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Nobility of Interpretation: Equity, Retrospectivity, and Collectivity in Implementing New Norms for Performers' Rights

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NOBILITY OF INTERPRETATION: EQUITY, RETROSPECTIVITY, AND COLLECTIVITY IN IMPLEMENTING NEW NORMS FOR PERFORMERS' RIGHTS

Antony Taubman*

TABLE OF CONTENTS

I. INTRODUCTION: PERFORMERS' RIGHTS & THE EVOLUTION OF INTELLECTUAL PROPERTY LAW .......................... 353
   A. THE INTERNATIONAL LEGAL MATRIX .......................... 354
   B. REHASHING THE POLICY RATIONALE .......................... 359
   C. NATIONAL IMPLEMENTATION OF NEW NORMS .................. 363
   D. UPSETTING OR RESTORING THE EQUITABLE BALANCE? ........... 365

II. THE DOMESTIC LEGISLATOR WITHIN THE INTERNATIONAL INTERPRETATIVE COMMUNITY ..................................... 369
   A. LEGAL AND PRACTICAL IMPLICATIONS OF OTHER NATIONAL CHOICES .................................... 372
   B. FLEXIBILITY IN TREATY IMPLEMENTATION ....................... 378
   C. OBJECT AND PURPOSE OF THE WPPT .......................... 381

III. MORE POWER TO THE SPEAR-CARRIER: PRACTICAL EQUITY IN DEFINING THE TERM "PERFORMER" .......................... 382
   A. DEFINING ELIGIBLE PERFORMERS .............................. 383
      1. Expressions of Folklore and Copyright Works .............. 383
      2. Scope of Eligible Performances ............................. 385
   B. REASONABLE INTERPRETATIONS OF PERFORMERS ............... 387
   C. LIMITATIONS ON THE DEFINITION ............................. 390

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351
IV. EQUITY AND RETROACTIVITY ........................................... 397
   A. APPLICATION IN TIME UNDER BERNE .......................... 399
   B. MUTATIS MUTANDIS APPLICATION TO THE WPPT ............. 404
      1. Applying the Principle in the WPPT Context .............. 405
      2. Retroactivity Under TRIPS .................................. 406
      3. WPPT Negotiations .......................................... 408
      4. The Effect of Other WPPT Provisions ....................... 409
      5. What Rights Are at Issue? ................................. 411
   C. OPTIONS FOR RETROSPECTIVITY ................................ 412

V. MAKING THE CASE FOR ADHERENCE .............................. 414

VI. CONCLUSIONS: NOBILITY OF INTERPRETATION .............. 420
I. INTRODUCTION: PERFORMERS' RIGHTS & THE EVOLUTION OF INTELLECTUAL PROPERTY LAW

The development of intellectual property (IP) rights over (performers’ rights) illuminates a cluster of broad, systemic issues that confront the IP policymaker and legislator today. These include:

• The development of performers’ rights is a concise instance of the contested recalibration of the public domain, as established notions of equity come under pressure through the impact of technological change and shifts in social values.

• At a time of renewed calls for IP laws to form a more explicit part of a broader policy matrix, regulation of performers’ interests has traversed the uncertain boundary between distinct, intangible property rights and associated forms of public policy regulation through exclusivity, compensatory liability, criminal law, unfair competition and labor law.

• Performers’ rights set equity and pragmatism at odds in protecting the individual right holder in asymmetric negotiations over the exploitation of IP;

• Recognition of a spectrum of performers’ rights within a diverse ensemble entails reconciling individual as against collective interests.

• The issue highlights the tension between autonomous domestic policymaking and legislation and the pre-emptive effect of international standards and trade negotiations, and the uncertain role of the domestic legislator as an interpretative authority of treaty obligations.

• Protection of performances of expressions of folklore lends some momentum towards more direct and effective recognition of the IP interests of traditional and Indigenous communities; it also foreshadows in a practical context the broader themes of retroactivity, collectivity and equity that lie at the heart of the debate over recognition of traditional and Indigenous interests in the IP system.

This Article explores each of these themes by considering the relationship between an abstract notion of equity and the pragmatism of constructing an effective legal mechanism. Specifically, this Article addresses three overlapping aspects of performers’ rights where equity and practicality appear to be at odds: retrospectivity of protection, recognition of individual performances within an ensemble or collective endeavour, and protection of expressions of folklore as an expanded element of protection of performances. While it is tempting to see equity and practicality as inherently at tension and the resolution of these competing demands as a reductive trade-off, it may be more productive to view practicality as an important ingredient of effective delivery of equitable outcomes.

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Part I introduces the legal and policy context for performers' rights and the challenges confronting the interpreter of international standards.

Part II considers the role of the domestic legislator within the international interpretative community and the pragmatic choices confronting the policymakers, and highlights three key issues of practical treaty interpretation: extension of performers' rights to folklore, retroactivity or application in time, and recognition of individual performers' rights within an ensemble.

Part III examines the practical challenges in dealing equitably with an individual performer as an interpreter of a musical work within an ensemble.

Part IV reviews the possibilities for equitable treatment of application in time of new levels of protection for performances, in view of reshaping of the public domain and impacting on legitimately acquired rights.

Part V draws on the positive choices open to the domestic legislator as treaty interpreter to illustrate the legislator's self-interest in taking a positive role in shaping understanding of treaty standards. The process of constructing the domestic mechanisms that give effect to abstract conceptions of balance and equity is construed as a higher form of treaty interpretation. Such an approach, as a positive act of treaty-guided policymaking, can provide a greater service to the international interpretative community than an essentially passive or reactive emulation of received view.

Part VI draws broad conclusions about the nature of treaty interpretation as a practical task, and recalls that for many traditional communities, a performance may itself be an articulation and a preservation of a customary legal tradition. At both levels, the act of interpretation is recognized as having greater worth and value than as a passive transmission of imposed norms.

A. THE INTERNATIONAL LEGAL MATRIX

The right of performers in their performances as the subject of IP protection in themselves, as distinct from rights in a copyrighted work (such as a recording or a broadcast) was first recognized in international law through the Rome Convention (Rome),1 reinforced in the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),2 and then strengthened and clarified in the WIPO Performers and Phonograms Treaty.

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Subsequent bilateral agreements have applied these standards. This composite international norm-making process has its roots in the Berne Convention (Berne) as a formulation of rights neighboring on copyright as an extension of author's rights. But protection of performers' interests was also conceived in the context of international labor standards and cultural policy. Moreover, performers' interest protection has been on the table in multilateral and bilateral trade negotiations, and embodies the first formal recognition of folklore as an object of IP protection at the level of international law.

Despite this pluralistic and complex quality of performers' rights and the diverse legal and policy basis of both international and municipal laws regulating interests in performances, the most likely forum for resolution of international differences over the protection of performers' rights is in the context of a trade dispute, thanks to the incorporation of standards on performers' rights within the WTO trade law system and in bilateral trade agreements. One aspect of broader concerns expressed by critics of TRIPS is whether there is sufficient scope for this diverse policy and jurisprudential base, and a broad and inclusive notion of equity within the emerging trade-related international law of IP. These concerns,


5 Negotiators at the Revision Conference of the Berne Convention, held at Rome in 1928, raised the issue of performers' or artist's rights and considered an international convention premature, but called on governments to consider measures to protect performers. Actes de la Conférence Réunie à Rome, du 7 mai au 2 Juin, Proceedings of the Rome Conference, May 7 to June 2, 1928 Berne, at 229, 260 (1929), reprinted in WORLD INTELLECTUAL PROP. ORG., 1886-1986: BERNE CONVENTION CENTENARY (1986).

The Secretariat of the Berne Union and the International Institute for the Unification of Private Law (UNIDROIT) convened a meeting of experts in 1939, which produced a draft treaty on performances and phonograms. WORLD INTELLECTUAL PROP. ORG., GUIDE TO THE ROME CONVENTION AND TO THE PHONOGRAMS CONVENTIONS 8 (1981) [hereinafter WIPO GUIDE]. The Revision Conference of the Berne Convention, held in Brussels in 1948, referred to performers' rights as "neighboring on copyright" but ruled out their incorporation within copyright proper. Documents de la Conférence Réunie a Bruxelles, du 5 au 26 Juin 1948, Documents of the Brussels Conference, June 5–26, 1948, Berne (1951).

6 The International Labor Organization (ILO) was closely involved in the long gestation of the Rome Convention. This involvement dated back at least 1926. See WIPO GUIDE, supra note 5, at 8 (describing the ILO's involvement as "of prime importance"). The ILO Committee on Employees and Intellectual Workers took up the issue from 1950 and coordinated with the Secretariat of the Berne Union. Id. The ILO, with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Berne Union Secretariat jointly convened the diplomatic conference that concluded the Rome Convention.

7 UNESCO took part in the preparatory work for the Rome Convention, and serves jointly with the ILO and WIPO (as the successor to the Berne Secretariat) as its Secretariat.
at least as much as the actual formal legal uncertainties, may potentially have a chilling effect on public policy formulation. This complex background creates an interpretative conundrum, forum shopping tensions, and international choice of law questions as substantive IP standards (including multilateral standards on performers’ rights) are increasingly built into bilateral and regional trade agreements.

This catches the practical interpreter of treaty text—the legislator or domestic policymaker—between competing goals of a legal clarity established through precise formalist interpretation, and a robust realist stability grounded in the actual political context in which diverse, even opportunistic, interpretations of treaty text guide actual behavior and determines choices. This challenge is illustrated by the questions which confront the practical interpreter of the WPPT. The WPPT is the most recent and far-reaching multilateral articulation of the law of performers’ rights, but questions linger about its jurisprudential context and its formal status within the international legal matrix. Several authoritative commentaries examine basic questions about its legal relationship with existing international instruments. This issue needs to be addressed prior to any attempt to interpret the WPPT given the strong potential influence of these other instruments. Among the key questions are the WPPT’s relationship to Rome and the interpretative implications of that linkage, and whether its negotiators intended TRIPS jurisprudence to inform its legal context. The WIPO Copyright treaty (WCT), the companion treaty negotiated in parallel, is explicitly stated to be a “special agreement” under Berne. The same negotiators chose not to articulate an analogous linkage between the WPPT and Rome even though Article 22 of Rome provides for special agreements akin to Article 20 of Berne. On its face, this would suggest a conscious decision against such a formal relationship.


9 In turn, did TRIPS negotiators intend TRIPS jurisprudence to import the Rome and Berne background law—or is that a moot point, as practical interpretation has since led to this outcome anyway?


11 See WCT, supra note 10, art. 1.

12 During the early preparatory work for the so-called “New Instrument” (the draft WPPT) as
a deeper normative level, the WCT preamble explicitly calls for the fundamental “balance . . . as reflected the Berne Convention” to be maintained,\textsuperscript{13} while the WPPT refers to a more abstract balance, and does not invoke Rome in this manner.\textsuperscript{14} Article 1(3) of the WPPT “expresses the self-standing nature of the WPPT in respect of any other treaties.”\textsuperscript{15} But by at least one analysis, this still means the WPPT is a special agreement under Article 22 of Rome since Article 1(1) refers to Rome and is accordingly not an other treaty in the sense of Article 1(3).\textsuperscript{16} And by another analysis the WPPT meets the factual criteria of a “special agreement” as defined in Rome, so the absence of a formal declaration of this status is not decisive.\textsuperscript{17} Yet accession to the WPPT is not limited to contracting parties of Rome. In contrast, entitlement to accede to several such special agreements in the industrial property field is restricted to parties of the principal treaty. Does a state’s choice to ratify WPPT and not Rome have implications for its obligations under the WPPT? The self-standing lack of “connection” of the WPPT with any other treaty—disclaiming a legal, rather than historical, linkage—suggests on a formal reading that the WPPT should, in principle, be interpreted independently of the WCT and Rome. This applies a fortiori to independence from TRIPS “even where a provision . . . has been modelled on a corresponding provision” of TRIPS.\textsuperscript{19} A WTO panel report on such a corresponding provision would not “constitute any interpretation of the WPPT, since there is no legal connection” between the two agreements.\textsuperscript{20} The WPPT negotiators developed an independent interpretation of TRIPS text; a distinct set of legal standards and obligations in the same domain as TRIPS which is to be distinguished from TRIPS jurisprudence as such. Article 1(3) of the WPPT was introduced during the diplomatic conference with the intention of clarifying that

\textsuperscript{13} WCT, supra note 10, preamble.

\textsuperscript{14} WPPT, supra note 3, preamble.

\textsuperscript{15} REINBOTHE & VON LEWINSKI, supra note 8, at 242.

\textsuperscript{16} See id. at 243.

\textsuperscript{17} FICSOR, supra note 8, at 591.

\textsuperscript{18} REINBOTHE & VON LEWINSKI, supra note 8, at 243.

\textsuperscript{19} Id.

\textsuperscript{20} Id.
TRIPS obligations concerning enforcement did not apply to the WPPT, and with the background concern that the coverage of the WTO dispute settlement understanding should not extend to WPPT obligations.

Such formal considerations would suggest a relatively isolated interpretative context for the WPPT. Yet this provides little comfort for the pragmatic interpreter of the text. The prudent legislator should consider, practically, the fora in which WPPT and related TRIPS provisions are most likely to be contested, and the contexts in which interpretations (including informal and tendentious readings) are most likely to permit or restrain actual state action. This operational context could include legislative processes (and associated lobbying by industry, civil society and foreign trade interests), domestic courts, bilateral trade representations and negotiations, and dispute settlement consultations. Indeed, even considering the formal interpretative context, the sole WTO panel decision to date on copyright matters interpreted TRIPS with reference to the subsequent WCT, which equally provides for no connection with TRIPS. The panel also drew on the non-binding agreed statements adopted by the Diplomatic Conference. The panel noted the formal limitations of this approach, but still indicated that it was guided by these materials in view of the “public international law presumption against conflicts” and the need to avoid conflicts within an informal conception of an “overall framework for multilateral copyright protection,” comprising these elements which lack formal connection. This suggests that a practical interpretation of the WPPT should step beyond the narrow bounds of formal treaty interpretation and take account of this broader context, including the informal or de facto connections that would be drawn in practice. WPPT interpretation should also recognize the broader policy need for consistency between potentially balkanized elements of international IP law which would buttress desired domestic policy settings, safeguard them against external challenge, and would stand up robustly in a contested political and trade context.

21 WORLD INTELLECTUAL PROP. ORG., 2 RECORDS OF THE DIPLOMATIC CONFERENCE ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS 772 (1999) [hereinafter WIPO RECORDS].
22 FICSOR, supra note 8, at 418.
23 Note, however, that panel decisions on TRIPS are not formally binding on parties not involved in the dispute, and technically stare decisis does not apply (in spite of a de facto practice of following interpretative precedent within WTO dispute settlement).
25 WIPO RECORDS, supra note 21, at 79-81.
26 U.S. Copyright Act, Report of the Panel, supra note 24, ¶¶ 6.66, 6.70.
27 This interpretative use of the WCT and Agreed Statements was earlier foreseen in Neil W. Netanel, Comment, The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement, 37 VA. J. INT’L L. 441 (1997).
Further, the prospect of the WPPT standards being incorporated within TRIPS over time (on par with Berne and Rome) suggests that a prudent domestic policymaker would anticipate this broader, informal context with a view, paradoxically, to achieving a more defensible jurisprudential basis for sustaining policy choices. Australia has proposed that WTO Members should consider means by which the [WCT and WPPT] might be recognized in the context of [TRIPS], and that the Council for TRIPS make a statement which explicitly recognizes the relevance of the WCT and WPPT to regulating copyright and related rights in the online environment in a manner that supports the existing provisions and general objectives of [TRIPS].

Further, the spread of bilateral agreements giving effect to multilateral IP standards, either wholly or in an adapted or interpreted form, raises—at least in theory—the prospects both of bilateral dispute settlement forums interpreting multilateral standards on this hybrid jurisprudential base, and ultimately of WTO panels taking account of bilateral agreements as suggestive of pertinent state practice and interpretative trends when such agreements effectively provide a gloss or elaboration of TRIPS provisions. In practice, bootstrapping a comprehensive TRIPS jurisprudence, which is at once robust and inclusive, entails following the normative lead of domestic policymakers in order to clarify the nature of the obligations constraining domestic policymakers. But, also practically speaking, the lack of detailed guidance at the international level creates the need to bootstrap TRIPS jurisprudence with reference to domestic practice and policy balances. This creates a circularity: Bootstrapping a comprehensive TRIPS jurisprudence which is at once robust and inclusive entails following the normative lead of domestic policymakers in order to clarify the nature of the very obligations that constrain domestic policy processes. A more encompassing interpretative framework should at once be more defensible against challenge and exert more influence at the international level.

B. REHASHING THE POLICY RATIONALE

The roots of this more robust and comprehensive jurisprudential base lie in the context of public policy formation. Here the creation of performers’ rights offers an instructive example. To fashion a new category of IP by establishing exclusive property rights entails consciously imposing excludability over what

would otherwise fall in the public domain on the basis that exclusion yields a higher order public good outweighing cost to the public. The rationale for taking this step is classically shaped by utilitarian considerations: The need to create an economic incentive for new creations, inventions, and market reputations that would not otherwise exist. A complementary rationale is shaped by an appeal to equity and fairness, and the invocation of natural rights which may be construed as inherent public goods in the normative sense. The natural rights theory recalls the need to distinguish the public good as a desirable end in itself—an assertion of ethical status—and the kind of “collective consumption good” considered by Samuelson. The justification for recognizing performers’ rights has always had a strong equitable character while the more utilitarian incentive argument for IP protection has been less evident. Performers are typically characterized (or caricatured) either as stars who already have strong control over the economic exploitation of their performances, or as willing enthusiasts for whom the aroma of greasepaint is sufficient incentive. Alternatively, performers are considered as workers with a weak bargaining position in the labor market.

It is partly the lack of economic bargaining power, or perhaps the willingness of performers to forego it, that sets this category of IP uniquely in the domain of international labor standards. The utilitarian argument can accordingly be expressed more in terms of ensuring economic welfare for this category of intellectual worker, rather than the argument that an incentive for performers is critically lacking. The first demand for protection of performers was a

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30 MINISTRY OF ECON. DEV./MANATU OHANGA, PERFORMERS RIGHTS: A DISCUSSION PAPER 16 (“The nature of the consent that is given by a performer is therefore a critical issue. It is usually a matter for negotiation in which the performer may not be in a strong bargaining position.”).
31 The ILO as you know is concerned primarily with the conditions of working people, including performers. My Organization was led to deal with the subject before you because of the adverse effects upon the social and economic conditions of performers resulting from innovations in the field of recording and broadcasting, and the ever-increasing use of more and more elaborate and often combined methods and techniques of communication of performances. Abbas Ammar, Deputy Director General of the International Labor Office, Opening Speech at the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Oct. 1961), in *RECORDS OF THE DIPLOMATIC CONFERENCE ON THE INTERNATIONAL PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS* 162 (1968).
33 It is noteworthy that the preamble of the WCT emphasizes “the outstanding significance of copyright protection as an incentive for literary and artistic creation,” while also referring to the
response to the threat of "technological unemployment," or displacement of performers by technology. The second demand was closer to an IP rationale: that of repressing bootlegging, or the use of technology to deprive performers' of their capacity to capture the marketplace benefits of their performances. "As technology developed, performers' demands were for rights to control the uses of their performances so that they could secure greater financial returns."

