. First, Canada joins the ranks of countries that are signatories of the WIPO Internet Treaties, and have chosen to enact performers' moral rights as part of their implementation of the international accords. Notably, both the UK and Australia, sister common-law jurisdictions, have created moral rights for performers in their copyright laws. Australian implementation, like its regime for moral rights, more generally, is a model of legislative reform.[25] The UK position, like its overall approach to moral rights, is ambiguous, and has been criticized by commentators.[26] Nevertheless, the simple fact of adopting moral rights for performers means that each country, within its respective limits, has signalled its commitment to the international community — to the belief that obligations assumed in the international arena are to be taken seriously by its members. To whatever extent possible, their position helps to enrich international discussions and support better compromises on international copyright issues. Canada, as a good international citizen,

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for Electronic Access, www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=2743. The structure of Korean copyright law closely resembles Japanese law and, through it, German law. For a fascinating discussion of the colonial history between Japan and Korea, and Korea's distinctive cultural affinity with moral rights, see Ilhyung Lee, "Culturally-Based Copyright Systems?: The US and Korea in Conflict" (2001) 79 Washington University Law Quarterly 1103.

25 See Australian *Copyright Act 1968* (Cth), www.austlii.edu.au/au/legis/cth/consol_act/ca1968133; *Copyright Amendment (Moral Rights) Act 2000*, www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/D25408DC39D0C132CA257434001EEDAE/$file/1592000.pdf.

26 For example see Ilanah Simon Fhima, "The Introduction of Moral Rights for Performers," Part 1 [2006] European Intellectual Property Review 552 & Part 2 [2006] European Intellectual Property Review 600.

has done the right thing by respecting the letter of the law where international copyright matters are concerned.

Secondly, moral rights for performers are to be implemented into Canadian law on exactly the same terms governing the protection of authors' moral rights. This aspect of performers' moral rights must be cited as a strength, because it emphasizes the equality of performers with authors under Canadian law. The approach confirms that Canada will be at least as serious about performers' moral rights as it is about the moral rights of authors.

But this last point undoubtedly leads to what must be a serious and fundamental critique of the proposed reforms. The problem of implementing the WIPO Internet Treaties in Canadian law presents a valuable opportunity to reconsider Canadian copyright practice — to examine Canada's approaches to copyright problems, and perhaps, improve the sophistication of the solutions generated by Canadian law. Unfortunately, where moral rights are concerned, this opportunity appears to have been wasted. Instead, performers' moral rights in Canada are a copy of authors' moral rights; and the flaws and dissatisfactions generated by the treatment of authors are now perpetuated in the new legislative scheme for performers.

Ironically, this problem must have arisen quite naturally. As noted above, a similar approach was followed by the WPPT in its presentation of performers' moral rights: they are closely resemble authors' moral rights as framed in Article 6*bis* of the *Berne Convention*, though they are not identical to the Berne formulation. No doubt, Canadian drafters took their lead from the practices at WIPO, itself. However, the significance of following the Berne approach is rather different — its provisions on authors' moral rights represented a series of compromises established over five decades, and it could be argued that the WPPT had little scope to move beyond the norms established by Berne. On the other hand, the Canadian treatment of moral rights may render them largely unprotected in practice. A consideration of how moral rights have evolved in Canadian law shows that, if the current bill is adopted, persistent difficulties will plague performers' moral interests much as they have afflicted authors' moral rights over the past eighty years.

D. THE MORAL RIGHTS OF AUTHORS IN CANADIAN LAW: WHAT CAN PERFORMERS LEARN?

Canada, legally and otherwise, is a more or less happy combination of French and English traditions. However, the now relatively smooth surface of French-English relations should not obscure the fact that Canadian

legal practice is built on the shifting sands of an alliance between two potentially conflicting cultural traditions. In no area of the law could this be more true than in relation to moral rights.

A closer look at the treatment of moral rights in Canadian law reveals the deep divisions on this issue between French- and English-Canadian jurists. The latest ruling of the Supreme Court of Canada, in the case of *Théberge,* resulted in a decision where the court was split precisely along linguistic lines.[27] What is the status and authority of a majority ruling in a case such as this? The observation that Canadian law must be more accepting of moral rights because of its French roots is appealing in theory, but a consideration of the facts shows it to be fundamentally untrue.

Rather, Canada's approach to moral rights is one of suspicion. In particular, three features of the Canadian regime illustrate the complex status of moral rights. First, it is true that moral rights enjoy explicit formal protection. However, they are simultaneously subject to onerous requirements of proof, represented both by the language of the statute, and by judicial conventions surrounding the issue. Canadian judges prefer to rely on objective assessments of damage to an author's reputation in order to establish a violation of moral rights.[28] The scope for defending a moral rights claim in Canada is correspondingly liberal.

