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WIPO and the American Constitution: Thoughts on a New Treaty Relating to Actors and Musicians

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ABSTRACT

The World Intellectual Property Organization (WIPO) is seeking to reform U.S. copyright law. The WIPO Treaty on Audiovisual Performances (AV Treaty) would restrict the communication of actors' and musicians' performances without authorization. The treaty would probably make it illegal to display or show clips of performances, or make a movie or YouTube video by transforming or adapting other actors' or musicians' performances, particularly when the original credits and copyright information are dropped.

This Article analyzes key provisions of the AV Treaty to ascertain whether they change US law, or merely globalize existing US doctrines. This Article describes the threat posed to the First Amendment by the AV Treaty's introduction of performers' moral rights, and by the outlawing of acts that make performances "available" to others even without a distribution of clips of them. This Article analyzes these First Amendment threats using the rubric provided by Eldred v. Ashcroft. *It also outlines the due process concerns that arise from the AV Treaty's vague language and arbitrary distinctions, and the Eighth Amendment problems arising from statutory damages in civil actions regarding the misuse of performances. Moreover, the Trans-Pacific Partnership Agreement may exacerbate the harms to the Internet inflicted by the AV Treaty, by requiring criminal charges for the noncommercial use of a performance.*

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Many American businesses and citizens believe that Congress and the courts have unduly expanded copyright law since the Copyright Act of 1909 and that copyright is not in need of any further expansion in terms of its duration, scope, or related rights, such as moral rights.[1] In the nineteenth century and arguably until the Copyright Act of 1909, copyright's scope was more manageable.[2] In recent years, copyright has changed from a form of trade regulation into a regulation of language—even of political speech.[3] The definition of copyright infringement has grown from printing, reprinting, and

1. *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS 110 (2001) (suggesting more than ten years ago that intellectual activity was already too "controlled by law"); David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 18 (1999) (suggesting that copyright liability was approaching undesirable extent); Brief of Amici Curiae Law Professors in Support of Respondents at 1–2, MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), 2005 WL 508116 (questioning expansion of secondary copyright liability since 1984); Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1996), http://www.wired.com/wired/archive/4.01/white.paper_pr.html (suggesting that proposed copyright reforms that were enacted in 1998 as Digital Millennium Copyright Act (DMCA) represented overextension of copyright liability); *see also* Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 1–3, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846 (questioning expansion of copyright term since 1998); Brief of Amicus Curiae the Internet Archive in Support of Petitioners, Eldred v. Ashcroft, 537 U.S. 186 (2002) (No. 01-618), 2001 WL 34092058 (similar); Brief for Intellectual Property Law Professors as Amici Curiae Supporting Petitioners, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2001 WL 34092058 (similar); *cf.* Richard A. Posner, *Do We Have Too Many Intellectual Property Rights?*, 9 MARQ. INTELL. PROP. L. REV. 173, 179 (2005) (exploring question from economic perspective).

2. *See* Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1234–35 (1997).

3. *See id.* at 1232–35, 1239 n.146.

selling books to include reproducing nonliteral material having substantial value to another author, displaying or performing fragmentary content having substantial value to a record company or movie studio, and making a movie by transforming, recasting, or adapting information having substantial value to another.[4]

The economic justification for this development is that copyright law is evolving to transfer more of the social value associated with a copyrighted work back to the copyright owner. The shift takes value away from the subsequent author or improver, the reseller or renter of copyrighted material, and the consumer.[5] Consequently, the consumer's interest in the public domain has been radically scaled back.[6]

Part I of this Article describes the World Intellectual Property Organization (WIPO) and its role in expanding copyright-like rights through statutes such as the Digital Millennium Copyright Act (DMCA) and the Beijing Treaty on Audio Visual Performances (AV Treaty). Part II analyzes key provisions of the AV Treaty to determine whether they change US law, or merely globalize its existing rules. Part III describes the threat that these changes to US law pose to the First Amendment. Part IV analyzes these First Amendment threats using the rubric provided by the Supreme Court in *Eldred v. Ashcroft*. Part V outlines the due process concerns that arise from the AV Treaty's vague language and arbitrary distinctions.

I. WIPO AND THE DMCA

WIPO is an intergovernmental organization affiliated with the United Nations.[7] It has a dual mandate: to develop poor economies by ensuring technology transfer from rich ones, and to encourage creativity by promoting the recognition of intellectual property rights.[8]

WIPO has played an important role in propertizing copyrights and trademarks—rights akin to trade regulations rather than

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4. *See id.* at 1218–20, 21 n.38, 1262–63.

5. *See id.* at 1240–41.

6. *See, e.g.*, Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part I*, 18 COLUM.-VLA J.L. & ARTS 1, 3–6 (1993); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 654 (1996); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1223–28, 1244–46 (1996).

7. *See* Jennifer L. Hanley, Note, *ISP Liability and Safe Harbor Provisions: Implications of Evolving International Law for the Approach Set Out in* Viacom v. YouTube, 11 J. INT'L BUS. & L. 183, 190 (2012).

8. Agreement between the United Nations and the World Intellectual Property Organization, art. 1, Dec. 16, 1974, 956 U.N.T.S. 405, *available at* http://www.wipo.int/treaties/en/agreement/index.html.

property rights at the time of the founders and under the common law of Great Britain.[9] Mark Lemley argues that, prior to WIPO, it was relatively uncommon to refer to "intellectual property" at all.[10] The copyright law of the time did not grant every author the right to pursue everyone who copied his or her work in a game of Whac-A-Mole.[11] That is a more modern legal spectacle, which increasingly resembles celebrity-paparazzi lawsuits or 1930s-era alcohol prohibition.[12] Trademark law also existed prior to WIPO, but it provided relatively little protection against noncompetitive uses that did not tend to defraud consumers.[13] WIPO has nurtured concepts such as digital-rights management, trademark dilution, and cybersquatting from their infancies into fairly vigorous and global adulthoods.

WIPO became the key vehicle by which concepts alien to US law, such as "breaking into your own computer" and "documents that spy on you," have been codified, despite popular opposition.[14] The

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9. *See* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895 n.123 (1997) (book review).

10. *See id.*

11. *See id.* at 902–03; *Sinking the Copyright Pirates: Global Protection of Intellectual Property: Hearing Before the H. Comm. on Foreign Affairs*, 111th Cong. 2 (2009) (noting that when one widely criticized music download service was shut down, "it became a game of Whac-A-Mole, as almost immediately several others took its place"). Lemley argues that WIPO has been central to the "propertization" of statutory rights formerly directed to the promotion of progress in science and the arts. *See* Lemley, *supra* note 9, at 886–87, 895–96. This "propertization," by condemning imitation as "theft" and invoking the popular impression that property rights have fewer costs than official monopolies, results in too much protection for intellectual property owners at the expense of the "free flow of information." *See* Lemley, *supra* note 9, at 895–96, 902–03.

12. *See* Lemley *supra* note 9, at 902-03; *see also* Mike Masnick, *So Many Similarities Between Copyright Law and Prohibition*, TECHDIRT (Aug. 20, 2012, 7:16 AM), http://www.techdirt.com/articles/20120817/02295020080/so-many-similarities-between-copyright-law-prohibition.shtml; *cf.* Kim See-bong, *Encouraging Tattling Among Neighbors*, KOREA TIMES, Dec. 11, 2011, *available at* 2011 WLNR 27246669 ("Like a swarm of buzzing insects, paparazzi follow their victim relentlessly in their search for a journalistic scoop.").

13. *See* Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L. J. 1717, 1719–20 (1999).

14. *See* Timothy K. Armstrong, *Fair Circumvention*, 74 BROOK. L. REV. 1, 5 n.12 (2008) ("When initial efforts to adopt legislation enacting the White Paper's recommendations encountered resistance in Congress, however, the Administration turned to the WIPO process instead."); Derek Khanna, *The Most Ridiculous Law of 2013 (So Far): It Is Now a Crime to Unlock Your Smartphone*, ATLANTIC (Jan. 27, 2013, 10:31 AM), http://www.theatlantic.com/business/archive/2013/01/the-most-ridiculous-law-of-2013-so-far-it-is-now-a-crime-to-unlock-your-smartphone/272552 (contending that under WIPO-influenced laws "it is illegal to unlock new phones to make them available on other carriers"); Samuelson, *The Copyright Grab*, *supra* note 1 (noting that the US Department of Commerce attempted to persuade WIPO to implement agenda of "[h]elping documents spy on you" by banning tampering with attachments of "copyright management information to digital forms of their works," and requiring "online service providers to become copyright police, charged with implementing pay-per-use rules, . . . cutting off service to scofflaws . . . [and] reporting copyright crime to the

United States and its trading partners have entered into bilateral trade agreements that purport to obligate Congress to obey the WIPO Copyright Treaty (WCT), the WIPO Performance and Phonograms Treaty (WPPT), and other treaties.[15] It enacted the DMCA and a statute intended to outlaw the fixation of unfixed musical or dramatic performances on camera.[16] The implications of the latter for consumers using their smartphones at concerts and sharing the material online have yet to be considered or decided.[17]

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criminal justice authorities"); Pamela Samuelson, *Legally Speaking: Why the Anticircumvention Regulations Need Revision*, COMMC'NS ACM, Sept. 1999, at 17, 17 [hereinafter Samuelson, *Anticircumvention Regulations Need Revision*] ("[S]ome copyright industry representatives argued that fair use should not be an acceptable reason to 'break' a technical protection system used by copyright owners to protect their works, likening this act to burglary. . . . Anticircumvention regulations were contentious in the U.S. Congress and at the diplomatic conference leading up to adoption of the WIPO Copyright Treaty. The main concerns expressed in both venues were: the harmful effect such rules would likely have on public access to information and on the ability to make noninfringing uses of copyrighted works . . . ."); Pamela Samuelson, *Encoding the Law Into Digital Libraries*, COMMC'NS ACM, Apr. 1998, at 13, 13 [hereinafter Samuelson, *Encoding the Law*] ("Delegates to the World Intellectual Property Organization (WIPO) diplomatic conference on digital copyright issues held in Geneva in December 1996 rejected the Clinton administration's proposal to regulate so-called circumvention technologies out of concern that this would undermine access to public domain information and interfere with fair uses and other public purposes of copyright."). Other concepts alien to US law, such as copyright-like protection for facts, have also been proposed within the WIPO system. *See, e.g.*, Pamela Samuelson, *Legal Protection for Database Contents*, COMMC'NS ACM, Dec. 1996, at 17, 17 [hereinafter Samuelson, *Legal Protection for Database Contents*] (describing how an international committee working with WIPO was poised to recommend "legal protection for the contents of databases" and why "the facts and theories contained in historical work" might be a "database" under the proposal).

15. *See* WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 245 [hereinafter WPPT]; *Background and Summary of the WIPO Audiovisual Performances Treaty*, USPTO.GOV (June 2012), www.uspto.gov/news/WIPO_AVP_TREATY_FACT_SHEET.pdf [hereinafter USPTO, *Summary of WIPO AVP Treaty*]; *see, e.g.*, *Implementation of U.S. Bilateral Free Trade Agreements With Chile and Singapore: Hearing Before the Subcomm. on Trade of the H. Comm. on Ways and Means*, 108th Cong. 5 (2003) (recognizing that "trading partners must adhere to the effective level of copyright protection that is found in the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and the [WIPO] Copyright Treaty"); SHAYERAH ILIAS & IAN F. FERGUSSON, CONG. RESEARCH SERV., RL34292, INTELLECTUAL PROPERTY RIGHTS AND INTERNATIONAL TRADE 24 (2011), *available at* http://fpc.state.gov/documents/organization/159012.pdf ("In general, the United States has viewed the TRIPS Agreement and WIPO-administered treaties as a minimum standard and has pursued higher IPR protection and enforcement levels through regional and bilateral agreements.").

16. *See* 17 U.S.C. §§ 512, 1101, 1201–02 (2012); *see also infra* note 88 and accompanying text.

17. For example, the US Code Annotated contains only one case citing the statute. It involved a commercial use of a performance recorded prior to the statute's effective date. That court initially stated that it was unconstitutional but later reversed that decision. *See* 17 U.S.C.A § 1101 (West 2012); Kiss Catalog, Ltd. v. Passport Int'l Prods., Inc., 350 F. Supp. 2d 823 (C.D. Cal. 2004), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

II. KEY PROVISIONS RELATED TO ONLINE AUDIOVISUAL COMMUNICATION

In 2012, representatives of forty-eight countries signed the AV Treaty.[18] A few of its provisions promise to have significant impacts on constitutional rights in the United States.

The treaty provides performers in signatory states with the exclusive right to reproduce, distribute, or make available a performance.[19] Article 6 seems to grant a broad new right to restrict the "communication" of unfixed performances not already broadcast, with some exceptions that "may"—but need not—be granted.[20] Article 12 contemplates additional royalties to be paid to performers, irrespective of existing contracts governing performances embodied in movies, songs, television shows, or video games.[21] The US Patent and Trademark Office (USPTO) contends that these rights do not change existing law because US law already treats actors and musicians as "authors . . . with copyright rights."[22] This is not entirely true with regard to traditional federal copyright law, which did not protect "unfixed performances."[23] Under the Copyright Act of 1976, even the director "is treated as a hired hand, rather than the creative and artistic force behind [a] film," so that "the author of a film is the person or entity for whom the work was prepared, in other words, the producer or studio, not the director."[24] State law also did not

18. *See* Press Release, US Dep't of State, Signing of Audiovisual Performances Treaty (June 26, 2012), http://www.state.gov/r/pa/prs/ps/2012/06/194101.htm ("Today in Beijing, the United States joined 47 other countries in signing a treaty to strengthen the rights of audiovisual performers around the world.").

19. *See* Beijing Treaty on Audiovisual Performances, arts. 5–12, June 24, 2012, WIPO DOC. AVP/DC/20 [hereinafter AV Treaty], *available at* http://www.wipo.int/edocs/mdocs/copyright/en/avp_dc/avp_dc_20.pdf.

20. *See id.* art. 6.

21. *See id.* art. 12.

22. *See* USPTO, *Summary of WIPO AVP Treaty*, *supra* note 14, at 2 ("Under U.S. law, actors and musicians are considered to be 'authors' of their performances providing them with copyright rights. Just as the rights established in U.S. law already provide the protection for musical performers mandated by the WPPT, U.S. law is already generally compatible with the AVP provisions. (This was also the Administration's view in 2000.) Nonetheless, implementation of the AVP may require some technical amendments of the Copyright Act . . . .").

23. *See* Jarvis v. A & M Records, 827 F. Supp. 282, 297 (D.N.J. 1993) ("[Plaintiff] argues that this is not preempted because the common law protects against radio and live, and other manner of unfixed performances of the plaintiff's composition done without his permission. It is true that the federal copyright statute expressly withheld preemption from works 'not fixed in any tangible medium of expression.'"); H.R. REP. NO. 94-1476, at 52 (1976) ("[A]n unfixed work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, would continue to be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection under section 102.").

24. David A. Honicky, *Film Labelling As a Cure for Colorization and Other Alterations: A Band-Aid for a Hatchet Job*, 12 CARDOZO ARTS & ENT. L.J. 409, 416 (1994); *see also* Mira T.

necessarily protect performances under the common law unless a plaintiff could show actionable misappropriation.[25] There is some indication that performances were fair game under state law for anything short of "bad faith" misappropriation.[26] For example, if actors as well as movie studios were copyright owners in motion-picture performances, then presumably each of the actors could have sued the videocassette and DVD companies for making allegedly unlicensed use of their performances.[27] Such claims were so tenuous as not to be filed in the vast majority of cases.[28]

The making-available right, in particular, would radically transform existing US law. The derivative-work right in the United States does not extend to communicating the content of a work or to making it available without a fixed tangible item that contains material from the work and that uses the material for a similar

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Sundara Rajan, *Center Stage: Performers and Their Moral Rights in the WPPT*, 57 CASE W. RES. L. REV. 767, 770–71 (2007) ("Copyright law has traditionally understood performers to be engaged in the dissemination of information or culture, rather than creating works of art in their own right. . . . [Moral rights for performers codify for the first time the theory that performers are harmed by] the failure to acknowledge them as the creators of their own performances, or to preserve the integrity of their interpretations.").

25. *See, e.g.*, Ippolito v. Lennon, 542 N.Y.S.2d 3, 5–6 (N.Y. App. Div. 1989).

26. *See, e.g.*, G. Ricordi & Co. v. Haendler, 194 F.2d 914, 915–16 (2d Cir. 1952) (questioning whether plagiarism of uncopyrighted aspects of plaintiff's work could be actionable under common law without bad-faith conduct such as misrepresenting the source of the defendant's product as some entity other than defendant); Computer Assocs. Int'l, Inc. v. Computer Automation, Inc., 678 F. Supp. 424, 429 (S.D.N.Y. 1987) (dismissing the common law claim of unfair competition based on taking of content because the complaint did not allege a "bad faith misappropriation of the labors and expenditures of another, likely to cause confusion or to deceive purchasers as to the origin of goods"); Eagle Comtronics, Inc. v. Pico Prods., Inc., 682 N.Y.S.2d 505, 506 (N.Y. App. Div. 1998) (dismissing claim under common law for taking of content, holding that "[u]nder Federal or State law, the gravamen of a claim of unfair competition is the bad faith misappropriation of a commercial advantage belonging to another by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets"); Capitol Records, Inc. v. Greatest Records, Inc., 252 N.Y.S.2d 553, 554–55 (N.Y. Sup. Ct. 1964) (in case based on "identical reproductions" of Beatles records, court found liability because defendant's work was misrepresented "as if it was the bona fide product of the plaintiff" working a fraud and deception on the public); Brief of Defendant-Appellee at 23–24, Capitol Records, Inc. v. Naxos of America, Inc., 372 F.3d 471 (2d Cir. 2000) (No. 03-7859), 2000 WL 34547616 ("Cases analyzing unfair competition doctrine as applied to pre-1972 sound recordings uniformly stand for the proposition that something more than mere commercial use of an alleged intellectual property right is required to support a cause of action for unfair competition. . . . Decisions from this Court and others squarely reject the notion that a claim of unfair competition can exist without a showing of bad faith on the part of the defendant.").

27. Most of these cases have involved parties other than actors or singers. *See, e.g.*, Muller v. Walt Disney Prods., 871 F. Supp. 678, 679 (S.D.N.Y. 1994) ("The home video release of 'Fantasia' has spawned several lawsuits [from parties other than composers].."). This is consistent with the focus of copyright law on "Writings" that are "fixed."

28. *But see* Brown v. Twentieth Century Fox Film Corp., 799 F. Supp. 166, 169–72 (D.D.C. 1992) (concluding that where plaintiff musician granted to television producers the right to reproduce his performance "perpetually and throughout the world ... [sic] in and by all media and means whatever," this included subsequent videocassette usage).

purpose.[29] Moreover, existing law often does not treat online streaming as a violation of copyright law.[30]

WIPO's position, however, is that the expansion of copyright has no negative impact on the rights of subsequent users or of consumers, who have no rights to create imitative works. WIPO believes that:

> Authors of derivative works have no particular right to create them in the first place. Copyright law prevents anyone from modifying or distributing [the work] without the explicit permission of the copyright holder–permission granted usually through a license. The copyright holder, choosing to grant the permission to modify, is free to set any conditions on the license.[31]

New artists are at the mercy of initial producers, who may withhold a license on a whim, in this vision of creativity. WIPO launched a public campaign that reproduced a statement from the actor Javier Bardem, who said that actors would like to control "the

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29. *See, e.g.*, Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 964 F.2d 965, 968 (9th Cir. 1992) (holding that Game Genie device that altered private performances of Nintendo games without reproducing them was not a derivative work because no fixation of the altered performances was created, reproduced, or distributed); Warner Bros. Entm't, Inc. v RDR Books, 575 F. Supp. 2d 513, 550 (S.D.N.Y. 2008) (holding that online encyclopedia of Harry Potter universe was not a derivative work of the novels because it did not have the same purpose).

30. The Copyright Act defines it as a potential infringement "to perform the copyrighted work publicly," 17 U.S.C. § 106(4), and defines a performance to include acts that "transmit or otherwise communicate a performance . . . of the work . . . to the public . . . whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times," *id.* § 101. But where an intermediary service is established, such as a cloud-storage service or a repository of links to where videos may be streamed, the intermediary may not "publicly" perform the work. *See, e.g.*, Flava Works, Inc. v. Gunter, 689 F.3d 754, 756, 758, 760–61 (7th Cir. 2012) (holding where "myVidster creates a web page that makes the video appear to be on myVidster's site," but "the video is being transmitted directly from the server on which the video is stored to the viewer's computer," that "the viewer . . . determines when the performance begins, and it is odd to think that every transmission of an uploaded video is a public performance," and, additionally, that the service was not an infringing reproduction "unless those visitors copy the videos they are viewing on the infringers' websites") (citing Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 797 (9th Cir. 2007)); Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 139 (2d Cir. 2008) (streaming video is not a public performance when viewer decides when performance begins, potentially in the privacy of his or her home); *cf.* In re Napster, Inc., 377 F. Supp. 2d 796, 804–05 (N.D. Cal. 2005) ("[A] copyright owner seeking to establish that his or her copyrighted work was distributed in violation of section 106(3) must prove that the accused infringer either (1) actually disseminated one or more copies of the work to members of the public or (2) offered to distribute copies of that work for purposes of further distribution, public performance, or public display."); MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.11[A] (2011) ("[A] public performance of a work, even if unauthorized, does not infringe the distribution right. Transmissions qualify as public performance, meaning liability for that conduct lies outside the distribution right.").