The incorporation of performers' rights into TRIPS created a formal international obligation for protection both to serve utilitarian welfare goals and to strike an equitable balance. A systematic jurisprudence of TRIPS would require protection of performers' rights to be undertaken "in a manner conducive to social and economic welfare, and to a balance of rights and obligations." This should be contrasted with the policy direction articulated in Rome, limited to a preambular reference, which expresses a desire for contracting states to "protect the rights of performers." There is potentially greater scope within a TRIPS paradigm to construct a practical and positive account of equitable policy settings than is explicitly provided for in earlier international instruments, provided the jurisprudential basis for this account is coherent, broad-based, well-founded, and fully articulated.

The advent of TRIPS also forced the evolution of international trade law to recognize the intangible or intellectual component of conventional trade. This paradigm shift blended equitable considerations in "behind the border" regulatory issues, such as IP protection, with the increasing practical reality that the tradeable value of many physical products counted as goods. The established "trade in goods" paradigm had to evolve to account for the role of some traded goods as a platform, carrier, or mere vector for more valuable trade in IP. The early profound impact of technological change on the creation and use of works and the need for an equitable balance. See WCT, supra note 10, preamble. The WPPT preamble lacks any reference to the incentive role of protection for the creation of performances and phonograms, even though it invokes in analogous terms the impact of technological change and the need for equitable development. See WPPT, supra note 3, preamble. It may be unwise to read too much into this distinction, however. See FICSOR, supra note 8, at 589.

34 MINISTER OF ECON. DEV., supra note 30, at 12.
35 Id. at 7.
36 TRIPS, supra note 2, art. 7.
37 Rome, supra note 1, preamble.
38 The preambles of the WCT and WPPT, concluded after TRIPS, refer to the need to maintain a balance of interests between rights and "the larger public interest" (in the case of the WCT, a balance "as reflected" in Berne). See WPPT, supra note 3, preamble; WCT, supra note 10, preamble. This recalls that such a balance was implicit in the preexisting law and the diplomatic record, even if not explicitly stated as treaty language. As Ficsor points out, it is not a new principle, but "a kind of 'reverse engineering' of a principle... manifested in the existing norms of [Berne]." FICSOR, supra note 8, at 416.
development of rights in performances prefigured this fundamental shift. In a
telling legal construction, an early decision reviewing the basis for protection of
a recorded performance concluded that the legend “not licensed for radio
broadcast” when applied to a physical copy of the recording was a reasonable
“equitable servitude on a chattel.”\(^\text{39}\) The changing legal construction of trade in
a recording of a musical work is an illustration of how the conception of IP in
traditional commerce has evolved. The notion of an interest in the performance
as an equitable servitude on the physical carrier as a traded good prefigures the
progressive understanding that the traded good is but one element of a hybrid
transaction, as the role of the physical medium becomes increasingly contingent
and subsidiary. The “sale” of a recording is in essence an IP license but is still
counted (for instance in international trade statistics),\(^\text{40}\) as the sale of a good. As
the need for a physical platform recedes with the advance of Internet distribution
of works, the purchase of a physical medium as an ancillary chattel is no longer
necessary. Hence, the true nature of trade in sound recordings as a nonexclusive
and limited licence of a bundle of IP rights becomes manifest. Technological
change has driven the movement towards distinct protection of performances.
Thus the WPPT preamble confirms the purpose is a response to “questions
raised by economic . . . and technological developments” and the “profound


\(^{40}\) In international trade in aural performances, governed in part by the WPPT, the value of IP
content within the trade in goods paradigm is apparent in the very way trade statistics are compiled.
The Harmonized Commodity Description and Coding System ("Harmonized System" or HS),
administered by the World Customs Organization, defines the commodity groups that are used as
the basis for tariffs and statistics on trade in goods. See WORLD CUSTOMS ORGANIZATION,
ie/En/TopicsIssues/HarmonizedSystem/DocumentDB/TABLE%20OF%20CONTENTS.html.

The HS distinguishes between headings 85.23 (unrecorded media) and 85.24 (recorded
media). \textit{Id}. In the harmonized system nomenclature of commodity groups used as the basis for
tariffs and statistics on trade in goods, the chief difference between these two categories of
commodity in many cases comprises the musical work, and performances and sound recordings
thereof. \textit{Id}. These sound recordings are licensed under IP rights to purchasers of the carrier
medium that forms the nominal traded good for commodities under the HS heading 85.24. \textit{Id}. The
distinction essentially concerns intellectual content, even though it applies to the description of the
carrier medium. The interface between IP related content and a traded carrier medium also arises
in customs valuation. See WTO Agreement on Implementation of Article VII of the General
Agreement on Tariffs and Trade, \textit{in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL
TRADE NEGOTIATIONS: THE LEGAL TEXTS}, art. 8.1(c) (1994).

The interface further arises in the distinction between content traded on physical carrier
mediums and the same content traded electronically, or the question of “classification of the content
of certain electronic transmissions.” \textit{Fifth Dedicated Discussion on Electronic Commerce under the Auspices
impact" of technological change.\textsuperscript{41} The more recent impact of this technological change has been to clarify the platform-neutral nature of the underlying transaction in recordings of performances. This clarification should strengthen the rationale for distinct economic and moral rights for performers over their performances as a form of property. It may therefore consolidate the apparent trend away from a more diverse doctrinal basis for legal protection of performances, towards exclusive intangible property rights.

C. NATIONAL IMPLEMENTATION OF NEW NORMS

The adherence of a wide range of countries to the WPPT and its recent entry into force now shifts the focus onto domestic implementation of this amalgam of international law.\textsuperscript{42} The delivery of this equitable balance and the creation of a sound doctrinal basis becomes a practical task and policy choice for legislators. WPPT implementation requires the legislator to restructure the relationships between the performer and the public interest, and between the performer and other right holders: for example, owners of copyright in works performed, and owners of rights in sound recording. In principle, this balance is to be reestablished without diminishing existing rights\textsuperscript{43} or affecting the existing public policy balances expressed through limitations and exceptions, while still responding to the potentially radical impact of technological change on modes of exploitation and distribution of fixations of performances.\textsuperscript{44}

This Article considers the matrix of international standards for performers' rights and the role of national legislators within the international interpretative community of performers' rights standards, and addresses several interpretative

\textsuperscript{41} WPPT, \textit{supra} note 3, preamble.

\textsuperscript{42} At April 15, 2004, it had forty-three contracting parties, including twenty-five developing countries and two established industrialized states: Japan and the United States.

\textsuperscript{43} The WPPT provides that protection "shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of [the WPPT] may be interpreted as prejudicing such protection." WPPT, \textit{supra} note 3, art. 1(2).

\textsuperscript{44} The 1996 Diplomatic Conference that concluded the WPPT applied its agreed statement concerning Article 10 (on Limitations and Exceptions) of the WCT \textit{mutatis mutandis} to Article 16 (also on Limitations and Exceptions) of the WPPT. WIPO RECORDS, \textit{supra} note 21. That statement provided:

\textit{It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.}

\textit{Id. at 28.}
issues that arise in seeking to maintain an equitable balance in the domestic implementation of these standards with a focus on the Australian jurisdiction. Recalling that the WPPT extends IP rights to performers of expressions of folklore, the Article also reflects on the significance of performers’ rights in proposals for sui generis rights over traditional knowledge and expressions of folklore. The recognition of expressions of folklore as a legitimate objective of IP protection potentially marks an important legislative step in Australia towards recognizing specific IP interests of Indigenous communities. This represents a partial culmination of two long-debated and closely analyzed domestic legal reform processes: one concerning protection of folklore, the other protection of performers’ rights. Some argue that performers’ rights should explicitly deal with Indigenous concerns. While the immediate scope of this development may be disappointing to advocates of more thorough protection of Indigenous IP, it is practically useful for the protection of Indigenous songs, chants, and stories. This development also marks a definitive end to prior a priori misgivings. For example, at the 1967 Stockholm Conference, Australia objected to an explicit mention of folklore within the revised Berne Convention. Article 15(4) of Berne

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45 The WPPT defines performers as “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.” WPPT, supra note 3, art. 2(a).

46 Id.


49 Thus, Sherman and Bentley recommended that in view of the uncertainty over the protection of Aboriginal and Torres Strait Islander performances, “it may be helpful if a specific reference to Aboriginal and Torres Strait performance was included within the definition of performance. Consideration should also be given to extending the definition to include artists performing expressions of folklore.” SHERMAN & BENTLEY, supra note 48, at 12.
refers instead to “the case of certain unpublished works of unknown authorship.” The international dynamic has been integral to the domestic process; the WPPT effectively defines the framework and bilateral trade relations forces the pace of implementation. Indeed, in view of the duration and range of the domestic policy process in both folklore and Indigenous IP and performers’ rights, it is noteworthy that Parliament crossed these thresholds in Australian law reform through a bill to implement a bilateral trade agreement. The effect of the bill was to focus parliamentary debate on much broader economic and political issues rather than these long awaited reforms of IP law.

D. UPSETTING OR RESTORING THE EQUITABLE BALANCE?

In principle, notwithstanding the strong de facto influence of international developments on the form and timing of legislative reform, the implementation of performers’ rights is a study in the purposeful response of the legislator to a perception that the advance of technology has upset the equitable balance in the IP system and requires intervention in the form of a new property right. A stand-alone performer’s right was considered necessary only when the technological possibilities for bootlegging negated performers’ prospects for defending their interests through contract and physical constraints on access. A natural rights justification for granting IP rights to performers would need to map how a sense of fairness and equity evolves according to technological change, and how an inherently unjust or natural sense of entitlement can be reconciled with the contingent and unnatural quality of new technologies. Recognizing new intangible property rights in response to technological and social change inevitably brings a recalibration of the public domain that sets an individual or collective right against a utilitarian conception of the public domain as a public good—a further variable in the equitable equation.

For constitutional or broader policy reasons, legislators can balk at the creation of a new category of IP right even while desiring its economic and social effects.

50 Berne, supra note 4, art. 15(4). Domestic implementing laws, such as that of the United Kingdom, do nonetheless refer explicitly to folklore as being the subject matter of this provision.

51 U.S. Free Trade Agreement Implementation Act 2004 c.120 (Austl).

52 On June 23, 2004, the Australian House of Representatives pass the bill, but at the time of writing the bill had not been considered by the Senate. The only reference to performers’ rights in the House debate was in the Minister’s Second Reading speech; protection of expressions of folklore was not mentioned. The subsequent Senate debate (in committee) on the bill included two references by opposition senators to performers’ rights but folklore was not mentioned. See SENATE HANSARD, June 23, 2004, at 26414 (statement of Sen. Lundy); SENATE HANSARD, June 23, 2004, at 26428 (statement of Sen. Ridgeway).
In Australia, as recently as 1987, the Copyright Law Review Committee accepted the need for legislation to protect against unauthorized fixation of performances but a majority recommended against creation of a distinct proprietary right. 53 Hesitation over “the grant of a property right in the nature of a copyright” in negotiations on Rome led to a formulation short of distinct property rights which allowed contracting parties to protect performers’ interests by providing for criminal sanctions to punish “those who make and/or use performances without consent.” 54 The stronger property right now established for performers under international standards is a more decisive transfer in principle from the public domain into the scope of private rights. In effect, the advance of technology has given the performance, formerly considered ephemeral and transitory, something approaching the material form that common law jurisdictions have considered as a practical requirement for copyright-style protection. Shifts in social values 55 have also led to a greater recognition of the performer as a distinct creator or interpretative artist whose contribution may be valued by society more than the

53 COPYRIGHT LAW REVIEW COMMITTEE, supra note 48, at 47. The Committee remarked:
It seems to the majority that what is in substance sought by those representing performers is not a “copyright” at all, but rather a convenient basis upon which a system of enforceable collective bargaining can be superimposed upon the arbitration system. The issue, in a very real sense, is an industrial issue rather than a copyright issue.


55 As a notable gauge of the social status of performers in the eighteenth century, Adam Smith attributed the high levels of rewards to performers (including “players, opera-singers, opera-dancers, etc.”) to the shameful status of this profession “as a sort of public prostitution,” so that the pecuniary recompense . . . must be sufficient, not only to pay for the time, labour, and expense of acquiring the talents, but for the discredit which attends the employment of them as the means of subsistence. It seems absurd at first sight, that we should despise their persons, and yet reward their talents with the most profuse liberality.

ADAM SMITH, I AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 119 (Henry Frowde ed., Oxford Univ. Press 1909) (1776). The temptation to associate tangible productivity with economic value is apparent in Smith’s reference to the intangible or ephemeral product of “players, opera-singers, opera-dancers, etc.” as producing “nothing which could afterwards purchase or procure an equal quantity of labour. Like the declamation of the actor, the harangue of the orator, or the tune of the musician, the work of all of them perishes in the very instant of its production.” Id.
songwriter, screenwriter, director, or producer.\textsuperscript{56} This value shift is in turn expressed in terms of aesthetic evaluation of performances as distinct intellectual works,\textsuperscript{57} and raises the appealing prospect that legal evolution may be shaped by aesthetic and musicological insights.\textsuperscript{58} The past unwillingness to protect performers in Australia has been attributed to "a reluctance on behalf of successive governments to recognize the creative contribution made by performers to Australian culture."\textsuperscript{59} Even now, with a well established acceptance in principle of the need for performers' rights, the immediate impetus for legislative action has been the international dimension.

The call for a recalibration of the balance of equitable interests and for recognition of performers' rights is, to many, a legitimate and long overdue response to the prejudicial impact of technological advance on performers' interests. Yet creating a new property right poses as many equitable questions as it answers, since it introduces an additional dimension into the already complex

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\begin{itemize}
\item \textsuperscript{56} Arnold, supra note 54, at 3.
\item \textsuperscript{57} The \textit{locus classicus} of this shift in aesthetic perception is perhaps Proust's fictional report of his recognition of the actor as a distinct creative artist:
\begin{quote}
I had found some difficulty in correlating my ideas of 'nobility of interpretation,' of 'originality'... Was this genius, of which Berma's interpretation was only the revelation, solely the genius of Racine? I thought so at first. I was soon to be undeceived... I realized then that the work of the playwright was for the actress no more than the raw material, more or less irrelevant in itself, for the creation of her masterpiece of interpretation... Thus into the prose sentences of the modern playwright as into the verse of Racine Berma contrived to introduce those vast images of grief, nobility, passion, which were the masterpieces of her own personal art, and in which she could be recognised as, in the portraits which he has made of different sitters, we recognize a painter.
\end{quote}

\item \textsuperscript{58} See Capitol Records Inc. v. Mercury Records Corp., 221 F.2d 657, 664, 105 U.S.P.Q. (BNA) 163, 168 (2d Cir. 1955) (Learned Hand, J., dissenting).
\begin{quote}
Musical notes are composed of a 'fundamental note' with harmonics and overtones which do not appear on the score... In the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a 'composition' as an 'arrangement' or 'adaptation' of the score itself, which § 1(b) makes copyrightable. Now that it has become possible to capture these contributions of the individual performer upon a physical object that can be made to reproduce them, there should be no doubt that this is within the Copyright Clause of the Constitution.
\end{quote}

\item \textsuperscript{59} Sherman & Bentley, supra note 48, at 14. The authors argue further that it is curious and perhaps a reflection of the way in which performers have been valued in this country, that while Australia has been willing to mimic British copyright legislation since Federation, no real effort was made to follow the lead offered by the United Kingdom, as early as 1925, in providing protection for performers.
\end{itemize}
composite of economic and legal relationships that arise when copyrighted works are performed, recorded, and disseminated to the public in various ways. A performance as such must be withdrawn from the public domain because an advance in technology has the potential for intolerable damage to legitimate economic and moral interests of the performer, yet any recalibration of the public domain creates consequent shifts in other equitable balances. There is a direct analogy with the demand for creation of property rights in traditional knowledge and traditional cultural expressions, or expressions of folklore.\textsuperscript{60} The advance of technology, in particular biotechnology and the technologies of fixation and replication, is held to deprive the traditional knowledge holder or custodian of folklore of their entitlement to an appropriate and equitable portion of the value of these IP assets in their downstream and marketplace exploitation, and to limit their capacity to preserve reputation, integrity, and attribution consistent with cultural norms and broader equitable considerations. Indeed, this is more than an analogy: In recognizing economic and moral rights over performances of folklore, the WPPT potentially gives traditional performers control over the songs, chants, and recitations that are the customary means of transmitting and preserving their cultural heritage and traditional knowledge.\textsuperscript{61} To some extent, the \textit{sui generis} protection of traditional knowledge it that is represented by aural performances of expressions of folklore is already part of binding international law in the form of the WPPT, which partially anticipates political demands for such an international instrument.\textsuperscript{62}

Unfair competition, an additional rationale for the extension of IP protection to performances in their own right, has also anticipated the search for a secure doctrinal basis for recognition of claims against misappropriation of traditional knowledge and traditional cultural expressions. Two landmark decisions in the U.S. accepted an expanded conception of misappropriation under the law of

\textsuperscript{60} These terms are used interchangeably: The term “traditional cultural expressions” is intended as neutral term for use when the more established term “folklore” is considered inappropriate or inaccurate by traditional communities. To some traditional communities, folklore suggests “something dead to be collected and preserved, rather than as part of an evolving living tradition.” Terri Janke, \textit{UNESCO-WIPO World Forum on the Protection of Folklore: Lessons for Protecting Indigenous Australian Cultural & Intellectual Property}, 15 COPYRIGHT REPORTER 104, 109 (1997).

\textsuperscript{61} See WPPT, supra note 3, art. 2(a) (defining a performer as one who performs expressions of folklore).