Second, moral rights may be waived comprehensively. The effect of these provisions is to weaken the bargaining power of authors in contractual negotiations with industry, and has encouraged the development of standard practices which fail to respect moral rights. Where waivers are concerned, Canadian law also includes provisions that effectively allow third parties using a work to benefit from waivers of moral rights that were made in relation to the publisher.[29] Arguably, this provision amounts to an effective alienation of moral rights, violating the essence of legal rights that are meant to be personally vested in the author and, thereby, inalienable. All of these features of authors' moral rights have been mechanically transported to the treatment of performers' moral rights in the proposed reform Bill.

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27 *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34, www.canlii.org/en/ca/scc/doc/2002/2002scc34/2002scc34.html, [2002] 2 S.C.R. 336..

28 For example, see *Snow v. The Eaton Centre Ltd.* (1982), 70 C.P.R. (2d) 105 [*Snow v. The Eaton Centre*].

29 For example, see Canadian *Copyright Act*, R.S.C. 1985, c. C-42, s. 14.1(4).

1) A Pioneering Common-Law Country

Canada holds the distinction of being the first common-law country to adopt provisions on moral rights into its copyright law. It did so in 1931, only three years after moral rights were first adopted in the *Berne Convention*.[30] It is equally significant that moral rights became a part of Canadian law a mere seven years after the country's first independent copyright law came into effect, the Canadian *Copyright Act* of 1921.[31] Interestingly, rights akin to moral rights enjoyed formal recognition even before the legislative amendments of 1931, but they were not in the *Copyright Act*. Rather, the Canadian *Criminal Code* provisions of 1915 included recognition for attribution and integrity.[32]

Canada's reasons for enacting moral rights were simple: it had signed the *Berne Convention*, and, Canada being a good international citizen, the Canadian government immediately set about enacting provisions to meet its international obligations. More than a desire to meet copyright obligations *per se,* the Canadian government was probably influenced by two other considerations — its peculiar awareness of cultural issues as a close neighbour of the United States, and a growing commitment to human

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30 See David Vaver, "Moral Rights Yesterday, Today and Tomorrow" **(1999) 7(3) International** Journal of Law and Information Technology 270 at 275–76.

31 *The Copyright Act, 1921*, S.C. 1921, c. 24 (entered into force in 1924). Prior to 1921, copyright in Canada was governed by the British *Imperial Copyright Act of 1842*, which applied to all British dominions. The Canadian government did try to enact a Canadian copyright law at various points, but the idea received serious consideration only after a British reform led to a new UK and imperial copyright act in 1911. The Canadian Copyright Act of 1921 was in part a reaction to taxes imposed on American books by British legislation ; Canadian legislation enacted for this purpose also created a tax on American imports, but it was far less than the tax collected by the British. The reason for taxation of American products was the flourishing US practice of re-printing copyright-protected works from other jurisdictions, an industry norm that was only limited by bilateral conventions on copyright initiated by the US, as the United States was not a party to the *Berne Convention* of 1886.

32 David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 159. Vaver is right to note this landmark: although the provisions were not in the *Copyright Act*, codification in the *Criminal Code* shows that the law had already achieved a significant level of acceptance. Formal recognition in criminal legislation certainly represents something beyond the informal recognition of a tort. Given the current emphasis on criminalizing copyright infringement, it is interesting to note that the idea is not a new one; indeed, other laws of the world have called infringement a criminal offence for even longer; see, for example, the discussion of the Russian copyright law of 1911, in Mira T. Sundara Rajan, *Copyright and Creative Freedom: A Study of Post-Socialist Law Reform* (New York: Routledge, 2006) c. IV at 82–85.

rights.[33] The language of the provision adopted in 1931 exactly mirrored the terms of Article 6*bis* of the *Berne Convention*.[34] However, the adaptation of the Berne provision into Canadian law led to an awkward and ambiguous result — what aspects of attribution were protected?[35] Did the right of integrity require proof of damage to reputation, or not?[36] In comparison, a still subtler ambiguity in the drafting of the integrity right in the 1988 British provisions required judicial clarification of the issue by the High Court. The issue arose in the very first integrity claim under the new rules, the "hip" and sparkling *Confetti Records* case.[37] David Vaver points out

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33 The instrumental role of Canadian lawyer and professor, John Peters Humphrey, in preparing the initial draft of the *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc A/810 (Dec. 12, 1948) [UDHR], must be noted.

34 See David Vaver, "Authors' Moral Rights in Canada" (1983) 14 International Review of Intellectual Property and Competition Law 329 [Vaver, "Authors' Moral Rights in Canada"] at 341.