31. WIPO Secretariat, Comm. on Dev. and Intellectual Prop., *Using Copyright to Promote Access to Information and Creative Content*, 13–14, WIPO DOC. NO. CDIP/9/INF/3, (Mar. 25, 2012) (addressing "a modified version or extension of an original work of software"), *available at* http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_inf_3.pdf.

use of their performances on the Internet," including "non-commercial uses."[32] Starting on June 20, 2012, Bardem and other actors, including Meryl Streep and Mei Baojiu, argued in favor of adopting the treaty.[33] WIPO has also noted that some countries permit governments to own intellectual property rights and that WIPO might draft a model law in this area. The law could eventually regulate noncommercial uses of congressional and judicial "performances" under the AV Treaty, limiting access to public hearings and oral arguments.[34]

This issue has arisen before.[35] The WPPT, which the United States ratified in 1999, potentially created new "rights of distribution and making available on the Internet, and the safeguarding of technological protection measures."[36] The DMCA, however, only implemented the new right of distribution and rights against the circumvention of technological protection measures (TPMs).[37] Courts eventually held that merely making available a work without actually distributing it did not violate the Copyright Act.[38] The struggle continues in the negotiations that may lead to the conclusion of a Trans-Pacific Partnership (TPP) treaty on the model of the North

32. Statement by Javier Bardem to the High Level Copyright Dialogue on the Film Industry, WIPO (July 11, 2011), http://www.wipo.int/about-wipo/en/copyright_dialogue/statements/bardem.html.

33. Press Release, WIPO, WIPO Beijing Treaty on Audiovisual Performances is Concluded (June 26, 2012) [hereinafter Press Release, WIPO Beijing Treaty Concluded], *available at* http://www.wipo.int/pressroom/en/articles/2012/article_0013.html.

34. *See* WIPO Secretariat, *supra* note 31, at 67–68.

35. *See* William New, *WIPO Lauded for New Beijing Treaty on Audiovisual Performances*, INTELL. PROP. WATCH (June 29, 2012, 4:54 AM), http://www.ip-watch.org/2012/06/29/wipo-lauded-for-new-beijing-treaty-on-audiovisual-performances; *cf.* Samuelson, *The Copyright Grab*, *supra* note 1 (discussing the Clinton administration's plans to rescind "traditional user rights to browse, share, or make private noncommercial copies of copyrighted works").

36. Samuelson, *supra* note 1.

37. *See* Digital Millenium Copyright Act (DMCA) of 1998, Pub. L. No. 105-304, §§ 1201, 1202, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.); *see also* US COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY (1998).

38. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1162 (9th Cir. 2007) (finding that Google did not infringe audiovisual performances available by offering access to unauthorized passwords to websites containing copies of them so as to make them available to users); In re Napster, Inc., 377 F. Supp. 2d 796, 802 (N.D. Cal. 2005) (noting that the Copyright Act requires proof of actual copying or distribution or performance or display); *see also* Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976, 983 (D. Ariz. 2008) (collecting cases); Atl. Recording Corp. v. Brennan, 534 F. Supp. 2d 278, 281–82 (D. Conn. 2008) (collecting cases); London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 173 (D. Mass. 2008) (collecting cases).

American Free Trade Agreement (NAFTA).[39] According to a comparison of the TPP with existing US law prepared by the non-governmental organization (NGO) Public Knowledge, current law "only prohibits a person from distributing, importing for distribution, or publicly performing works, while the TPP also includes . . . making available works."[40]

Article 5 of the AV Treaty states that, independent of any economic rights and even after the transfer of them, a performer has a right to control the use of his or her fixed, live performances.[41] Specifically, the performer may "object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations."[42] Article 16 also calls for civil remedies for communicating or making available to the public those "copies of performances fixed in audiovisual fixations knowing that electronic rights management information has been removed or altered without authority."[43]

Article 15 of the AV Treaty could provide legal reinforcement for the use of digital rights management (DRM) and TPMs to restrict fair use of online content, following prior applications of DRM technology to eBooks and DVDs.[44] Article 16 requires parties to

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39. *See TPP vs US Law: The Trans-Pacific Partnership Agreement*, PUBLIC KNOWLEDGE, http://tppinfo.org/resources/tpp-vs-us-law (last visited Oct. 28, 2013) (citing 17 U.S.C. § 1202(b)(3) (2012)).

40. *Id.*

41. AV Treaty, *supra* note 19, art. 5.

42. *Id.* Similarly, WPPT Article 5 states:

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

WPPT, *supra* note 15, art. 5. So Article 5(1) of the WPPT guarantees to performers the right to claim credit for a performance and the right of integrity for live aural performances and performances fixed in phonograms. *Id.* A proposal to require serious harm to a performer before he or she could stop an alteration was rejected in 1996 at a diplomatic conference of states parties. Since 2001, Chinese law has provided an apparently unqualified right to object to such alterations, which "goes far beyond the standards set by the majority of foreign laws and by Art. 5(1) of the [WPPT]." PETER GANEA & THOMAS PATTLOCH, INTELLECTUAL PROPERTY LAW IN CHINA 261 (Christopher Heath ed., 2005); *see also* Yong Wan, *Legal Protection of Performers' Rights in the Chinese Copyright Law*, 56 J. COPYRIGHT SOC'Y U.S.A. 669, 679, 684 (2009).

43. AV Treaty, *supra* note 19, art. 16.

44. *See id.* art. 15; Carolina Rossini, Mitch Stoltz & Yana Welinder, *Beijing Treaty on Audiovisual Performances: We Need to Read the Fine Print*, ELECTRONIC FRONTIER FOUND. DEEPLINKS BLOG (July 24, 2012), https://www.eff.org/deeplinks/2012/07/beijing-treaty-audiovisual-performances ("Article 15 of the Beijing Treaty could be used to establish sanctions for additional Digital Rights Management (DRM) technologies to protect the new 'performers' rights' for works that would not otherwise be subject to DRMs. As was the case with the DMCA, this could prevent important fair use applications of the material."). For a discussion of issues

provide civil remedies against those who negligently *facilitate* the distribution, importation for distribution, communication, or making available to the public of performances fixed in audiovisual media where the facilitator knows that "electronic rights management information has been removed or altered without authority."[45] This would appear to prohibit, for example, the use of clips of news broadcasts, films, or television shows with the copyright notices, credits, or contractual use terms intentionally omitted, even when used negligently in transformative works such as documentary films, news reports, parodies, and lip-synching videos. YouTube, according to many scholars, makes performances available to the public.[46] Does this mean that YouTube must remove all performances stripped of their original terms of use, for instance from cnn.com or cspan.org? Further, is a parody or lip-synching video a "copy" of a performance because it makes the performance perceptible to the human ear? A copy need not be literal or verbatim under many countries' laws.[47]

Read together with the preceding articles of the AV Treaty, Article 16 requires parties to provide civil remedies against those who negligently facilitate the availability or distribution of a performance, while knowing or having reason to know that the credits or terms of use have been omitted.[48] Existing US law has a copyright-management information provision (17 U.S.C. § 1202(a)), but it requires *intentional* removal or alteration of the information for purposes of infringement, not mere negligence.[49] A negligence

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with fair use of eBooks and DVDs in the past, see Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1140 (2009); Dana B. Robinson, *Digital Rights Management Lite: Freeing Ebooks from Reader Devices and Software*, 17 VA. J.L. & TECH. 152 (2012).

45. AV Treaty, *supra* note 19, art. 16.

46. *See, e.g.*, Rebecca Tushnet, *Scary Monsters: Hybrids, Mashups, and Other Illegitimate Children*, 86 NOTRE DAME L. REV. 2133 (2011).

47. WIPO–OECS Colloquium for the Judiciary on the Protection of Intellectual Property Rights, July 28–29, 2006, Roseau, Dominica, *The Private Sector and the Enforcement of IP Rights: (B) Copyright Based Industries*, 6, WIPO-OECS/IP/JU/ROS/06/5 (July 20, 2006), *available at* www.wipo.int/edocs/mdocs/lac/en/wipo_oecs_ip_ju_ros_06/wipo_oecs_ip_ju_ros_06_5.pdf; Uma Suthersanen, *Copyright in the Courts: The Da Vinci Code*, WIPO MAGAZINE, June 2006, http://www.wipo.int/wipo_magazine/en/2006/03/article_0004.html.

48. AV Treaty, *supra* note 19, art. 16.

49. *See* Gordon v. Nextel Commc'ns & Mullen Adver., Inc., 345 F.3d 922, 927 (6th Cir. 2003) ("A section 1202(b)(1) violation occurs when a person (i) without authority of the copyright owner or the law (ii) intentionally removes or alters any copyright management information (iii) knowing or having reasonable grounds to know that it will induce, enable, facilitate, or conceal an infringement of the federal copyright laws."); Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116, 1121–22 (C.D. Cal. 1999) ("Section 1202(a) prohibits falsification of copyright management information with the intent to aid copyright infringement. . . . [Plaintiff has no such claim because] even if § 1202(b)(1) applied, Plaintiff has not offered any evidence showing Defendant's actions were intentional, rather than merely an unintended side effect of the [Web] crawler's operation."), *aff'd in part, rev'd in part*, 336 F.3d 811 (9th Cir. 2003).

standard would wreak havoc with contemporary art and business models. Does Article 16 mean that YouTube or Netflix must be liable if it should have known that a documentary by Michael Moore that it makes available uses an actor's voice without permission or without the credits from the original movie?[50] Is the musician Girl Talk liable for playing thousands of uncredited samples?[51]

Although Article 13 of the AV Treaty provides that parties may establish similar exceptions and limitations to the audiovisual-protection right as they do for copyright, the second paragraph states that such exceptions and limitations must not injure the normal licensing expectations of the owner of any right in the audiovisual performance.[52] That is not US law, as applied by the US Court of Appeals for the Second Circuit in *Bill Graham Archives v. Dorling Kindersley Ltd.*, and the District Court for the Southern District of New York in *Authors Guild, Inc. v. Google, Inc.* and *Authors Guild, Inc. v. HathiTrust.*[53]

Could the United States someday face World Trade Organization (WTO) charges for allowing fair use of audiovisual clips on YouTube and be pressured to reform its copyright law in response? Article 70 of the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) refers to "acts . . . which become infringing under the terms of legislation in conformity with this Agreement," and says that it "gives rise to obligations in respect of all subject matter . . . which meets or comes subsequently to meet the criteria for protection

50. *See Fahrenheit 9/11*, YOUTUBE (June 19, 2012), www.youtube.com/watch?v=cY0OCdHICCo.

51. *See* Tom Breihan, *Watch a 20-Minute Girl Talk Documentary*, STEREOGUM (Sept. 7, 2011, 5:16 PM), http://stereogum.com/802931/watch-a-20-minute-girl-talk-documentary/video.

52. AV Treaty, *supra* note 19, art. 13.

53. *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 615 (2d Cir. 2006) ("[A] publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images."); Authors Guild, Inc. v. Google Inc., No. 05 Civ. 8136(DC), 2013 WL 6017130, at *8, 10 (S.D.N.Y. Nov. 14, 2013) (holding that "fair use has been found even where a defendant benefitted commercially from the unlicensed use of copyrighted works" and that failure to pay license fee does not result in infringement where defendant's use "enhances the sales of [the work] to the benefit of copyright holders"); Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 463 (S.D.N.Y. 2012) (rejecting the plaintiffs' contention that defendant's use of digitized books could normally be licensed by Copyright Clearance Center because "[w]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth factor would always favor the copyright owner." (quoting *Bill Graham Archives*, 448 F.3d at 614)); *see also* Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (reasoning that even though, in many cases, market existed for digital licensing of excerpts of texts assigned by university faculty, storage of them on a university computer server for students to access digitally was typically a fair use given the limited use and educational purpose).

under the terms of this Agreement."[54] Canada has stated to the WTO that this Article is triggered by "acts which were not infringing at that time but which subsequently became infringing once . . . [rights] are issued in accordance with the enabling legislation."[55] Additionally, Article 71 states that members may amend TRIPS to adjust to new multilateral agreements that all members of the WTO accept.[56]

Other countries could argue that the AV Treaty creates exclusive rights that give rise to WTO dispute-resolution authority involving Article 13 of TRIPS, which, in turn, says that limitations or exceptions to exclusive rights should not conflict with a normal exploitation of the work.[57] The European Communities successfully made this argument in a WTO case about a key small-business defense against copyright claims.[58] In that proceeding, the WTO defined an abnormal exception as one reducing copyright holders' revenue by a significant amount.[59] WTO findings could also have a domino effect, as the growth of exclusive rights where there were once exemptions may be used as evidence that the remaining exceptions are abnormal. Once a particular use becomes illegal, payments for licenses may become more common, significantly altering authors' or performers' normal expectations of compensation.[60] Situations in which "one source of music is free of charge while another triggers copyright liability may have a significant impact on which source of music the operators of establishments choose, and on how much they are willing to pay for protected music."[61] In addition, each

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54. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 70, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS].

55. Responses of Canada to Written Questions from the Panel, *Canada–Term of Patent Protection*, WT/DS170/R (Jan. 7, 2000), *available at* http://www.wtocenter.org.tw/SmartKMS/fileviewer?id=33358.

56. TRIPS, *supra* note 54, art. 71.

57. *See id.* art. 13; *cf.* Samuelson, *Legal Protection for Database Contents*, *supra* note 13 ("While the draft treaty seemed to contemplate that nations could limit the rights of database owners, it restricted such limitations to those that would not unreasonably conflict with the normal exploitation of the database or unreasonably prejudice the legitimate interests of the rights holder. Given the criteria for determining which takings are 'substantial,' it is fair to interpret the draft treaty as effectively forbidding exceptions to allow the extraction and use of substantial parts of databases for scientific research purposes. Even the EU's narrow limitations for purposes of scientific illustration might not satisfy the draft WIPO database treaty provision.").

58. Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000) [hereinafter Section 110 Panel Report].

59. *Id.*, ¶¶ 6.180, 6.183, 6.241.

60. *Cf.* Samuelson, *Legal Protection for Database Contents*, *supra* note 13 (arguing that database-protection laws may create an expectation to license scientific data, creating knowledge monopolies).

61. Section 110 Panel Report, *supra* note 58, ¶ 6.241.

WIPO-inspired treaty may be a "one-way ratchet" that increases copyright liability even in areas where it should be scaled back.[62]

Even if no parties bring WTO claims, the United States may experience pressure to reform its copyright law in response to its AV Treaty obligations.[63] WIPO and the WTO did not force the United States to act on previous occasions, but Congress amended US law to conform to international-treaty expectations anyway. The US Congress chose to amend the Copyright Act in 1989 and the Patent Act in 2011 to conform to an emerging international consensus.[64] The United States independently amended its copyright laws to aid copyright holders who ignore statutory formalities.[65] More recently, Congress amended patent law to give subsequent inventors or alleged infringers a claim to ownership of a patent in cases where the original inventor waited too long to file.[66] These are other precedents for amending US law for purposes of international harmonization, like the 1998 copyright extension did in theory, if not in practice.[67]

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62. *See* Recent Case, *Copyright—Constitutional Constraints—Tenth Circuit Subjects Copyright Statute to First Amendment Scrutiny.*— Golan v. Gonzales, *501 F.3d 1179 (10th Cir. 2007)*, 121 HARV. L. REV. 1945, 1949 (2008) ("Modern copyright legislation has been 'a one-way ratchet,' granting increased protection to copyright holders, and for longer periods of time. . . . One illustration of the one-way ratchet is the [DMCA], which prohibits circumvention of technological protection measures such as encryption.").

63. *Cf.* AV Treaty, *supra* note 19.

64. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.); Leahy–Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

65. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

66. *See* Leahy–Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011); David Kappos, Under Sec'y of Commerce for IP & Dir. of the USPTO, Remarks at the WIPO Symposium: Promoting Innovation and Creativity (Sept. 22, 2011), *available at* http://www.uspto.gov/news/speeches/2011/kappos_wipo.jsp ("The legislation transitions the U.S. from a focus on what inventors do in secret, to a focus on what they do to make their inventions available to the public by disclosure or sale of a product or by other means. It . . . moves other areas of [US] patent law to international norms."); *see also* Harmonization, USPTO.GOV, http://www.uspto.gov/ip/global/aia_harmonization.jsp (last modified Dec. 7, 2012, 11:28 AM) ("The America Invents Act paves the way for greater patent harmonization—the alignment of laws and procedures among intellectual property systems to ensure consistency and clarity of rights for the world's innovators."); Susan B. Meyer, 2011 America Invents Act Patent Reform (unpublished slideshow), *available at* http://www.sdbor.edu/services/academics/IP/documents/AIA_PPT.PPT (noting that traditional US patent law's norm of "first inventor" protection "made work within various IP treaties difficult," so US law was amended in 2011 to allow the second inventor to get the patent in some circumstances, despite resulting unfairness to first inventor whose innovation goes unrewarded).

67. *See* Eldred v. Ashcroft, 537 U.S. 186, 188, 205–06 (2003) (upholding Copyright Term Extension Act of 1998 against First Amendment and Copyright Clause challenges in part because "Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts"). *But see* Brief of Intellectual Property Law Professors as Amici Curiae Supporting Petitioners, Eldred v. Ashcroft, 537 U.S. 186 (2003), 2002

Assuming that the United States reforms the Copyright Act to reflect the AV Treaty's reforms, performers' rights may be codified in a way that omits US copyright law's meager public-interest protections. When WIPO led the drafting of the WCT and the WPPT, the treaties merely obligated states to ban circumvention of TPMs with respect to "acts . . . which are not authorized by the authors concerned or permitted by law."[68] In other words, the drafters did not intend these treaties to prohibit circumvention in order to make a fair use. Yet one court found that plaintiffs may utilize the DMCA, which codified the WCT, to pursue defendants who otherwise committed no unlawful conduct, potentially inhibiting the speech of "technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so."[69] The right to make fair use of encrypted works is a very important one because copyright holders often refuse a license unless they receive royalties.[70] Copying a clip from a prior performance into a subsequent audiovisual work is essential to many forms of journalism, political speech, and parody.[71] Without expensive newsroom equipment, Internet users may resort to "ripping" Web streams.[72]

WL 1041866, at *17–19 (May. 20, 2002) (arguing that extension did not harmonize US and European law).

68. Armstrong, *supra* note 14, at 5–6 (citing the WCT and the WPPT).

69. *Id.* at 15 (quoting Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 324 (S.D.N.Y. 2000)); *see also id.* at 18 n.95 ("[S]ince the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited." (quoting US COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 4 (1998), *available at* http://www.copyright.gov/legislation/dmca.pdf)).

70. *Cf.* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 5 (1997).

71. *See* Patricia Aufderheide et al., *Copyright, Free Speech, and the Public's Right to Know: How Journalists Think About Fair Use* 5 (July 30, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2119933; Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 799 (2010); Collette Leland, *All's Fair in Love and News: How the Current Application of the Fair Use Doctrine Favors the Traditional Media over Amateur Providers of News Content*, 8 WAKE FOREST INTELL. PROP. L.J. 226, 228 (2008); Daxton R. "Chip" Stewart, *Can I Use This Photo I Found on Facebook? Applying Copyright Law and Fair Use Analysis to Photographs on Social Networking Sites Republished for News Reporting Purposes*, 10 J. TELECOMM. & HIGH TECH. L. 93, 93 (2012); Madhavi Sunder, *From Free Culture to Fair Culture*, 4 WORLD INTELL. PROP. ORG. J. 20, 24 (2012); Tushnet, *Scary Monsters*, *supra* note 46, at 2135–36 (2011).

72. *See, e.g.*, Anthony King, *How to Rip Streaming Video*, EHOW, http://www.ehow.com/how_5028768_rip-streaming-video.html (last visited Oct. 28, 2013) ("Whether on YouTube, Google Video or just a random website, the Internet is full of embedded streaming video. . . . There is a simple process you can use to save streaming video directly to the computer's desktop, without downloading any programs or files."); Lindsay Pietroluongo, *How to Create a Video Mash-Up*, EHOW, http://www.ehow.com/how_12167378_create-video-mashup.html (last visited Oct. 28, 2013) (discussing the second step in making a mashup: "Gather the videos that will be

The TPP may reinforce the AV Treaty. Article 4.10 of the TPP requires parties to criminalize the intentional removal of copyright-management information from copyrighted work when done en route to infringement, and to impose civil liability for the negligent removal of the information.[73] Analyzing Article 4.10 and other provisions, the American Civil Liberties Union (ACLU) argues that the TPP could set the stage for "worldwide crackdowns on Internet activity by a coordinated authority that could work at cross-purposes with the laws and policies of the participating countries."[74] In this respect, it resembles the Anti-Counterfeiting Trade Agreement (ACTA) and Stop Online Piracy Act (SOPA).[75] Expected as early as 2014, the TPP would, according to a US proposal, impose civil liability for the removal of copyright terms or other "rights management information" from a copy of a copyrighted work as part of the mere facilitation of infringement.[76]

Both the AV Treaty and the TPP may represent substantial steps towards enacting WIPO's Model Copyright Law (Model Law). The Model Law has provisions echoing those of the AV and TPP treaties.[77] It would create liability for "the removal or alteration of any electronic rights management information without authority" and "the distributing, . . . communicating to the public or *making available* to the public, without authority, of works, performances, phonograms or broadcasts, knowing or *having reason to know* that rights management information has been removed or altered without authority."[78] This creates civil liability for negligently removing

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'mashed' together. Choose from a video catalog at a library, personal footage or video websites like YouTube or Google Video.").