\textsuperscript{62} A series of proposals and calls for a new instrument recently culminated in a proposed framework. \textit{Objectives, Principles and Elements of an International Instrument, or Instruments, on Intellectual Property in Relation to Genetic Resources and on the Protection of Traditional Knowledge and Folklore} (Mar. 15-19, 2004), WIPO Doc. WIPO/GRTKF/IC/6/12 (Mar. 15, 2004); \textit{The Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Core Principles}, WIPO doc. WIPO/GRTKF/IC/7/3 (Aug. 20, 2004).
unfair competition as a basis for distinct rights. This development was underpinned by increasing recognition of the distinct intellectual contribution that is invested in creating a performance. In Metropolitan Opera, Judge Greenberg noted that the "finished interpretative production would appear to involve such a creative element as the law will recognize and protect against appropriation by others." The movement towards protection of traditional knowledge and traditional cultural expressions is equally based on a growing general acknowledgment of the distinct intellectual and creative value of this material, notwithstanding its communal and traditional qualities. Accordingly, expanding the notion of misappropriation under the general doctrine of unfair competition may prefigure the development of a remedy against misappropriation of traditional knowledge and traditional cultural expressions, and may provide an avenue for evolution of distinct rights, not least because of the collective quality of many performances. The vexing question of whether rights can be asserted over materials that are already in the public domain, one aspect of the retrospective quality of some claims over traditional knowledge and traditional cultural expressions—was also anticipated to some extent in the judicial attention given to the question of whether sale of recorded performances had placed the performance in the public domain and thus extinguished commonlaw claims to protection. The Whiteman court initially upheld the public domain status of such performances, but in Capital Records the majority held that the distinct creative element represented by performances was susceptible to protection in itself.

II. THE DOMESTIC LEGISLATOR WITHIN THE INTERNATIONAL INTERPRETATIVE COMMUNITY

The establishment of performers' rights in Australia has attracted the kind of focused attention that IP policymakers typically apply to difficult crossover areas that entail uncertain delineation of the scope of rights, and the degree to which the potential to exercise them should be restricted in the interests of broader public policy objectives and the balancing of diverse interests. Some of the particular implementation questions are precise illustrations of the practical order of distinct public goods and constitutes the actual construction within national law of the kind of equitable balance that TRIPS invokes in abstract terms. It has

64 Metro. Opera Ass'n, 101 N.Y.S.2d at 493.
66 Capitol Records, 221 F.2d 657.
67 See supra note 48.
also required a careful consideration of the role of the domestic policymaker and the legislator as active members of the interpretative community that contribute to the concretion of state practice that—whether de facto or de jure—creates the framework for interpretation of treaty obligations. Clarity on the role and status of domestic interpreter is vital once the task of interpretation crosses the ill-defined boundary between a descriptive account of state practice in implementing a treaty and a normative determination that a state’s implementation complies with that treaty. This discussion focuses on three specific policy and legal questions that have arisen in the context of performers’ rights legislation in Australia.

The first policy question concerns expressions of folklore or traditional cultural expressions. In Rome and TRIPS, performers’ rights are defined to cover performances of literary and artistic works only. But as noted above, the WPPT explicitly extends the scope of protection to cover performances of expressions of folklore. While there is no authoritative international definition of expressions of folklore, the definition should cover more than artistic and literary works that were already the subject of copyright protection lest it be otiose. Hence the extension of this definition must entail exclusivity over performances that would otherwise remain in the public domain, explicitly raising for the first time in international IP law the question of how to strike a balance between IP rights and the public interest for such “traditional” subject matter.

The next policy question deals with individual, nonfeatured performances. The performer’s right is an individual one, enjoyed by the performer as defined in the relevant treaties. Yet many performances are collective activities. The scope of recognition of individual performers may be difficult where the boundary is unclear between featured performances and genuine ensemble performances. A hard reading of the definition of performer would suggest that even a minor contribution to an overall performance would give the individual performer a right of veto over fixation of the performance, and moral and economic rights over its subsequent exploitation. Potentially this would set that performer at odds with other performers whose distinctive contribution was higher, and would impede the capacity of those with rights in the musical work performed and the phonogram of the performance to exploit their rights. This balancing of equity within a collective, overall performance then flows into broader questions of equity in creating performers’ rights. Interpretation of the scope of definition of performer therefore has strong equitable and policy implications.

68 Rome, supra note 1, art. 3(a); TRIPS, supra note 2, art. 14.
69 WPPT, supra note 3, art. 2(a).
The final policy question addresses retrospectivity and application in time. Recognizing or broadening the scope of performers’ rights with retrospective effect creates a need to establish an equitable balancing of interests. Even a decision not to extend retrospectivity is an implicit choice of an equitable settlement of competing interests. This last point takes on a particular pertinence in the extension of protected performances to cover expressions of folklore, which is potentially a whole new range of subject matter. For proponents of more effective recognition of Indigenous and other traditional IP interests, the view of the public domain in which folklore and traditional cultural expressions have already lost any claim to exclusivity by virtue of past acts of fixation and publication is inherently inequitable. The claim to retrospective application of extended protection is at the core of the call for an equitable rebalancing of interests.

For the legislator and policymaker, these issues raise potentially contested approaches to treaty interpretation, and require a pragmatic assessment of how one country’s domestic policy choices will be perceived and acted upon by its trading partners. More broadly, the approach taken rests uncertainly on the boundary between a role for a sovereign nation as an active participant in the international interpretative process of WPPT and TRIPS treaty obligations, and the same country as a state bound by established standards of international law in its provision of performers’ rights. Behind these more precise questions is a fundamental, if pragmatic point in implementing international treaty standards in domestic IP laws. This issue has arisen especially in the international debate about the WCT and the WPPT. Focusing on the issue of circumvention of technological protection measures, the U.K. Commission on Intellectual Property Rights recommended that “[d]eveloping countries should think very carefully before joining the [WCT] and other countries should not follow the lead of the US” in their choice of implementing legislation. The commission implicitly distinguished between the interests of developing and developed countries and their respective capacities to chart an independent legislative course. By this

70 See Antony Taubman, Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (Keith Maskus & Jerome Reichman eds., 2005).


72 It is notable that the actual text of the WCT and WPPT concerning the critical question of technological protection measures is closely based on an African Group proposal replacing a more prescriptive (and prima facie less flexible and closer to existing legislative tendencies) original proposal. See WTC, supra note 10, art. 13; WPPT, supra note 3, art. 22; WIPO RECORDS, supra note
approach, apprehension about the negative consequences of a disadvantageous interpretation of a treaty’s provisions would lead to diffidence, circumspection, and nonparticipation in the treaty system. An alternative would be to take advantage of early participation in the treaty in the confidence that, through the conscious implementation of treaty provisions in domestic law, a state is inherently helping to determine the shape of its interpretation. This state takes a policy lead by pioneering treaty interpretation in national law.

Essentially, the question is whether there is a stronger interest in remaining outside the treaty system to maintain maximum policy flexibility, or, alternatively, in working within the confines of the treaty system as an active participant in the interpretative community. A first-mover advantage arguably applies in the construction of legislative models to implement uncertain, ambiguous or controversial treaty language, and allows the concerned state to influence the interpretation of subsequent state practice. By contrast, the state which postpones treaty adherence in the interests of greater policy flexibility may, ironically, find it has fewer policy options for the legal reason that there is a convergence of state practice which effectively restricts the range of choice, and provides policy advocates and trade interests with strong pragmatic arguments for conformity with other nations’ models. Over time, as international standards mature, compatibility with the accepted interpretations of those standards may be seen as a desirable end in itself, not merely for pragmatic reasons but even from a public policy perspective. The appeal of consistency can arise for diverse reasons: the desirability of workable compatibility between collective rights management arrangements, the broader benefits from coherency with trading partners’ systems, and the policy insights and benefits of legal clarity that can arise from jurisprudence in comparable jurisdictions.

A. LEGAL AND PRACTICAL IMPLICATIONS OF OTHER NATIONAL CHOICES

Even in the conscious exercise of national prerogatives, the domestic policymaker and legislator should nonetheless take account of the approach in other jurisdictions, both for the technical reason that it may be weighed as subsequent state practice in treaty interpretation, and for the prudential policy reason that it would provide a much stronger line of practical defence and rebuttal against challenge by trading partners—as opposed to—a more abstract case based on legal and policy reasoning. Expectations of trading partners are shaped, in part, by their own domestic settings, even to the point of preferring textual

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21, at 217, 321. This suggests a degree of ownership or paternity of the treaty that that could reflect a different perception of domestic interest and a choice during the negotiations to safeguard flexibility in the range of legislative approaches giving effect to this provision.
consonance with domestic laws rather than substantive conformity with agreed international principles. On performers' rights, a practical approach to policymaking would include paying close attention to the choices taken in other national and regional laws which seek to implement Rome, TRIPS, the WPPT, and in any case law applying these treaties. This approach would note merely shed light on applicable state practice, but would also be relevant to an assessment of the risk of a significant challenge to the interpretative approach taken by Australia in making legislative choices. For instance, Australia's trading partners may perceive both a policy and economic interest in a rigorous approach to retrospectivity. In the context of TRIPS negotiations, given the trade, commercial, and IP policy interests involved: "heroic efforts were made by Administration and copyright industry trade negotiators to secure retroactive protection for United States works in Pacific Basin and other countries." 73 More recently, the United States has used the WTO dispute settlement mechanism to press for a rigorous view of retroactivity in its interests concerning application in time of patent law under provisions of TRIPS in Canada—Term of Patent Protection, although in an area where there was arguably little legal uncertainty, as the findings in that case seem to confirm. 74

Successive E.U. directives on copyright and related rights on application in time manifest some ambivalence, and assert the general principle of retroactivity while safeguarding acquired rights or prior acts of exploitation. E.U. related rights legislation over the last decade has developed with a particular focus on TRIPS, which is particularly relevant to the interpretation of the WPPT given the decision to align WPPT application—in—time provisions with those of TRIPS. 75 The E.U. directive on copyright term, which, among other things, brought the term of performers' rights into line with TRIPS requirements, requires that there be no "prejudice to any acts of exploitation performed" before the date of effect of the directive, and that E.U. countries adopt "the necessary provisions to protect in particular the acquired rights of third parties." 76 77 The Rental Right Directive provides a complex set of provisions for the application in time of relevant rights, including deeming of authorization, exclusion of effect on preexisting contracts, delayed introduction of remuneration

75 See infra Part IV.B.3.
77 Id.
rights, and presumption of transferral of new rights through earlier consent to exploitation. 78

A thorough consideration of national implementation options raises both specific legal issues and broader policy issues, and requires the assessment of the benefits of Australia's formal participation in the international legal framework, while also recognizing the more direct impact of bilateral trade negotiations. In principle, the need to find workable and effective domestic solutions would also raise the possibility of conscious noncompliance with a treaty on technical points, while still giving effect to the spirit and objective of the treaty, inasmuch as the two can be distinguished. Apart from its impending accession to the WPPT, Australia already had international obligations concerning performers' rights under Rome (subject to a significant reservation) and TRIPS, as well as under Berne (to the extent Berne applied to performances which in themselves are also eligible for protection as copyright works). If the analysis of options for domestically initiated reform of performers' rights and the choice of adherence to the WPPT were insulated from broader, de facto international influences, and could be undertaken from an immediate perspective of domestic selfinterest—accepting this now as entirely an analytical fiction—then four general options reflecting different approaches on the issues of international law and policy set out above present themselves:

• Neutrality to the WPPT. Develop the performers' rights system with a view to maintaining existing international obligations, drawing on elements of the WPPT and systems in other benchmark jurisdictions as appropriate, but without the specific aim of giving effect to the WPPT, and electing not to accede to the WPPT and not to be bound by it.
• Planned Limited Compliance. Develop a performers' rights system consistent with domestic interests and constitutional constraints, compliant as far as possible with the WPPT, and with the objective of adhering to the WPPT. This option is conscious that some limited elements of the domestic performers' rights regime may remain technically inconsistent with certain provisions of the WPPT while indisputably giving effect to its objectives and its normative essence.
• Domestically responsive full compliance. Develop a performers' rights system consistent with domestic interests and constitutional constraints, with the express aim of complying with the obligations of the WPPT as they are understood. This option would use actual policymaking experience in

developing a workable national regime of performers’ rights that meets domestic concerns from the point of view of practicality, constitutionality, and equity as the basis for promoting an approach to implementation that does justice to the treaty text while providing an attractive model for other countries which are finding difficulties in adhering to the WPPT. Such difficulties might arise in areas of possible textual obscurity or uncertainty in finding how to practically establish an equitable balance, such as on questions of retrospectivity and individual rights within ensemble performances.

- Reactive compliance. Implement a performers’ rights system that conforms with external judgements, in particular those of trading partners, as to what amounts to an adequate level of protection, a correct interpretation of international standards, which makes direct textual use of external legislative models.

These distinctions are not, in practice, entirely exclusive. For instance, there is considerable potential overlap in terms of the scope of actual outcomes between the second and third options, precisely because of the scope of discretion in national implementation and because of the inevitable subjectivity that arises when assessing the intent of national administrations in treaty implementation. A trading partner’s expectations as to detailed implementation will typically reflect their own domestic settings which, in turn, may be influential as state practice relevant for treaty interpretation. Of course, one country’s proper exercise of sovereign discretion can be, to another country, a defiance of international standards. And detailed questions of compliance may indeed be unresolved or indeterminate until settled by the courts. Even so, the second approach (planned limited compliance) is inherently undesirable for legal, policy and immediate pragmatic grounds. In particular, these grounds include:

- The formal obligation to implement treaty obligations in good faith (*pacta sunt servanda*) and the ongoing systemic interest in an international culture of compliance with treaty obligations in the IP domain.
- The general policy interest for a country such as Australia, a mid-level international player with inherently limited political and economic leverage, in supporting the predictability, clarity, and equity that flows from a strengthened trend to interpret and implement treaties consistently prima facie with their text and with their objectives. An approach of planned limited compliance may be used to justify a comparable approach by other economic partners in ways inimical to its own core interests.
- The need to limit exposure to potential criticism, friction in trade relations, and trade based retaliation based on a perceived failure to apply international standards.
The need to ensure continuing input into the interpretation and application of treaty standards, including serving as a potential model for emerging markets for copyright materials in its region, and the commensurate loss of influence and credibility that would flow from planned limited compliance.

The potential future negotiating difficulty that would be faced if a review of TRIPS were to address enhanced performers’ rights. Australia felt it had to seek enhanced rights to avoid the application of the WPPT under its WTO obligations despite being bound by it. Contrast the potential position of influencing TRIPS provisions on the application of WPPT standards from the position of a good faith WPPT state party with a track record of reasonable and effective implementation of its standards.

The following section expands on some consequences of the first approach (neutrality to the WPPT). Australia has shown a general policy preference for commitment to the WPPT since Australia’s participation in its negotiation. Independence from the WPPT is no longer a realistic option given the formal commitment to adherence under the Australia—United States Free Trade Agreement. In any event, this choice would be inherently undesirable and self-limiting, especially if it was assumed that Australia would adhere to the WPPT at some later time (and then to comply with its more mature and potentially less flexible jurisprudence). That course would probably limit the scope of legislative choice and responsiveness to domestic interests. One can draw an interesting parallel with the relatively pragmatic and open approach taken by the United States at the time of its implementation of Berne, albeit prior to the radical step towards constitutionalization of international IP law represented by TRIPS. The costs and equity of retroactive application of higher levels of protection were key elements in the domestic debate over Berne accession. A report of the House of Representatives acknowledged that Article 18 of Berne entitled “Works Existing on Convention’s Entry Into Force” raised serious issues, but concluded


80 United States-Australia Free Trade Agreement, May 18, 2004, art. 17.1.4, 118 Stat. 919, available at www.dfat.gov.au/trade/negotitions/us.html (providing that each party “shall ratify or accede to the [WCT] and the [WPPT] by the date of entry into force of this Agreement, subject to the fulfillment of their necessary internal requirements”).

81 Berne Convention Implementation Act, Pub. L. No. 100-568, § 12, 102 Stat. 2853 (1988) (providing that “Title 17, [US] Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the [U.S.]”).

82 On application in time, Article 18 provides that:

(1) [Berne] shall apply to all works which, at the moment of its coming into
nonetheless that "any solution to the question of retroactivity can be addressed after adherence to Berne when a more thorough examination of Constitutional, commercial and consumer considerations is possible." 83

This suggests a preference for an approach which seeks to interpret and apply WPPT standards on the basis of a clear intention to carry out the treaty obligations fully, but crafts legislation to safeguard legitimate domestic policy interests and legal issues, rather than following external models directly. This is, of course, the third approach (domestically responsive full compliance). The prudence and logic of this choice is reinforced now that the treaty has entered into force (after an unexpected hiatus immediately following its conclusion) and the treaty so clearly defines economic partners' expectations and negotiating ambitions, possibly also over time gaining status as customary international law. This does not, however, mean that Australia need shrink from interpreting those obligations in a way that is reasonable and equitable from the point of view of its domestic interests. To the contrary, reconciling domestic interests in line with the broad standards of equity and balance now present in the international law of IP is arguably a higher obligation than one of simple and reactive compliance with minimum standards. By the very nature of the domestic debate and the specific domestic and international interest groups that are engaged, there is an inevitable tendency to see treaty implementation as a tradeoff between defending domestic interests and meeting the dictates of the international instrument. Yet the domestic legal and commercial environment is the only one in which the underlying standards of equity, balance, reasonableness, and effectiveness—as expressed, for instance, in the WPPT preamble—can be measured. At their core, these key concepts do not define relations between Australia and other states, but the tripartite relation between performers, other IP right holders, and the

force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.

(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.


Australian public. Hence the process of determining what is balanced, reasonable and effective in the Australian domestic context is itself a legitimate process of treaty interpretation. In other words, to seek an equitable balance within the domestic policymaking process, Australia is at once both a treaty obligation and an exercise in treaty implementation, potentially influential at the international plane.

The bare treaty language is given context by the understanding that Australia is an active participant in the interpretative community of international copyright law, and that Australia's understanding of what constitutes a practical, equitable and reasonable means of giving effect to the WPPT in good faith can provide guidance on the treaty's interpretation. Some countries ratified the WPPT without a well defined performers' rights regime, which may in part be attributed to difficulties in domestic implementation and the perceived uncertainty about the legal effect of some WPPT provisions. In that light, a state party's good faith endeavor to give effect to the WPPT may be presented as a positive and needed contribution to the interpretative community, at a time when the lack of clarity and the lack of established working models may delay implementation of the treaty and realization of its objectives.