35 See Vaver's discussion of the aspects of the attribution, or "paternity" right: Vaver, "Authors' Moral Rights in Canada," above note 33 at 352–55.

36 So subtle a change as the removal of a comma from the Berne phrase leads to this doubt. The Canadian section states that the author may restrain "any distortion, mutilation or other modification of the said work that would be prejudicial to his honour or reputation." (Quoted in Vaver, "Authors' Moral Rights in Canada," *ibid.* at 341.) In fact, prior to the latest amendments in 1994, the copyright law of India provided for moral rights in much the same language as the Canadian act, but it divided the phrase in its s 57, into two parts. "'Any modification' could lead to a violation of the right of integrity, but it would depend on the artist's ability to show 'damage to his honour or reputation.'" See Mira T. Sundara Rajan, "Moral Rights and the Protection of Cultural Heritage: *Amar Nath Sehgal v Union of India*" (2001) 10(1) International Journal of Cultural Property 79 at 83–84, and the old section 57 of the *Indian Copyright Act 1957*, Act 14 of 1957, s 57; the act is published by the Government of India, http://copyright.gov.in/Documents/CopyrightRules1957.pdf [Indian *Copyright Act*]. The Indian *Copyright Act* is available in many online versions, some of which are out of date; for example, the pre-1994 section 57 provisions can still be found on the website of the Commonwealth Legal Information Institute, www.commonlii.org/in/legis/num_act/ca1957133. Vaver's criticism of the integrity right focuses on the question of whether personal reputation, as well as literary interpretation, is involved, and he concludes that both are legitimately touched by the integrity right. The critique could apply equally to the *Berne Convention* itself, which has also enshrined the term "honour," of uncertain legal connotations in modern copyright law. Vaver also draws attention to the use of the term "restrain," clearly intended to invoke the court's power to grant an injunction: see Vaver, "Authors' Moral Rights in Canada", *ibid.* at 355–60.

37 *Confetti Records v. Warner Music UK Ltd.*, [2003] EWHC 1274 (Ch.). The case involved hip-hop music, known as "Garage" in the UK.

> the folly of transporting virtually verbatim a provision from an international Convention into a domestic statute, without elaborating the provision in the manner intended by the Convention and without adapting it to the existing structure of domestic laws . . .[38]

Subsequent amendment of the Canadian law waited a half-century and more. Reform in 1988 brought some clarification to the moral rights of authors, and the Canadian government took the additional step of codifying a right of publicity which protects authors from the commercial association of their works with products in advertising.[39] However, the greater precision of the 1988 provisions on moral rights was achieved at a cost. It is true that ambiguities in the earlier enactment were resolved, but the solutions invariably took the form of explicit restrictions on the exercise of moral rights.

Two noteworthy examples of these new limits on moral rights arise in relation to the integrity right, and on the question of waivers. As noted above, the drafting of the integrity right in the 1931 amendments created a degree of ambiguity about whether or not proof of damage to reputation was required to show that the right had been violated. When Canadian copyright law was reviewed by Claude Brunet and A.A. Keyes in 1977, they recommended that proof of reputation should not be required under the new Canadian law.[40] The provision was indeed clarified, but the new version actually added a new requirement of proof of damage to reputation. The right was transformed from, potentially, a pure right of integrity, into a limited right of reputation.[41]

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38 Vaver, "Authors' Moral Rights in Canada," above note 33 at 330.

39 Section 28.2(1)(b) of the Canadian *Copyright Act*, above note 29. Vaver, "Authors' Moral Rights in Canada," *ibid*. at 331–40 mentions this protection of the conditions in which a work receives public exposure as part of the common law of moral rights in Canada. Accordingly, codification in this case represents a further degree of formalization for a pre-existing right, rather than the creation of a new right at Canadian copyright law.

40 Andrew A. Keyes & Claude Brunet, "Le droit d'auteur au Canada : propositions pour la révision de la loi" (Ottawa: Consommation et Corporations Canada, 1977) [Keyes & Brunet]. The Ministry of Consumer and Corporate Affairs, which then had an Intellectual Property bureau. Responsibility for copyright law in Canada is now shared by 2 ministries, Heritage and Industry Canada. The split leads to bureaucratic inefficiencies, between 2 ministries with fundamentally different portfolios, and has probably been one of the structural obstacles to copyright reform in Canada.