73. *See TPP vs US Law*, *supra* note 39 (art. 4.10 of leaked TPP documents).

74. Sandra Fulton, *An International SOPA?*, FREE FUTURE (June 25, 2012, 3:51 PM), http://www.aclu.org/blog/free-speech-national-security-technology-and-liberty/international-sopa.

75. *See id.*; Hanley, *supra* note 7, at 191, 200.

76. *See TPP vs US Law*, *supra* note 39. As Timothy Armstrong notes, courts have found that copyright owners have attempted to utilize the DMCA where there was no evidence of copyright infringement and even where they "were abusing the DMCA as a means of gaining improper advantage over a competitor in the marketplace." Armstong, *supra* note 14, at 2 (citing Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc., 431 F.3d 1374 (Fed. Cir. 2005); Chamberlain Grp. v. Skylink Techs., Inc., 381 F.3d 1178 (Fed. Cir. 2004); Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004)).

77. *See* Draft Copyright Bill, § 46 (Ant. & Barb.), (quoted in Responses to Questions Posed by Canada, the European Communities and Their Member States, Japan, Switzerland, and the United States, *Review of Legislation*, IP/C/W/317 (Nov. 15, 2001), *available at* http://www.wtocenter.org.tw/SmartKMS/fileviewer?id=33358); CAROLYN DEERE, THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 204 (2008) (noting that the Antigua and Barbuda law was based on the WIPO model).

78. Copyright Act 2002, art. 30 (Act No. 12/2002) (Tonga); *cf. also* Copyright Act 1987, art. 36(4) (Act No. 332/2006) (Malay.) (adopting similar language apparently based on WIPO

rights-management information from an audiovisual performance in order to communicate the performance or make it available to others without permission.[79] The way that rights holders, like those who sued All Headline News and Shepard Fairey, construe the phrase "rights-management information," the display of an image from a clip without the credits would be unlawful.[80]

III. FIRST AMENDMENT PROBLEMS WITH THE WIPO COPYRIGHT SYSTEM

The AV Treaty threatens the freedom of speech by creating moral rights that could lead to endless litigation concerning mashups.[81] Article 5 states that a performer shall "have the right . . . to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation."[82] Many YouTube videos are mashups of news, entertainment, or public affairs

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model law on copyright and related rights for developing countries); Copyright and Neighbouring Rights Act of 1999, art. 44 (Tanz.) (using similar language).

79. *Cf.* Baltimore & Potomac R.R. Co. v. Jones, 95 U.S. 439, 441–42 (1877) (negligence is the failure to do what should have been done or what a reasonable person would do in the circumstances).

80. *See* Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454, 461–62 (S.D.N.Y. 2009); Answer, Affirmative Defenses and Counterclaims of Defendant ¶¶ 65, 180–86, Fairey v. Associated Press, No. 09 Civ. 01123 (S.D.N.Y. Mar. 11, 2009) (No. 09-01123), 2009 WL 648762 ("In light of Plaintiffs' willful, unauthorized use of The AP's Obama Photo, The AP has no choice but to assert claims for damages and injunctive relief based on Plaintiffs' copyright infringement under the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq., and violation of the [DMCA], 17 U.S.C. § 1202, as well as a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 that Plaintiffs have no copyrights in the Infringing Works."). The Associated Press also sued Fairey's customers. *See* Shelly Rosenfeld, *A Photo Finish? Copyright and Shepard Fairey's Use of a News Photo Image of the President*, 36 VT. L. REV. 355, 356 n.5 (2011) (citing Larry Neumeister, *AP Sues Urban Outfitters, Nordstrom Over Obama 'Hope' Poster Use*, HUFFINGTON POST (Mar. 11, 2011, 6:46 PM), http://www.huffingtonpost.com/2011/03/11/ap-urban-obama_n_834785.html). Fairey's complaint alleged that between January 29 and February 6, 2009, the Associated Press threatened to sue him, but that he sued for declaratory judgment first. Complaint for Declaratory Judgment and Injunctive Relief ¶¶ 35–50, Fairey v. Associated Press, No. 09 Civ. 01123 (S.D.N.Y. Feb. 9, 2009), 2009 WL 319564. The premise of the Associated Press counterclaims under the DMCA would arguably apply to many Facebook or Pinterest photos, YouTube videos, and other Web content:

> Upon information and belief, Fairey, without authority of The AP or the law, has intentionally removed and/or altered and has caused and induced others to remove and/or alter copyright management information from The AP's Obama Photo, including for use in the Infringing Works, and have thereafter distributed said works, having reasonable grounds to know that such acts will induce, enable, facilitate or conceal an infringement of copyright . . . in violation of 17 U.S.C. § 1202(b)(1) and (3).

Answer, Affirmative Defenses and Counterclaims of Defendant, *supra*, ¶¶ 182–83.

81. *See* AV Treaty, *supra* note 19, art. 15. Mashups are videos, frequently posted to streaming video sites like YouTube or Dailymotion, which juxtapose video clips from a single or multiple film or television program to convey a message distinct from the original work.

82. AV Treaty, *supra* note 19, art. 5.

videos with additional commentary or montage.[83] They resemble *The Daily Show with Jon Stewart*, *The O'Reilly Factor*, or Glenn Beck's programs on CNN Headline News, then Fox News, and more recently, The Blaze—shows that splice together footage and add commentary.[84] Although it is difficult to believe that they always get permission, it is possible that Viacom, News Corp., and Time Warner license some footage. It is doubtful that they license all of the quotations and screenshots that they use from newspapers, books, YouTube, and Facebook.[85] Mashups and other YouTube videos that appropriate clips from news and popular culture let "people with somewhat limited financial resources to talk back to mass culture in language that

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83. One example is "Autotune the News," which comments upon nightly news conventions by making them into R&B music videos. Carol Vernallis, *Music Video and YouTube: New Aesthetics and Generic Transformations*, *in* REWIND, PLAY, FAST FORWARD: THE PAST, PRESENT AND FUTURE OF THE MUSIC VIDEO 234, 234 n.5 (Henry Keazor & Thorsten Wübbena eds., 2010). Another is "Planet of the Arabs," a short film posted to YouTube which uses clips from many years of film and television to comment upon the portrayal of Arabs by Hollywood. Brief Amici Curiae of Electronic Frontier Foundation et al. in Support of Appellee and Affirmance at 24–25, Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899 (8th Cir. 2012) (Nos. 11-2820, 11-2858), 2012 WL 725741. A third is "Bush and Blair's Endless Love," parodying a political alliance to the tune of the Lionel Richie and Diana Ross duet. MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD 132 (2010).

84. The mashup therefore resembles the style to which some writers attribute the success of *The Daily Show* or *The Glenn Beck Show*, i.e., reappropriation and transformation of mainstream media symbols and doctrines. *Cf.* Jeremy Gillick, *Meet Jonathan Stuart Leibowitz (aka Jon Stewart)*, MOMENT, http://www.momentmag.com/meet-jonathan-stuart-leibowitz-aka-jon-stewart (last visited Oct. 28, 2013) (describing how *The Daily Show* with Jon Stewart won "critical and popular acclaim and . . . [eleven] Emmy Awards" over the first nine years, making its host one of the four "most admired journalists in America," using a "trademark editing technique of playing back-to-back clips of politicians contradicting themselves has garnered that highest form of flattery: imitation by the very networks Stewart mocks," after the host's initial show "lasted [only] two seasons."); Mark McBeth & Randy Clemons, *Is Fake News the Real News? The Significance of Stewart and Colbert for Democratic Discourse, Politics, and Policy*, *in* THE STEWART/COLBERT EFFECT: ESSAYS ON THE REAL IMPACTS OF FAKE NEWS 80, 84 (Amarnath Amarasingam ed., 2011) (arguing that like Stewart, Glenn Beck uses a "highly postmodern mixing of entertainment, commentary, and news" to convey to the viewer a "construction of reality"). Madhavi Sunder, incorporating work by the Finnish Ministry of Education, has called the opportunity for everyone to reappropriate and transform symbols "fair culture," or "the realization of cultural rights and the inclusion of everyone in cultural signification, irrespective of their age, gender, ability, or ethnic, religious or cultural background." Sunder, *From Free Culture to Fair Culture*, *supra* note 71, at 23–24 (quoting Hannele Koivunen & Leena Marsio, *Ethics and Policy*, D'Art Topics in Arts Policy No. 24 (2008), *available at* http://www.ifacca.org/topic/ethics-in-cultural-policy). This recalls the work of Sonia Katyal, who argues that the consumer of news, entertainment, fashion, and other cultural products should be able to comment on, criticize, satirize, and parody them. *See* Katyal, *Stealth Marketing and Antibranding*, *supra* note 70, at 849.

85. *See* Aufderheide, *supra* note 71, at 5 ("News moguls such as Rupert Murdoch inveigh against fair use . . . even while their own staff are employing it openly in order to do the work of the day.") (citations omitted); *see also* Leland, *supra* note 71, at 228; Stewart, *supra* note 70, at 93.

audiences are ready to hear."[86] With YouTube, anyone can be on "television."[87]

The AV Treaty's copyright-management right compounds the problem posed by its moral rights. There are already precedents for using the removal of "rights management information" from a remix in an attempt to censor artists and other creators of fair-use works. For example, the video search engine Veoh went bankrupt defending suits over storing users' videos that allegedly contained infringing clips of copyrighted music, even though the Ninth Circuit upheld a lower court ruling that the site complied with the safe harbor for websites set forth in the DMCA.[88] The Associated Press sued the artist Shepard Fairey, who made the Obama "Hope" poster, for removing from his stylized version of President Obama's visage the copyright-management information attached to the image of Obama after the Associated Press fixed it in a photograph.[89] The organization also sued an online news aggregator for providing excerpts of news articles to nonsubscribers without the original rights-management data.[90] John Bergmayer of Public Knowledge has argued: "Creating new kinds of 'middleman rights' could increase the complexity of dealing with content exponentially. It could give broadcasters the right to prevent recording shows for later viewing, or even effectively

86. Tushnet, *Scary Monsters*, *supra* note 46, at 2154.

87. *See* DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 40, 143 (2008).

88. *See* Yvette Joy Liebesman & Benjamin Wilson, *The Mark of a Resold Good*, 20 GEO. MASON L. REV. 157, 166 (2012) ("Veoh Networks, which, even though it was cleared of copyright infringement liability, was fatally wounded defending itself. 'Veoh is legal, but Veoh is dead—killed by rightsowner lawfare that bled it dry. Meanwhile, rightsowners wrongly assessed the legality of Veoh, but the worst consequence they suffered was overpaying their lawyers.'" (quoting Eric Goldman, UMG v. Shelter Capital: *A Cautionary Tale of Rightsowner Overzealousness*, TECH. & MARKETING L. BLOG (Dec. 27, 2011), http://blog.ericgoldman.org/archives/2011/12/umg_v_shelter_c.htm)).

89. *See* Complaint for Declaratory Judgment and Injunctive Relief at 1, Fairey v. Associated Press, No. 09 Civ. 1123 (S.D.N.Y. Feb. 9, 2009), 2009 WL 319564.

90. *See* Associated Press v. All Headline News Corp., 608 F. Supp. 2d 454 (S.D.N.Y. 2009); *see also* Fox v. Hildebrand, No. CV 09-2085 DSF (VBKx), 2009 WL 1977996 (C.D. Cal. July 1, 2009) (involving a plaintiff who argued that a copyright notice on the defendant's website falsified copyright-management information relating to a drawing posted to the website and defendants who claimed they intended only to copyright the website and to use the drawing to promote the sale of real estate depicted in the drawing); Mike Mintz, *Associated Press Sues News Aggregator for Copyright Infringement*, MARTINDALE.COM BLOG (Mar. 8, 2012), http://blog.martindale.com/associated-press-sues-news-aggregator-for-copyright-infringement-and-misappropriation; Matthew Williams, *U.S. Court of Appeals for the Third Circuit: Removing "Copyright Management Information" from Analog Copies of Works Is Prohibited by 17 USC § 1202*, MITCHELL SILBERBERG & KNUPP INTELL. PROP. ALERT (July 2011), http://www.msk.com/news/pub.cfm?id=1447.

remove works from the public domain."[91] Most artists and small businesses will buckle under corporate pressure when facing such claims.[92]

The AV Treaty's moral rights could lead to endless litigation concerning mashups and the like. We have already seen many attempts to restrict the fair use of books, news stories, songs, music videos, and video games in cases such as *Authors Guild v. Google*, *Cambridge University Press v. Becker*,[93] *Campbell v. Acuff-Rose Music*,[94] *Lenz v. Universal*,[95] and *Lewis Galoob Toys v. Nintendo*.[96] Article 6 of the AV Treaty seems to grant a broad new right to restrict the "communication" of unfixed performances not already broadcast, exceptions to which countries "may" but need not grant.[97] Although US law already has such a provision,[98] it is of dubious constitutionality unless grounded in the Treaty Clause or some similar grant of congressional power other than the Copyright Clause.[99] In any event, it is arguably unconstitutional as an end run

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91. John Bergmayer, *The Broadcast Treaty vs. Broadcast Law*, PUBLIC KNOWLEDGE (June 24, 2011), http://publicknowledge.org/blog/broadcast-treaty-vs-broadcast-law.

92. *See* Liebesman & Wilson, *supra* note 88, at 166 ("[M]any small businesses would most likely choose to close shop rather than spend the energy and money required to defend themselves against the behemoths. [For example, d]ue to the high costs of prolonged litigation, resellers [of trademarked goods on eBay] who most likely would have a valid nominative fair use claim may not be able defend themselves.") (citations omitted).

93. Authors Guild, Inc. v. Google Inc., No. 05 Civ. 8136(DC), 2013 WL 6017130, at *8, 10 (S.D.N.Y. Nov. 14, 2013) (court rejected effort to restrict search engine for books, where evidence indicated that searchability benefitted authors commercially); Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (court rejected effort to ban all unauthorized uses of books posted electronically for teaching purposes); *see also* Brief of Amicus Curiae Academic Authors and Legal Scholars in Support of Defendants-Appellees and Affirmance at 1–2, Cambridge Univ. Press v. Becker, Nos. 12-14676-FF, 12-15147-FF (11th Cir. Apr. 25, 2013), 2013 WL 1869775 (describing how the lawsuit threatens education, scholarship, and knowledge).

94. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (describing allegations that parody of song did not constitute fair use); *see also* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1446 (6th Cir. 1992) (Nelson, J., dissenting) (warning that the case may lead to "the prospect of the courts turning copyright holders into censors of parody"), *rev'd* 510 U.S. 569 (1994).

95. Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1152–53, 1157 (N.D. Cal. 2008) (describing copyright owner's allegations that posting a home video with copyrighted background music to YouTube constituted infringement).

96. Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 964 F.2d 965 (9th Cir. 1992) (rejecting attempt to restrict fair use of video games using device that did not reproduce or distribute them, but altered their private "performances").

97. AV Treaty, *supra* note 19, art. 6.

98. *See* 17 U.S.C. § 1101 (2012).

99. *See* United States v. Martignon (*Martignon I*), 346 F. Supp. 2d 413, 423–24 (S.D.N.Y. 2004), *vacated*, (*Martignon II*) 492 F.3d 140 (2d Cir. 2007); KISS Catalog v. Passport Int'l Prods., 350 F. Supp. 2d 823, 832–33 (C.D. Cal. 2004) ("[T]he current version of the statute creates perpetual copyright-like protection in violation of the 'for limited Times' restriction of the Copyright Clause."). The court in *Martignon I* addressed the constitutionality of 18 U.S.C. § 2319A, which is in some ways analogous to 17 U.S.C. § 1101. *Martignon I*, 346 F. Supp. 2d at

around the Copyright Clause.[100] Unlike the Copyright Act and Visual Artists Rights Act of 1990 (VARA), it does not merely apply to "Writings" such as artworks.[101] The Seventh Circuit has strongly implied that, under the Copyright Clause, federal statutes like VARA may not protect unfixed works.[102]

WIPO warns: "Digital technologies make it easy to manipulate video images and may do so in ways that can harm an actor's

423-24. The district court noted that: "The Framers of the Constitution created a system whereby only fixed works were entitled to Copyright protection, and Congress has honored this interpretation of 'writings' since that time." *Id.* On that basis, the court held that "by virtue of the fact that it regulates unfixed live performances, the anti-bootlegging statute is not within the purview of Congress' Copyright Clause power." *Id.* at 424. The Second Circuit vacated the decision, finding that the law was valid under Commerce Clause unless it violated the First Amendment, but remanded "to allow the district court to consider the First Amendment argument." *Martignon II*, 492 F.3d at 153.

100. *See, e.g.*, Ry. Labor Execs.' Ass'n v. Gibbons, 455 U.S. 457, 468–71 (1982) (Congress could not evade limitations of Bankruptcy Clause by using Commerce Clause on related subject matter); *Martignon I*, 346 F. Supp. 2d at 425 n.16 ("When a specific clause of the Constitution, such as Clause 8 of Article I, Section 8, has been construed as containing general limitations on Congress's power, Congress may not avoid those limitations by legislating under another clause." (quoting William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 361 (1999))); Brief of Amici Curiae Internet Archive et al. in Support of Defendant-Appellee and Affirmance, *Martignon II*, 492 F.3d 140 (No. 04-5649-CR), 2005 WL 5835236 (arguing that statute regulating unauthorized fixation of unfixed performances must be scrutinized under the Copyright and Patent Clause, which intended limited monopolies for innovation to be uniform and to be restricted to "Writings" in the case of expressive works); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Restraint on Congress*, 2000 U. ILL. L. REV. 1119, 1178 (2000) (opposing Commerce Clause basis for copyright-like protection for uncopyrightable materials because Copyright and Patent Clause denies Congress power to grant such rights).

101. *Cf. Martignon I*, 346 F. Supp. 2d at 421, 423 (holding that one of "central problems" with it is "that an unrecorded live musical performance is not a writing," and noting that while live performances may become fixed by authorizing a recording, "live musical performances of which an artist does not authorize a recording never become fixed").

102. *See* Kelley v. Chi. Park Dist., 635 F.3d 290, 293, 304–05 (7th Cir. 2011) (holding that "the Copyright Clause empowers Congress to secure for 'authors' exclusive rights in their 'writings,'" but that a living garden is not subject to protection under VARA as a "Writing" because its "constituent elements are alive and inherently changeable, not fixed," even though defendant publicly described garden as "form of 'living' art" and a way "to incorporate the landscape in artistic creation," and even though an "expert, a professor of art history, reinforced [the] view that [the garden] was both a painting and a sculpture"). Aaron Perzanowski points out that copyright protection for works "fixed" in transitory transmissions, such as in computer memory for purposes of Internet transmission, is constitutionally problematic. *See* Aaron Perzanowski, *Fixing RAM Copies*, 104 NW. U. L. REV.1067, 1089–90 (2010). He states that as to "copyrightability, fixation ensures compliance with this constitutional mandate," and argues that works of transitory duration "that fail to enable the evidentiary and progress promotion functions [of fixation] should not qualify as fixed," an issue that is becoming more relevant because the Internet's "constant stream of instantiations of copyrighted works has outstripped the traditional conception of the copy, one rooted in the concrete and tangible paradigm of an enduring bound volume." *Id.* at 1068, 1089–90, 1096.

reputation."[103] WIPO further states that "performers in some countries retain moral rights to object to . . . derogatory treatment of their performances."[104] Under this justification, the AV Treaty resembles an anti-blasphemy law for actors and Hollywood. Of course, ordinary people often will not be able to complain about being portrayed in a derogatory way by a film or TV show.[105] *That* would be censorship.

WIPO and the USPTO promise that Hollywood will be protected because the transfer of rights from actors to producers will be automatic, making the AV Treaty more of a producers' and broadcasters' rights treaty.[106] Hollywood is also protected by an

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103. *Performers' Rights*, WIPO, http://www.wipo.int/pressroom/en/briefs/performers.html (last visited Oct. 28, 2013).