B. FLEXIBILITY IN TREATY IMPLEMENTATION

There is a crucial difference between making use of acknowledged areas of flexibility and general indistinctness in treaty provisions to find a domestically optimal formula for meeting treaty obligations and a stated or apparent intention not to apply treaty obligations in order to accommodate domestic concerns. For example, despite the long tradition of copyright harmonization, the repeated returns by negotiators to the Berne text (including implicitly in the TRIPS negotiations), and the rich tradition of interpretative commentary on Berne, it is still possible for the copyright world to be divided by two different notions of authorship, and of the degree of originality consistent with eligible authorial status.84 This applies more persuasively to those areas where the treaty language

84 This distinction is typically considered in terms of legal doctrine and in terms of distinct value systems: a focus on author's rights with an aesthetic reading of originality favoring the author as lone creative force, or a utilitarian approach where sweat of the brow, not artistic creativity, determines eligibility and the system is focused on social needs. See Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 TUL. L. REV. 991 (May, 1990). A classic statement of the Anglo-Saxon conception of originality was by Justice Peterson, in University of London Press, Ltd. v. University Tutorial Press, [1916] 2 Ch. 601, 608 (Eng) who states: The word "original" does not in this connection mean that the work must be the expression of original or inventive thought ... the Act does not require that the expression must be in an original or novel form, but that the work must not be
is known to be indistinct and in which there is a wide spread of national practice. Such is the case on retrospectivity and on nonfeatured performances.\textsuperscript{85}

Accordingly, the process of matching domestic needs with treaty implementation need not be seen from the view point of limiting policy options outright. It simply imposes an obligation to express the limitations in the lexicon of applicable international law. In assessing the scope of national discretion in applying the terms of the WPPT, the key interpretative tools are the customary rules on treaty interpretation codified in the Vienna Convention (\textit{Vienna}).\textsuperscript{86} The WTO Appellate Body has authoritatively applied these rules in the interpretation of TRIPS.\textsuperscript{87} While there is less explicit authority concerning \textit{Berne} or the WPPT as an authoritative codification of customary international law and as a treaty widely accepted, \textit{Vienna} would unquestionably be applied in any rigorous analysis of the WPPT, such as when a particular national approach was criticized or contested. The \textit{Vienna} rules are not rehearsed here, beyond recalling that this interpretative framework carries with it an implied norm that no propounded interpretation of treaty language should lead to a manifestly absurd or unreasonable result. On this basis, it should be possible to avoid a treaty interpretation that could lead to unreasonable or absurd consequences of the recognition of performers' rights. This gives grounds to circumscribe the absolute exercise of rights, so as to avoid unreasonable situations. For instance, in the United Kingdom, the

Copyright Tribunal has the power to override a performer's refusal of consent to the making of copies . . . if it is being unreasonably withheld, or if he or she cannot be identified. The fourth cygnet could otherwise hold to injunctive ransom the considerable investment in a film of Swan Lake, through failure to get her consent.\textsuperscript{88}

\textsuperscript{copied from another work—that it should originate from the author.}


\textsuperscript{85} \textit{See supra} Part IV & III.


\textsuperscript{88} W.R. Cornish, \textit{Intellectual Property: Patents, Copyright, Trade Marks, and
More generally, the Vienna rules point to an interpretative approach that permits the progressive recourse to wider ranges of interpretative tools in those areas where interpretation is especially uncertain, ambiguous, and more likely to be reliant on state practice. Nonetheless, the norm against interpretations leading to results that are manifestly absurd or unreasonable does not simply mean domestically inconvenient, or in conflict with domestic laws or policy interests, or even incompatible with constitutional law. Treaty interpretation applies to the rights and obligations states intended to establish between themselves, and the rules are based on the assumption that no parties to the treaty would intend an absurd or unreasonable obligation. Hence, the objective of exploring policy flexibility should be seen not as seeking to evade or mitigate the effect of what is felt to be unwelcome or undesirable treaty obligations, but as finding a way of applying the treaty that is workable and coherent, and not unreasonably prejudicial to existing interests. Further, where there is potential uncertainty about WPPT implementation, a thorough and conscientious search for a workable and equitable model for treaty implementation, including determining the reasonable limits to which obligations need not be applied, may be presented as a positive service to states party to the treaty; a higher form of good faith in treaty implementation.

Australia’s own use of the Asia-Pacific Economics Cooperation IP Rights Experts’ Group (IPEG) in promoting collective discussion about approaches to the implementation of the WPPT illustrates how a deliberate shift can be made from a zero-sum, compliance-based, and reactive view of treaty implementation, to a collective endeavor to use the treaty as a vehicle for promoting shared policy interests and as a benchmark for public welfare outcomes. This process acknowledges that there are serious questions of interpretation and practical implementation, that there is room for national discretion, and that collaboration through the formation of an epistemic community of policymakers is an effective way of promoting practical resolution of implementation issues in a way that

**ALLIED RIGHTS 473 (3d ed. 1996).**

89 Vienna, supra note 86, art. 32(b).

90 Noting that these interests are shared by most parties to the treaty, and the assumption of profound differences in policy interests may be over stated.


92 See Antony Taubman, Collective Management of TRIPS: APEC, New Regionalism and Intellectual Property, in INTELLECTUAL PROPERTY HARMONISATION WITHIN ASEAN AND APEC (Christoph Antons et al. eds., 2004).
promotes consistency in the approaches taken in domestic law within the bounds of national discretion.

C. OBJECT AND PURPOSE OF THE WPPT

Consideration of national policy options under the WPPT accordingly entails operating within a clear interpretative framework, which—under the broad influence of the TRIPS-WTO legal system—is likely to take on a more rigorous, black-letter quality than the more accommodating view taken of Berne and Rome implementation in the past. This entails consideration of the object and purpose of the WPPT. The preamble provides limited guidance on this point, which refers to the parties’ desire “to develop and maintain the protection of the rights of performers . . . in a manner as effective and uniform as possible” and to recognize “the need to maintain a balance between the rights of performers . . . and the larger public interest.”

Just as the original push for performers’ rights was stimulated by the development of new technologies that made fixation and distribution possible, enhancement of performers’ rights under the WPPT was also framed in terms of “the profound impact of the development and convergence of information and communication technologies on the production and use of performances.” In the particular context of the WPPT negotiations, another important consideration was the general need for consistency with existing standards (Berne and Rome) and with TRIPS. The level of consistency differed, however, on the definition of performers. The negotiators apparently aimed for consistency with Rome and TRIPS, but chose to expand the definition to include performers of expressions of folklore. On the issue of retroactivity, the absolute nonretroactivity standard of Article 20.2 of Rome was clearly not followed in favor of consistency with the more complex retroactivity standards of Article 18 of Berne and Article 70 of TRIPS.

93 WPPT, supra note 3, preamble.
94 Id.
95 WPPT, supra note 3, art. 2(a). In principle, it is possible the reference to expressions of folklore was intended as an explanatory gloss on the umbrella term “literary and artistic works,” given the open ended nature of its definition in Article 2(1) of Berne, supra note 4. This reading is syntactically improbable, however, and also unlikely in the negotiating context. The explanatory notes on the draft WPPT indicated that this was an “extension of the scope of artists covered by the definition” the effect of which would be that “this added group of performers would enjoy protection irrespective of the nature of the object of the performance.” WIPO RECORDS, supra note 21, at 244.
96 Cf. WPPT, supra note 3, art. 22; Rome, supra note 1, art. 20.2; TRIPS, supra note 2, art. 70, and Berne, supra note 4, art. 18.
III. MORE POWER TO THE SPEAR-CARRIER: PRACTICAL EQUITY IN DEFINING THE TERM “PERFORMER”

Although many performances are collective endeavors, a conscious choice was made in establishing performers’ rights to create separate, individual rights, potentially enjoyed and exercised discretely by each performer in an overall performance. Yet this creates both practical problems and equitable issues, including the inequitable consequences of unreasonable withholding of consent by a minor performer. The very definition of the term “performer” may therefore carry with it assumptions about inherent equities and the tripartite balance between public, collective, and individual interests. Exclusion of minor contributors would clear the way for more valued performers to exercise more effectively their more deserved individual rights. Just as the term “authorship” in copyright may be assessed with reference to quantitative (quantum of contribution, or sweat of the brow) and qualitative (originality or other aesthetic assessments) criteria, such quantitative and qualitative factors may be considered when assessing whether a performer qualifies for protection. One approach would be to create a preemptive limitation to privilege those performers who make an exceptional contribution and to exclude lesser artists from eligibility, conceived either in aesthetic, qualitative terms or in effectively market-based, commercial terms, extending with reference to signed or featured artists. On the face of it, this question resolves whether WPPT obligations to establish performers’ rights apply to certain categories of individuals and addresses the precise definition of the term performer and the relevant protected acts, and the test for determining whether or not a particular individual meets the definition on the basis of their actual contribution. The way “performer” is defined leaves open considerable areas of interpretative flexibility, with some commentary suggesting that national courts would provide the precise definition. Contrast, for instance, the application of the terms national or public, which, while somewhat indistinct, are conceptually clear.

97 CORNISH, supra note 88, at 473.
98 See supra note 57 (presenting a purely aesthetic analysis).
99 An approach that would apply too high a threshold of originality means that the definition of a protected performance would come close to a distinct work eligible for copyright protection, thus begging the question of whether there is a distinct need or rationale for performers’ rights.
A. DEFINING ELIGIBLE PERFORMERS

The WPPT defines performers very generally. The use of the terms "other persons" and "otherwise perform" suggests an intention to be inclusive and not to exclude a broad application. The treaty objective of seeking protection "as uniform as possible" would also tell against broad limitations that would narrow the scope of this term. The definition is broader than the Rome provision (applied in TRIPS) on which it is based because of the addition of the term interpret and the extension to "expressions of folklore." The inclusion of the term "interpret" suggests a possible broadening of the range of activities that would serve as the basis of a claim for the status of performer, or at least an intention to clarify that the scope is broader than the bare text of Rome might otherwise suggest. This may be due to an intention to clarify that conductors and directors may be considered performers, settling an area of some uncertainty at least in the English text. The definition is, however, limited by its dependence on two terms of art: The performance is of a "literary or artistic work" or an "expression of folklore." The former term is widely interpreted and applied based upon a broad and inclusive definition in Berne. The latter is of less established application, but should broaden the scope of eligible performers inasmuch as expressions of folklore may apparently not be works.

1. Expressions of Folklore and Copyright Works. Given the historic importance and legal significance of the formal recognition of folklore in the WPPT, and notwithstanding the unease or apprehension the perceived patronizing timbre and colonialist implications of this term causes for some traditional and Indigenous

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100 WPPT, supra note 3, art. 2(a) (defining performers as "actors, signers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore").

101 Id.

102 Id. at preamble.

103 Rome, supra note 1, art. 3(a).

104 WIPO RECORDS, supra note 21, at 244.

105 The Jamaican delegation to the Diplomatic Conference pointed to the difficulty in applying the term "interpret" in English speaking countries and proposing its deletion in the English text of the WPPT, seemingly because it would go beyond a reasonable sense of what should create a performer's eligibility. WIPO RECORDS, supra note 21, at 689.

106 The Rapporteur General already clarified at Rome that conductors of musicians or singers are included in the definition by virtue of the signification of the French text. Report of the Rapporteur-General, reprinted in WIPO RECORDS, supra note 21, at 40. This fact was reinforced by the WIPO commentary on Rome: "In order that there should be no doubt that conductors of instrumental and vocal groups were protected, both were considered included in the expression 'artiste interprète ou exécutant.'" WIPO GUIDE, supra note 5, at 21.

107 WPPT, supra note 3, art. 2(a).

108 Berne, supra note 4, art. 2.1.
some clarification of the relationship between these two forms of protected subject matter would be essential for the effective implementation of WPPT standards. The question of how to define expressions of folklore is of policy interest in itself, but is also relevant to the general scope of the definition, since it makes clear that the boundaries of the term "performer" extend beyond those of Rome and TRIPS and confirms that the underlying subject matter that is performed need not be itself original or copyrighted. As the background to Article 15(4) of Berne implies, at least some folklore may fall within the definition of literary or artistic works, even if they are unpublished works of unknown authorship. Some laws include folklore partially or wholly within the scope of literary and artistic works, while others define it altogether distinctly either within copyright laws or in sui generis laws for protection of folklore. The distinction cannot turn on whether the performed material—typically the musical work—is currently in copyright, as works performed in eligible performances may include unfixed and anonymous works and works created in the distant past. The interpretation of this term from a copyright perspective can often turn on what characteristics an expression of folklore might lack, by contrast with a copyrighted work: for example, underlying originality, individual authorship, a fixed form, and

In view of such concerns, the synonymous term "traditional cultural expressions" has been used interchangeably with "expressions of folklore" in some recent policy debate. See, e.g., WIPO Doc. WIPO/GPTKF/IC/6/3 (Dec. 1, 2003).

Berne, supra note 4, art. 15(4)(a), states:
In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the union.

The UNESCO-WIPO Tunis Model Law on Copyright for Developing Countries defines folklore as "all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of traditional cultural heritage." UNITED NATIONS EDUC., SCIENTIFIC AND CULTURAL ORG. & WORLD INTELLECTUAL PROP. ORG., TUNIS MODEL LAW ON COPYRIGHT FOR DEVELOPING COUNTRIES (1976).

See, e.g., Copyright Act 1981-1982, § 13 (1981) (Barb.) (defining folklore as "all literary and artistic works that (c) constitute a basic element of the traditional and cultural heritage of Barbados; (b) were created in Barbados by various groups of the community; and (c) survived from generation to generation").

This approach is taken in numerous African laws. The Cameroon law defines folklore as: all productions involving aspects of traditional cultural heritage, produced and perpetuated by a community or by individuals who are clearly responding to the expectations of such community, comprising particularly folk tales, folk poetry, popular songs and instrumental music, folk dances and shows, as well as artistic expressions, rituals and productions of popular art.

Law No. 90-010 on Copyright, art. 10, Aug. 10, 1990 (Cameroon).
clear boundaries. For instance, folklore “must be distinguished from specific works created by distinguishable persons or groups of persons at a certain time on the basis of folklore or interpreting certain folkloric elements.” Yet it is submitted that these terms cannot be mutually exclusive; some degree of overlap can be expected in practice and indeed is implied by Article 15(4) of Berne. Further, strictly speaking, an eligible performer does not perform folklore per se, but rather an expression of folklore, thus setting the performance at two conceptual levels away from the underlying folklore. This suggests some latitude in defining this background concept. In any event, an inclusive definition should be positively responsive to the traditional cultural environment, and should not merely define folklore in counterpoint to conventional copyright works. While there is no firm international law on the scope of folklore, international policy development regarding folklore protection has a long history, and there are formulations which may be influential in the interpretation of this term. The UNESCO-WIPO Model Provisions define expressions of folklore illustratively as “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of country] or by individuals reflecting the traditional artistic expectations of such a community.”

The Model provisions expand on the definition with a list of specific examples, including most relevantly to the WPPT, given its application to aural fixation of performances only—“verbal expressions, such as folk tales, folk poetry and riddles” and “musical expressions, such as folk songs and instrumental music.”

2. Scope of Eligible Performances. In spite of the WPPT’s attempt partly to clarify and partly to broaden the Rome-TRIPS definition of performers, and the guidance provided by the plain text, it may still be necessary to look to further sources of
interpretation to clarify certain issues. This is because of the possibility of unreasonable or absurd outcomes. For example, a literary critic or legal commentator could be said to be another person who interprets a literary work, yet clearly does not qualify as a performer. Also, a truly minimal or incidental contribution, such as an audience encouraged by a performer to chant a song's verse during a public performance, should not give rise to legal rights. The term “otherwise perform” in the definition does have a limiting role in that it suggests that the preceding verbs (“act, sing, deliver, declaim, play in, interpret”) should be read in a restrictive way as falling within the general notion of perform. So an act of interpretation which manifestly did not perform the work should not fall within the definition. Here it should be noted that there is an inevitable degree of circularity in the definition of performers: Performers are defined as those who undertake actions which are defined by context as various categories of the verb “to perform”; and “performance”—which the Rome negotiators (and subsequently TRIPS and WPPT negotiators) elected not to define separately—was described in the report of the Rome Conference Rapporteur General as “the activities of a performer qua performer.” Standard dictionaries also offer little insight, so it is necessary to look at the context and possibly to state practice in order to break this circularity.

The diplomatic records of Rome give little guidance on the application of this term, suggesting rather that it is to be interpreted in practice by legislators and judicial authorities. These records reflect the overall more permissive approach to national legislative prerogatives that characterized the pre-WTO landscape of international IP law. The preparatory work on the Convention does, however, give some limited guidance. For instance, the Czechoslovak delegation in the Monaco conference sought to limit the definition of performer to soloists. But this effort was unsuccessful, and a commentator on the preparatory work observed that:

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117 See WPPT, supra note 3, art. 2(a) (defining performers as “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore”).

118 See id.

119 This dealt with the concern about the English sense of this term noted above.

120 A definition of performance was included in the draft text that went to the conference. See infra note 145.


122 The Monegasque delegate commented during preparatory discussions that attempts had been made if not to include a definition in the text, at least to preserve explicitly the freedom of action of the national legislator. G. STRASCHNOV, PROTECTION INTERNATIONALE DES DROITS VOISINS 85 (1958).

123 Id.
In principle, all artists, even the members of an orchestra or a choir, will be able to claim protection. However, a certain latitude will nonetheless be left to the national law, just as that has equally given a certain degree of liberty in domestic laws. We consider that the national legislature will not go as far as to extend the benefit of protection to simple "figurants." If it is probably forbidden to deny recognition to musicians, choir members, or ensemble dancers, it will be in a position to bring to bear a corrective in determining the manner in which the individuals composing an ensemble will be exercised in relation to third parties.

Similarly, the WPPT records give no specific guidance on the definition of performer, with the exception of the concern about the term "interpret," addressed above, and the broadening of the scope to include expressions of folklore. It would seem that the Rome-TRIPS definition was considered sufficiently clear and settled by the WPPT negotiators, reflecting the general desire in the WPPT negotiations to maintain strong consistency with existing treaty standards. At the same time, this would suggest an intent to leave open any liberty of interpretation in domestic law—again, provided the two new elements of the definition are included. It also means that state practice in implementing of Rome would be relevant to interpreting the meaning of performers in the later WPPT.

B. REASONABLE INTERPRETATIONS OF PERFORMERS

There are three potential ways of limiting the scope of the definition of performers or its application to avoid unreasonable or absurd outcomes and to ensure a workable and equitable form of domestic implementation:

- Limit the definition to include only a substantial role in the performance of the work or folkloric expression. This would be a quasi-quantitative restriction, with the effect of excluding negligible, trivial and possibly minor roles.

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125 G. STRASCHNOV, supra note 122, at 85 (author's informal translation).
Establish a relationship with the work that accords with the undefined conception of a qualifying performance within the sense of the term "perform." This would be a qualitative restriction involving an assessment of degree of engagement as a performer with the work or expression, such as degree of aesthetic input.

Limit the capacity to exercise performers' rights through deeming provisions such as an assumption of waiver or assimilation in employment contracts, akin to copyright. These provisions would be produced through negotiation in terms of a performance contract with provision for no unreasonable refusal, or through a requirement for collective ownership or assignment to a proxy, such as an orchestra manager.