41 Keyes and Brunet made two types of recommendations in relation to Canadian moral rights: the first, a general call for clarification, and the second, specific proposals for the treatment of moral rights in amended legislation. For a quick overview of

In relation to the question of whether moral rights could be waived in Canadian law, the changes of 1988 made waivers fully and comprehensively available to authors.[42] Interestingly, the practical consequence of this provision was to transform waivers into a standard feature of Canadian copyright contracts.[43] The example is an important one: it illustrates one of the ways in which the influence of law is felt far beyond the confines of the courtroom. The language of the law can fundamentally shape the terms on which industries deal with copyright works. Litigation is only the final, narrowest, and most extreme consequence of legal provisions on moral rights.

As for the level of general clarity, an area where improvement was needed, the drafting of specific provisions was clarified, but an overall problem remained.[44] The issue concerned the structure of the Act. Canadian moral rights are dispersed throughout the *Copyright Act*, and it is difficult to piece together the complete jigsaw puzzle of the scheme. The rights are expressed in sections 14 and 28 of the Act, and they are separated from each other by a variety of unrelated provisions. The rationale for doing so may be that section 14 defines the rights, while section 28 defines infringement. The placement of the infringement offense in section 28 may reflect the fact that other parts of the Act dealing with the infringement of copyright may be found in the same area of the Act. But this explanation is not satisfactory. The provisions in section 28 also serve to define the integrity right, and to clarify the other definitions of moral rights which are introduced in the earlier set. The two sections need to be read together to make sense.

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the proposals, see R.J. Roberts' review of the report, in (1978) 4(2) Canadian Public Policy 264. The tone of the review is somewhat overwrought, but, in fact, the proposals made by Keyes and Brunet reflect common practices in civil law countries — including damages and an accounting of profits among the remedies available for a moral rights infringement, for example. The damages awarded in a moral rights case are highly discretionary, and could be symbolic: the recent Hugo case resulted in damages of €1 to the plaintiff. Roberts is also mistaken when he says that the report would allow authors to "force the copyright owner to withdraw from publication the author's work": the French model underlying this proposal would entail serious economic consequences for the author, and is a severely limited right.

42 Currently, section 14(4) of the Canadian *Copyright Act*, above note 29.

43 The Writers' Union of Canada now advises Canadian authors to refuse to sign publishing contracts that include waivers of moral rights. The warning may be found under "Hot Topics: Danger Clauses, Dubious Practices & Cautions" on the Union website, www.writersunion.ca/ht_clausecautions.asp.

44 Keyes & Brunet, above note 39.

2) The Rights Protected: Attribution, Integrity, and Association

Section 14 of the *Copyright Act* defines two rights: attribution and integrity. The attribution right is comprehensive, and represents an innovative aspect of the Canadian moral rights scheme. It not only affirms the author's right to be "associated with the work . . . by name," but it also protects the author's right to maintain a pseudonym, and to protect any chosen anonymity. With regard to integrity, this section only tells us that "The author of a work has, subject to section 28.2, the right to the integrity of the work." For the substance of the integrity right, it is necessary to refer to the latter provision directly.[45] The definition of integrity in section 28.2 exactly parallels Article 6*bis* of the *Berne Convention*. It states that infringement of the integrity right will occur when the work is "distorted, mutilated or otherwise modified," in such a way as to "prejudice. . .the honor or reputation of the author."[46]

But this provision has a second part. It provides that the author's right of integrity will be infringed if his work is "used in association with a product, service, cause or institution" in such a way as to "prejudice the honour or reputation of the author." This right could be considered an aspect of the integrity right, or a third Canadian moral right, known as a right of association. Given the presence of the right of association within a provision defining integrity, the first view seems more accurate. The framing of the right mirrors a similar provision in the UK *Copyright, Designs and Patents Act* of the same year.[47] In the Canadian context, the unauthorized use of a work for commercial or endorsement purposes is not only a violation of the author's copyright. It may also involve a violation of the moral right of integrity, provided that the author can show that the association has caused damage to his reputation.

3) A Special Case: The Visual Arts

It is striking to note that, in one specific case, Canadian law does not require proof of damage to an author's honour or reputation. This will arise where the author is an artist in the exact sense of the word — the creator

45 It is worth noting that the electronic version of the Act does not correct this inconvenience, by offering the facility of a hyperlink to connect directly between sections 14 and 28: see n. 36, http://laws.justice.gc.ca/eng/C-42/index.html.