104. *Id.*

105. If ordinary persons are public figures due to their participation in some political campaign or organization, they will face nearly insurmountable obstacles to recovery in a libel or slander action. *See, e.g.*, BRUCE D. ITULE & DOUGLAS A. ANDERSON, NEWS WRITING AND REPORTING FOR TODAY'S MEDIA 649 (1987) ("We're dealing with a peculiar law of actual malice which makes it almost impossible for a public figure to prove . . . . Clearly, it is not enough for a public figure to show that a media defendant carelessly published a defamatory or false [statement] . . . ."); Association of the Bar of the City of New York, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 64 (1987) (noting "the 'almost impossible level' of the actual malice burden of proof at trial, regardless of how well-financed" the plaintiff may be). This was not an accidental development on the broadcasters' part. *See, e.g.*, Motion for Leave to File Brief Amicus Curiae of the National Association of Broadcasters at 3–4, 8, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (No. 73-797), 1974 WL 185866 (arguing, successfully as it turned out, that persons other than actors and musicians should not have a "right of reply" against criticisms of them in the media because: "An affirmative requirement may still constitute a form of censorship and, more importantly, it may impose a 'chilling effect' upon the free exercise of First Amendment rights. . . . [R]estraints upon the free exercise of First Amendment rights bear a heavy presumption against their constitutional validity."); Motion for Leave to File Brief Amicus Curiae of the American Civil Liberties Union Foundation et al. at 4, 9, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (No. 86-1278), 1987 WL 881313 ("Harsh criticism or personal revelations in the media" should not be actionable unless there is a malicious falsehood, even though such revelations "may undoubtedly hurt or cause embarrassment or even emotional distress," because "'[t]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.'" (quoting Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974))); *id.* at 11–12 ("[T]his Court has warned that liability based on 'defendant's hatred, ill-will or desire to injure [is] clearly impermissible absent'" proof of "an intention to harm through falsehood." (quoting *Old Dominion Branch No. 496*, 418 U.S. at 281)); *see also* Brief Amici Curiae of the Reporters Committee for Freedom of the Press et al. in Support of the Appellant at 14, Florida Star v. B.J.F., 491 U.S. 524 (1989) (No. 87-329) 1988 WL 1026323, at *14 ("Florida's interest in prohibiting the publication of a rape victim's name does not outweigh the First Amendment right of the news media to publish publicly available information."); *id.* at 19 ("In [Smith v. Daily Mail Publ'g Co.], 443 U.S. 97 (1978), this Court ruled that a statute . . . was unconstitutional. West Virginia made it a misdemeanor for newspapers to publish the names of juvenile offenders without obtaining prior written approval from the juvenile court.").

106. *See* USPTO, *Summary of WIPO AVP Treaty*, *supra* note 15, at 2 ("With the now acceptable 'transfer of rights' provisions, the AVP Treaty represents a win-win for labor and industry, allowing them to work even more closely in fighting global piracy. Ratification . . . will

Agreed Statement to Article 5, providing that "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)."[107] Thus, actors' and directors' traditional objections to unflattering editing, the cutting of performances, and translation to lower-quality images may still fail.

Under WIPO's influence, American copyright infringement, which generally requires a volitional act that copies, distributes, or transmits a work to another person,[108] or that knowingly assists or directly profits from authorizing such an act,[109] could someday morph into the vague "use" right envisioned by Javier Bardem.[110] This appears to be the purpose of Articles 5, 6, and 12 of the AV Treaty, Articles 5, 6, 10, and 19 of the WPPT, and Articles 4.10(a)(iii), 5 and 12.4 of the TPP.[111] Redefining the mere "making available" of a work as a violation of exclusive rights, as these articles of the AV Treaty

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give U.S. stakeholders another mechanism to promote protection of the intellectual property in their films."); Press Release, WIPO Beijing Treaty Concluded, *supra* note 33.

107. AV Treaty, *supra* note 19, art. 5.

108. *See* CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 549 (4th Cir. 2004) (noting that direct copyright liability "requires conduct by a person who causes in some meaningful way an infringement"); *id.* at 551 (finding that "a system that automatically transmits users' material but is itself totally indifferent to the material's content" does not cause infringement in a meaningful way); Parker v. Google, Inc., 422 F. Supp. 2d 492, 497–99 (E.D. Pa. 2006) ("When an ISP automatically and temporarily stores data without human intervention so that the system can operate and transmit data to its users, the necessary element of volition is missing. The automatic activity of Google's search engine is analogous. It is clear that Google's automatic archiving of USENET postings and excerpting of websites in its results to users' search queries do not include the necessary volitional element to constitute direct copyright infringement."); Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1368–70 (N.D. Cal. 1995) ("[T]he mere fact that [the ISP's] system incidentally makes temporary copies of plaintiffs' works does not mean [the ISP] has caused the copying. The court believes that [the ISP's] act of designing or implementing a system that automatically and uniformly creates temporary copies of all data sent through it is not unlike that of the owner of a copying machine who lets the public make copies with it. . . . Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.").

109. *See* Flava Works, Inc. v. Clavio, No. 11 C 05100, 2012 WL 2459146, at *3–5 (N.D. Ill. June 27, 2012); Flava Works, Inc. v. Gunter, No. 10 C 6517, 2011 WL 1791557, at *3–6 (N.D. Ill. May 10, 2011).

110. *See supra* text accompanying note 30.

111. *See* AV Treaty, *supra* note 19, arts. 5, 6, 12 (expanding performers' moral, economic, and transfer rights); WIPO Performances and Phonograms Treaty arts. 5, 6, 10, 19, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 245 (1997) (expanding performers' moral, economic, and transfer rights); *TPP vs US Law*, *supra* note 39 (discussing articles 4.10(a)(iii), 5, and 12.4 of the TPP); Hanley, *supra* note 7, at 191, 200 (citing *Anti-Counterfeiting Trade Agreement Final; Group Calls Process 'Unconstitutional,'* 81 PAT., TRADEMARK, & COPYRIGHT J. 72 (2010), *available at* http://www.bna.com/anticounterfeiting-trade-agreement-n6476).

and the WPPT do, and making the violation subject to statutory damages, as the TPP does, will deter Internet remixes of performances. If making sounds or images available violates the distribution right, millions of Americans will be potentially liable for ordinary Internet activities. If, on the other hand, actual downloads of copies of the sounds or images are required to show a distribution, users will less often be liable.[112]

The AV Treaty also hampers preservation efforts by extending the term of protection for performances to 50 years, which is an eternity in Internet time. Lack of preservation is a crisis in the television industry—a report for the Library of Congress concluded that "extensive and irretrievable losses have occurred in the past. . . . For most local television news footage from the late 1940's to the 1970's it is already too late to do anything. Programs were just not recorded and millions of feet of film clips and outtakes were destroyed."[113] As we transition to digital TV production, the losses will be worse. The computer library service OCLC warns: "The fragility of digital storage media, combined with a high degree of technology dependence, considerably shortens the 'grace period' during which preservation decisions can be deferred. . . . The digital files produced by public television are very large, complex, and come in multiple formats."[114]

The AV Treaty provides that there shall be "effective legal remedies against the circumvention of effective technological measures that are used by performers in connection with the exercise of their rights under this Treaty and that restrict [unlawful] acts."[115] An Agreed Statement to the treaty claims that "producers, service providers, and persons engaged in communication or broadcasting using performances on the basis of due authorization" will enjoy legal remedies against interference with TPMs.[116] The parties with standing to sue for circumvention could multiply wildly. Thus, one of the AV Treaty's most important effects is to reinforce the process by which producers prohibit fair use of films and television by wrapping them in technological shackles that inhibit quotation and mashups.

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112. Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y U.S.A. 1, 1 (2011).

113. *See* 1 WILLIAM T. MURPHY, LIBRARY OF CONGRESS, TELEVISION AND VIDEO PRESERVATION 1997: A REPORT ON THE CURRENT STATE OF AMERICAN TELEVISION AND VIDEO PRESERVATION (1997), *available at* http://www.loc.gov/film/tvstudy.html.

114. YVONNE NG ET AL., LIBRARY OF CONGRESS, STRATEGIES FOR SUSTAINABLE PRESERVATION OF BORN DIGITAL PUBLIC TELEVISION 15–16 (2010), *available at* https://www.prestocentre.org/system/files/library/resource/PDPTV_SustainabilityStrategies.pdf.

115. AV Treaty, *supra* note 19, art. 15.

116. *Id.*

Revising copyright law to declare "making available" a distribution, and to prohibit the removal of copyright-management information from a performance, will have a chilling effect on fair use.

IV. FIRST AMENDMENT LIMITATIONS ON NEW RIGHTS FOR PERFORMERS

In *Eldred v. Ashcroft*, the Supreme Court held that copyright law was subject to First Amendment challenges, but that parties may only file such challenges when new copyright provisions alter the "traditional contours" of copyright.[117]

A. Article 5

Article 5 of the AV Treaty alters the traditional contours of copyright.[118] Pamela Samuelson has argued that European-style "intellectual property protection" is "a policy that has no counterpart in US law," in part because the US "motion picture industry has opposed granting moral rights to creative contributors of motion pictures, including performers."[119]

The 1790 Copyright Act did not cover audible and audiovisual works, and it only protected books, maps, and charts against "printing, reprinting, publishing, and vending," rather than nonliteral or partial literal appropriation.[120] Under the 1831 Copyright Act, copyright infringement included printing, publishing, and importing books and some other works, but it did not confer a "property [right] in [an author's] original conceptions," such as characters or scenes, because others were free to use those conceptions in "the composition of a new work."[121]

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117. For a discussion, see Michael Birnhack, *Copyright Law and Free Speech After* Eldred v. Ashcroft, 76 S. CAL. L. REV. 1275 (2003) (rev. 2008); JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008), *available at* http://www.thepublicdomain.org/wp-content/uploads/2009/02/thepublicdomain.html; *see also* Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1156 (2009) (reviewing NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX (2008)).

118. *See* AV Treaty, *supra* note 19, art. 12; *see also* Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.").

119. Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 371 nn.13, 15 (1997). Jessica Litman concurs, stating that "[w]ith the narrow exceptions of painters and sculptors, American authors have no enforceable attribution or integrity rights." Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1382 (2010).

120. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831).

121. Stowe v. Thomas, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853); *see* Act of Feb. 8, 1831, ch. 16, § 4, 4 Stat. 436, 437 (repealed 1870).

It took until the late nineteenth century for such derivative-work rights to gain acceptance in the courts.[122] By 1909, copyright infringement had extended to the public performance of a written drama, the dramatization or translation of a story, the conversion of a written drama into a novel, the arrangement or adaptation of a musical work, or the completion of a work of art using an existing model or design.[123]

Under the 1976 Copyright Act, the copyright owner enjoys the right to prepare derivative works, and to limit the performance of plays or musical compositions.[124] The derivative-work right, however, does not prohibit *de minimis* distortions, works that are dissimilar overall, or the fair use of a work that denies the rights holder some of his or her normal licensing revenue—each of which the AV Treaty purports to restrict in some way or other.[125] Derivative-work lawsuits

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122. *See* Voegtli, *supra* note 2, at 1235; Christina Bohannan, *Taming the Derivative Works Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright*, 12 VAND. J. ENT. & TECH. L. 669, 690 (2010); Raymond Shih Ray Ku, *F(r)ee Expression? Reconciling Copyright and the First Amendment*, 57 CASE W. RES. L. REV. 863, 876–77 (2007).

123. Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075, 1075 (repealed 1976); *see also* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 393–94 (1968) (citing Copyright Act of 1909, 35 Stat. 1075, *as amended*, 17 U. S. C. § 1 *et seq.*), *superseded by statute*, Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, *as recognized in* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Russell v. Price, 612 F.2d 1123, 1128 n.16 (9th Cir. 1979) ("A copyright proprietor has an exclusive monopoly over all uses of the protected work, including the right to copy, print, vend, publish, make other versions of, perform or exhibit the work." (citing Copyright Act of 1909, 17 U.S.C. § 1, 35 Stat. 1075)); *Gilliam*, 538 F.2d at 20 ("Section 7 of the Copyright Law [of 1909] provide[d] in part that 'adaptations, arrangements, dramatizations . . . or other versions of . . . copyrighted works when produced with the consent of the proprietor of the copyright in such works . . . shall be regarded as new works subject to copyright . . . .'"); P.C. Films Corp. v. MGM/UA Home Video Inc., 138 F.3d 453, 456 (2d Cir. 1998) ("Under the Copyright Act of 1909, a transfer of anything less than the totality of rights commanded by copyright was automatically a license rather than an assignment the copyright. . . . [An agreement might transfer] the right to distribute, as well as various other incidental rights, while retaining other copyright rights, such as novelization and sequelization rights.").

124. 17 U.S.C. § 106(2) (2012).

125. *See* Lil' Joe Wein Music, Inc. v. Jackson, 245 F. App'x 873, 880 (11th Cir. 2007) (holding that although the initial section of the defendant's song "prominently" used the plaintiff's allegedly copyrighted musical phrase, the use was *de minimis* because "the 'average lay observer' would not confuse the two works" as a whole); Tufamerica, Inc. v. Diamond, No. 12 Civ. 3529(AJN), 2013 WL 4830954, at *16 (S.D.N.Y. Sept. 10, 2013) (holding that where the defendant's song used a three-second sample from the plaintiff's song along with allegedly "distinctive shouted lyrics," no infringement was plausible because the lyrical phrase was not used in "the title of the song [or] repeated emphatically at various points in the recording"); Poindexter v. EMI Record Grp. Inc., No. 11 Civ. 559(LTS)(JLC), 2012 WL 1027639, at *4 (S.D.N.Y. Mar. 27, 2012) (holding that the use of a single note from the plaintiff's work in new work was *de minimis*); Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325, 1338 (S.D. Fla. 2009) (holding that where an allegedly "distinctive" and "memorable" vocal sequence was sampled in the defendant's song, use was *de minimis* because the parties' songs had "different lyrical content, tempo, rhythms, and arrangements"); Gottlieb Dev. LLC v. Paramount Pictures Corp., 590 F. Supp. 2d 625, 633 (S.D.N.Y. 2008) (holding that the use of the plaintiff's pinball machine in seconds-long excerpts in the background of a three-and-a-half minute scene in the

have failed even against such systematic borrowings as the *Greatest American Hero*, in which an ordinary man develops nearly all of Superman's powers, or *The Wind Done Gone*, a commentary on and derivative of *Gone with the Wind*.[126] As the Second Circuit stated in 1964: "[C]ourts in passing upon particular claims of infringement must occasionally subordinate the copyright-holder's interest in a

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defendant's film was *de minimis* because the machine was "not elevated into any prominence" in the scene); Jean v. Bug Music, Inc., No. 00 CIV 4022(DC), 2002 WL 287786, at *7 (S.D.N.Y. Feb. 27, 2002) (holding that the use of a three-note sequence along with the words "Clap Your Hands" was not infringing where the parties' "songs, taken as a whole, [were] substantially different"); Amsinck v. Columbia Pictures Indus., Inc., 862 F. Supp. 1044, 1046, 1048 (S.D.N.Y. 1994) (holding that where the plaintiff's sculptural work product was displayed in the defendant's film in a "fleeting and impermanent" way, it was not an infringing derivative work even though display lasted for "approximately one minute and thirty-six seconds"). *But see* Greenberg v. Nat'l Geographic Soc'y, 244 F.3d 1267, 1274–75 (11th Cir. 2001), *overruled by* 244 F.3d 1267 (11th Cir. 2001) (holding that where the National Geographic Society and the co-developer of a CD-ROM utilized the plaintiff's work in way that was "both qualitatively and quantitatively significant," they infringed on the derivative-work right and the use was not *de minimis*); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 76–77 (2d Cir. 1997) (holding that the use of 80 percent of the plaintiff's copyrighted work for its cultural significance in more than 26 seconds of the defendant's work was not *de minimis* and could infringe); Williams v. Broadus, No. 99 Civ. 10957 MBM, 2001 WL 984714, at *5 (S.D.N.Y. Aug. 27, 2001) (holding that a new song taking a small number of notes from a prior song, and replaying them throughout, could infringe).

126. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1267 (11th Cir. 2001) (requiring evidence that a book based upon a prior book have encapsulated the prior book by using the "very same copyrighted characters, settings, and plot" before concluding that there was substantial similarity between them, and going on to find that the new book likely made fair use of the prior book); Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231, 241–43 (2d Cir. 1983) (holding that a character in a television series who had many of the powers of Superman, the comic-book and film hero, did not result in the infringement of the character copyright because the television series character acted differently on his "missions" than Superman would have, but noting that "lack of substantial similarity is not a complete answer to a Lanham Act claim, since a second comer can violate section 43(a) by falsely representing his goods as those of the trademark owner"); Pillsbury Co. v. Milky Way Productions, Civ. No. C78-679A, 1981 WL 1402, at *6–10 (N.D. Ga. Dec. 24, 1981) (holding that defendant who created sexually-suggestive illustration of plaintiff's copyrighted Pillsbury dough-people characters did not make unfair use of characters where defendant intended a "social commentary" on the characters and there was no proof that defendant "intended to fill the demand for the original or that its presentation had this effect"). *See also* Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 1004 (1999) (describing a fundamental shift in trademark analysis). Justin Hughes observed,

> [I]n *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, the court moved from a standard trademark analysis–consumer beliefs about source of a product–to a more interesting thought about 'corrupting' an idea: Defendants assert that the Lanham Act requires confusion as to the origin of the film . . . . Appellants read the confusion requirement too narrowly. In order to be confused, a consumer need not believe that the owner of the mark actually produced the item and placed it on the market. The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement.

Id. (quoting *Dallas Cowboys Cheerleaders, Inc.*, 604 F.2d 200, 204–05 (2d Cir. 1979)).

maximum financial return to the greater public interest in the development of art, science and industry."[127]

The Copyright Act contains other provisions that subordinate the author's right to control the "use" of a work to the interests of other authors in reusing a work. While a cover artist may not avail himself or herself of a compulsory license in order to alter the basic melody or fundamental character of a song, the law seems to tolerate substantial variation, and the licensing rate for a cover is only 9.1 cents per copy.[128] The Copyright Act of 1976 starkly limited performance rights "to permit garage bands and other musicians the right to record cover versions of their favorite songs without the songwriter's permission" and "to permit cable and satellite companies to retransmit network television programming without prior consent of the copyright owners."[129] Such provisions are important to "prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests."[130]

The most recent change in US copyright law that compares to the AV Treaty is the transition following US implementation of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) from the pre-Berne 1976 Act to the post-Berne framework, including VARA. The limited collective coverage of the Berne Convention and VARA and the no-expansion-of-rights clause in the Berne Convention Implementation Act resulted in more modest changes than the AV Treaty entails.[131] When the United States joined the Berne Convention in 1989,[132] Congress chose to perpetuate

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127. Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966) (quoting Berlin v. E. C. Publ'n, Inc., 329 F.2d 541, 544 (2d Cir. 1964)); *see also* Williams & Wilkins Co. v. United States, 203 Ct. Cl. 74, 89 (1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

128. *See, e.g.*, 17 U.S.C. § 115 (2012); *FAQ*, LIMELIGHT, https://www.songclearance.com/faq (last visited Oct. 28, 2013). For the difficulties faced by cover song video authors who upload to YouTube, see Andy Baio, *Criminal Creativity: Untangling Cover Song Licensing on YouTube*, WIRED (May 2, 2012, 3:24 PM), http://www.wired.com/business/2012/05/opinion-baio-criminal-creativity; *Posting Cover Songs on YouTube: Music Licensing Law Explained*, DIY MUSICIAN BLOG (Mar. 28, 2012), http://diymusician.cdbaby.com/2012/03/on-posting-cover-songs-on-youtube-music-licensing-law-explained.

129. Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO STATE L.J. 1361, 1402 (2009).

130. H.R. REP. NO. 2222, at 7 (1909).

131. *Cf.* Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 339 (2004) (noting that Berne Convention was "modest" in scope of rights guaranteed to authors).

132. Berne Convention for the Protection of Literary and Artistic Works, revised at Paris July 24, 1971, 331 U.N.T.S. 217 [hereinafter Berne Convention], available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_ wo001.html.

limitations on moral rights provided by US common law, state statutes, the Copyright and Lanham Acts, and the VARA proposal.[133] The Berne Convention Implementation Act states that: "Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto."[134] As the Berne Convention merged with trade law in 1994, the United States demanded that TRIPS not include moral rights that would be contrary to US law.[135] Although WIPO's Director General reassured Congress that US law did not need to change,[136] scholars have noted that US copyright law has traditional contours that deny the moral rights contemplated by Berne.[137]

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133. The Berne Convention's Moral Rights Clause states: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." *Id.* art. 6*bis*(1).

134. 17 U.S.C. § 104(c) (2012) (codifying Berne Convention Implementation Act (BCIA) § 3, 102 Stat. 2853 (1988)).

135. *See* Ruth L. Okediji, *Through the Years: The Supreme Court and the Copyright Clause*, 30 WM. MITCHELL L. REV. 1633, 1651 (2004).