It would be more difficult to find a market or commercial basis for restricting the application of the term "performers" to exclude certain artists who have a secondary contractual status, such as the exclusion of non-featured artists per se or session musicians. In other words, it may be problematic to define performer to exclude specific forms of contractual relationship—although, as noted below most inherent rights may be transferred by contract—or even to exclude on the basis of public acknowledgment, recognition, or reputation before the public. In particular, the definition of performer could not be applied only to featured artists as such. This is to assume that, in their professional usage, the terms "featured artist" or "signed artist" do not cover all performers who make a substantial contribution to the musical performance. This is supported by reviewing the policy basis for protection, which, apart from measures strictly against bootlegging, arises especially in respect of those performers who are not feature and therefore have a weaker bargaining position. The redistribution of control over performances, and the rebalancing of equity, involved in the development of enhanced performers' rights must entail giving distinct new rights to relatively anonymous members of an ensemble or collective of performers. Indeed, the objective of the moral rights clause would suggest that it is intended precisely to serve the interests of non-featured artists. It would defeat the purpose of this provision to have a right to "claim to be identified as the performer of his

126 I.e., more than negligible or trifling.
127 See WPPT, supra note 3, art. 5(1), which 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.
performances" which was limited to performers who were signed or featured artists only—assuming that these artists would, almost by definition, be acknowledged in the presentation of the performance.

Does this mean that relatively minor performers have a veto over the commercialization of a group performance? The WPPT is permissive on the transfer of economic rights of performers (clearly so, given that Article 5(1) explicitly excludes the transfer of moral rights). This suggests that economic rights can be transferred implicitly or explicitly, and there is scope for rights deemed to have been transferred as part of performance contracts and as a term of employment, akin to copyright. Moreover, given established practice and the existing provision in Article 8 of Rome, there is a clear basis for the management of ensemble performers’ rights by a single proxy, such as an orchestra’s leader. Further, a contracting party can limit or deny altogether the right under the WPPT to a “single equitable remuneration” to be shared by performers and phonogram producers.

So a curtailment of the scope of protected performer on broad grounds of equity or practical workability—a sense of practical equity—cannot extend as far as an exclusion of non-featured artists who make a substantive contribution in contrast to truly insubstantial, minor, or negligible contributions, such as the figurant noted above. Rather, the potential practical problems that might arise from including insubstantial contributors in the definition are more likely to be addressed by limiting the capacity to exercise their rights as performers. This very flexibility was behind the recent debate about whether sound recordings should be deemed as “work made for hire” under the U.S. Satellite Home Viewer

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128 Id.
129 Id.
130 Rome, supra note 1, art. 8.
131 Cf. WPPT, supra note 3, art. 15(1) (concerning the remuneration); WPPT, supra note 3, art. 15(3) (concerning the scope for remuneration limitation by contracting parties, subject to notification). As of April 15, 2004, Chile, Japan and the United States had notification limitations. WORLD INTELLECTUAL PROP. ORG., WIPO PERFORMANCES AND PHONOGRAMS TREATY STATUS ON JANUARY 17, 2005 (2005), available at www.wipo.int/treaties/en/documents/pdf/s-wppt.pdf. Chile limits availability of the right only for “direct uses of phonograms published for commercial purposes for broadcasting or for any communication to the public.” Id. at n.3. The U.S. limits availability only for “certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries.” Id. at n.5. Japan excludes (excluding “phonograms made available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and a time individually chosen by them.” Id. at n.2. Chile and Japan also subject the right to a reciprocity standard. Id.
132 See supra note 124 and accompanying text.
Improvement Act. The effect of this act was to curtail or transfer a number of recording artists' stand-alone rights. That debate pivoted on balancing domestic interests and clarifying domestic law rather than on the bounds of treaty obligations. It was apparently assumed to be within the bounds of international law to assimilate performers' rights in this way, even though the desirability of this amendment was under vigorous challenge from some quarters.

C. LIMITATIONS ON THE DEFINITION

So to what extent and on what basis can the WPPT definition of performers be limited in its effect in order to make a domestic performers' rights systems balanced, effective, and reasonable? Recognition as performers could not be denied altogether to musicians who, despite being non-featured, undertake a substantial role in the performance of the work, including making original interpretative contributions to the overall performance. The a priori denial of performers' rights to such contributions to collective performances could not be justified in the light of the general objectives of the WPPT. This does not mean, however, that the exercise of such performers' rights must lead to outcomes that are burdensome for other members of an ensemble, nor unreasonable requirements for third parties. Equally, it does not require that any individual who played a minor role, however trivial, need be accorded performers' rights. There remains a range of practical options for limiting the application of the term “performers” so as to ensure that implementation is not burdensome, absurd, or unreasonable.

136 For example, the performances of noted session musicians such as Steve Cropper and Donald Dunn (Blues Brothers recordings), and Sly Dunbar and Robbie Shakespeare (backing Grace Jones) are viewed as having higher musical value than the performances of the featured vocalists, although these musicians remain largely unknown to the public due to the overwhelming reputation of the featured performers and the context of the performance (and who may be considered non-featured). Other examples would be celebrity performers such as supermodels and soap opera stars, who might be the featured performers yet provide little to the musical performance as such, with the performance greatly relying on non-featured performers. It could be argued that the WPPT was intended to address exactly these situations which arise commonly in the contemporary music business and in which distinct legal recognition of performers' rights is most likely to have beneficial effect.
Restrictions may be implicit in the interpretation of the definition itself or on how rights are apportioned and exercised. First, trivial contributions to a performance may be excluded. This does not, however, permit the exclusion of non-leading roles within a genuine collective performance, such as a member of a band, orchestra or other ensemble. The records of Rome, TRIPS and WPPT negotiations give no direct guidance on the general definition of performers, although it is clear that ensemble players and choir members who make a substantial contribution do have prima facie rights. This is the rationale for Article 8 of Rome, concerning the rights of “performers acting jointly.” The WIPO Guide suggests that all members of an orchestra should be included.

One scholar commented that “the aims of the convention are supposed to benefit all performing artists regardless of the position or name,” yet observed that this does not lead to an individual right of consent or veto, and does not limit the possibility of implied waiver. This is a key aspect of maintaining a balance between rights of performers and the “larger public interest” as set out in the WPPT preamble. A broader, more inclusive approach to the definition of performers should arguably be balanced by stronger assumptions of waivers, transfers of rights, or denial of the right to unreasonably withhold consent, or should be structured as a hierarchy of performers based on degree of input and featured or backing status.

State practice in applying Rome and TRIPS does give some guidance. Some national laws exclude relatively insubstantial performances. Article 16 of the French Law of July 3, 1985 provided:

To the exclusion of the merely supporting artist (artiste du complément) considered as such by professional usage, the performer (artiste interprète ou exécutant) is the person who represents, sings, recites, declaims, plays or performs in any other way a literary or artistic work, or a variety, circus or marionette piece.

\[\text{137} \text{ See WPPT, supra note 3, art. 1(3) (providing that the WPTT shall not “prejudice any rights and obligations” under Rome).}\]
\[\text{138} \text{ WIPO GUIDE, supra note 5, at 21 (suggesting inclusion as “artistes exécutants”).}\]
\[\text{139} \text{ NORDEMANN ET AL., INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS LAW 390-91 (1990).}\]
\[\text{140} \text{ WPPT, supra note 3, preamble (“Recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest.”).}\]
The criterion of exclusion of supporting artists based on professional usage is reportedly applied to speeches of fewer than thirteen lines in a play or film. Similarly, Belgium's 1994 law on Copyright and Neighboring Rights does not extend protection to ancillary performers. In the preparations for the Rome Convention, it was accepted that national laws could legitimately except figurants, or extras and minor players. This form of exclusion should be distinguished from a true ensemble performance (e.g., an orchestra, which collectively performs a work) in which the individual rights (e.g., the contribution of the tympanist) are not considered ancillary, but may be effectively transferred to the collective (or the employer) or otherwise limited in their exercise.

A test for a substantive nature or quality of the performer's contribution can also limit the scope of the definition. German law requires a personal creative contribution for performers' rights to arise. This may set up an analogous debate similar to the different Anglo-Saxon and continental conceptions of authorship and the nature of originality. According to one leading German commentary on the international law of neighboring rights:

[The] individual input into the production of a work which imbues it with the personality of the artist is the decisive characteristic that applies to both the conductor and director and which furnished the lines of demarcation that separates this activity from contributions that lie outside the realm of artistic performances in the sense of artistic neighbouring rights.  

The nature of the performer's relationship to the underlying work may also be relevant, given the negotiators' decision (taken in the Rome Convention diplomatic conference, and followed in subsequent negotiations on performers' rights) not to define performance as a distinct object of protection, on par with a copyrighted work. "Neighboring rights are nearly always rights in derivative works because

143 The need to maintain this flexibility, and to exclude those who do not perform as artistes, was behind the late change in Rome defining performance to include a definition of performer. The Government of Austria, in its comments on the draft convention, proposed that "a definition of the term performer be included in the draft, in order to distinguish between persons protected and the technical personnel collaborating in a performance." Governments' Observations and Comments on the Draft International Convention, WIPO Doc. CDR/5 at 13. At the Conference itself, Austria proposed a definition of performer as meaning "anyone who takes part as artiste in the performance or presentation of a literary or artistic work or a variety show." WIPO Doc. CDR/49 records of the Rome Conference (1961) emphasis added).
144 NORDENMANN ET AL., supra note 139, at 356.
145 The Hague Draft of Rome defined performance as: "the recitation, presentation or performance of a literary or artistic work." INT'L LABOUR ORG., supra note 54, at 5. A non-
they presuppose a pre-existing work. Performers are only protected if they perform works."\textsuperscript{146} Given that a performer is defined with reference to an underlying work or expression, it suggests that there must be a substantial relationship with that work or expression. An incidental, trivial, or passing relationship with an underlying work could be argued not to meet the intended standard of performance.

On the face of it, the definition would suggest the performance of the whole of the work or the expression. A performer is defined as performing a work, such as a musical composition, and not a portion of it. Yet it would be unreasonable to limit the right in this way. The performer's right should not be extinguished merely because he or she performs excerpts of a musical composition. But it would equally be unreasonable for the performance of a trivial citation or element of a musical work to be sufficient basis for performers' rights. Speculatively, the same kind of principles that apply to an infringement of a copyright work might be applied to a sufficient performance of a musical work. For instance, if a performance of a work were sufficient in extent to be covered by the public performance right in a musical work, it could be considered sufficient for the purposes of establishing a performer's right.

The definition of performer would therefore consider the degree of contribution to the performance of the work itself, such as in terms of extent of contribution, degree of originality, or distinctiveness in the performance. An individual right might be limited to a performance that stands alone as a substantial, direct performance with a substantial portion of the artistic or literary work. An even higher, perhaps controversial standard would suggest a degree of distinctiveness. For example, the standard might require a personal imprint, creative input, or originality. The distinction in the French text between "artiste interprète" and "artiste exécutant," and the decision to include both, suggests that requiring a high level of individual originality or interpretation would be problematic.\textsuperscript{147} There is no evidence that the negotiators intended to deny

\textsuperscript{146} \textsc{Stephen M. Stewart}, \textsc{International Copyright and Neighbouring Rights} 178 (1983).

\textsuperscript{147} The French text of the Convention uses the term "artistes interprètes ou executants" throughout and the same article of the Spanish text uses "artista interprete o ejecutante" throughout, where the English text simply employs "performers." Article 33 of \textit{Rome} states that the three texts are equally authentic, so the greater nuance provided by the dual terminology in the romance versions can reasonably be read into the English text to confirm that an eligible performance may be a distinct interpretation of a work or a simple (technical) execution of it. \textit{See Rome, supra note 1, art. 33.}
protection to the mere carrying out or unoriginal rendition of a work, provided there is a substantive act of performing. Yet the WIPO Guide to the Rome Convention hints at a qualitative assessment—a "personal stamp" or a measure of distinctiveness—even if it may be impractical to draw an absolute distinction:

If the Convention includes in a single group a wide category of persons who communicate works to the public, this does not mean that in practice their situations are identical. Some artists put the stamp of their personality on their performance of a work: the conductor of an orchestra completes the score by his personal annotations; the soloist plays his instrument in an individual way; the actor gives his own interpretation to a part. They are in a sense creators who are tied, in their performances, to the work itself but who, in practice, are with difficulty distinguished since one cannot determine with precision who, by virtue of his inventiveness, must be judged artist. But it is clear that he must "perform" and the words used in French in the Convention might tend to exclude more extras of theater or cinema and those who assume a merely mechanical role (stagehands for example) since their part in the show bears no personal stamp and is marginal or secondary. It is a matter for the courts to interpret these terms. The words "act, sing, deliver, declaim, play in or otherwise perform" give them wide latitude.148

This latitude should, a fortiori, be enjoyed by national legislators, particularly those in common law countries in which treaties are not self executing.

The third point of limitation, addressing the extent to which rights can be exercised, does not go to the definition of performers in itself. Nonetheless, it remains an important policy tool for dealing with the concerns that lie behind this question. There is adequate authority and practice to establish a rule that hierarchies of performers and their associated rights can be created, and that individual rights can be accumulated into a single collective right. For instance, where the performance is part of a group or ensemble activity, there is authority in Rome for the performers' rights to be treated collectively.149 Nothing in TRIPS or the WPPT suggests that this manner of defining or administering rights was intended to be curtailed. On the other hand, a recent commentator argues for a discrete sense of ownership of a right in a distinct performance in the WPPT, even where performers operate collectively and in spite of the Rome provision:

148 WIPO GUIDE, supra note 5, at 22.
149 See Rome, supra note 1, art. 8.
If the performance is given by more than one individual, each performer is entitled to the rights conferred. Although the performance may be given by more than one individual, there is no express concept of a joint performance. In most, if not all cases, the performance of each performer is distinct from the other or others. It might be argued, however, that as rights are conferred on performers in respect of a performance, if one qualifying individual takes part or if it takes place in a qualifying country, rights may be enjoyed jointly with him by other performers taking part.  

Hence even this commentator suggests a notion of joint entitlement in the case of a group of performers, only one of whom has the necessary point of attachment. Accordingly, for practical or reasonableness purposes, some form of collective recognition would be legitimate.

In this context, the U.S. approach in the Digital Performance Right in Sound Recordings Act and the Digital Millennium Copyright Act is of interest. In establishing the default compulsory licensing system for webcasting, these acts draw a distinction between featured recording artists and non-featured artists, with the latter comprising non-featured musicians and non-featured vocalists. While no category of artist is denied access to the royalty stream altogether on the basis of this distinction, the level of royalties is sharply distinguished, with 45% of royalties going to featured artists as such, and 2.5% each to the two categories of non-featured artist (each associated with a particular collecting society). This suggests that in implementing the WPPT, there should be no in principle difficulty in establishing such a hierarchy of performers, making use of these or similar categories—such as soloist or ensemble player—to define different levels of entitlement in terms of royalties and capacity to exercise veto power. The E.U. Rental Rights Directive notes in its preamble that “equitable remuneration must take account of the contribution of the . . . performers concerned to the phonogram.” In other words, equity may even require such an acknowledgment of hierarchy of contribution.

Accordingly, while some restrictions on eligibility for performers’ rights may be necessary for a regime to be both fair and workable, this exclusion cannot

150 COPINGER & SKONE JAMES ON COPYRIGHT 666 (Kevin Garnett et al., eds., 14th ed. 1999).
153 Id. § 114(g).
extend to minor or non-featured artists. These minor artists are still responsible for a substantial and distinctive contribution. They could engage with the greater portion of the underlying work or expression of folklore, provide substantial aesthetic input or otherwise contribute to much of the perceived value of the performance, and have a particular need for recognition of moral rights. Yet a range of options is open to limit entitlements in the interests of broader equity, including:

- Exclude truly ancillary or de minimis performance related activities.
- Require a substantial part in the overall performance, or performance of a substantial portion of the work or expression of folklore.
- Treat artists as a collective ensemble where appropriate, and with appropriate limitations on veto rights.
- Allow for the transfer of the majority of WPPT rights through employment contracts and specific contracts for session musicians.
- Introduce a qualitative element in which the performance meets a threshold test for originality, distinctiveness, or personal creative input.
- Limit or categorize the right to equitable remuneration for uses of the performance in broadcasting or public communication. This can include limiting on the basis of some measures of quantum of contribution, or other forms of a hierarchy of performers while remaining apparently in accord with the objectives of the treaty.

The most controversial, and perhaps most difficult to administer of these forms of limiting the definition would be the qualitative approach. Yet, as noted above, equitable considerations may demand the practical recognition of a hierarchy of creative input into the performance. There are potential problems with assessing the degree of a performer’s creative input contributed before the individual is considered to have crossed the definitional threshold at all and to be recognized as a performer in the WPPT sense. Even though there is some ambivalence in the diplomatic background and commentary,\(^{155}\) and the notion of the “personal stamp,”\(^ {156}\) a strong aesthetic requirement would push performers’ rights closer to a category of copyright, so that the performance itself is conceived as a copyrighted work.\(^ {157}\)

\(^{155}\) WIPO GUIDE, supra note 5, at 22 (“[O]ne cannot determine with precision who, by virtue of his inventiveness, must be judged artist.”).

\(^{156}\) Id. at 21.

\(^{157}\) This is a legal judgment with aesthetic overtones, even if it is still short of Proust’s articulation of the underlying work as being subordinate to the performer as heroic artist. See PROUST, supra note 57.
The international debate over protection of traditional knowledge and traditional cultural expressions may be reduced—if somewhat crudely—to the bare question of retroactivity. This debate pivots on the legitimacy of the public domain as currently conceived and the degree to which demands of equity can lead to a reinstatement of exclusivity over public domain material. The debate accounts for constraints under the customary law of traditional communities, whether in the public domain of knowledge; the public cultural domain; the common genetic heritage, and the common language. The Saami Council has stated that “Indigenous peoples had rarely placed anything in the so-called ‘public domain,’ a term without meaning to us[,] . . . the public domain is a construct of the IP system and does not take into account domains established by customary indigenous laws.” If the accepted contours and boundaries of the public domain are to be revisited on the grounds of equity and applied with some retrospective effect, there is inevitably a set of bona fide third party interests or acquired rights that may require respect to preserve an equitable balance.

Because the WPPT can be characterized in part as an adjustment of the public domain, the choice of specific measures concerning interpretation and application of the WPPT’s provisions on application in time is an illuminating case study on the practical issues that arise from retroactivity. In principle, the WPPT “applies to all performances . . . which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” Retroactivity issues potentially arise in relation to the public domain, to the acquired rights of third parties who have used public domain material, and to the rights of third parties who hold copyright in the musical works performed and in sound recordings of performances. Since the WPPT extends the scope of protected performances to include performances of expressions of folklore, there may be significant potential impact on the conventional public domain, even in some countries with strong established systems of performers’ rights.

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158 Such as traditional medical knowledge used without the source community’s consent, but in the absence of any legal restraint.

159 The use of Indigenous motifs, designs and styles, for instance, free of copyright but the use of which causes cultural offence.