46 Canadian *Copyright Act*, above note 29, s 28.2 (1) (a).

47 *CDPA*, above note 19.

of a work of visual art, such as a painting, sculpture, or engraving. Any "distortion, mutilation or other modification" is "deemed" to be prejudicial to the author's reputation; rather than eliminate the need for damage to reputation, the Canadian Act tells us to infer it. In practice, this means that in the case of a work of visual art, any modification is, *prima facie,* an infringement of the artist's right of integrity.[48]

This provision accomplishes the important result of shifting the burden of proof from artist to audience, owner, or user. The formula by which this is done is not as straightforward as it could be. The right of integrity could have been left open-ended, with no mention of reputation. This would allow the artist to protest any modification of his work that he found objectionable — the usual practice in civil-law jurisdictions.[49] Regardless, the moral right of integrity is much stronger for visual artists than for others. The special status of visual artists is reminiscent of the American situation, where the *Visual Artists Rights Act* of 1990 enacted moral rights for this class of artists alone.[50] Why the distinction? It may be justified by the unique nature of an artwork: in contrast to other art forms, there is one, and only one, original work of visual art. In this sense, visual art is quite unlike a book, music, or any other type of copyright work. Damage to an original artwork can never be set right.

But if, in fact, this is the rationale behind the separate regime for visual art, the Canadian law then goes on to impose two unexpected limits.[51] The first of these involves the conditions of display: controversially, the circumstances in which an artwork is exhibited will not give rise to a moral rights claim.[52] Secondly, conservation is addressed: "steps taken in good faith to restore or preserve the work" will also be exempted from an in-

48 But note that, in Canadian law, "modification" will have to be read *ejusdem generis*, in the context of a phrase beginning with "distortion . . . [and] mutilation," and it is conceivable that an artist might have to show that the modification is inherently damaging, or likely to cause damage to the work.

49 For example, see the French Intellectual Property Code, Art L121-1: *Loi N° 92-597 du 1er juillet 1992 relative au code de la propriété intellectuelle (partie législative)*, *Journal officiel de la République française du 8 février 1994; Légifrance: Le service public de la diffusion du droit*, www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT00000 6069414&dateTexte=20100412 [Intellectual Property Code, CPI, *Code de la Propriété Intellectuelle*].

50 *VARA*, above note 13.

51 Canadian *Copyright Act*, above note 29, s. 28.2(3).

52 The "Explanation" to India's section 57 states: "*Explanation.*—Failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section." See Indian *Copyright Act*, above note 36.

fringement claim. The purpose of the latter provision is clear: the goal is to avoid discouraging or penalizing valuable conservation work. The rationale for exempting the conditions of display from liability is harder to discover. It seems rather arbitrary — a way to limit the liability of galleries, companies, and perhaps government, for the mistreatment of artworks in their possession.[53]

4) Inalienability and Waiver

If the framing of moral rights by Canadian legislators seems generally more favourable than the UK approach, the treatment of waivers in the *Copyright Act* is a caveat to the success of the endeavour. Canadian law follows the British approach of allowing extensive waivers. Indeed, under Canadian law, the only meaningful restrictions on the scope of waivers would appear to be those found in the common-law principles governing the interpretation of contracts. Short of a finding of unconscionable dealings, or waiver under duress, nothing compels an author to retain his moral rights, or restores them to him once they are waived.

Canadian law includes a most controversial provision on waivers. Article 14.1 (4) provides

> Where a waiver of any moral right is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver.

In other words, should an author waive his moral rights when he sells or offers to licence his copyright to a publisher, he cannot then claim a violation of moral rights by anyone who is subsequently authorized by the *publisher* to use the work. An example helps to understand the implications of this provision. The author of a book signs a contract with the publisher, waiving his moral rights. The publisher authorizes another publisher to produce a chapter of the book as an article in a volume of essays. The author may object to the division of his work into separately

53 A similar issue occurs in Indian law; the reason is, most probably, to protect the Indian government from liability for damage to works of art that it owns. In the context of a developing country, the fear is understandable: government is a major owner, and sponsor, of works. At the same time, the importance of its role in protecting culture should not fail to attract obligations. See the comments of the Delhi High Court in the landmark *Amar Nath Sehgal* case: *Amar Nath Sehgal v Union of India* 2005 (30) PTC 253 (Delhi High Court) [*Sehgal*].

published fragments. However, he cannot object to the republication by a third party as a violation of his moral right of integrity. The practical utility of the provision is clear: it allows the publisher to exploit his own rights without creating any inhibition in the purchaser about the possible consequences of moral rights. In effect, the provision is a kind of negative assignment — an alienation in fact, if not in name. The author agrees to forego his moral rights, but the publisher effectively conveys that protection to any person who acquires the authority to use the work from it. At the same time, Canadian law specifies that authors cannot assign their moral rights; they can only be inherited upon the author's death.[54] In this sense, moral rights are formally 'inalienable'; but, can they truly be considered inalienable when they can be waived in favour of a third party with whom the author has no contract?