136. Seth Tipton points out that the WIPO Director-General concurred in the assessment by Congress that amendments to the Copyright Act were not needed to enact the Berne Convention. *See* Seth Tipton, Note, *Connoisseurship Corrected: Protecting the Artist, the Public and the Role of Art Museums Through the Amendment of VARA*, 62 RUTGERS L. REV. 269, 289–90 & n.169 (2009). Tipton quotes Dr. Arpad Borgsch, the Director General of WIPO, opining that:

> [I]t is not necessary for the United States of America to enact statutory provisions on moral rights in order to comply with Article 6*bis* of the Berne Convention. The requirements . . . can be fulfilled not only by statutory provisions in a copyright statute but also by the common law and other statutes. I believe that in the United States the common law and such statutes (Section 43(a) of the Lanham Act) contain the necessary law to fulfill any obligation under Article 6*bis*.

Id. at n.169 (quoting The Berne Convention: Hearings on S. 1301 and S. 1971 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary, 100th Cong 323 (1988) (letter of Arpad Bogsch to Irwin Karp, Chairman of the National Convention, June 16, 1987)).

137. ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 37 (2012) (noting that "we may not be in compliance with our obligations under the Berne Convention"); MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 393 (5th ed. 2010) (noting that "VARA falls short of conforming to the requirements of the Berne Convention" by terminating moral rights before the expiration of economic rights); DAVID NIMMER, COPYRIGHT ILLUMINATED: REFOCUSING THE DIFFUSE U.S. STATUTE 445 & n.108, 469 (2008) (noting that excepting 6*bis* of the Berne Convention from enforcement under the TRIPS protocol "casts doubt on the bona fides of the United States in world copyright circles" and invites charges that the United States "is failing to comply with some very important Berne provisions"); Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After* Dastar, 61 N.Y.U. ANN. SURV. AM. L. 111, 116–18 (2005) (highlighting the House Judiciary Committee's insistence that "adherence of the United States to the Berne Convention did not in itself expand or reduce any right of an author to claim authorship of the work or to object to a work's derogatory treatment"); Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing a Global*

In ratifying the Berne Convention, Congress drew attention to the Lanham Act and state laws respecting the right of publicity, breach of contract, defamation, fraud, misrepresentation, and unfair competition.[138] The Lanham Act does not cover the authorship of performances,[139] and the right of publicity and the common law of misappropriation typically do not prohibit noncommercial use of a performance, such as in artistic expression, journalism, or scholarship.[140] Major centers of audiovisual production, including California, Florida, New York, and Texas, allow the noncommercial use of performances.[141] An expansion of moral rights to potentially

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Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond, 46 HOUS. L. REV. 1187, 1209 (2009) ("The United States, for instance, did not join the Berne Convention until 1988, and it never fully complied with all of its requirements (which is why Article 6*bis* of the Berne Convention was excluded from TRIPS)."); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 281 (2004) (asking about US claims that existing law already covered the article 6*bis* rights in light of their exclusion from TRIPS sanctions, "Were we fibbing? Some would say 'Yes,' . . . "); Justin Hughes, *American Moral Rights and Fixing the* Dastar *"Gap,"* 2007 UTAH L. REV. 659, 661 (2007) ("The *Dastar* ruling was unquestionably important for a robust public domain, but the reasoning the Court employed makes American compliance with Article 6*bis* considerably more problematic."); Tyler T. Ochoa, *1984 and Beyond: Two Decades of Copyright Law*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 167, 181 n.116 (2003) ("The exception concerning Article 6*bis* was insisted upon by the United States, for the obvious reason that we knew we were not in full compliance with Article 6*bis*."). *See generally* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

138. *See* Hughes, *American Moral Rights*, *supra* note 136, at 660–62, 665–66.

139. *See* S. REP. NO. 1333-79, at 3 (1946) (noting that the Lanham Act is concerned with the source of goods); Brief for the United States as Amicus Curiae Supporting Petitioner at 11, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (No. 02-428), 2003 WL 544536 ("Quite unlike copyright or patent law, the Lanham Act is not designed to reward innovation or encourage invention, but instead to protect the public from confusion as to the source of goods."); Hughes, *American Moral Rights*, *supra* note 136, at 661 (noting that the Supreme Court has confirmed that the Lanham Act is concerned with the source of goods); *see also* Brief for the United States as Amicus Curiae Supporting Petitioner, *supra*, at 10 (Congress compared Berne Convention with Lanham Act upon ratifying the former, and as a result of implementing legislation, "the [Berne] Convention is 'not self-executing under the Constitution and laws of the United States,' and the United States' adherence to the Convention does 'not expand or reduce any right of an author of a work . . . to claim authorship of the work' under existing domestic law." (quoting BCIA, § 3, 102 Stat. at 2853 and citing Berne Convention, 828 U.N.T.S. at 235, 251)); Brief for the United States as Amicus Curiae Supporting Petitioner, *supra*, at 21 (arguing against reading "a specialized right of attribution for the authors of *artistic* works" into the Lanham Act).

140. *See, e.g.*, CAL. CIV. CODE § 3344(a), (d) (2012).

141. *See id.* (requiring that the use of a celebrity's image or likeness be "for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent," and exempts by statute the "use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign"); Weil v. Johnson, No. 119431/02, 2002 WL 31972157, at *3–4 (N.Y. Sup. Ct. Sept. 27, 2002) (explaining that although New York lacks a common-law right of publicity, its Civil Rights Law protects a person's name, portrait, picture, or voice against use in "advertising" or "trade," provisions which are "narrowly construed and strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a

prohibit noncommercial uses of performances through the AV Treaty is undesirable.

The Department of Commerce report that led to the DMCA suggested that "serious Constitutional questions" about moral rights exist under the Copyright Clause.[142] The justification that they are necessary to promote the progress of science and useful arts is lacking given our country's creative productivity without them.[143] This productivity has a history stretching back to the performance of Spanish and Native American plays in the seventeenth century and the publication of John Smith's history of colonial Virginia early in the seventeenth century.[144] More recently, the remarkable outpouring of performances on YouTube and other websites suggests that even without performers' rights, Americans will still perform music, skits, speeches, and parodies.

Moral rights, as defined by VARA, only extend to the intentional alteration of a work of visual art or the intentional or grossly negligent destruction of a work of recognized stature in the art world. VARA only protects paintings, sculptures, and "still photographic image[s] produced for exhibition purposes

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living person."). *But cf.* Hilton v. Hallmark Cards, 599 F.3d 894, 911 (9th Cir. 2010); Kirby v. Sega of America, Inc., 50 Cal. Rptr. 3d 607, 607 (Cal. Ct. App. 2006); Krista Correa, *All Your Face Are Belong to Us: Protecting Celebrity Images in Hyper-Realistic Video Games*, 34 HASTINGS COMM. & ENT. L.J. 93, 109–10 (2011); John Gillison, Recent Development, *California's Right of Publicity Undergoes a Significant Transformation:* Comedy III Productions, Inc. v. Gary Saderup, Inc., 29 W. ST. U. L. REV. 359, 362 (2002). Mark Lemley points out that "[a] celebrity (and presumably even an ordinary mortal) can use the right of publicity to control not only the use of her name, but also her picture, voice, and overall image." Lemley, *supra* note 9, at 899 (citing McFarland v. Miller, 14 F.3d 912, 923 (3d Cir. 1994) (involving an actor); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1400–01 (9th Cir. 1992) (involving an actor); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1100 (9th Cir. 1992) (involving a singer); Midler v. Ford Motor Co., 849 F.2d 460, 462–63 (9th Cir. 1988) (involving a singer)).

142. *See* U.S. PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 146 (1995) [hereinafter, USPTO, NATIONAL INFORMATION INFRASTRUCTURE].

143. Aaron K. Perzanowski reproduces the following excerpt from a treatise concerning the traditional contours of US copyright protection:

> It would seem that a copy involves the conception that it must have some degree of permanency or the maxim de minimis would apply. Thus, while the making of a single copy may be infringement, if this copy were destroyed almost as soon as made, as, for example, if a vaudeville artist drew with colored chalks, or if a verse were cast upon a screen through a stereopticon, it may be doubted whether such a temporary production could fairly be called a copy.

Perzanowski, *supra* note 102, at 1091 n.132 (quoting ARTHUR W. WEIL, AMERICAN COPYRIGHT LAW 406 (1917)).

144. *See, e.g.*, *Mexican-American Theater*, TEX. ST. HIST. ASS'N, http://www.tshaonline.org/handbook/online/articles/kkmvs (last visited Oct. 31, 2013); *John Smith Assumes Presidency of Jamestown*, AM. MEMORY, http://memory.loc.gov/ammem/today/sep10.html (last visited Oct. 31, 2013).

only"—probably because other photographic images are routinely modified and mutilated as part of normal, let alone avant garde or transgressive, artistic and journalistic practice.[145] The House Report to VARA stated that moral rights in the United States should be limited to visual art intended for exhibitions and "created in single copies or in limited editions."[146] The Copyright Office described VARA as reflecting the fact that "Congress for the first time legislated limited moral rights of attribution and integrity to authors of narrowly defined works of visual arts."[147] The rights created are "personal to the artist" and last only as long as his or her lifetime, a limitation that distinguishes these moral rights from other US intellectual property protections.[148]

The Register of Copyrights has warned that moral rights legislation requires judges to act as arbiters of artistic quality contrary to American traditions.[149] During the 1980s, Congress also declined to amend the Lanham Act to prohibit "omission of material information" as to authorship from products or advertising, because this presented a problem of compelled speech as to all material facts and "raised difficult questions [of] freedom of speech."[150] In the 1990s, Congress failed to pass the Film Disclosure Act, which would have required labeling of films to reflect editing of the performances therein in later editions.[151] The act stalled due to opposition from the Motion Picture Association of America, the ACLU, and the Department of Commerce.[152] The ACLU described the bill as a "form of censorship" under the First Amendment.[153] A Commerce Department report noted

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145. *See* 17 U.S.C. § 101(2) (2012).

146. H.R. REP. NO. 101-514, at 6919 (1990).

147. U.S. COPYRIGHT OFFICE, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS: EXECUTIVE SUMMARY (1996) [hereinafter WAIVER], *available at* http://www.copyright.gov/reports/exsum.html; *see also* U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS (1995), *available at* http://www.copyright.gov/reports/annual/archive/ar-1995.pdf.

148. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 139, at 20 (citing 17 U.S.C. § 106A(b), (d), (e) (2012)).

149. *See, e.g., Visual Artists Rights Act of 1987: Hearing on S. 1619 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 100th Cong. 21 (1987) (statement of Ralph Oman, Register of Copyrights).

150. Brief for Petitioners at 35 & n.38, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (No. 02-428), 2003 WL 367729 (citations omitted).

151. *See* Honicky, *supra* note 24, at 425.

152. *See id.* at 428; *see also The Film Disclosure Act: Hearing on H.R. 1248 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Jeffrey Eves, President, Video Software Dealers Association); *The Film Disclosure Act: Hearing Before the Subcomm. on Patents, Copyrights, & Trademarks of the S. Comm. on the Judiciary*, 102 Cong. 72–73 (1993) [hereinafter *Film Disclosure Act Hearing*] (statement of Robert Peck, ACLU).

153. *Film Disclosure Act Hearing*, *supra* note 151, at 71; *see also* Honicky, *supra* note 24, at 428 n.143.

that moral rights that are "non-waivable may create difficulties for the commercialization of works in the [Internet] environment."[154] A Japanese report on multimedia copyright and related rights reached a similar conclusion.[155]

The AV Treaty also alters the contours of copyright known to WIPO. The WCT did not extend moral rights to computer programs, electronic rights-management information, or TPMs.[156] The negotiators of the WCT also refused to provide that a company could be liable for negligently providing facilities to a person who transmits a remix of a protected performance with the original credits removed or altered, which is what Article 16 of the AV Treaty aspires to do.[157] Although the WPPT recognized moral rights, the negotiators omitted the audiovisual world from it.[158] According to Graeme B. Dinwoodie, this was because the United States could not agree with Europe on the

154. USPTO, NATIONAL INFORMATION INFRASTRUCTURE, *supra* note 142, at 146.

155. *Id.*

156. There is no counterpart to Article 5 of the AV Treaty in the WCT. *See* WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121 ("Contracting Parties shall apply mutatis mutandis the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty."). Moral rights appear in Article 6*bis* of Berne, which is distinct from and appears after Article 6.

157. Although the WCT contains a similar provision, it is limited to "electronic rights management information" (in other words, not to analog credits or other rights management boilerplate) and to those who distribute, import, broadcast, or *directly* communicate to the public (and not simply by providing facilities for enabling or making a communication) a work from which it is known that "electronic rights management information" have been removed without authority. *See id.*; Pamela Samuelson, *Legally Speaking: The Never-Ending Struggle for Balance*, COMMC'NS ACM, May 1997, at 19 (addressing interpretations that "reject[] the idea that merely providing facilities for transmission of digital works should be the basis for liability."). The WCT specifically provides that:

> Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

Id. art. 12. It also presents the understanding that "the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention . . . [and] that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2)." *Id.* art. 8 & n.7.

158. WPPT, *supra* note 15, art. 5(1) ("Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.").

language and Europe believed that a treaty without US participation was not useful.[159]

The Supreme Court has struck down a number of laws on the basis that they were overbroad, insofar as they applied by their literal terms to protected works of artistic, cultural, or political expression.[160] A similar analysis would raise grave concerns about the AV Treaty's constitutionality. Its literal terms would create even more ambiguous and unpredictable liability than the laws struck down by the Supreme Court in *Citizens United v. FEC* or *ACLU v. Reno*.[161]

Consider a claim by Mitt Romney against CNN or MSNBC for using his performance at a private fundraiser in which he referred to the "47 percent" who are dependent on government and who believe that they are entitled to food.[162] Article 2 defines a performer to include those who "declaim" a "literary" work or works.[163] Romney's declamation of his speech would be a performance.[164] Romney would have the exclusive right to record his unrecorded declamation of his presentation to his donors. By quoting it out of context, the Obama campaign would be altering and mutilating it.[165] The "classic definition" of performers defines them to include those who "declaim"

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159. Graeme Dinwoodie, *The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?*, 57 CASE W. RES. L. REV. 751, 763 n.46 (2007).

160. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 476, 482 (2010) (holding that the section of the US Code banning the sale for commercial gain of depictions of cruelty to animals, originally entitled Punishing Depictions of Animal Cruelty Act, violated First Amendment because it might apply to "hunting television programs, videos, and Web sites"); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364, 371–72 (2010) (holding that the Federal Election Campaign Act of 1971 § 316, 2 U.S.C. § 441b, violated First Amendment because it might apply to "a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds," and noting that "[m]odern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the 'purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value' in order to engage in political speech." (quoting 2 U.S.C. § 431(9)(A)(i) (2012))); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 247–48 (2002) (holding that the Child Pornography Prevention Act of 1996 violated the First Amendment because it might apply to director Baz Luhrmann's version of *Romeo and Juliet*, Oscar Best Picture nominee *Traffic*, and Oscar Best Picture winner *American Beauty*, films that also portray teenagers having sex); Reno v. ACLU, 521 U.S. 844, 856 (1997) (holding that the Communications Decency Act section prohibiting communications to minors of indecent material violated the First Amendment because it might apply to "newsgroups and chat rooms containing discussions of art, politics, or other subjects that potentially elicit 'indecent' or 'patently offensive' contributions").

161. *See* AV Treaty, *supra* note 19, art. 5.

162. *See Mother Jones Sees Record Traffic from Mitt Romney Video*, HUFFINGTON POST (Sept. 18, 2012), http://www.huffingtonpost.com/2012/09/18/mother-jones-mitt-romney-traffic_n_1894609.html.

163. AV Treaty, *supra* note 19, art. 2.

164. *See id.*

165. *See id.* art. 5.

a "literary" work or works.[166] Romney's speech would arguably be a literary work under the *I Have a Dream* speech decision[167] and *Harper & Row Publishers v. Nation Enterprises*, among others.[168]

Moral rights could also be applied retroactively to works created prior to the AV Treaty's ratification, such as Romney's speech.[169] If Congress adopts a framework for the AV Treaty similar to the Uruguay Round Amendments Act of 1994, performers may be able to send a notice to those who relied upon the absence of performers' rights in US law when creating their own work.[170] After performers send notice, those who relied upon the absence of such rights may have to cease distributing or performing their own work after one year.[171] Similarly, creators of derivative works may in turn be enjoined from exploiting their own works unless they pay what the performer believes to be reasonable compensation.[172]

A defender of the TPP or the AV Treaty might respond that Congress would have to act before Americans could face civil liability or criminal charges for their YouTube videos or other remixes, but the federal government has been seizing websites that do not themselves infringe copyrights.[173] The fear is that the many vague clauses in

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166. *See* International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations art. 3(a), Oct. 26, 1961, 496 U.N.T.S. 43.

167. *See* Estate of Martin Luther King, Jr. v. CBS, Inc., 194 F.3d 1211, 1216–17 (11th Cir. 1999).

168. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 582–83 (1985) (Brennan, J., dissenting); Joseph Beck, *Flexibility in Parody of Copyrighted Material*, 10 MEDIA L. & POL'Y 3, 3–6 (2003).

169. *See General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing Before the Subcomm. on Intellectual Prop. & Judicial Admin. of the H. Comm. on the Judiciary and the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 103d Cong. 85 (1994) (statement of Xavier Becerra, Member, H. Comm. on the Judiciary) ("[R]etroactivity . . . is probably the best way to ensure that some of our older American works, anything from Motown, to 'Star Trek,' to 'The Hardy Boys' get the protection in . . . emerging foreign markets. It is important to ensure that countries no longer use our U.S. law as an excuse for not extending retroactive copyright protections to some of our own works.").

170. Uruguay Round Agreements Act § 514, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 17 U.S.C. § 104A (2000)).

171. *See id.*

172. *See* 17 U.S.C. § 104A(d)(3)(A)–(B) (2012); Brief for the Motion Picture Association of America as Amicus Curiae Supporting Respondents at 3, Golan v. Holder, 132 S.Ct. 873 (2012) (No. 10-545), 2011 WL 3561888 (citing these provisions and discussing them).

173. *The Cybersecurity Partnership Between the Private Sector and Our Government: Protecting Our National and Economic Security: Joint Hearing Before the S. Comm. on Commerce, Sci., & Transp. and the S. Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. 6 (2013) (statement of Janet Napolitano, Sec'y, Department of Homeland Security) (stating that more than 2,000 domain names related to counterfeiting have been seized); Amici Curiae Brief of Electronic Frontier Foundation et al. in Support of Petitioner at 1–15, 19–20, Puerto 80 Projects, S.L.U. v. United States, No. 11-3390-cv (2d Cir. Sept. 23, 2011), 2011 WL 5909020 (arguing that the United States, in violation of the First Amendment, seized domain names that had been adjudicated to be noninfringing by a court); *cf.* Michael Kelley, *Kim Dotcom Is Basking*

treaties such as the TPP, ACTA, or the AV Treaty will lead to the end of the Internet as we know it. Internet companies could be forced to edit out the quotation of copyrighted material, and the state could inspect all Internet traffic. Executive power has tended, in recent years, to reach to the very limits of implied grants of congressional authority—and beyond.[174]

B. Article 10

As noted in Part II, the AV Treaty creates an "exclusive right of authorizing the making available to the public of . . . performances fixed in audiovisual fixations, by wire or wireless means."[175] The Copyright Acts of 1790, 1831, and 1909 provided no such right.[176] Indeed, the Act of 1909 did not even contain a performance right that covered transmissions of a sound recording over the radio or that could cover a transmission of a television program over a cable wire.[177]

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in Another Significant Legal Victory Over the US Government, BUSINESS INSIDER (May 31, 2013, 4:34 PM), http://www.businessinsider.com/kim-dotcom-wins-another-legal-victory-2013-5 (suggesting that 22 million emails were seized for one case, and quoting Kim Dotcom, Megaupload chief and target of the investigation, as arguing that he has won Canadian, German, and New Zealand "[c]ourt rulings in favor of #Megaupload" and reporting a ruling by a New Zealand judge that the raid on Dotcom's computers was "miscarriage of justice"); *Judge Rules Seized Items to Be Returned to Dotcom*, TVNZ (May 31, 2013, 4:02 PM), http://tvnz.co.nz/national-news/judge-rules-seized-items-returned-dotcom-5453027 (reporting ruling by a New Zealand judge that the raid on Dotcom's computers was illegal and that the cloned hard-drives with personal information on them should be returned to him).

174. *See* Robert Bloom & William J. Dunn, *The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 15 WM. & MARY BILL RTS. J. 147, 149 (2006); Richard A. Epstein, *Executive Power on Steroids*, WALL ST. J. (Feb. 16, 2006, 12:01 AM), http://online.wsj.com/news/articles/SB113980208779772206; *see also* GENE HEALY, THE CULT OF THE PRESIDENCY: AMERICA'S DANGEROUS DEVOTION TO EXECUTIVE POWER 199 (2009); DANA D. NELSON, BAD FOR DEMOCRACY: HOW THE PRESIDENCY UNDERMINES THE POWER OF THE PEOPLE 3 (2008); GARY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE 1–4 (2011).

175. AV Treaty, *supra* note 19, art. 10.

176. *See* H.R. REP. NO. 104-274, at 10–11 (1995).