160 Objections to the utilization and commercialization use of genetic resources accessed and used legally, but still contrary to a certain community’s expectations.

161 Whether terms that have become generic should be reinstated as geographical indications.


163 COPINGER & SKONE JAMES, supra note 150, at 1202.
The implementation of Berne in the United States raised overlapping Constitutional and international law issues for Congress, broadly similar to application in time issues raised in Australia by the implementation of performers' rights under the WPPT. These issues may, at least in principle, be resolved differently for the rights of Australian performers as against foreign right holders. More explicitly than other treaties, such as TRIPS, the WPPT only requires that the rights it prescribes be extended to nationals of other contracting parties. It is therefore a matter of domestic policy to determine whether and to what degree the WPPT-specific rights accorded to foreign nationals are extended to Australians. Concerning the implications of Article 18 of Berne in the U.S., one commentator noted that "[s]ome Constitutional [sic] challenges to retroactivity might have more validity as to restoration of copyright to United States works because that was not required by the Berne Convention or other treaties." Difficulties and limitations may, however, arise in situations where performers of different nationalities give the collective performance, are not all nationals of WPPT Contracting Parties. This is inherently more likely than, say, shared authorship of a musical work. Participation of one eligible performer in a collective performance might be sufficient to create a joint entitlement to performers' rights.

The WPPT draws the general principle on application in time from Berne applies it to performers' rights in a similar manner. This area of treaty interpretation is particularly marked by lack of clarity and diversity in state practice. The general principle, nonetheless, is clear in itself. The drafters of the WPPT elected not to take the approach of Article 20 of Rome under which no obligations pertained to performances that took place prior to the Convention's entry into force. Instead, in common with the TRIPS negotiators, they chose to apply the general principle of retroactivity as expressed in Article 18 of Berne.

164 WPPT, supra note 3, art. 3(1).
165 Karp, supra note 73, at 74.
166 This situation is partly dealt with by the mechanism for points of attachment established in Rome and the WPPT. See Rome, supra note 1, art. 4; WPPT, supra note 3, art. 3. The issue was considered in the negotiations on Rome, when the logic of a strict criterion of nationality was questioned in the case of collective performances: "If a large orchestra contained one member who was a convention national, would that have been sufficient to protect the whole performance?" Report of the Rapporteur General, supra note 106, at 12.
167 WPPT, supra note 3, art. 22(1).
168 WIPO RECORDS, supra note 21, at 328 stating: "[T]he proposed Treaty would be applicable to performances that took place . . . before the date on which the Treaty would enter into force for the respective Contracting Parties. This approach differs from that adopted in the Rome Convention, but it is similar to the approach taken in the TRIPS Agreement."
169 See Berne, supra note 4, arts. 18(1)-18(2) stating: This Convention shall apply to all works which, at the moment of its coming into force, But first, the Berne Convention, art. 3(1), seems to require application in time to the extent that it is applied to works of authors of a member-state. The issue of the WPPT only requires that the rights it prescribes be extended to nationals of other contracting parties. It is therefore a matter of domestic policy to determine whether and to what degree the WPPT-specific rights accorded to foreign nationals are extended to Australians. Concerning the implications of Article 18 of Berne in the U.S., one commentator noted that "[s]ome Constitutional [sic] challenges to retroactivity might have more validity as to restoration of copyright to United States works because that was not required by the Berne Convention or other treaties." Difficulties and limitations may, however, arise in situations where performers of different nationalities give the collective performance, are not all nationals of WPPT Contracting Parties. This is inherently more likely than, say, shared authorship of a musical work. Participation of one eligible performer in a collective performance might be sufficient to create a joint entitlement to performers' rights.

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There is a prima facie requirement to extend protection of performers’ rights to existing subject matter. However, there are several fundamental points of uncertainty:

- What is the scope of exceptions and limitations to the application of the general principle under Berne itself?
- What is the effect of the mutatis mutandis application of the principle and its associated jurisprudence and state practice to performers’ rights?
- What particular aspects are relevant in applying this general principle to performers’ rights as such, due to their intrinsic nature, the negotiating context of the WPPT, and state practice?
- What is the effect of other provisions of the WPPT in determining the application of this principle?

A. APPLICATION IN TIME UNDER BERNE

It is a common theme in commentary on Berne that the application in time provision is subject to considerable flexibility of interpretation. Again, the rule is clear at the most general level: Berne obligations apply to any work that is not already in the public domain due to expiry of the term of protection when the treaty comes into force, in contrast to works that have entered the public domain due to failure to undertake necessary formalities such as renewable copyright. Yet the allowances for flexibility in the application of this general principle lead to much uncertainty, and commentaries “unanimously lament the force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection. If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

Such existing subject matter apparently refers to performances that had not entered the public domain by reason of expiry of protection. WPPT, supra note 3, art. 18(1) (applying Article 22(1) of Berne, supra note 4). The possibility under Article 18(2) of the WPPT of excluding moral rights on performances which occurred after the entry into force of the WPPT implies that economic rights must be applied to eligible performances that occurred before entry into force, if the text is interpreted according to the principle of expressio unius est exclusio alterius. See WPPT, supra note 3, art. 18(2).

Article 22 of the WPPT requires Contracting Parties to “apply the provisions of Article 18 of the Berne Convention, mutatis mutandis, to the rights of performers and producers of phonograms provided for in this Treaty.” WPPT, supra note 3, art. 22. In other words, the Berne provisions apply but with the necessary changes having been made.

Berne, supra note 4, art. 18.
[lack of] clarity" of Article 18.173 In the absence of bilateral agreements, "the [Berne] Convention leaves member countries a great deal of latitude over what their law may contain" and that "in practice, considerable differences exist between member countries."174 A standard commentary on TRIPS reiterates that this provision is "interpreted as giving countries a great deal of latitude."175 The original version of the application in time provision in Berne proposed common agreement on reservations and conditions concerning this principle.176 Yet the concluding protocol for the original 1886 text of Berne already invoked the need for greater flexibility, and elected instead to leave the matter to bilateral agreements or national discretion.177 As commentators point out, however, this discretion does not extend denying the principle of retroactivity altogether.178

The objective of this provision and the need for flexibility were discussed in the original negotiations on Berne:

Mr. Reichardt [Germany] explained that the draft convention did not recognize retrospectivity properly speaking and did not injure the interests of anyone. In effect, reproductions made or commenced lawfully before the entry into force of the Convention did not fall under the prohibitive dispositions of the latter.

The president joined Mr. Reichardt in declaring that the transitional provisions of the Convention contained absolutely nothing which should prevent any government from adhering.179

173 NORDEMANN ET AL., supra note 139, at 162.
174 WIPO GUIDE, supra note 5, at 101.
175 DANIEL GERVAIS, THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS 267 (1st ed. 1998); see also TRIPS, supra note 2, art. 70(2) (giving effect to the Berne provisions on application in time).
177 The application of the Convention to works which have not fallen into the public domain at the time when it comes into force shall take effect according to the relevant provisions contained in special conventions existing, or to be concluded, to that effect. In the absence of such provisions between any countries of the Union, the respective countries shall regulated, each in so far as it is concerned, by its domestic legislation, the manner in which the principle contained in Article 14 is to be applied.

179 Minutes, Fourth Meeting of the Conference for the Protection of Literary and Artistic Works, The Berne Convention (Sept. 8, 1885), reprinted in BERNE CONVENTION CENTENARY, supra note 5, at 117.
The subsequent review conference saw an attempt to withdraw this provision, and thus strengthen the application of the principle of retroactivity, but this was rejected. Hence, since the initial Berne negotiations there has been a consistent pattern of negotiators insisting on flexibility and relative indistinctness in the application of this principle. This has been the case in the TRIPS, WCT, and WPPT negotiations, which all offered opportunities to import greater clarity and precision (as, indeed, did all the successive Berne review conferences from 1896 to 1979). Notably, in the negotiations on the WPPT, the original draft text proposed more precise rules on retroactivity, but these were rejected in favor of a proposal by the republic of Korea that, in effect, imported the background of flexibility and relative indistinctness. The upshot of this drafting suggestion is that states seeking to give effect to Article 18 of Berne are likely to be required to use the supplementary rules of interpretation under Vienna, and to make judgements based on the circumstances of the conclusion of the treaty, and in doing so, to read considerable flexibility into it.

There is nonetheless a mainstream interpretative view that would limit the scope of the Article 18 limitations. Ricketson suggests a rigorous reading of this provision, stressing that the principle of retroactivity cannot be denied altogether and suggesting that limitations on retroactive application should be limited both in scope and in time, and should be transitional in nature. The letter of the then–Director General of WIPO to the United States Patent and Trademark Office (PTO) Commissioner in October 1995 takes a similar view. The French authorities thus proposed purely and simply asserting the principle [of retroactivity] by deleting the reference to reserves and conditions. This proposal met with opposition from the German and British Delegations who affirmed that, despite the passage of time, absolute retroactivity might harm legitimate interests. International Union for the Protection of Literary and Artistic Works, Records of the Conference Convened in Paris, The Berne Convention (Apr. 15 to May 4, 1896), reprinted in BERNE CONVENTION CENTENARY, supra note 5, at 141.

Amendment to Article 26 of Draft Treaty No. 2, WIPO Doc. CRNR/DC/26 (Dec. 10, 1996) (consisting of a proposal by the Republic of Korea); see also Proposal by the Delegation of the People's Republic of China, Amendment to Partly Consolidated Text of Draft Treaty No. 2, WIPO Doc. CRNR/DC/71 (Dec. 13, 1996) (consisting of a proposal by the People's Republic of China, supporting the proposal by the Republic of Korea); WIPO RECORDS, supra note 21, at 409. The [draft] provisions... are intended to be as clear as possible in order to avoid any legal uncertainty.” Id. at 328.

Vienna, supra note 86.

Ricketson, supra note 178, at 675.

Bruce Lehman, Article 18 of the Berne Convention: Correspondence Between WIPO Director General Arpad Bogsch and Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, 43 J. COPYRIGHT SOCY U.S.A. 181, 195 (1995). According to Lehman, the letter makes clear that paragraph (3) of Article 18 does not allow any denial or limitation of the application of paragraphs (1) and (2) of the same Article. It only allows certain "temporary provisions," "transitional measures," the purpose of which
difficulties that the U.S. had in ratifying Berne, which in part led to the negotiation of the Universal Copyright Convention, arose partly from a concern that the restrictive reading of the retroactivity principle would prejudice acquired rights.\textsuperscript{185}

What makes the case of WPPT implementation distinctive, however, is that the chief retroactivity issue is not the presence or absence of protection altogether, but the strengthening of rights over already protected material and the impact not on the public domain as such, but on holders of other copyright or related rights. Much of the commentary and the practical case law concerning the effect of the retroactivity provision focuses on the revival or creation of copyright over works that had been in the public domain either through lapsed protection or lack of protection. There is less of a focus on the interpretation of the retroactivity principle in cases involving modification or amendment of the scope of protection for works which remain in protection at the time of entry into force of the convention. In general, however, it should be more permissible to deny the benefits of an expanded or strengthened form of protection—such as the abolition of compulsory licensing provisions—to preexisting subject matter which is under continuous protection than to deny the benefits of protection altogether to performances which had fallen into the public domain when the convention entered into force but should, in principle, be protected.

Hence, any constraint on the right of contracting parties to set conditions for the application of the retroactivity principle for works may not necessarily apply directly to modifications in the way protection is to be defined and enjoyed by the right holder. For example, it is one thing to refuse to restore protection to lapsed subject matter or unprotected subject matter. It is another thing to take the view that exercise of the right to consent to the fixation of a performance carries with it an implied consent for that fixation to be used in line with existing commercial practice. In other words, this does not deny the existence of the essential right, thus giving general effect to the principle of retroactivity, but it does make assumptions as to what its earlier application entailed in terms of deemed consent.

\textsuperscript{185} S. REP. NO. (1954) 83-5 states:
The United States has found it impossible to subscribe to the Berne Convention because it embodied concepts at variance with American Copyright Law. These concepts involved such matters as . . . the retroactivity of copyright protection with respect to works which are already in the public domain in the United States. This revival of copyright under the retroactivity doctrine would have worked considerable prejudice to American motion picture, music, and publishing houses.
Against this background, the general approach taken by states is for the rights in
preexisting subject matter to be adjusted in line with the new standards, but to
provide exceptions for acts relevant to those rights where those acts occurred
prior to the treaty’s entry into force.  

**Berne** was originally applied in the United Kingdom through the International
Copyright Act 1886, which provided that “where any person has, before the date
of the publication of an Order in Council, lawfully produced any work in the
United Kingdom, nothing in this section shall diminish or prejudice any right or
interests arising from or in connection with such production which are sustaining
and valuable at the said date.”  

This led to several decisions on retroactivity.  

One decision articulated the rationale for recognizing acquired rights, confirming
that the term “lawful” meant “without contravening any existing copyright,” and
held, in particular, that a bandmaster who had prepared a work for performance
while it was out of copyright had a sustaining and valuable interest.  

The court held that the bandmaster had “an interest to recoup and to obtain the return
for the outlay he had been put to in purchasing the piece, in training his band in its
performance, and possibly in adapting it to the different parts for his men, and
that this interest was of value.”  

These acquired rights are, in a sense, contrary to the overall objective of **Berne**
and to the rights for which it provides. Even though acquired rights conflict with
the principle of retroactivity, they are considered legitimate in the overall policy
context of the treaty. If it is accepted that retroactive application of newly
defined or extended rights should not impair such acquired adverse rights, then
there should be a greater policy rationale for ensuring that retroactivity should not
impair prior copyright and related rights that are defined and protected under
**Berne** itself. In other words, the policy basis for limitations on retroactivity of a
newly defined or extended right—such as right of translation or performers’
rights—is arguably stronger when retroactive application would prejudice other
rights defined under **Berne**—such as the interests of the producer of a sound
recording in which the performer may, in principle, enjoy newly extended rights.

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186 See TRIPS, supra note 2, arts. 70.1 & 70.2.
187 International Copyright Act, 1886, c.6 (Eng.).
188 See, e.g., Lauri v. Renad, 3 Ch. 402 (Eng. C.A. 1892); Haufstaengl Art. Publ’g Co. v. Holloway,
2 Q.B. 1 (1893).
190 Id.
191 For example, acquired rights would typically allow for activities that would otherwise infringe
rights recognized under the treaty.
192 This could be counted as an instance of the equitable balancing of interests that is recognized
explicitly in Article 7 of TRIPS, supra note 2, and according to Ficsor has been “reverse engineered”
in the context of **Berne**. See FISCOR, supra note 8.
This suggests a more permissive environment for constraints on retroactivity when legislators introduce limitations in order to preserve interests which are specifically recognized in the treaty and are consonant with its underlying objectives. For instance, legislators could make a stronger case for constraints on retroactive application of performers’ rights if they were motivated by the need to avoid prejudice to phonogram producers’ rights recognized under Berne, Rome and the WPPT, and to avoid conflict with the constitutional safe guards against prejudice to those interests.

Accordingly, the claim that exceptions to retroactivity under Article 18 of Berne should be considered especially narrowly and only transitional may not apply with such rigor to cases where a strict application of retroactivity would harm preexisting copyright and related rights, and this harm would not abate over time. A rough analogue is the consideration of rights in derivative works such as translations and adaptations based on an underlying copyright work. Yet producers’ rights and rights in the underlying copyright work are not derivative in this sense, but are stand-alone rights not dependent on the performer’s right. This analysis is relevant to the current question in that the interests affected are not in the category of acquired adverse rights but, by contrast, are rights and interests fully in accord with the objective of the WPPT and Berne, as well as TRIPS and Rome.

B. MUTATIS MUTANDIS APPLICATION TO THE WPPT

What does it mean to make the necessary changes when applying Article 18 of Berne to performers’ rights under the WPPT? A similar question arises in relation to TRIPS which applies the same formula in Article 14(6) and 70(2). There is limited but useful TRIPS commentary on this point, and a fortiori limited commentary on the WPPT. Two key points arise, however, which suggest that

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193 See, e.g., Lehman, supra note 184, at 195, stating that

[i]t would hardly be justified to provide that the derivative work, which may be a very valuable work, should not be used anymore, or should even be destroyed, unless the owner of right in the restored work which had served as a basis for the derivative work, “retrospectively” authorizes the existence and use of the derivative work.

194 Against this view, the full context of the WPPT is shaped by the choice of its negotiators to insert a reference in the preamble to “the need to maintain a balance between the rights of performers . . . and the larger public interest.” WPPT, supra note 3, preamble. This reference was absent in the draft WPPT presented to the Diplomatic Conference. WIPO RECORDS, supra note 21, at 42.

195 TRIPS, supra note 2, arts. 14(6), 70(2).
the *mutatis mutandis* requirement, which is substantive, rather more than simple textual amendment, or cutting and pasting the relevant words:

- Article 22(1) of the WPPT refers to the “rights of performers,”\(^{196}\) not performances or performed works, while Article 18(1) of Berne refers to “works.”\(^{197}\) Performances are not defined as works in their own right, and they are generally treated distinctly from any rights. A direct verbal substitution is not coherent. This suggests that states may need to consider the relationship of the performer with the work. The relative indistinctness in the relationship between the performer and the subject matter of the performance may lead to flexibility in interpretation.

- The different nature of the performers’ rights and the interests involved, including the normal form of exploitation and the nature of implicit consent. For instance, that consent to fixation of a performance might be more readily taken to be consent to the further commercial exploitation of the performance, with contract terms being negotiated accordingly.

It is nonetheless generally assumed that the effect of the phrase *mutatis mutandis* is that the performance itself should be considered, not the status of the performed work. Hence, for example, a performance of a work for which the copyright term has expired can be protected.

1. **Applying the Principle in the WPPT Context.** The negotiators of the WPPT made an explicit choice to apply the principle of Article 18 in preference to the more precise language of the draft treaty. Arguably, in context, the implication of this decision was not to strengthen retroactivity but to safeguard the flexibility and latitude available to legislators. The draft convention submitted to the Diplomatic Conference sought greater clarity, and was more deterministic and restrictive.\(^{199}\) It sought to apply the provisions of the treaty to “performances that took place” prior to the treaty’s entry into force, yet provided that this “shall be without prejudice to any acts concluded or rights acquired” \(^*\) before entry into force.\(^{200}\) In any event, even this form of words was described in the explanatory

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\(^{196}\) WPPT, supra note 3, art. 22(1) (“Contracting parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.”).

\(^{197}\) The distinction is still clearer in *Rome*, which leaves open the possibility of protection for performers who do not perform literary or artistic works at all, such as circus or variety artists. *Rome*, supra note 1, art. 9.

\(^{198}\) Berne, supra note 4, art. 18(1).