5) A Drought in the Courts

Although litigation is but one measure of the effectiveness of moral rights, the paucity of cases on moral rights in Canada is remarkable. In the entire history of Canada's moral rights provisions to 1988, only one successful case was ever brought by an artist.[55] It was the well-known case of sculptor, Michael Snow, whose sculpture of Canada geese decorating Toronto's Eaton Centre, one fine winter day, found itself adorned with festive ribbons for the Christmas season.[56] Snow argued that this was a violation of his integrity right, and a sympathetic court ruled in his favor, issuing an injunction for the immediate removal of the ribbons. The case also established the principal of reliance on expert evidence as a way of proving the requisite damage to reputation in Canada:

> The plaintiff is adamant in his belief that his naturalistic composition has been made to look ridiculous by the addition of ribbons and suggests it is not unlike dangling earrings from the Venus de Milo. While the matter is not undisputed, the plaintiff's opinion was shared by a number of other well-respected artists and people knowledgeable in his field.[57]

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54 See Canadian *Copyright Act*, above note 29, ss. 14.1(2) and 14.2(2).

55 Section 12(7) of the old Canadian *Copyright Act* (pre-1988).

56 *Snow v. The Eaton Centre*, above note 28.

57 *Ibid*. at para. 6.

6) Proof of Infringement: The Significance of the *Théberge* Ruling

The Canadian *Copyright Act* defines the duration of moral rights as the minimum required by Berne: it protects them for the same duration as the economic rights enjoyed by the author, for his lifetime and fifty years after his death. In this sense, the practice of the Act is in keeping with the 'monist' theory, whereby economic and moral rights are protected for the same duration. The monist theory is additionally in evidence in the Canadian Act, because no formal distinction is made between an infringement of copyright and an infringement of moral rights.

In Canada, however, the relationship between economic and moral rights is problematic in a deeper sense. If moral rights and economic rights are seen as two branches of the same tree, the logical possibility of a potential overlap between the two arises. In other words, depending on the facts, an infringement claim could be made on both economic and moral grounds. In a truly monist system, the same facts could give rise to both moral and economic claims. On this theory, it should matter little to Canadian courts whether a claim is framed in terms of economic rights or moral rights. It may matter to the plaintiff, because the nature of the remedies available in the two cases will be different, moral rights leading to the practical solutions offered by injunctive relief, while economic rights lead to damages. And, again, in a single case, on a single set of facts, a plaintiff may be entitled to both.

This conclusion is of little concern to the French-speaking judges of the Supreme Court, who seem prepared to move seamlessly between the economic and moral dimensions of an author's rights. For the English-speakers, however, the point needs to be resolved. The judges appear to be concerned that a monist approach implies a degree of equality between moral and economic claims which they are unwilling to recognize. In their view, it is not supported by the Act. As a result, in the recent ruling of *Théberge,* a majority of the Supreme Court affirmed that Canadian law is based on a dualist approach, where moral and economic rights are distinct. In particular, under Canadian law, the hierarchy between the two places economic rights above moral rights. Accordingly, facts that appear to contain the potential for a successful claim on both economic and moral grounds may nevertheless fail to generate a viable claim for the infringement of moral rights. A claim that would succeed as an economic rights claim, if approached as a moral rights issue, may fail.

The reason for this duality, as affirmed by the Supreme Court, is that the nature and standard of proof required for a moral rights infringement

in Canada is higher than that required for an infringement of economic rights. The Court takes its cue from the legislation. The key phrase is to be found in "damage to honour or reputation," which appears as a prerequisite for moral rights claims in relation to all works except for the visual arts. No such evidence of an effect on reputation is required to show a violation of economic rights. On the contrary, any unauthorized action is, by definition, a violation of the author's economic copyright.

A consideration of the facts of *Théberge* illustrates this point, and shows how precariously balanced is the majority's reasoning. The case involved paintings by a Canadian painter, Claude Théberge, who authorized a company to make posters and art cards of his work for sale to the public. Unexpectedly, an art gallery which purchased the cards decided to make a further reproduction — this time, as a canvas-backed copy of the original image. The technique, on which became the case turned, was to lift the ink from the postcard and superimpose it onto the canvas. The card was left blank, and the ink was transferred to the canvas.

Was this a reproduction of the work? The majority of the Court found that, in fact, no reproduction of Théberge's work had occurred. Rather, there was merely a transfer of ink from one medium to another. There was no increase in the overall number of copies of the work. The element of multiplication, required to constitute a reproduction, was missing.[58] This statement is somewhat reminiscent of the notion of media neutrality in a digital environment articulated by the Supreme Court in the 2006 case of *Robertson*,[59] affirming that the conversion of a piece of writing from print to data — newspaper to CD-ROM — would not qualify as a reproduction of the work.