177. *Id.* ("The historic lack of a performance right for sound recordings under U.S. copyright law has been a source of controversy for decades. . . . Sound recordings were first granted Federal copyright protection by amendment to the Copyright Act in 1971."); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 394 n.9, 401–02 (1968) (holding that transmission over cable system did not "perform" a work under Copyright Act of 1909 because "[w]e take the Copyright Act of 1909 as we find it," even though that Act defined it as an infringement "to make or to procure the making of any transcription or record [of a work] by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever," or in the case of a musical composition, "to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced" (citing 17 U.S.C. § 1 (1968))), *superseded by statute*, Copyright Revision Act of 1976,

Moreover, "[p]rior to 1994, there was no federal protection extended to unrecorded live musical performances. A [fan] could record a live musical performance, and distribute copies without any authorization from the performers, and would not have violated copyright law."[178]

Although the Copyright Act of 1976 faintly echoed the "making available" right by referring to the authorization of a distribution as a "distribution," it did not codify a making-available right.[179] The word "distributed" in 1976 had a considerably narrower public meaning than the words "available" and "published."[180] A broad definition would interpret "distribute" as offering, soliciting the taking of, or advertising. A narrower one would interpret "distribute" as the sorting, sending, or placing of things, as in an allotment or division of land among persons, a delivery of magazines or products, a franchising of a business, or a spreading of seeds on land. As Peter S. Menell points out, the dictionary meaning of "distribute" relates to the division or placement of several members of a group of things, the spreading out or scattering of things, the separation of concepts into classes or species, or the marketing of a commodity in a particular area.[181] Each of these definitions implies a "sending" of sorts. Congress also dealt separately with the importation of copies for purposes of distribution, thereby negating the implication that the "distribution" right already extended to acts prior to an actual distribution.[182]

Pub. L. No. 94-553, 90 Stat. 2541, *as recognized in* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

178. Cristina Lipan, *The Constitutionality of Anti-Bootlegging Legislation*, CHRISTINA M. LIPAN, ESQ. (Dec. 17, 2009), cristinalipan.com/articles/anti-bootlegging.

179. *See, e.g.*, Flava Works, Inc. v. Gunter, 689 F.3d 754, 757–58, 760–62 (7th Cir. 2012) (noting that contributory copyright infringement requires either direct participation in a performance by owning a server from which the performance is transmitted directly to the viewer's computer, or by making a copy of the performance) (citing Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)); Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 139 (2nd Cir. 2008) (stating that making copies of television shows available to users of a cable service is not a direct infringement by reproduction or distribution to viewers' dedicated storage space, unless viewers do not decide when to view the copies); Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976, 982–83 (D. Ariz. 2008) (questioning whether infringement may occur without making copies or delivering them to another person); Atl. Recording Corp. v. Brennan, 534 F. Supp. 2d 278, 281–82 (D. Conn. 2008); London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 173 (D. Mass. 2008). *But see* Arista Records LLC v. Greubel, 453 F. Supp. 2d 961, 969–70 (N.D. Tex. 2006) (suggesting that authorizing a distribution is already a distribution by making the work available).

180. "[T]he ordinary meaning of the word 'distribute,' as defined in leading dictionaries [from 1933 and 1962], necessarily entails a transfer of ownership or possession from one person to another." Brief for Copyright Law Professors as Amici Curiae in Support of Defendant at 3, Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-1497), *available at* https://www.eff.org/files/filenode/capitol_v_thomas/20080613LawProfsAmici.pdf.

181. *See* Menell, *supra* note 112, at 56.

182. *See* 17 U.S.C. § 602(a) (2012).

C. The Interaction of Articles 5 and 6 with Other Laws

Performance rights, and especially moral rights, will interact in very complex ways with existing US law. Lawsuits against speakers on matters of public import will multiply, for several reasons.

First, there may be a new class of plaintiffs to challenge the decryption of DRM on audiovisual works for purposes of making a fair use of them in teaching, scholarship, or subsequent creative work.[183] There is a widespread consensus among academics that without clear user and subsequent-creator rights, the WCT's requirement for anticircumvention rules "harms legitimate interests of the public in making fair uses, privileged uses, and other non-infringing uses of copyrighted works."[184] Proposals in Congress that the WCT be implemented in a way that did not outlaw circumvention of DRM in order to engage in noninfringing use were rejected after software and entertainment distribution companies opposed them.[185]

Second, performers may chill fair use and republication of public-domain works by sending demand letters to companies like Facebook, Pinterest, Twitter, and YouTube. Google and YouTube already process 10 million or more DMCA takedown requests per month, in addition to similar demands originating in dozens of other legal systems.[186] A single DMCA consulting firm is able to send eight million DMCA takedown demands per month.[187] Empirical work has also made clear that the secondary liability of websites and

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183. *See, e.g.*, Jennifer M. Urban & Laura Quilter, *Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 643 (2005).

184. Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 984 (2007).

185. *Id.* at 1001.

186. *See* Hanley, *supra* note 7, at 195 ("Companies like Google must be especially cognizant of varying foreign domestic laws on IPR because the borderless nature of the Internet means Google is accountable to 'hundreds' of different legal systems at one time."); Mike Masnick, *MPAA: Millions of DMCA Takedowns Proves That Google Needs to Stop Piracy*, TECHDIRT (Dec. 17, 2012, 10:39 AM), http://www.techdirt.com/articles/20121214/23441221394/mpaa-millions-dmca-takedowns-proves-that-google-needs-to-stop-piracy.shtml ("'According to Google, they receive 2.5 million [DMCA] takedown requests per week–and that data does not even include YouTube, where an enormous amount of infringement takes place.' . . . The massive expansion of copyright law and broad tools like the DMCA's notice-and-takedown lead to massive amounts of collateral damage that–absolutely and without question–infringe on free speech rights." (quoting Marc Miller, *The Burden on Creators to Protect Their Work*, MPPA BLOG (Dec. 13, 2012, 12:31 PM), http://blog.mpaa.org/BlogOS/post/2012/12/13/The-Burden-on-Creators-to-Protect-Their-Work.aspx)).

187. *See Irdeto Anti-Piracy Services Tracking and Enforcement*, IRDETO, http://irdeto.com/component/content/article/125-mobile/707-anti-piracy-services.html (last visited Oct. 30, 2013).

peer-to-peer file-sharing software is resulting in the deletion and noncommunication of thousands of fair-use and public-domain works without any corresponding benefit to creators and authors.[188] In 2005, Jennifer Urban and Laura Quilter released a study focused on demand letters sent to Google and other digital media firms that showed that many of the demands posed a "serious problem for Internet speech" because they demanded the deletion of websites or other communications that likely did not violate any copyright.[189] Lydia Pallas Loren argues that cases of viewpoint-based censorship using DMCA takedowns "abound."[190]

Internet users could even lose their access to newly dominant communications platforms as a result of repeatedly altering performances.[191] AT&T has warned users that violations of moral rights may result in termination of their Internet service.[192] *A&M Records, Inc. v. Napster* stands for the rule that "if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement."[193] An early version of the ACTA contained a provision for the termination of Internet access to users who are repeatedly accused of copyright infringement, even prior to a trial.[194] This development would have entangled extrajudicial copyright enforcement with many unrelated aspects of US trade with the European Union, Canada, Japan, Mexico, South Korea, and other major trading partners.[195]

Even under the existing system, which rejects moral rights and contains many formalities, eBay and Facebook have complained of

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188. *See* Urban & Quilter, *supra* note 183, at 687–88.

189. *Internet Study Finds Questionable Use of Cease-and-Desist Notices*, FACULTY FOOTNOTES (USC Gould School of Law, L.A., Cal.), Fall 2006, at 2, *available at* http://law.usc.edu/assets/docs/FINAL-footnotes06.pdf; *see* Urban & Quilter, *supra* note 182, at 687.

190. Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745, 747 (2011).

191. *See AT&T Acceptable Use Policy*, AT&T, http://www.corp.att.com/aup (last visited Oct. 28, 2013).

192. *Id.*

193. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001).

194. *See* Hanley, *supra* note 7, at 200. Although the language is less directly aimed at the Internet, there may be an argument that under the final version of ACTA, states Party are required to empower courts or other "authorities" to destroy computers, servers, or hard drives "predominantly used in the creation of counterfeit trademark goods or pirated copyright goods." Anti-Counterfeiting Trade Agreement (ACTA), art. 25.4 (2010), http://www.ustr.gov/webfm_send/2417.

195. *See* Hanley, *supra* note 7, at 191–92, 200 (citing *Anti-Counterfeiting Trade Agreement Final; Group Calls Process 'Unconstitutional'*, 81 PATENT, TRADEMARK, AND COPYRIGHT JOURNAL (BNA) 72 (2010), *available at* http://www.bna.com/anticounterfeiting-trade-agreement-n6476/).

"the suppression of some lawful, creative works and uses as a by-product of extra protection for other creative works and uses."[196] eBay, Yahoo!, AOL, and Facebook describe grave threats to "many innovative Internet-based services, marketplaces, communities, and platforms, [which] have arisen or expanded due in substantial part to the safe harbor."[197] The National Alliance for Media Art and Culture points out: "broadcasters [have] sent DMCA takedown notices to remove political ads from a number of [political] campaigns without considering fair use and . . . such removal chilled political speech."[198] The NGO Public Knowledge contends that "time sensitive videos making fair use of clips [may be] automatically blocked, their timeliness and impact [being] lost and they [will be] effectively censored."[199]

Third, performers will be new claimants for statutory damages if the US implementation of the AV Treaty is similar to its implementation of the WPPT. Small businesses such as bars, retail establishments, and restaurants could be liable for $100,000 per night for performances during musical sets that imitate those of prior musical artists, even though the establishments had a BMI or ASCAP license.[200] Statutory damages under section 504(c)(1) of the Copyright Act may range up to $150,000.[201] As Judge Kimba Wood noted in *Arista Records LLC v. Lime Group LLC*, an allegation of infringement involving 11,000 works may, by multiplication across infringers and according to the Recording Industry Association of America (RIAA)'s theories, become a claim for damages of tens of trillions of dollars, perhaps even more money than has even been printed.[202]

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196. Brief for Amici Curiae eBay Inc. et al. Supporting Defendants-Appellees and Urging Affirmance at 28, Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012) (No. 10-3270-cv), 2011 WL 1536815.

197. *Id.* at 8.

198. Brief of Amici Curiae National Alliance for Media Art and Culture and the Alliance for Community Media in Support of Defendants-Appellees and in Support of Affirmance at 21–22, Viacom Int'l, Inc., v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012) (No. 10-3270-cv), 2011 WL 1461433.

199. Brief of Amicus Curiae Public Knowledge in Support of Affirmance for Defendants-Appellees at 11, Viacom Int'l Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012) (No. 10-3270-cv), 2011 WL 4541963 [hereinafter Brief of Amicus Curiae Public Knowledge].

200. *Cf.* Broad. Music, Inc. v. CDZ, Inc., 724 F. Supp. 2d 930, 936–37 (C.D. Ill. 2010).

201. 17 U.S.C. § 504(c)(1) (2012); *see* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009).

202. Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 313, 317 (S.D.N.Y. 2011) ("If Plaintiffs were able to pursue a statutory damage theory predicated on the number of direct infringers per work, Defendants' damages could reach into the trillions."); *see also id.* at 317 & n.3 (suggesting figures of $150,000 per infringer and 500 million downloads); Victor Li, *Manhattan Federal Judge Kimba Wood Calls Record Companies' Request for $75 Trillion in Damages 'Absurd' in Lime Wire Copyright Case*, AM. LAW. (Mar. 15, 2011),

The Consumer Electronics Association (CEA) has estimated that YouTube could be liable for between $11 and $500 billion in statutory damages per year, and Facebook for $36 trillion to more than $360 trillion per year.[203] As the National Venture Capital Association stated in *MGM Studios, Inc. v. Grokster, Ltd.*: "[T]he threat of secondary liability from copyright suits is qualitatively different from most other sorts of business risk that investors can insure against or build into their risk calculations. The mandatory mechanism of statutory damages—designed to discourage direct infringement—has crushing implications for vendors of multi-purpose technologies, where damages from unforeseen users can quickly mount in the millions and even billions of dollars."[204]

Facing these unprecedented threats, YouTube increasingly relies on "automated content matching" as a form of self-regulation. Automated content matching creates thousands of false positives and is unable to distinguish fair use, which will "inevitably reduce the free flow of speech and expression online."[205] On YouTube, more than 7,300 videos are "flagged" for copyright infringements annually due to "false positives" during "content matching" even "when they did not . . . match a clip provided by . . . cooperating copyright holders."[206] Human Rights Watch and others argue that the statutory-damages remedy for online streaming sites that allow audiovisual works to be communicated, including derivative works and nonliteral copies or imitations, will "drive smaller firms and non-profits to the sidelines" and "is certain to deter firms that might otherwise enter the field to

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http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202486102650&slreturn=20130124164509 (noting that Limewire and "record companies" disputed whether damages should be addressed on a per-download or per-work basis, and that on a per-download basis there would be $75 trillion in damages).

203. The association notes that if one percent of videos uploaded to YouTube infringed, and statutory damages are set at $10,000 per work, YouTube would face $11 billion in statutory damages per year assuming no overlap among works (if 50 percent of videos infringed, which is also possible, the total would be $500 billion), while if one percent of photographs uploaded to Facebook infringed, and statutory damages are set at $10,000 per work (assuming no overlap), Facebook would face $36 trillion in statutory damages per year (and using a statutory damages figure of $100,000 per work, the total would be $360 trillion). Brief of Amicus Curiae Consumer Electronics Ass'n in Support of Appellees and Affirmance at 4, 23–24, Viacom Int'l Inc., v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012) (No. 10-3720-cv), 2011 WL 1356931.

204. Brief of the National Venture Capital Ass'n as Amicus Curiae in Support of Respondents at 17, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), 2005 WL 497759.

205. Brief of Amicus Curiae Public Knowledge, *supra* note 198, at 11.

206. *Id.* at 9–10.

develop the next 'generation' of internet-based platforms and media, those that will make Facebook and YouTube seem dated."[207]

The creation of audiovisual rights that would immediately be infringed en masse (due to the nature of the Internet), and resolved only via complex licensing mechanisms (such as the one attempted in the Google Book Search case), would create headaches from the perspective of antitrust and competition law.[208] As the music and motion-picture industries raised claims of mass infringement against peer-to-peer services like Napster and Scour Exchange, they formed joint ventures like MusicNet, PressPlay, and Movielink. These ventures generated multiple potential antitrust violations in terms of price coordination, the leveraging of copyright licenses into control over distribution channels, joint decision making by rivals on output levels, and information sharing among rivals that could suppress competitive vigor.[209] Google's competitors have raised concerns that its proposed licensing of orphan works through class-action representatives, which was submitted to a federal court, could grant it an unstoppable advantage in the digital-library and Internet-search markets.[210] James Grimmelman argues that Google's license to make a digital bookstore could bring about "coordinated pricing [that] would amount to an anti-competitive price-fixing scheme."[211]

While there is nothing necessarily unlawful about unions of performers or authors of any kind, guilds of producers of audiovisual works, empowered by the AV Treaty to reach collective settlements with Internet entertainment services, could be dangerous to the public interest. For example, the Dramatists Guild filed an antitrust counterclaim against The League of New York Theaters and Producers, Inc. in 1982.[212] The Guild alleged that the League, its President, and the investors controlling a monopoly market share of "first class theaters" in New York City had conspired to "fix, stabilize

207. Brief for Human Rights Watch et al. Amici Curiae in Support of Appellees at 20, Viacom Int'l Inc., v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012) (No. 10-3720-cv), 2010 WL 6510812.

208. *See* Authors Guild v. Google Inc., 770 F. Supp. 2d. 666, 669–72 (S.D.N.Y. 2011); Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 91 (2006).

209. *See* Katherine L. Race, *The Future of Digital Movie Distribution on the Internet: Antitrust Concerns with the Movielink and Movies.Com Proposals*, 29 RUTGERS COMPUTER & TECH. L.J. 89, 126–27, 134–35 (2003); Travis, *supra* note 208, at 158–59.

210. *See* Objection of Amazon.com, Inc., to Proposed Amended Settlement at 1, 9, 18–32, Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. 105CV08136), 2010 WL 451143.

211. James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. REV. 387, 420 (2013).

212. *See* Barr v. Dramatists Guild, Inc., 573 F. Supp. 555, 557–58 (S.D.N.Y. 1983).

and/or maintain at artificially low and noncompetitive levels the compensation received by playwrights."[213] Similarly, athletes and musicians have complained of associations and leagues conspiring to reduce the compensation paid to performers in sporting events and recorded music.[214] Freelance photographers alleged that news outlets suppressed the licensing payments due for photographs of events.[215] Broadcasters and the Department of Justice have also challenged the actions of collective-licensing organizations to fix the prices paid by radio and television stations to perform copyrighted music.[216] Moreover, such guilds and leagues may inhibit the freedom of expression. Jessica Litman remarks that according to the Dramatists Guild of America, extending copyright protection to the directors and producers of performances of dramatic works would "infringe on the rights of dramatists to own and control their plays, and may inhibit

213. *Id.*; *see* Alison Zamora, *The Playwright Licensing Antitrust Initiative Act: Empowering the "Starving Artist" Through the Convergence of Copyright, Labor, and Antitrust Policies*, 16 DEPAUL-LCA J. ART & ENT. L. 395, 407 (2006); Ashley Kelly, Comment, *Bargaining Power on Broadway: Why Congress Should Pass the Playwrights Licensing Antitrust Initiative Act in the Era of Hollywood on Broadway*, 16 J.L. & POL'Y 877, 904 (2008); Carol Lawson, *Dramatists Guild Sued Over Royalty Payments*, N.Y. TIMES, July 28, 1982, http://www.nytimes.com/1982/07/28/theater/dramatists-guild-sued-over-royalty-payments.html.

214. *See, e.g.*, Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 332–33 (7th Cir. 2012) (describing allegations that injured student-athletes' "failure to acquire a scholarship equal to the full cost of obtaining a bachelor's degree is the result of the NCAA's regulation of participating schools' athletic scholarships," including a "one-year scholarship limit, which prohibits NCAA member schools from offering student-athletes multi-year scholarships," and a "cap on the number of athletic scholarships a school can offer for each team in a given year"); Nat'l Ass'n Freelance Photographers v. Associated Press, No. 97 Civ. 2267(DLC), 1997 WL 759456, at *8 (S.D.N.Y. Dec 10, 1997) (describing claims of antitrust and copyright infringement by freelance photographers' association seeking "declaratory and injunctive relief largely on the basis of AP's practice of requiring photographers who are on assignment for AP, and from whom it buys photographs, to assign their copyrights in those photographs to AP as a condition of sale"); *United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. 155–56 (2000) [hereinafter *Hearings on Work Made for Hire*] (statement of Sheryl Crow, artist) (complaining that singer-songwriters are not treated as authors of recordings by record companies despite performing the song and financing the recording in many cases, and suggesting some coordination by companies to bring about this state of affairs); Valerie Alter, Note, *Building Rome in a Day: What Should We Expect from the RIAA?*, 26 HASTINGS COMM. & ENT. L.J. 155, 164–65 (2003) (describing disputes between RIAA and "Hole" frontwoman Courtney Love, and Smashing Pumpkins group as well); Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 592–605 (2010) (collecting sources regarding disputes between blues musicians and record companies).

215. *See Nat'l Ass'n Freelance Photographers*, 1997 WL 759456, at *8 ("The Amended Complaint asserts antitrust and copyright infringement claims and seeks declaratory and injunctive relief largely on the basis of AP's practice of requiring photographers who are on assignment for AP, and from whom it buys photographs, to assign their copyrights in those photographs to AP as a condition of sale.").

216. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 14 (1979); Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM-VLA J.L. & ARTS 349, 349–51 (2001).

the opportunities of other professionals, and audiences, to participate in the re-creation and enjoyment of the play."[217]

V. DUE PROCESS IN INTELLECTUAL PROPERTY AND THE US CONSTITUTION

As Justice John Paul Stevens observed, the Constitution of the United States contains a Liberty Clause.[218] The Fifth Amendment states that the federal government may not take away your liberty or property without due process of law.[219] Justice Stevens points out that part of this liberty is the right to equal treatment.[220] Akhil Reed Amar adds that the preamble to the Constitution contains another liberty clause, stating that the whole Constitution was ordained by "the people of the United States, in Order to . . . secure the Blessings of Liberty to [them]selves and [their] Posterity."[221]

Justice Stevens then declared in a 2004 dissent: "The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property."[222] In Joseph Story's formulation, the Due Process Clause "in effect affirms the right of trial according to the process and proceedings of the common law."[223] Thus, when liberty is at stake "there must in every instance be judicial proceedings," including "a hearing before an impartial tribunal, with proper jurisdiction."[224] Justices Scalia and Thomas have pointed out that "the Due Process Clause keeps punishment within the bounds established by the legislature, and the Cruel and Unusual

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217. Litman, *supra* note 119, at 1423 n.263 (quoting *Statement: Dramatist Copyright and Intellectual Property Rights*, DRAMATISTS GUILD OF AM., http://dramatistsguild.com/about_statements_copyright.aspx (last visited Apr. 2, 2010), *available at* http://web.archive.org/web/20080516092242/http://www.dramatistsguild.com/about_statements_copyright.aspx).

218. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3090–92 (2010) (Stevens, J., dissenting) (citing the "liberty clause of the Fourteenth Amendment" as well as the "liberty" protected by the Fifth and Fourteenth Amendments' Due Process Clause).

219. U.S. CONST. amend. V.

220. *See McDonald*, 130 S. Ct. at 3090–91 (Stevens, J. dissenting); John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 21–24 (1992).

221. Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 626 (2001) (quoting U.S. CONST. pmbl.).

222. Hamdi v. Rumsfeld, 542 U.S. 507, 556 (2004).

223. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783, at 661 (1833).

224. *Hamdi*, 542 U.S. at 556 (citing THOMAS COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 224 (1880)).

Punishments and Excessive Fines Clauses place substantive limits upon what those legislated bounds may be."[225]

The AV Treaty will create various serious due process problems when lawyers conversant in the DMCA invoke it. It is vague, discriminatory, and impossible to implement. Most obviously, the ban on the derogatory use of performances is so vague as to fail to place Internet users on notice of which fair uses are allowed in the audiovisual context. The Supreme Court has previously struck down laws regulating indecent speech and the sale of depictions of cruelty to animals on the Internet.[226] The Court has demanded that Congress use "sensitive tools" to enforce the "separation of legitimate from illegitimate speech."[227] For example, it only upheld a statute prohibiting interstate communications that are lewd, indecent, obscene, or lascivious with intent to harass or annoy by interpreting it as being limited to obscenity, which has a long-standing definition.[228]

Words like alteration and derogation are blunt, insensitive instruments in relation to speech, particularly speech on the Internet, which is often uninhibited, rowdy, and anonymous. Copyright expert David Nimmer has warned that as copyright law becomes vaguer, "the danger arises that the Internet itself could be prosecuted out of existence."[229] To prevent censorship of the Internet, laws must set forth "explicit standards" in order to preclude "arbitrary and discriminatory enforcement."[230] With the AV Treaty, an arbitrary distinction is erected between Hollywood and sites like YouTube, insofar as Hollywood may not be liable for mutilating or using without attribution the performances of persons who consented to recordings but who had no idea that their work would someday be played on a DVD or website.[231] The vagueness of the text facilitates this plan.[232]

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225. Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 803 (1994) (Scalia, J., dissenting).

226. *See* United States v. Stevens, 559 U.S. 460, 462–63, 476 (2010) (holding that a statute criminalizing animal cruelty depiction violated the First Amendment because it was so vague that it might apply to "hunting television programs, videos, and Web sites"); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 856 (1997) (finding an indecency law's vagueness and overbreadth violated the First Amendment).

227. Speiser v. Randall, 357 U.S. 513, 525 (1958).

228. *See* ApolloMedia Corp. v. Reno, 526 U.S. 1061 (1999), *aff'g* 19 F. Supp. 2d 1081 (N.D. Cal. 1998) (ruling that the challenged provision of the statute applied only to "obscene" communications and was therefore constitutionally valid).

229. *Copyright Piracy, and H.R. 2265, the No Electronic Theft Act: Hearing on H.R. 2265 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 105th Cong. 156 (1997) (statement of David Nimmer, on behalf of U.S. Telephone Association).

230. City of Chicago v. Morales, 527 U.S. 41, 64 (1999) (affirming the lower court's holding that Chicago's anti-gang statute was unconstitutionally vague under this standard).

231. *See* AV Treaty, *supra* note 19, art. 12.

232. *See id.* at arts. 5–11.

Moreover, the federal government has been seizing websites that do not themselves infringe copyrights.[233] The Motion Picture Association of America sent a letter to Congress in support of SOPA in which it claims that Congress has chosen to regulate Internet search engines.[234] The letter notes that courts are increasingly ordering the seizure of websites without a trial based on a theory that there was "probable cause" to believe that infringement occurred.[235] While conceding that orders seizing dozens of domain names at a time may harm protected speech, the letter said that the presence of noninfringing speech does not immunize a copyright violator and that the user may repost material after establishing compliance.[236] Would anyone argue that the presence of an infringing melody or poster in a Hollywood film should result in its removal from theaters subject to a renewed release date?[237] Mira Rajan argues that Hollywood traditionally opposed performance treaties, fearing the actors and songwriters, but changed its position in order to assert greater control over what the rest of society does in digital environments.[238] The proposed regime portends unequal treatment of Internet speech as compared with Hollywood films, TV shows, and big concerts.

Misleading claims as to the ownership and infringement of performance rights will bombard services like YouTube.[239] This will result in the removal of First Amendment-protected speech and

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233. *See* Letter from Floyd Abrams, on Behalf of Motion Picture Association of America et al., to Lamar Smith, Chairman, H. Comm. on the Judiciary 6–12 (Nov. 7, 2011), *available at* http://www.mpaa.org/resources/1227ef12-e209-4edf-b8b8-bb4af768430c.pdf (writing about the Stop Online Piracy Act).

234. *See id.* at 6, n.3.

235. *Id.* at 11.

236. *See id.* at 9–13.

237. A similar argument was made as to trade dress and trespass, and mockingly dismissed by the court, in Sherwood 48 Associates v. Sony Corp. of America, 213 F. Supp. 2d 376, 377 (S.D.N.Y. 2002), *aff'd in part, vacated in part*, 76 F. App'x 389 (2d Cir. 2003).

238. *See* Rajan, *supra* note 24, at 772.

239. *Cf.* Brief Amicus Curiae Electronic Frontier Foundation in Support of Appellees and Affirmance at 12, Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012) (No. 11-2620), *available at* https://www.eff.org/sites/default/files/filenode/Brownmark_v_Comedy_Partners_CA7_amicus-brief_as-filed.pdf. ("Large media companies deliver hundreds of thousands of 'takedown' notices under 17 U.S.C. § 512 each month to online service providers who host and link to information posted by Internet users. . . . [and] remix video creators have found themselves mistakenly caught in the takedown notice driftnet."); Brief of Amicus Curiae Electronic Frontier Foundation in Support of Defendant-Appellee and Urging Affirmance at 29, Sony BMG Music Entm't. v. Tenenbaum, 660 F.3d 487 (1st Cir. 2011) (No. 10-1883) ("One 2006 study estimated that fully one-third of DMCA takedowns were improperly asserting infringement claims; indeed with media companies sending as many as 160,000 takedown notices at a time, it could hardly be otherwise."), *available at* https://www.eff.org/files/filenode/inresonybmgetal/EFFamicustenenbaum.pdf.

ideas.[240] Misrepresentations will inevitably occur when audiovisual performances are protected but formalities such as registration are done away with.[241] Article 17 of the AV Treaty forbids any formalities in the audiovisual-performance ownership right, which threatens the many important roles that formalities play in US copyright law.[242] As Jason Mazzone has argued:

> The US Copyright Office registers copyrighted works, but there is no official registry for works belonging to the public. As a result, publishers and the owners of physical copies of works plaster copyright notices on everything. These publishers and owners also restrict copying and extract payment from individuals who do not know better or find it preferable not to risk a lawsuit. These circumstances have produced fraud on an untold scale . . . .[243]

New layers of intellectual property protection may disrupt licensing arrangements, forcing works made possible by such licenses or public-domain status out of circulation.[244] Owners of rights in performances, as well as broadcasters, may use the performance right to attack devices that permit the recording of TV shows and movies.[245]

The TPP, if signed and ratified, would compound the due-process threats posed by the AV Treaty. The TPP leverages and multiplies all of the censorial provisions of the AV Treaty and the WPPT by stating that criminal copyright infringement shall include instances of "related rights infringements that have no direct or

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240. *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1112 (9th Cir. 2007) ("A user could have content removed, or may have his access terminated entirely. If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed.").

241. *Cf.* MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.04 (2007) ("[T]his treatise attests to how difficult it can be to determine whether all the elements of infringement are present—from proper ownership and standing to lack of license (express or implied) to satisfaction of notice formalities (unless excused by national origin or otherwise), to the perennially murky issue of fair use, and beyond."); Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1030 (2006).

242. *See* AV Treaty, *supra* note 19, art. 17.

243. Mazzone, *supra* note 241, at 1030.

244. *See* Bergmayer, *supra* note 91.

245. *See* Atl. Recording Corp. v. XM Satellite Radio, Inc., No. 06 Civ. 3733(DAB), 2007 WL 136186, at *8–9 (S.D.N.Y. Jan. 19, 2007) (refusing to dismiss claim that satellite radio company infringed performances by offering recording devices that made them available at times when they were not being transmitted to public); Lyle Preslar, Essay, Atlantic Recording Corporation v. XM Satellite Radio*: A Brief Analysis of the Case and its Implications for U.S. Copyright Law*, 9 VAND. J. ENT. & TECH. L. 541, 544–45 (2007); Complaint for Declaratory and Injunctive Relief and Damages at 1, Atl. Recording Corp. v. XM Satellite Radio, Inc., No. 06 Civ. 3733(DAB) (S.D.N.Y. May 16, 2006), *available at* https://www.eff.org/document/atlantics-initial-complaint-against-xm; Order Granting Defendants' Motion for Partial Summary Judgment and Resolving Related Motions, 321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004) (No. C 02-1955-SI), *available at* http://w2.eff.org/IP/DMCA/MGM_v_321Studios/20040219_Order.pdf.

indirect motivation of financial gain."[246] Currently, the law requires mass public distribution or infringements of works with a cumulative retail value of more than $1000 before invoking criminal penalties.[247]

The TPP may work in conjunction with the AV Treaty to increase exponentially the complexity of licensing negotiations and DMCA takedown disputes surrounding audiovisual clips. The TPP requires parties to "provide that for copyright and related rights, any person acquiring or holding any economic right in a work, performance, or phonogram . . . by virtue of a contract . . . shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right."[248] The TPP also requires courts to presume that a person named as the "performer, or publisher of the work, performance, or phonogram is the designated right holder in such work, performance, or phonogram."[249] Currently, US law does not presume this, and the burden is on the plaintiff to establish ownership of a valid copyright.[250] Therefore, "nonexclusive licensees cannot bring suit to enforce a copyright, even if an infringer is operating without a license to the detriment of a nonexclusive licensee who has paid full value for his license."[251] At the same time that the TPP may give nonexclusive licensees standing to send takedown letters or file lawsuits, it also attempts to overrule the Federal Circuit doctrine that a violation of the DMCA's anti-circumvention of TPMs provision requires an infringement of copyright.[252] As a result, takedown demands directed at websites will become even less respectful of fair use.

The absence of formalities for performance rights will aggravate our existing licensing chaos.[253] Under the current

246. *TPP vs US Law*, *supra* note 39, art. 15.1(a).

247. *See* 17 U.S.C. § 506(a) (2012).

248. *TPP vs US Law*, *supra* note 39, art. 4.7(b).

249. *Id.* art. 10.2.

250. *See, e.g.*, ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 64 (2d Cir. 1996) ("To demonstrate likelihood of success, [and to obtain preliminary injunctive relief, plaintiff] must establish *prima facie* a copyright infringement by showing that it owns valid copyrights and that Tracks has engaged in unauthorized copying."), *abrogated by* Salinger v. Colting, 607 F.3d 68, 75 (2d Cir. 2010).

251. Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1144 (9th Cir. 2008) (citing 3-10 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.02(B)(1) (2007)).

252. *See* Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc., 421 F.3d 1307, 1318 (Fed. Cir. 2005) (requiring proof in 1201 cases that circumvention either leads to or facilitates infringement); *see also TPP vs US Law*, *supra* note 39, art. 4.9(c) ("Each Party shall provide that a violation of a measure implementing this paragraph is a separate cause of action, independent of any infringement that might occur under the Party's law on copyright and related rights.").

253. *See* Giancarlo F. Frosio, *Google Books Rejected: Taking the Orphans to the Digital Public Library of Alexandria*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 81, 88 (2011)

system—one of reduced but still present formalities—the American Library Association identifies a large group of "orphan works" whose rights holders cannot be located even by well-intentioned creators and users.[254] The Library of Congress has already reported that it did not preserve many films representing our shared cultural heritage because it could not locate the production companies to inquire about licensing the work.[255] Google argues that "the difficulty and cost of even locating the relevant 'rightsholder' from whom a license might be negotiated are . . . often insurmountable."[256]

The Society of American Archivists has warned that non-US "traditions employ the notion of 'moral rights' in copyright law to prevent the use of unpublished material and thereby censor history."[257] The society urged against codifying additional exclusive rights.[258] The new layer of protection for performers will complicate licensees' relationships with producers, labels, studios, composers, performers, and post-production engineers and technicians.[259] A coalition of digital libraries and subscription information services confirmed that when an additional layer of freelancer rights becomes enforceable as to collective works of authorship, digital archives must withdraw many such works because it would be "impossible" to secure consents from all such freelancers.[260] Diane Zimmerman

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(discussing a survey of twenty-two "institutions involved in the digitization of works" that revealed that the "high number of orphan works," defined as those whose rights holders are very difficult or impossible to locate, "together with high transaction costs, may present an overwhelming burden for several digitization projects," and that prior "rights clearance can be prohibitively costly and complex for many institutions" so that "social value of digitizing our cultural heritage, in terms of openness and accessibility, may be eradicated by copyright strictures.") (footnotes omitted).

254. *See* Brief Amici Curiae of American Library Ass'n et al. in Support of Petitioners at 22, Golan v. Holder, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2533007.

255. *See* 1 LIBRARY OF CONG., FILM PRESERVATION 1993: A STUDY OF THE CURRENT STATE OF AMERICAN FILM PRESERVATION 5 (1993), *available* at http://www.loc.gov/film/study.html; Diane Leenheer Zimmerman, *Can Our Culture Be Saved? The Future of Digital Archiving*, 91 MINN. L. REV. 989, 1036 n.220 (2007). Citing this study and other evidence, Lydia Pallas Loren argues that many films that are not being distributed or whose copyright owners have died or left the business are being "held hostage" by overbroad and overly lengthy copyrights. Lydia Pallas Loren, *Abandoning the Orphans: An Open Access Approach to Hostage Works*, 27 BERKELEY TECH. L.J. 1431, 1452 (2012).

256. Brief for Google, Inc. as Amicus Curiae in Support of Petitioners at 14, Golan v. Holder, 132 S. Ct. 873 (2012) (No. 10-545) 2011 WL 2533006.

257. Letter from Steven Hensen, President, Soc'y of Am. Archivists, to Velicia Steadman, Director, USPTO (Oct. 17, 2001), *available at* http://www.uspto.gov/web/offices/dcom/olia/haguecomments/tab09.pdf.

258. *See id.*

259. *See* Rajan, *supra* note 24, at 771–72.

260. Brief for Advance Publications, Inc. et al. Amici Curiae in Support of Defendants-Appellees at 16, Faulkner v. Nat'l Geographic Soc'y, 409 F.3d 26 (2d Cir. 2005) (No. 04-0263-CV(L)), 2004 WL 3756762. The other amici contributing to this brief were Proquest Information

argues: "[e]ven if ownership determination were possible, the costs of multiple searches for thousands of rights holders would often be too high for a prospective user to bear," and "the licensing fee demands for use of the works in question, cumulatively, may be high enough to render a preservation project infeasible."[261]

The AV Treaty's ban on exceptions to performance rights will also create havoc with fair use rights. It may narrow exceptions in US law that interfere with performers' significant sources of royalties. As Judge Pierre Leval of the Second Circuit pointed out, "By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties."[262] Another judge on the Second Circuit has warned of a circular approach whereby rights holders argue that they would like to charge permission for every use and therefore that research is not a fair use.[263] The Second Circuit resolved this question in 2006, holding that fair use is possible even though a market exists to license the use and there was a formal willingness to pay for a license.[264]

The statutory damages that may be available under US law if ordinary copyright remedies are extended to performance rights will threaten to violate the Excessive Fines Clause of the Eighth Amendment, as well as the Due Process Clause.[265] Although one line of authority states that statutory damages are not subject to Eighth Amendment analysis,[266] another states that civil fines and forfeitures

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and Learning Company, Reed Elsevier Inc., Inc., Association of American Publishers, Dow Jones & Company, Inc., Gannett Co., Gruner*Jahr USA Publishing, the Hearst Corporation, Magazine Publishers of America, the New York Times Company, Time Inc., Tribune Company, and the Washington Post Company. *See id.* at 1–2.

261. Zimmerman, *supra* note 255, at 1036.

262. Leval, *supra* note 70, at 1124; *see also* Loren, *Redefining the Market Failure Approach to Fair Use*, *supra* note 70, at 4–5 (noting that "courts often view an assertion of fair use by a copyright defendant suspiciously" and "have not fully embraced the importance of fair use as a counterbalance to the limited monopoly rights granted to copyright owners").

263. *See* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 934 (2d Cir. 1994) (Jacobs, J., dissenting) (disagreeing with majority as to whether a use "becomes unfair when the copyright holder develops a way to exact an additional price for the [use]"). The Second Circuit subsequently rejected an "argument for actual market harm . . . that the defendant has deprived her of a licensing fee," because a copyright owner is "not entitled to a licensing fee for a work that otherwise qualifies for the fair use defense." Liebovitz v. Paramount Pictures Corp., 137 F.3d 109, 116–17 (2d Cir. 1998).

264. *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 615 (2d Cir. 2006).

265. *See* Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 804–05 (1994) (Scalia, J., dissenting); Austin v. United States, 509 U.S. 602, 606–18 (1993); Samuelson & Wheatland, *supra* note 200, at 441, 480–506.

266. *See* St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919) (concluding the statutory damages award satisfies Due Process Clause as long as it "cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable."); Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587–88 (6th Cir. 2007) (applying

are punitive if not tied to a remedial purpose.[267] The trillions of dollars confronting YouTube in theoretical copyright liability for knowingly displaying and performing protected performances, typically in mutilated clip form without the credits or packaging, may exceed by many orders of magnitude the harm done by the site to authors and performers.[268] The result will be a harsh chilling effect on fair-use speech such as mashups.[269]

There are alternative ways of protecting performers without trampling on the human right to communicate and exchange one's views with other persons. At least six pro-performer reforms could help ameliorate the problems of lack of compensation and control delineated by Bardem and others.[270] Congress might, for example:

1. Rewrite the termination-of-rights statute[271] in the Copyright Act so that musicians and other performers are less likely to lose their termination rights due to work-made-for-hire status;[272]

2. Place a levy on digital devices, computer hardware, and some storage media in order to harness Moore's Law to compensate performers for the many uncompensated uses of their works in online services or stored on digital devices;[273]

3. Raise the mechanical and radio royalties paid by record companies and radio stations to composers of music or the publishers

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Williams to copyright damages); Centerline Equip. Corp. v. Banner Pers. Serv., Inc., 545 F. Supp. 2d 768, 777 (N.D. Ill. 2008) (applying *Williams* to Telephone Consumer Protection Act statutory-damages scheme); Verizon California Inc. v. OnlineNIC, Inc., C 08-2832 JF (RS), 2009 WL 2706393, at *7 (N.D. Cal. Aug. 25, 2009) (applying Williams to Anti Cybersquatting Consumer Protection Act statutory damages scheme).

267. *See, e.g.*, Austin v. United States, 509 U.S. 602, 606–18 (1993) (rejecting the argument that "the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal"); *see also* Samuelson & Wheatland, *supra* note 200, at 496.

268. *See supra* notes 203–04 and accompanying text.

269. *See supra* notes 186–90 and accompanying text.

270. Bardem, *supra* note 32.

271. *See generally* U.S. CONST. art. I, § 1 (providing the source of Congress's power to rewrite a statute and make new law); 17 U.S.C. § 203 (2012) (stating the conditions and effects of terminating transfers and licenses).

272. *See Hearings on Works Made for Hire*, *supra* note 214 (requesting amendment); Michael P. Matesky, II, Note, *Whose Song Is It Anyway? When Are Sound Recordings Used in Audiovisual Works Subject to Termination Rights and When Are They Works Made for Hire?*, 5 VA. SPORTS & ENT. L.J. 63, 82 (2005) (discussing the problem with termination rights and works made for hire).