\(^{200}\) Id. art. 26.
notes to the draft treaty as making clear that the protection "shall not be retroactive" and "safeguards previously acquired rights in the same way as Article 20.1 of the Rome Convention." Yet it sought to limit the effect of this exception to "a limited period of time" for rights such as the rental right and right of distribution.

The Diplomatic Conference rejected this approach, and instead consciously chose a more flexible approach by importing Article 18 of Berne. Consistency with Article 70 of TRIPS was also a key factor in this choice. The diplomatic conference amendments therefore had the effect of:

- Reintroducing the ambiguity and indistinctness of Article 18 of Berne, the latitude for national discretion associated with that Article, and its mutatis mutandis application to performers' rights.
- Deciding against an explicit provision that limitations on retroactivity should only apply for a limited period of time, and importing the more general background law on retroactivity.
- Applying the same retroactivity standards as for TRIPS on performers' rights.

2. Retroactivity Under TRIPS. The WTO Appellate Body in Canada—Term of Patent Protection extensively considered the general TRIPS standards on retroactivity. Despite the formal independence of the WPPT and TRIPS, these findings should be weighed when assessing retroactivity under the WPPT, given the de facto choice in the WPPT negotiations to accord with TRIPS standards:

[I]n the realm of intellectual property rights, it is of fundamental importance to distinguish between "acts" and the "rights" created by those "acts." In the field of patents, for example, the grant of a patent (which is clearly an "act") confers at least the following substantive rights on the grantee, according to the provisions of the TRIPS Agreement: [omitted here]

With respect to Article 70.1, the crucial question for consideration before us is, therefore: if patents created by "acts" of public authorities . . . continue to be in force on the date of

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201 Id., notes on art. 26.
202 Id. art. 26.
203 The drafting proposal on this article "was intended to maintain the current retroactive provisions, that is, Article 14.6 and Article 70.2 of the TRIPS Agreement." WIPO RECORDS, supra note 21, at 726.
application of the TRIPS Agreement... can Article 70.1 operate to exclude those patents from the scope of the TRIPS Agreement, on the ground that they were created by "acts which occurred" before that date?

The ordinary meaning of the term "acts" suggests that the answer to this question must be no. An "act" is something that is "done," and the use of the phrase "acts which occurred" suggests that what was done is now complete or ended. This excludes situations, including existing rights and obligations, that have not ended. Indeed, the title of Article 70, "Protection of Existing Subject Matter," confirms contextually that the focus of Article 70 is on bringing within the scope of the TRIPS Agreement "subject matter" which, on the date of the application of the Agreement for a Member, is existing and which meets the relevant criteria for protection under the Agreement.\(^\text{205}\)

In this case, the Appellate Body found that acts taking place before the application of the agreement cannot be cited as the basis of denying the entitlement to enhanced rights under the treaty.\(^\text{206}\) The Appellate Body also cited the instance of a compulsory license, implying that a compulsory license granted prior to TRIPS need not be curtailed due to non-compliance with TRIPS.\(^\text{207}\) At a general level of principle, this leaves uncertain whether entitlements to performers' rights protection based on earlier performances (prior to the treaty's effect), could be denied on the basis that it would upset existing contractual arrangements (in particular, the record producers' and songwriters' interests). But in any event, TRIPS explicitly softens the retroactivity principle for performers' rights by applying Article 18 of Berne, which has a more permissive effect than the general TRIPS rule. The Canada–Term of Patent Protection case did not address this specific provision.

In addition, Article 70(5) of TRIPS provides that a particular new right provided by TRIPS—the commercial rental right of both the copyright owner and the related right owner—is not applicable at all for products already purchased at the time of the treaty's entry into effect.\(^\text{208}\) This provision creates a specific precedent for an outright exception to retroactivity, which could be considered to be an illustration of the latitude provided for under Berne Article 18

\(^{205}\) Id. at 17.

\(^{206}\) Id.

\(^{207}\) Id. at 14.

\(^{208}\) TRIPS, supra note 2, art. 70(5).
in its \textit{mutatis mutandis} application to related rights. Yet it could be argued to the contrary that the very inclusion of this provision limits the entitlement to provide for similar exceptions in respect of other rights. Overall, it suggests that treaty negotiators are conscious of the need to apply the general principle in a flexible and practical way that does not prejudice legitimate, acquired rights.

3. WPPT Negotiations. The negotiations on the WPPT underscore the expectation of delegates that retroactivity would be applied in a flexible way that is responsive to other interests and constitutional constraints. For instance, even when considering the earlier, more rigorous drafting proposal, the Chair of Main Committee I observed that “retroactivity, per se, had been excluded from the application of the provisions of the Draft Treaty,” and that he believed that “there would be no retroactive effect concerning prior acts and the provisions of the Treaty would not introduce an obligation to countries to change laws in such a way that prior agreements would be changed.”

\begin{footnotesize}
\begin{enumerate}
\item Berne, supra note 4, art. 18.
\item However, the outcome of two WTO cases gives some indirect evidence of at least perceived rigor in the TRIPS provisions on retroactive protection for previously unprotected subject matter. See, Japan – Measures Concerning Sound Recordings: Request for Consultations, WT/DS42/1 (June 4, 1996); Japan – Measures Concerning Sound Recordings: Request to Join Consultations Communication, WT/DS42/2 (1996). For example, in its request for a panel, the E.U. asserted that:
\begin{quote}
[b]y virtue of the TRIPS Agreement, particularly its Articles 14.6 and 70.2 in conjunction with Article 18 of the Berne Convention, [WTO Members] are required to protect producers and performers of sound recordings for a period of 50 years from the end of the year in which the fixation was made or the performance took place and which have not yet fallen into the public domain. In practice, this means that works which have come into existence since 1 January 1946 have to be given TRIPS level protection for the remainder of the 50 year period because the TRIPS Agreement became effective for the developed country Members of the WTO on 1 January 1996.
\end{quote}
\end{footnotesize}
this was probably already constitutionally prohibited. The greater concern applied to the practical effect of reinstating lapsed rights, which is not at issue in the present case. Delegations including the Republics of Korea and Singapore went on to seek assurances that the treaty would not lead to derogations from the existing rights and obligations under *Rome* and TRIPS.

State practice in this area may shed light on the approach taken to retroactivity in relation to performers’ rights, particularly given the alignment between TRIPS and WPPT standards. Article 13(3) of the E.U. Rental Rights Directive provides that “[m]ember states may provide that the rightholders are deemed to have given their authorization to the rental or lending of an object referred to in Article 2(1) [includes the fixation of a performance] which is proven to have been made available to third parties for this purpose or to have been acquired before [the date of application of the directive].” And Article 13(7) provides that “when rightholders who acquire new rights under the national provisions adopted in implementation of this Directive have, before [the date of application of the directive], given their consent for exploitation, they shall be presumed to have transferred the new exclusive rights.”

4. The Effect of Other WPPT Provisions. Finally, it is necessary to consider the relationship between the application in time provisions and other provisions in the WPPT. First, Article 22(2) makes clear that there is no obligation to recognize moral rights associated with performances that took place before the treaty enters into force. This implies that there is an obligation to recognize economic rights associated with such performances. In other words, an obligation to extend retroactive moral rights does not exist even in principle. The choice of such a high degree of flexibility in according moral rights implies a greatly restricted scope to curtail economic rights over past performances. While this contrasting choice means that economic rights do extend retroactively in principle, it does not directly imply that there can be no curtailment of economic rights. In other words, this choice is short of complete failure to recognize economic rights over past performances.

Article 1(2) affirms that WPPT protection “shall leave intact and shall in no way affect the protection of copyright in literary and artistic works,” and limits the

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211 *European Union Information Office* (containing the Summary Minutes of Main Committee I).
212 *Id.* at 617, 728-29.
213 The European Community is not a member of the Berne Union nor a contracting party to *Rome*, yet it is bound to apply substantive standards of those conventions by virtue of the obligations under TRIPS it acquired as a member of the WTO, and it is entitled to become a party to the WPPT by virtue of Article 26 of that treaty. See WPPT, *supra* note 3.
215 *Id.*
216 WPPT, *supra* note 3, art. 22(2).
interpretation of each provision of the WPPT so that it must not prejudice copyright protection.\textsuperscript{218} It could be argued, in considering retroactivity, that this provision creates an expectation that no existing rights in musical works can be prejudiced by WPPT implementation. The degree to which existing contracts relating to the underlying musical work that is the subject of a performance may be affected by retroactive performers’ rights could be a reasonable basis for exercising the latitude implied in Article 22(1), even if the prejudicial effect was only indirect.\textsuperscript{219} Similarly, Article 1(3), which is a very general savings clause, reaches far beyond the Draft WPPT Treaty which was essentially focused on copyright and Berne.\textsuperscript{220} It suggests at the least that retroactivity may be limited by reference to preexisting entitlements under existing treaties—in particular Berne, Rome and TRIPS—and that measures introduced in good faith to implement those treaties may not be retrospectively prejudiced by WPPT obligations. Under Article 1(3), WPPT implementation cannot prejudice rights and obligations under other treaties—notably TRIPS, and the flexibility on performers rights in TRIPS.\textsuperscript{221} Protection under TRIPS is defined very broadly, and includes “availability, acquisition, scope, maintenance and enforcement” of IP.\textsuperscript{222} To the extent that retrospective recognition of performers’ rights could negatively impact producers or the owner of copyright in sound recordings, it could be a diminution of existing rights, or at least prejudicing their protection, and should therefore be limited in line with Article 1(2) and Article 1(3).\textsuperscript{223}

Concerning the WPPT right to remuneration for broadcasting and communication to the public, Article 15(3) allows wide flexibility for contracting parties.\textsuperscript{224} Given the latitude allowed here, in conjunction with Article 21(1) and Australia’s particular constitutional issues concerning acquisition of property on just terms, it may even be possible to deny retroactivity entirely for this right.\textsuperscript{225} Less drastic ways are available, however, to mitigate its retrospective impact and its prejudice to existing contractual and statutory entitlements.

Finally, Article 16 of the WPPT provides for limitations and exceptions in accordance with the familiar three-step test.\textsuperscript{226} Quite apart from the Article 22 retroactivity provisions, this provision may provide the basis for some

\textsuperscript{218} Id. art. 1(2).
\textsuperscript{219} Id. art. 22(1).
\textsuperscript{220} Cf. id. art. 1 (3); Draft WPPT Treaty, supra note 199, art. 1(2).
\textsuperscript{221} WPPT, supra note 3, art. 1(3).
\textsuperscript{222} TRIPS, supra note 2, art. 3.
\textsuperscript{223} WPPT, supra note 3, arts. 1(2), 1(3).
\textsuperscript{224} Id. art. 15(3).
\textsuperscript{225} See Austl. Const., § 51(xxxi); id. art. 21(1).
\textsuperscript{226} Id. art. 16.
exceptions. The possibility of exceptions is more speculative, not least because of the continuing debate about the effect of this kind of provision, especially under TRIPS. Even so, it is noteworthy that the parallel provision in TRIPS concerning patents, appearing in Article 30, is generally viewed as permitting prior use rights for otherwise infringing acts by third parties. This allowance is a very rough parallel to the notion of acquired rights under the WPPT. Generally, this provision could be used to buttress a claim to the legitimacy of acquired rights under the WPPT, and the position that performers' interests may be reasonably prejudiced in the case where prior consent was given to the fixation of their performances before the implementation of the WPPT. Particularly, this arguably is consistent with a normal exploitation of a performance in accordance with the commercial or industry practice at that time. In short then, there could be a legal and conceptual overlap between limitations to retroactive application under Article 22, and limitations and exceptions to the rights per se under Article 16. Article 22 would, however, provide a surer basis for a relatively wide retroactivity exception, and it is more closely linked to the specific policy rationale for such exceptions.

5. What Rights Are at Issue? The performers' rights under the WPPT which may be claimed to have retrospective effect include moral rights of attribution and integrity (Article 5); economic rights of reproduction of performances fixed in phonograms (Article 7), of distribution of phonograms (Article 8), of rental (Article 9), of making available to the public (Article 10), and of remuneration (Article 15); and obligations concerning technological measures and rights management information (Article 18 and Article 19).

The Article 6 right of authorizing the broadcasting and public communication of unfixed performances and authorizing the fixation of unfixed performances presumably cannot have retrospective effect. If a performance took place prior to the treaty's entry into force, it would be impossible to broadcast it as an unfixed performance after the treaty's entry into effect. And if it was not fixed

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227 Cf. id. art. 22; id. art. 16.
228 TRIPS, supra note 2, art. 30.
229 See WPPT, supra note 3, arts. 16, 22.
230 See id. art. 22.
231 See WPPT, supra note 3, art. 5.
232 See id. art. 7.
233 See id. art. 8.
234 See id. art. 9.
235 See id. art. 10.
236 See id. art. 15.
237 See id. arts. 18, 19.
238 Id.
at the time of performance, it could not be retrospectively fixed after the treaty came into effect.\footnote{239} If a performer has consented to fixation of the performance prior to the treaty's entry into effect, there could be a strong presumption that this consent extended, in line with general commercial and industry practice, to the further use of that fixation. If there was an explicit contractual agreement to the contrary—in association with the original consent to fix the performance—then the agreement could be used to rebut the presumption of implicit consent. Presumably, in that case there could be no argument that legitimate interests would be impaired by retroactive application of new performers' rights. The legitimacy of a presumption of consent applies particularly when it is consonant with the normal commercial practices of the time. The E.U. Rental Right Directive provides that "[m]ember [s]tates may provide that the rightholders are deemed to have given their authorization to the rental or lending" of objects dealt with prior to the operational date of the directive.\footnote{240} It provides for an optional exclusion in this context of digital recordings, however, which suggests a distinction drawn for new forms of exploitation.\footnote{241} This may be important in the event that commercial practices shift significantly away from the sales of phonograms as the chief form of exploitation of performances and towards greater use of online delivery. This shift may prejudice the interests of performers in an unforeseen way when the performers gave consent to phonogram-based exploitation of the fixation of their performances.

C. OPTIONS FOR RETROSPECTIVITY

Drawing together the above survey of the legal landscape and considering the specific performers' rights identified under the WPPT, the theoretical options available for limiting the application of the general principle of retroactivity could include:

- Do not provide for moral rights at all in relation to performances prior to the entry into force of the WPPT.
- Do not provide the Article 15 right of remuneration at all for performances prior to the entry into force of the WPPT, or not providing the right to the extent that it conflicts with the Constitution, with existing contractual arrangements regarding performances, or with acquired rights generally defined.\footnote{242}

\footnote{239} See id. art. 6.
\footnote{241} See id.
\footnote{242} See WPPT, supra note 3, art. 15.
In the case of pre-WPPT performances, when performers have authorized their fixation, deem that performers have also consented to subsequent usage of the fixation in line with normal commercial practices at the time of the authorization. The consented practices include all the rights provided in Articles 7, 8, 9 and 10, possibly with the exception that this presumption did not apply in the event of explicit agreement to the contrary or in respect of new forms of exploitation. Alternatively phrased, this would be a presumption of the transfer of new exclusive rights when performers have already, prior to the operational date of legislation, consented to the commercial exploitation of their performances, again with an optional exclusion for new exploitation such as digital exploitation.

Do not provide for retroactive effect in relation to pre-WPPT performances to the extent that it would otherwise unreasonably prejudice the interests of rightholders whose rights were defined and provided for in the context of earlier treaties on IP protection, including Rome, Berne and TRIPS.

In view of the need to balance performers’ rights with the larger public interest, recognize acquired rights in phonograms or fixations of performances that were legitimately obtained prior to the treaty’s entry into force, and were legitimately used in accordance with the law immediately prior to the entry into force of implementing legislation.

These options mark out the possible boundaries of national discretion in finding a workable national system on the basis of good faith policy interests. In practice, implementation entails taking account of formal legal considerations, expressing policy objectives clearly, and addressing constitutional law questions, especially those concerning acquisition of property on just terms. Though often assumed to be at odds, these aspects of implementation may be mutually supportive in practice. Any specific choice on retroactivity would be further legitimized by an express intent to give full effect to the letter and spirit of the WPPT, and to ensure that other IP right holders’ interests, including record producers, were not prejudiced or impaired by WPPT implementation in the interests of balanced and effective protection. Constitutional issues in this instance need not stand in tension with treaty obligations. Indeed, the legitimacy (under international law) of a proposed policy option could be enhanced if

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243 See id. arts. 7, 8, 9, 10.
245 See, e.g., AUSTL. CONST., § 51(xxxi) (“[A]cquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.”); Australian Tape Mfg. Ass’n, Ltd. v The Commonwealth (1993) 176 CLR 480 (considering the Australian Constitution’s provision in Section 51 in relation to copyright).
constraints on the retroactive application or extension of rights were expressed in terms of equity and fairness under the national constitution. The argument would be, in effect, that in the absence of specific guidance in the international jurisprudence and associated commentary on retroactivity of Berne, TRIPS and the WPPT, constitutional guarantees on fairness and protection against unjust appropriation are not merely a defensible sovereign choice, but a positive contribution to a systematic and just international jurisprudence of IP. This argument is a legally sound and appropriate policy choice that gives real effect to such international desiderata as the "need to maintain a balance between the rights of performers . . . and the larger public interest," the recognition of "unreasonable prejudice and legitimate interests," and the "balance of rights and obligations." The defensive aspect of this argument refers to the constitutional problems that would be precipitated by an unqualified right to claim retroactive recognition of economic rights to performances that had already been fixed. An additional aspect is the desire to avoid unpredictability and instability in the performers' rights regime that could be precipitated by doubts about constitutionality. The WTO Appellate Body has endorsed the need for confidence in the constitutionality of IP laws in India—Patent Protection for Pharmaceutical and Agricultural Chemical Products, which confirmed that there should be a sound legal basis for TRIPS-based IP protection. The positive aspect of the argument points to a just settlement according to domestic constitutional principles as being an effective and desirable implementation of a broader treaty obligation to strike an equitable balance of diverse interests.