No unauthorized reproduction under section 3(1) had occurred, but something else was at stake: a potential violation of the artist's moral rights and, in particular, an infringement of the artist's right of integrity under section 28.2(1) of the Act. The artist, himself, had alerted the Court to this fact. In his testimony, Théberge affirmed that the canvas-backed reproductions could be confused with his original works, leading to what

58 *Théberge*, above note 27 at paras. 42–50.

59 On the other hand, the re-publication of a work in an online newspaper, subject to a new format and regular updates, would. See *Robertson v. Thomson Corp.*, 2006 SCC 43, http://scc.lexum.umontreal.ca/en/2006/2006scc43/2006scc43.html, [2006] 2 S.C.R. 363.

he considered "a dilution of my work."[60] Owners of Théberge originals might misunderstand the artist's intentions.[61]

However, Justice Binnie, writing for the majority, points out that there is an additional onus of proof that must be satisfied in relation to a moral right.[62] In the case of economic rights, any unauthorized reproduction is a prima facie violation of copyright, and this is clearly indicated in the language of the Act.[63] But this is not the case in relation to moral rights. The Act explicitly requires prejudice to reputation, and Théberge had evidently failed to satisfy the additional requirement of proof. Instead, the artist was asserting an economic right in the guise of a moral right. The right, said Justice Binnie, was a *droit de destination* — a right to control the use of the work, among the moral rights recognized in civilian jurisdictions.[64] A clear distinction is drawn between economic and moral rights, with different standards of proof coming into play in relation to each. This is a dualist theory of copyright — although in Canada, the application of the term "dualist" is slightly jarring. French dualism implies a higher status for moral rights in the legal hierarchy, and leads to protection for moral

60 *Théberge*, above note 27 at para. 20.

61 *Ibid*. at paras. 17–21, and, especially, the statements of M. Théberge, himself, reproduced at para. 20.

62 *Ibid*. at para. 17.

63 See Canadian *Copyright Act*, above note 29, s. 3(1).

64 Interestingly, it may be more accurate to characterize the '*droit de destination*' as an economic right: in French law, it is recognized as an aspect of the right of reproduction, and allows an author to exercise some control over the treatment of a work in circulation by a third party who is neither author nor *exploitant*. The reference to a moral rights aspect seems unusual; it could be considered a follow-on to the right of disclosure, by allowing an author some control over the fate of a published work. See Pascal Kamina, *Film Copyright in the European Union, Cambridge Studies in Intellectual Property Rights* (Cambridge: Cambridge University Press, 2002) at para. 1.97; he defines the right as, "an expression of the right of the author to limit uses of copies of his work (droit de destination) . . ." Kamina does not mention the moral aspect of the *droit de destination,* but he makes an interesting comment in relation to Belgian law, reformed to include specific aspects of *destination* within its provisions on economic rights; he says, "that the theory could still be valid to justify a control over the resale of copies of copyright works or other acts of distribution not covered by the rental and lending rights." This could be interpreted as the (continued) existence of moral aspects of *destination* under Belgian law. Online sources also emphasize the economic nature of the right; for example, see www.cabinetaci.com/le-droit-moral-et-patrimonial-de-l-auteur.html. The right is the subject of a thesis by Frédéric Pollaud-Dulian, *Le droit de destination: le sort des exemplaires en droit d'auteur*, ed LGDJ, Bibliothèque de droit privé Tome 205 (ISBN : 978-2-275-00791-5), 1989.

rights beyond the scope of economic rights. In Canada, it is just the reverse. Dualism means that moral rights are restricted in scope.

A brief consideration of the dissent in *Théberge* is instructive. Writing for the minority — all of the Francophone judges of the Court — Justice Gonthier argues that the majority approach is artificial. The claim may well involve a moral interest, but it is also a clear violation of the author's copyright. His observations emphasize the fact that the nature of reproduction in a digital environment must receive due consideration:

> . . . [I]t is clear that multiplication of the number of copies of a work is not an essential element of the act of "reproduc[ing it] . . . in any material form whatever". It does not matter that the process which produces a new materialization eliminates another; all that matters is that a new act of fixation occurs. Therefore, what we must *count* in order to determine whether a work has been reproduced is not the total number of copies of the work in existence after the rematerialization, *but the number of materializations that occurred over time*.[65] (emphasis added)

In an interesting afterword to the case, the 2003 *Desputeaux* decision is the latest ruling from the Supreme Court touching on moral rights. It supports the monist idea in Canadian law. The case involved arbitration proceedings, and the interesting question of whether copyright lies sufficiently within the ambit of personal rights to fall outside the jurisdiction of arbitrators. The Supreme Court states:

> Parliament has indeed declared that moral rights may not be assigned, but it permits the holders of those rights to waive the exercise of them. The Canadian legislation therefore recognizes the overlap between economic rights and moral rights in the definition of copyright.[66]

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65 *Théberge*, above note 27 at para. 149.