273. *See* Michael Geist, *Recording Industry's Digital Strategy Out of Tune*, TORONTO STAR (Feb. 19, 2007), http://www.thestar.com/business/tech_news/2007/02/19/the_recording_industrys_offkey_strategy.html (noting that Canadian "private copying levy . . . has generated an enormous amount of income (over $150 million since its inception)" and "has provided peer-to-peer file sharers with a legitimate argument that downloading for personal, non-commercial purposes is lawful in Canada").

who pay them royalties, as the songwriters are also frequently the performers;[274]

4. Increase to 75 percent or more the share of revenue from online music services such as Pandora that go to the performer or band, rather than allocating 50 percent to the corporation as the current system does, in an arrangement which may not be equitable if the band financed the music's production, and if the label has already recouped its marketing costs;[275]

5. Allow musicians and actors to sue producers to share in revenues for DVDs and streams as new uses that were not authorized under the contracts governing the performers' respective original contributions to films or television shows;[276] or

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274. *See* M. WILLIAM KRASILOVSKY ET. AL., THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE BUSINESS AND LEGAL ISSUES OF THE MUSIC INDUSTRY 73 (10th ed. 2007) ("Under current law, the only digital broadcasts exempt from [Digital Performance Right in Sound Recording Act]/DMCA license fees are those emanating from 'terrestrial' radio stations . . . ."); Kaitlin M. Pals, Note, *Facing the Music: Webcasting, Interactivity, and a Sensible Statutory Royalty Scheme for Sound Recording Transmissions*, 36 J. CORP. L. 677, 695 n.153 (2011) ("Congress did not subject terrestrial broadcasters to sound recording performance rights for decades before the Digital Performance Right in Sound Recording Act in 1995, enabling terrestrial radio stations to build 'very profitable businesses on the creative works of artists and record companies.'" (quoting *Webcasting FAQ*, RIAA LICENSING & ROYALTIES, http://web.archive.org/web/20021015121959/http://www.riaa.com/Licensing-Licen-3a.cfm (last visited Mar. 7, 2011))). For example, the agreement between YouTube and the Harry Fox Agency guarantees publishers up to 50 percent of the advertising revenue from a user-generated video using their musical works, and 15 percent in other instances. *See YouTube Licensing Offer*, GCG, http://www.youtubelicenseoffer.com (last visited Oct. 30, 2013) ("The National Music Publishers' Association ('NMPA'), The Harry Fox Agency ('HFA') and YouTube are excited to offer to all independent music publishers (regardless of affiliation with NMPA or HFA) and to non-U.S. mechanical collection societies that have entered into reciprocal agreements with HFA, the opportunity to opt into a direct license agreement with YouTube (the 'License Agreement') administered by HFA (the 'YouTube Licensing Offer').").

275. *See* Sally Hership, *Pandora Seeks Lower Royalties for Musicians*, MARKETPLACE BUS. (Aug. 30, 2012), http://www.marketplace.org/topics/business/pandora-seeks-lower-royalties-musicians ("Last year, Pandora spent $137 million on royalties – about half its revenues. . . . Pandora also has to pay [labels or] performers."); Glenn Peoples, *Business Matters: The Truth About Pandora's Payments to Artists*, BILLBOARD NEWS (October 10, 2012, 3:05 PM), http://www.billboard.com/biz/articles/news/1083455/business-matters-the-truth-about-pandoras-payments-to-artists ("Pandora doesn't actually pay artists. It pays SoundExchange, which then gives artists 45 percent of net royalties. Half of net royalties goes to labels, and a portion may find its way back to artists through its royalty accounting system. . . . [5] percent [goes] to the session musicians and backup singers."); Tim Westergren, *Pandora and Artist Payments*, PANDORA BLOG (Oct. 9, 2012), http://blog.pandora.com/2012/10/09/pandora-and-artist-payments ("For top earners like Coldplay, Adele, Wiz Khalifa, Jason Aldean and others Pandora is already paying over $1 million each. Drake and Lil Wayne are fast approaching a $3 million annual rate each."). On bands and singers financing production, see *Hearings on Work Made for Hire*, *supra* note 214.

276. *See, e.g.*, *Louis Prima's Widow Sues over Royalties*, BILLBOARD, http://www.billboard.com/articles/news/76526/louis-primas-widow-sues-over-royalties (last visited Sep. 16, 2013); *cf. Louis Prima's Widow Sues Disney*, READING EAGLE, July 31, 2000, at D8.

6. Grant all performers the right to take possession, individually or in proportion to their contributions to a collective performance, of surplus, unsaleable copies of works containing their performance that are about to be destroyed, placed in off-site storage, or otherwise rendered inaccessible to the public.[277]

Justin Hughes argues that the Lanham Act should be amended to reverse the ruling in *Dastar* and to provide that a false designation of "origin" under the Lanham Act may include a false statement of the "person(s) defined as the author(s) of the copyrighted work under Title 17."[278] This would not be a desirable response, or in the case of many works of art and commentary even a constitutional response, to performers' pleas for aid.[279] An amicus brief to the Supreme Court in *Dastar* pointed out the many problems with such an approach:

> Scientists, economists, and analysts often use large amounts of data from earlier databases in order to construct more comprehensive databases or to compare different data sets. Similarly, historians might extract information from a table and intersperse it throughout a text.... [T]he ethical rules of some academic disciplines require

277. This might involve the amendment of section 106 of the Copyright Act to add a new exclusive right to preservation of a performance or other artistic contribution, which might be phrased to state that the performer shall have no remedy if the party disposing of the remaining copies of a performance or collection of performances proves by a preponderance of the evidence that prior to the disposal, the disposing party or a person acting on behalf of it conducted and documented a search, in good faith, for the performer and was unable to find him or her to offer him or her the surplus copies. *Cf.* Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008) (discussing the limitation on remedies for orphan works); Matthew J. Weldon, Note, *Publishing Raymond Carver's "Original" Stories as "Fair Use,"* 7 CARDOZO PUB. L. POL'Y & ETHICS J. 531, 562 (2009) ("The integrity right is very limited in the U.S, and literary authors generally have no right to object to the destruction of the original or copies of a work after the copyright has been assigned.").

278. Hughes, *supra* note 137, at 700.

279. *See id.* at 703. Protection of authors of copyrighted work from plagiarism of their ideas may violate the First Amendment, and interference with transformative works attributed to new authors may also violate the First Amendment. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1263 (11th Cir. 2001) (noting that the lack of copyright protection for ideas preserves the "balance between the First Amendment and copyright"); Brief of Amicus Curiae the American Civil Liberties Union in Support of Petitioners at 21, Golan v. Holder, 132 S. Ct. 873 (2012) (No. 10-545), 2011 WL 2578555 (arguing that "by choosing which words to publish, to distribute, and to repeat—and which *not* to use—a non-original speaker is making his or her own expressive, communicative choices, deciding which speech he or she believes is valuable and worthy of distribution to others"). Noncommercial impersonation for purposes of criticism or parody may merit free-speech protection. *See generally* Bosley Med. Inst. v. Kremer, 403 F.3d 672, 677, 678–79 (9th Cir. 2005) ("[C]ommercial speech may be regulated in ways that would be impermissible if the same regulation were applied to noncommercial expressions" and a "parody site" may not violate the Lanham Act as long as it doesn't prevent "users from obtaining or using [a party"s] goods or services."); Taubman Co. v. WebFeats, 319 F.3d 770, 774 (6th Cir. 2003) (explaining that the first step in determining a Lanham Act violation is determining if the defendant's use is commercial); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 23–33 (1st Cir. 1987) (holding that applying an anti-dilution statute to a noncommercial parody violated the Constitution).

> attribution of the sources of facts, but even they do not require attribution to the degree [that a Lanham Act right to have one's status as author attributed truthfully would].[280]

Even more confusion would confront creative writers and visual artists if the Lanham Act regulated express or implied representations of fact as to the authorship of content. How would Andy Warhol's paintings and other Pop Art have fared under such a rule?[281] And one might imagine cases in which, for example, Anne Rice contends that there is a false designation of origin by later authors of "sexy vampire" stories who did not credit her for their ideas. Perhaps Bela Lugosi or Anne Rice could sue Robert Pattinson or Stephanie Meyer under the new "authorial" Lanham Act.[282] The Lanham Act right to be protected against false or confusing designations may be much broader and more flexible than the "substantial similarity" standard in copyright law, so that very dissimilar products or services may be similar enough under the Lanham Act's multi-factor tests to establish a violation.[283] Thus,

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280. Brief Amici Curiae of American Library Ass'n et al. in Support of Petitioner at 6, Dastar Corp. v. Twentieth Century Fox Film, 539 U.S. 23 (2003) (No. 02-428), 2003 WL 367723.

281. Andy Warhol and other "appropriation" artists allegedly used unlicensed advertising logos designed by other persons in their art, on some occasions at least. *See* JOHN R. HALL, MARY JO NEITZ, & MARSHALL BATTANI, SOCIOLOGY ON CULTURE 140 (2003); ANNE GILSON LALONDE, JEROME GILSON, & KARIN GREEN, 1 TRADEMARK PROTECTION AND PRACTICE 5-116 (2007) ("The vogue of affixing well-known trademarks to all types of articles may well have evolved from the Pop Art movement. Andy Warhol, an early exponent, stirred considerable controversy in the early 1960s with his paintings of trademarked products . . . .").

282. *Compare* Lugosi v. Universal Pictures, 603 P.2d 425, 429 (Cal. 1979) (discussing Lugosi's development of a new, ambiguously threatening yet alluring performance of traditional Dracula character and his asserted rights under California law), *with* Ann Bartow, *Bloodsucking Copyrights*, 70 MD. L. REV. 62, 70, 72–73 (2010) (suggesting that Twilight series author Stephanie Meyer "may have drawn creative blood in terms of vampirical carnal appeal" from prior films and television shows, including those featuring Lugosi as "Dracula, [who] transforms virginal women into sexual aggressors," and "the television show, Buffy the Vampire Slayer," as well as "Sookie Stackhouse[—]the protagonist of True Blood, a television series pulsing with hot, steamy human-on-vampire action[—who] fell in love with a vampire named Bill Compton," and from "Anne Rice's successful Vampire Chronicles novels [which] channel the eroticism of bloodsucking for an adult audience with a sultry New Orleans taste").

283. *Compare* Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 202, 204–05 (2d Cir. 1979) (stating pornographic film "Debbie Does Dallas" likely violated Lanham Act even though cheerleaders in film were not called "Cowboys cheerleaders" and plot of film differed from cheerleaders' performances at football games and in related media), *and* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 753–54, 758–59 (9th Cir. 1978) (noting that the district court relied solely on "abstract" comparison of Disney trademarks and comic books' imitation of them on multiple occasions using characters' original names and likenesses in new and "bawdy" plots, the appellate court remanded for trial on whether "the imitation would be seen by an adult in a counter-culture store who in all probability before seeing the imitation would already have been struck by the incompatibility of defendants' work with Disney's, as well as defendants' proper attribution of source [i.e. that they rather than Disney authored the comics] in the front of each book"), *and* Bartow, *supra* note 282, at 85 n.140 (noting that trademark law "constructs can influence the ways that copyrights in characters are perceived and protected," and make a parody "look like actionable disparagement that is somehow outside

Rebecca Tushnet points out that while trademark law focuses on "reputational concerns," copyright's "special solicitude for parody demonstrates that its concern for creativity requires a different kind of analysis."[284]

If all other means of aiding performers should fail, a 2.5 percent tax on advertising, broadcasting, cell phone and Internet bills, and consumer electronics would raise about $13 billion per year for performers, including actors, dancers, singers, musicians, poets, and performance artists.[285] This compares to less than $10 billion that was earned collectively by all wage-and-salary (i.e., not self-employed) actors and musicians, combined, in 2008.[286] A levy on the transmission of performances would be a far more efficient and

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the acceptable bounds of commentary or criticism"), *and* William W. Fisher III, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1443 (2010) (noting that Lanham Act may "penalize unauthorized modifications" when "the producer can show that the modifier's behavior is likely to cause a significant group of consumers to believe either that the altered version was produced by the original manufacturer or that the manufacturer sponsored the modification, the modifier will be subject to liability under the Lanham Act"), *with* Salinger v. Colting, 641 F. Supp. 2d 250, 264 (S.D.N.Y. 2009) (requiring evidence that new book contained "nearly identical supporting characters, settings, tone, and plot devices to create a narrative that largely mirrors that" of prior book to find substantial similarity between books), *order vacated*, 607 F.3d 68, 83 (2d Cir. 2010), *and* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1267 (11th Cir. 2001) (requiring evidence that a book based upon a prior book have encapsulated the prior book by using the "very same copyrighted characters, settings, and plot" before concluding that there was substantial similarity between them, and going on to find that the new book likely made fair use of the prior book), *and* Warner Bros. v. Am. Broad. Cos., 720 F.2d 231, 241–43 (2d Cir. 1983) (holding that a character in a television series who had many of the powers of Superman, the comic-book and film hero, did not result in the infringement of the character copyright because the television series character acted differently on his "missions" than Superman would have, but noting that "lack of substantial similarity is not a complete answer to a Lanham Act claim, since a second comer can violate section 43(a) by falsely representing his goods as those of the trademark owner").

284. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 675 n.119 (1997).

285. Adam Thierer & Berin Szoka, *The Wrong Way to Reinvent Media, Part 1: Taxing Devices & Networks to Subsidize Media*, PROGRESS & FREEDOM FOUND. BLOG (Mar. 24, 2010), http://blog.pff.org/archives/2010/03/the_wrong_way_to_reinvent_media_part_1_taxing_devi.html. Depending on the cost of one's radio or television, Britain's per-capita broadcasting taxes may represent anywhere from 5 percent of to more than 10 times the cost of purchasing a radio or television in order to consume performances. *See id.*; *The License Fee*, BBC, http://www.bbc.co.uk /aboutthebbc/insidethebbc/whoweare/licencefee (last visited Oct. 30, 2013) (discussing that "[b]etween 1 April 2010 and 31 March 2011 the cost was £145.50," or 5 percent of the cost of a souped-up television, but more than ten times the cost of many radios and even some used or cut-rate televisions).

286. This is a very rough estimate based on median, not average, wages. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 2010–2011, at 320, 329–31 (2011) (estimating median wage of $16.90 per hour for actors and that there were 56,500 actors in 2008, so if each actor worked 2,000 hours they would have earned a collective $1.9 billion, and estimating median wage of $21.24 per hour for musicians and that there were 186,400 of them in 2008, so if each musician worked 2,000 hours in 2008 they would have earned a collective $7.9 billion).

liberating solution to the problem of declining employment and incomes among performers, if this could be shown to be a problem at all.[287] Such a levy would avoid the deadweight losses inflicted on society when false positives cause noninfringing and fair-use works to be deleted from the Internet, the transaction costs of enforcing exclusive rights in massive class actions, and the administrative costs of the collective rights organization that would be needed to enforce exclusive rights against diverse media.[288]

Even setting the levy at 0.5 percent of relevant product and service revenues to raise $2.6 billion per year, the compensation distributed to performers would be many times greater than the recovery obtained by them from individual downloaders, or from intermediaries such as Napster, Grokster, Kazaa, Limewire, Veoh, Google, or YouTube.[289] In opposition to such a levy, some commentators argue that it would deter beneficial investments.[290] Yet there has been no showing that the disincentive already imposed by

287. Although comparable figures for actors were not available, it appears that the number of musicians, singers, and related workers like music directors and composers has grown from 215,000 in 2002 to 240,000 in 2008, and will grow to almost 260,000 in 2018. *See id.* at 329. Similarly, the number of actors, producers, and directors grew from 139,000 in 2002, to 155,100 in 2008, and the number of actors alone will probably grow by 13 percent through 2018, from 7,200 to 63,700. *See id.* at 320. *Compare* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 2004–2005: MUSICIANS, SINGERS, AND RELATED WORKERS, *available at* http://www.umsl.edu/services/govdocs/ooh20042005/www.bls.gov/OCO/ocos095.htm, *with* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 2004–2005: ACTORS, PRODUCERS, AND DIRECTORS, *available at* http://www.umsl.edu/services/govdocs/ooh20042005/www.bls.gov/OCO/ocos093.htm. The 25,000 increase in the number of working musicians, or 11.6 percent, compares to a rise in total nonfarm employment of less than seven million from 2002 to 2008, or 5.3 percent. The expected rise in the number of actors by 13 percent from 2008-2018 is nearly triple the rate of nonfarm employment growth. *See* Christopher J. Goodman & Steven M. Mance, *Employment Loss and the 2007–09 Recession: An Overview*, MONTHLY LABOR REVIEW, Apr. 2011, at 4, *available at* http://www.bls.gov/opub/mlr/2011/04/art1full.pdf.

288. *Cf.* Jonathan Band, *Cautionary Tales About Collective Rights Organizations* (Sept. 19, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2149036.

289. By mid-2008, about 30,000 out of more than 200 million users of peer-to-peer file sharing software had been sued, with most settlements generating about $3,000, for less than $20 million in recoveries per year over the 2003–2008 period, by a rough estimate. *See RIAA v. The People: Five Years Later*, Elect. Frontier Found. 10 (Sept. 2008), https://www.eff.org/files/eff-riaa-whitepaper.pdf. Plaintiffs owning or licensing performance rights have struggled to prevail in their lawsuits against Google, YouTube, or Veoh. *See supra* notes 80, 87 and accompanying text. Napster went bankrupt with less than $10 million in assets remaining to pay performers or their licensees. *Napster Files for Bankruptcy*, BBC NEWS (June 3, 2002), news.bbc.co.uk/2/hi/business/2023201.stm. The Grokster operators agreed to pay $50 million in settlements, or less than $20 million per year of infringements. *See Grokster Quits File-Sharing Fight*, BBC NEWS (Nov. 8, 2005), http://news.bbc.co.uk/2/hi/business/4416484.stm. Google does not appear to have paid massive settlements to performers despite admitting to hosting "over 14 million links to pirated material." *Google 'in Talks to Cut Funding to Illegal Piracy Sites,'* BBC NEWS (Feb. 19, 2013), http://www.bbc.co.uk/news/technology-21505060.

290. *See, e.g.*, Thierer & Szoka, *supra* note 285.

arbitrary and potentially punitive exclusive-rights laws is less than the disincentive threatened by an across-the-board tax on investments in transmitting performances and providing facilities for such transmissions, such as wired and wireless networks.[291] As many performance-rights holders pointed out to the Supreme Court in 1995, vigorous First Amendment speech rights may not be enjoyed if "speculative potential harm arising from otherwise protected speech" is actionable.[292] The "result is a disproportionately large punitive-damage award in relation to the compensatory damages, imposed without substantive limitation and providing no guidance to future defendants on whether, how, or why their conduct may result in no punitive damages or in an award that is five-hundred or one-thousand times a plaintiff's loss."[293] In further opposition to a levy system, commentators complain of the "coercive effects of subsidies on the independent editorial discretion of news-gatherers."[294] Yet it is fairly obvious that direct coercion—in the form of civil and criminal fines and prison terms—can be even more limiting on journalistic "discretion." How could an editor exercise free journalistic discretion when the use of performances to enrich political documentaries or cultural programming could result in seizure of a website, or a huge damages award?

VI. CONCLUSION

This Article has explored the structure and content of the AV Treaty. It has compared its provisions to existing US law, and to other treaties being considered by the United States. It warns of the agreement's threats to Internet communications in general and to mashups in particular. The threat includes potential censorship of the critic, the dissident, the parodist, and the postmodern author by culturally or politically powerful persons or business associations.

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291. If the 30,000 Internet users who were sued or threatened with suit in relation to music transmissions paid an average of $3,000 in settlements, and $2,000 in attorney's fees were incurred per suit or threat, the aggregate administrative and litigation-related cost would be $150,000,000, which might have paid $625 per musician as an equally-divided levy on products and facilities enabling the Internet transmission of music without authorization. *See RIAA v. The People: Five Years Later*, *supra* note 289. One study suggested that the cost of settlement alone, not including attorney time, was $5,000 per college student. *See* Dirk Lasater, *Comment: "Closing Pandora's Box:" Speculative Invoicing and Opportunism in File Sharing*, 12 WAKE FOREST J. BUS. & INTELL. PROP. L. 25, 28 n.12 (2011). The cost of going to trial might exceed $65,000, but few of the accused took this route. *See id.* at 28.

292. Brief Amici Curiae National Ass'n of Broadcasters et al. in Support of Petitioner at 19, BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (No. 94-896), 1995 WL 17008485.

293. *Id.*

294. Thierer & Szoka, *supra* note 285.

Such censorship threatens the First Amendment under the traditional contours of copyright test of *Eldred v. Ashcroft*, and under other Supreme Court cases addressing vague bans affecting websites, such as bans on indecent content, annoying material, and depictions of animal cruelty. The vagueness of the treaty's text is a Fifth Amendment problem; so are the potential damages.

The Constitution presents us with a beautiful tapestry of rights that have been invoked time and again to deflect rash congressional and state legislative action. It guarantees the freedom of speech, limited in ways analogous to those limitations existing at our nation's birth, and due process of law consisting in judicial procedures and a fair opportunity to be heard before liberty is denied. To abridge this freedom or to deny due process offends the text of the Constitution and threatens our liberties. Yet that is what happens when an arbitrary system denies people the ability to communicate on cultural and political themes in ways that copyright did not prevent for nearly two centuries.

To end by appropriating an apt formulation from Professor Akhil Reed Amar, the US Constitution's "grand phrases 'the freedom of speech,' 'the right to keep and bear arms,' 'due process of law,' and so on—define a basic vocabulary of liberty for ordinary citizens."[295] The Bill of Rights speaks in the name of "the People of the United States," but if it does not "live in the hearts and minds of ordinary Americans," it will fail to define and protect our liberties.[296]

295. Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143, 1144 (1998) (Symposium on Textualism and the Constitution, panel on Textualism and the Bill of Rights).

296. *Id.*