66 *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, http://csc.lexum.umontreal.ca/en/2003/2003scc17/2003scc17.html, [2003] 1 S.C.R. 178 at para. 57 [*Desputeaux*]. The Court goes on to say:

> > Parliament has indeed declared that moral rights may not be assigned, but it permits the holders of those rights to waive the exercise of them. The Canadian legislation therefore recognizes the overlap between economic rights and moral rights in the definition of copyright. This Court has in fact stressed the importance placed on the economic aspects of copyright in Canada: the Copyright Act deals with copyright primarily as a system designed to organize the economic management of intellectual property, and regards copyright primarily as a

Ironically, this very paragraph concludes with a reference to Justice Binnie's comments in *Théberge,* while the different theory on which *Théberge* is based, passes unremarked. As he affirms:

> The [Copyright] Act provides the respondent with both economic and "moral" rights to his work. The distinction between the two types of rights and their respective statutory remedies is crucial.[67]

E. CONCLUSION

Canada's Minister of Industry, the Honourable Tony Clement, claims that he wants to make Canada one of the world's leading digital societies.[68] In spite of the difficult political context of Canadian copyright reform, the current opportunity to revise the copyright law should be welcomed.[69] Minister Clement correctly observes that Canada's law has fallen behind technological developments. The vacuum in Canadian law is equally damaging to authors and artists, industry, and the public. Everyone stands to gain from copyright reform in Canada. No doubt, this is the true reason why Canadian revision projects over the past several years have become bitterly controversial, as every interested group attempts to promote its particular agenda.

As it stands, the proposed Bill offers a welcome improvement to the status of performers in Canadian law. However, it should be remembered that reform has two distinct objectives: the satisfaction of international obligations, but, equally important, the responsibility of providing guidance on the development of domestic policies towards Canada's own culture. On this second point, the proposed bill falls short.

The current mandate to include moral rights for performers in Canadian law should be seen as something more than an international de-

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mechanism for protecting and transmitting the economic values associated with this type of property and with the use of it.

See *Théberge*, above note 27 at paras. 11–12, Binnie J.

67 *Théberge*, *ibid*. at para. 11.

68 Statement by Industry Minister Tony Clement at the Canadian Copyright Roundtable held in Vancouver, July 2009. The Vancouver session was the first of a series of public sessions, held across Canada, to consult experts and stakeholders on copyright reform. Attendance was, of course, by invitation only.

69 See my short editorial on this theme: Mira T. Sundara Rajan, "Copyright: Let's take ownership Outdated legislation hinders Canada's digital engagement" *Globe & Mail* (31 July 2009), http://www.theglobeandmail.com/news/opinions/copyright-lets-take-ownership/article1238407/.

mand. In fact, the happenstance of WIPO implementation provides two outstanding opportunities that are entirely specific to Canada. First, the Bill provides an opportunity to recognize the contribution of performers to Canadian culture. In order to do so, however, the Canadian government has perhaps chosen a poor model — existing provisions for the protection of authors' moral rights in Canada which have probably done very little to improve the conditions of artists' and authors' working lives in this country during their tenure.

At the same time, the government had little choice. If it attempted to improve performers' moral rights beyond the proposed formula, the outcome would have been awkward: performers would enjoy better protection for their moral rights under Canadian law than authors. The second opportunity presented by law reform, and a real solution to this problem, would be different. Canada needs comprehensive reform of authors' moral rights to ensure the enactment in good faith of international obligations under both the WPPT and the *Berne Convention*, and to establish a more equal bargaining relationship between authors and industries in Canada. The real challenge that the government will face is to balance protection for moral rights with adequate protection from free speech: moral rights should not be allowed to become a new justification for restricting the use of copyright works on behalf of corporate interests. The government should do what is necessary to offer real protection for moral rights in Canadian law, and, in some respects, the proposed Bill C-32 provides a solid foundation for these changes. Notably, the Bill clarifies fair dealing exceptions under copyright law, expressly providing that the creation of new works of parody and satire will not be considered an infringement of copyright, and this provision could easily be expanded to stipulate that parodies will not violate the moral rights of the author.[70]

The project is a grand one, but it represents something more than copyright reform — a chance to prove that, at least in Canada, culture still matters. Will Canadian reform of moral rights rise to the challenge?

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70 French law implicitly does so: see Mira T. Sundara Rajan, *Moral Rights: Principles, Practice & New Technology* (New York: Oxford University Press, 2010) (forthcoming) at c. II, n. 109 and accompanying text.