V. MAKING THE CASE FOR ADHERENCE

The WPPT has provided the framework for Australia's achievement of stronger performers' rights and a partial form of sui generis protection for folklore (an important component of which can assumed to be Indigenous IP). But in

246 WPPT, supra note 3, preamble.
247 TRIPS, supra note 2, art. 13; Berne, supra note 4, art. 5.
248 TRIPS, supra note 2, art. 7.
250 Considering the roots of the international protection of performers' rights as including labor standards, a broad jurisprudence should also consider international law in this field. See INTERNATIONAL LABOR ORGANIZATION CONSTITUTION, art. 19.8, which states:
   In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.
realizing these aspirations, the questions becomes: Which set of interests determined the outcome and shaped the legislative context—international law, bilateral trade negotiations or domestic policy interests? Each has had substantial influence. Superficially, but here for the sake of argument only, one could make out a case that Australia had been coerced into adopting a “TRIPS plus” IP standard through bilateral trade pressure. As for any other category of IP, Australia is very likely always to remain a net importer of fixed performances, and the bilateral trade imbalance is likely to run in the favor of the United States for the foreseeable future.251 The sovereign decision whether or not to adhere to the WPPT was, in strict terms of process, preempted by a bilateral trade deal although there had earlier been firm indications of intent to do so as an independent step.252 The legislation giving effect to enhanced performers’ rights and folklore protection forms part of the omnibus bill implementing the bilateral free trade agreement. An in–principle decision to implement performers’ rights on par with copyright had been made by an Australian government almost ten years before, however,253 and Australia had actively negotiated the WPPT shortly thereafter. Past reform proposals had been both cautious and tellingly influenced by a minimal compliance view of international standards. In the 1987 Copyright Law Review Committee (CLRC) report, when rejecting the option of a distinct property right or copyright-style protection for performers, “the majority argued for the minimum changes which would be necessary to ensure entry into [Rom];”254 Yet a caricature of treaty adherence as a passive compliance with received international norms would plainly belie the more telling fact that Australia had over many years undertaken an active process of domestic policy development, reflection on policy options, and scrutiny of the implications of various forms of performers’ rights. This policy has made a positive contribution t. more

251 See BUREAU OF TRANSP. & COMMUNICATIONS ECONS., COMMONWEALTH OF AUSTL., ECONOMIC EFFECTS OF EXTENDED PERFORMERS’ RIGHTS 9 (Jan. 1996) (concluding that “there would appear the possibility of a strong negative impact on overseas royalty flows and, effectively, a terms of trade loss to the Australian economy”). The study also concluded that: performers rights on a reciprocal basis will result in a net outflow of remittances. If the US were to be included in a system of performers’ rights, the net outflows would be much higher. It is not possible to say what the size of the potential deficit would be, though the current deficit for music and film royalties could be taken as an upper bound [438 million dollars from 1993 to 1994].

Id. at 59.

252 United States-Australia Free Trade Agreement, supra note 80.


254 SHERMAN & BENTLEY, supra note 48, at 3.2.
widespread understanding of the practical and legal issues that arise when the WPPT is implemented. This understanding is of potential benefit and interest to the wider international interpretative community, beyond Australian policy circles. Ultimately, the norms need to be implemented in a legally coherent way that makes policy sense domestically. The misleading perception that treaty adherence is a reactive, coerced outcome would have the ironic effect of discounting this independent policy development and potentially reducing the scope for national discretion. Non-accession in the short term, with a view to later accession, would exclude the Australian perspective from interpreting and applying WPPT standards during the current relatively fluid period. It could also actually reduce later flexibility, potentially limiting the scope of retroactivity.

Given that treaty adherence does entail constraints on policy choices and a likely trade imbalance in payments for performers’ rights, and the possible perception that the WPPT is a TRIPS-plus imposition, it would be useful to consider the case in objective terms for adherence to the WPPT, setting aside the specific dynamics that have already led to a commitment to ratify the treaty. The most direct interest concerns Australian right holders in foreign markets. Non-accession would obviate any legal claim for WPPT protection for Australian performers in WPPT contracting parties, and would to a loss of potential earnings and other recognition in overseas markets, although they should still be entitled to undiminished protection already afforded under Rome or TRIPS. Other Australian right holders such as songwriters, should not be seriously affected, given the safeguards in Article 1 of the WPPT concerning “protection of copyright in literary and artistic works” and “any rights and obligations under any other treaties.”

Confidence in these legal guarantees would be limited by practical availability of avenues of recourse. If Australian right holders’ interests were prejudiced by WPPT protection in a WPPT contracting party state, Australia would, as a non-party, be in a weak position to claim prejudice as a result of such an apparent breach of the WPPT. Australia would have to rely on the limited safeguards under TRIPS. Essentially, Australian holders of performers’ and producers’ rights could be assured of the level of protection already provided under TRIPS, but no more, because of the constraints on national treatment and most–favored nation as applied to related rights, as discussed below. Owners of rights in literary and artistic works should have a guarantee under TRIPS of undiminished protection regardless of what steps are taken by trading partners to implement the WPPT. For example, a WPPT performers’ rights scheme in another WTO member state that adversely affected Australian songwriters’

\[\text{WPPT, supra note 3, art. 1.}\]
copyright interests could potentially be challenged under TRIPS—depending on the nature of the prejudice of interests.

Apart from the legal aspects, there may be practical implications of non-accession. This would depend on the exact schemes implemented at a national level, but it is possible to conceive of arrangements for collective administration of copyright and related rights that disproportionately benefit rights holders under the WPPT. For instance, mechanisms set up to administer new rights may be more efficient and accessible, have a stronger bargaining position, or have lower transaction costs than existing systems designed to administer more limited rights. Performers who held only the more limited, non-WPPT rights could be placed in a weaker position when negotiating contracts, and may be perceived as operating below a de facto industry standard. On the other hand, they may, in practice, be granted the same rights and privileges and have access to the same contractual and administrative arrangements because it may be too complicated and costly to administer two-tiered systems of rights.

If Australia were not a party to the WPPT, the additional protection to performers and producers under the treaty can be denied to sound recordings of Australian origin by countries which have acceded to the WPPT—unless the sound recording has a point of attachment to a contracting party. Article 3 of the WPPT restricts the obligation to extend the protection provided under the treaty to nationals of contracting parties.256 Even if Australia had extensive, WPPT–style protection in place, but withheld from acceding because of relatively technical points, it could not claim to benefit from reciprocal protection in WPPT contracting parties.

TRIPS generally requires national treatment and most-favored nation treatment for most aspects of IP protection, including “matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights.”257 National treatment would also include TRIPS-plus enhancements under subsequent treaties such as the WPPT. Australian rights holders would therefore normally be able to benefit from enhanced IP protection in other WTO member states even when that protection went beyond the scope of TRIPS standards. However, both principles (national and most-favored nation treatment) are specifically limited under TRIPS in respect of performers and producers of phonograms only to those rights provided under the Agreement.258 Because of these specific exclusions, Australia could not claim a breach of the wide ranging TRIPS obligations if a WTO member state, on acceding to the WPPT, elected to limit access to the benefits of WPPT protection to contracting

256 WPPT, supra note 3, art. 3.
257 TRIPS, supra note 2, art. 3 n.3.
258 Id. arts. 3-4.
parties to that treaty alone. As discussed above, Article 1(3) was introduced into the WPPT with the apparent intention of ensuring that TRIPS obligations did not extend to WPPT standards. 259 Rome similarly limits national treatment obligations to “protection specifically guaranteed, and the exceptions specifically provided for” under Rome itself. 260

There is no obligation to restrict the benefits of WPPT protection to nationals of other contracting parties and to deny benefits to others. It would therefore be a different matter whether Australia’s trading partners would, in practice, elect to exclude nationals of non-parties to the WPPT. This possibility can be ascertained through a survey of national legislation. Some may choose not to take this potentially unwieldy approach, but general experience with these issues suggests that a substantial number of them would so choose, given the continuing emphasis on reciprocity in determining levels of IP protection over unqualified access to a common level IP standards. Contracting parties may indeed seek to use the denial of enhanced protection as an incentive for other countries to adhere.

A second consideration is whether the costs of external pressure would lead to an objective rationale for ratification. Until the WPPT entered into force, failure to accede to the treaty may have had limited implications for trade relations. First, accession in itself is less important than the actual level and effectiveness of protection provided; not all the early adherents had fully effective national legislation in place. Second, in the past, once basic remedies against bootlegging had been assured, major trading partners did not prioritize extensive performers’ rights protection in their trade relations with Australia. This reaction is in contrast to other aspects of copyright law, policy and administration. But performers’ rights may move more towards the forefront in the calculation of IP-related trade interests. Entry into force of the WPPT has precipitated a higher level of attention to general adherence to its standards. The WPPT has also resulted in a default assumption that it forms part of the basic standard of rights that should be present in a trading relationship. The E.U. has, for instance, raised the question of incorporating the WPPT standards in a revised version TRIPS, although not as a formal negotiating proposal. 261 The voice of performers as a

259 See supra notes 220-24 and accompanying text.
260 Rome, supra note 1, art. 2(2).
261 The WCT and WPPT: represent a major step forward in recognizing the need for protection for authors, performers and phonogram producers in the digital environment. It is essential that these treaties are ratified and implemented as soon as possible. At an appropriate time, one might also consider incorporating these treaties in the TRIPS Agreement to make their implementation subject to the review by the TRIPS Council.
lobby group may be on the rise, and when felt domestically this voice will be transferred to the international arena in accordance with the well documented pattern for political management of these issues. The controversy in the U.S. about the work for hire status of sound recordings under the Satellite Home Viewer Improvement Act 1999\textsuperscript{262} sharpened the focus on performers' rights and illustrated the potential impact of performers in lobbying for their interests. A reflex minimalist approach—that is, one specifically aiming only to comply with the letter of the international law—would reduce negotiating elbow room and the depth and persuasiveness of policy and legal argumentation. This effect would be accentuated if the producers' rights and enforcement of WPPT provisions were formally taken up in any future renegotiation of TRIPS, and if Australia was obliged to oppose the effective integration of WPPT and TRIPS to avoid being pressured into a de facto adherence to the WPPT while it was still dealing with policy questions.

Accession would, in principle, constrain choices on the kinds of policy issues explored in this Article. Yet these dilemmas are not unique to Australia, and indeed Australia's trading partners have also sought various forms of flexibility in these areas, demonstrating approaches which provide positive guidance for domestically focused policy development in Australia. Choices made on these issues would be unlikely to elicit a specific challenge, provided that they were clearly phrased and explicitly intended to give effect to existing international standards, and to ensure compliance with constitutional constraints on unjust acquisition of property. These issues are especially important given that they concern existing IP rights recognized under \textit{Rome}, TRIPS and Berne.\textsuperscript{263} As a party to the WPPT, Australia would also be in a stronger position to argue for the legitimacy of its particular policy and practical choices. By contrast, if the WPPT emerges as an element in future TRIPS negotiations, then as a good-faith party to the WPPT Australia would be in a strong position to argue for greater clarity in retroactivity provisions. In particular, Australia could draw on its own practical experience to give its position authority and point out the particular burdens that developing countries would likely face and to offer practical insights concerning


\textsuperscript{263} Constitutional guarantees against unjust acquisition would operate in congruence with the safeguards of such rights in Article 1 of the WPPT, \textit{supra} note 3.
retroactive protection of performances potentially dating up to fifty years before entry into force. Yet Australia would be able to confidently express its demonstrated adherence to the WPPT standards per se.

Potentially, the most significant (setting aside trade and macroeconomic concerns) effect of an autonomous choice to adhere to the WPPT would be the protection afforded to Australia’s Indigenous communities through the creation of extensive rights in their performances of expressions of folklore, which would then enjoy reciprocal protection in foreign markets. This may apply to some past performances of expression of folklore or traditional cultural expressions. WPPT standards in application on time would apply at least in cases where the subject matter of traditional performances was not considered a work in the sense of Article 2(1) of Berne, but had been protected in Australia owing to a lower threshold for protection of such subject matter. Further, the development of a distinct Australian interpretation of the scope of rights in performances of traditional cultural expressions, with a view to recognition of the specific cultural and legal context of Aboriginal and Torres Strait islander communities, may also strengthen the effective scope of such reciprocal protection in foreign jurisdictions. Recognizing Aboriginal traditional cultural expressions in foreign jurisdiction would mirror the way that Australian courts recognize specific forms of Aboriginal customary law within copyright law, which have attracted policy attention elsewhere.

VI. CONCLUSIONS: NOBILITY OF INTERPRETATION

Proust, through the fictional voice of Marcel, reports that his initial expectations of the performer’s “nobility of interpretation” were disappointed at first when he saw the performer’s interpretation as simply uncovering the author’s genius; the true value of the performance being in the underlying literary work. But further aesthetic insight led him to value the act of interpretation as a distinct artistic achievement for which the underlying work serves as raw material, the

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264 See Berne, supra note 47, art. 2(1). Differing national conceptions of the scope of copyright law may mean that a literary or artistic work in Australia is not recognized as such in a foreign jurisdiction, but could still be protected there as an expression of folklore. In M v. Indoform Pty. Ltd. (1994) 130 A.L.R. 659, 665, concerning Indigenous art work rather than a performance, the court held that traditional artworks were still copyright works. Although “the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality.” Id.


distinct value of which is almost irrelevant. The scholarly community has perhaps rightly neglected the aesthetics of treaty interpretation by national legislators (despite occasional excursions into histrionics), but other parallels about the role of the interpreter are illuminating. For the domestic legislator and IP policymaker, treaty interpretation is often portrayed as a passive exercise in compliance with treaty norms; a parroting of a script prepared by others. For some developing countries especially, a challenging legislative schedule since the entry into force of TRIPS via the WTO Agreement, limited capacity, and limited policy and legal resources may have made passive compliance with treaties almost inevitable. At the extreme, organic domestic policy consultation and development may be replaced by literally cutting and pasting treaty text into national legislation. Ironically, this form of treaty implementation may take place in areas of ambiguous or flexible treaty language where there is the most scope calibrating of domestic policy interests, precisely due to the lack of settled international jurisprudence. Yet the domestic policymaker may—or at least should—be closer to the artiste interpret within the ensemble of international IP norms, rather than a mere figurant. The act of domestic treaty interpretation can therefore be ideally conceived as a distinct process of normative development that draws on the norms specified in the treaty, but shapes and interprets them according to the needs of the domestic audience.

The two specific interpretative issues dealt with here—confining the definition of performer to provide for workable equity, and constructing an equitable retrospectivity mechanism—precisely fit into this category. They illustrate that an active, domestically engaged process of treaty interpretation is not merely an option or a matter of flexibility, but is closer to a more earnest commitment to the attainment of the formal objectives and principles of the treaty. The constitutional rule against unjust acquisition of property may be equally construed as a constraint on domestic choice in implementing international standards, which serves as a hurdle in complying with treaty obligations. But the selfsame rule can also be construed as a better developed domestic jurisprudential basis for giving effect to a fundamental principle that lies within the treaty system but is inherently challenging to apply both equitably and practically. The key observation is that it is impossible to conceive practically of the interpretation and implementation of international IP standards in isolation from the complexity and specificity legal and policy context in individual jurisdictions. Legislative development need not, therefore, be viewed reductively as an act of compliance or reactive conformity, but should take on the quality of an active domestically-responsive interpretation,

267 Id.
268 Examples include the scope of permissible fair use or public interest exceptions.
269 See supra note 124.
which is consistent with but not subordinated to full treaty compliance. Just as the aesthetic goals of a musical work cannot be achieved without a performer, and the performer's interpretative imprint will determine how—and how successfully—those goals are achieved, the conceptions of equity and balance in international IP law have no independent existence apart from the specialist or scholar and do not deliver tangible outcomes, without a specific interpretation or performance within national or legal laws.

With this conception, the international framework for performers' rights provides a platform for further development to deal with some of the pressing contemporary issues set out in the opening of this Article. It is an opportunity to revisit and reflect on the interface between individual and collective rights and interests, the relationship between claims for new rights of exclusion induced by technological and social change, the extant public domain, acquired third party rights, and other IP interests. And it illustrates how broad international standards governing the equitable balancing of interests and competing property claims can, and perhaps must be, implemented under the guidance of established municipal jurisprudence on such matters as just terms, if the standards are to be implemented in a robust and effective manner within domestic law.

A recurring critique of the IP system often using TRIPS as a metonymy for broader trends is that it excessively favors individualistic, atomistic economic rights at the expense of broader interests, collective and communal forms of custodianship, or equitable ownership. Concerning performers' rights in a domain in which an ensemble activity is common, there is indeed "no concept of a group performance" and "the personal nature of performers' rights is made clear by granting the rights to each performer in respect of every performance he or she makes.\footnote{MINISTRY OF ECON. DEV. / MANATU OHANGA, supra note 30, at 13.} Yet as the practicality of implementing such rights has illustrated, this conceptual dichotomy must collapse in favor of a more workable dispensation of abutting rights, which is a legitimate policy concern that can even reach into the definition of an eligible performer. This also suggests a wider range of possibilities for managing collective interests in a performance.

The recognition in Australia of a full fledged performers' right and the IP aspects of traditional cultural expressions represents a convergence of interests that also opens up interesting avenues for future evolution. This evolution is guided by the increasing recognition of collective or communal interests in copyright and related rights, including customary Indigenous law, first by the courts and then in the form of draft legislation. The courts have recognized a community's equitable interest in enforcing copyright in works that draw on elements of traditional culture which are protected by customary law. The courts
have also accepted the conception of customary moral rights pertaining to an Indigenous community. This raises the question of how the emerging jurisprudence could be applied to the fixation of a sound recording in the performance of an expression of folklore that is covered by the customary law of an Indigenous community.

One possibility is for ownership to be determined by cultural or customary law considerations, building on the broader notion of ownership by a collective entity:

There are arguments in favor of persons other than the performer as the first owners of rights in a performance: There are cultural issues to be considered. For example, who would own the rights to a performance by a *kapa haka* group? Should they be owned by performers, or their *iwi* or *hapu*, or some other group charged with maintaining cultural heritage?²⁷¹

On ownership, the Attorney General's department stated that joint authorship of a work by two or more authors *is* recognized by [Australian copyright law], collective ownership by reference to any other criterion, for example, membership of the author of a community whose customary laws invest the community with ownership of any creation of *its* members, is not recognized.²⁷²

Yet ownership can be distinguished from practical management in the exercise of the right and the recognition of equitable interests in copyright on the basis of customary law.²⁷³ Moving along this trajectory, one could consider how a collective entity recognized by the law can manage the rights associated with a performance of a traditional cultural expression that is governed by their customary law. Past legislation has recognized that an individual performer within an ensemble cannot unreasonably withhold consent²⁷⁴ for the use of a fixation of

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²⁷³ Bulun Bulun v. R&T Textiles Pty Ltd. (1998) 157 A.L.R. 193 (finding that a relationship between an individual artist and his community concerning an artwork was one of mutual trust and confidence and was sufficient to create a fiduciary relationship, in particular restraining the artists from exploiting his work contrary to customary law and obliging him to take action against infringement of his work). The court indicated that the community itself may have an entitlement to equitable relief in certain circumstances. *Id.* at 264.
²⁷⁴ The Copyright, Designs and Patents Act, 1988, c.48, § 190(1) (Eng.) (empowering the Copyright Tribunal to give consent in a case where “a performer unreasonably withholds his consent”). This power was revoked by the 1996 amendments. *See* The Copyright and Related
a group performance. Some laws on performers' rights structure the process of group consent in a way that is practically indistinguishable from a form of collective ownership. For example, under German law:

[In the case of choral, orchestral and stage performances, the consent of the elected representatives of the participating groups of performers, such as choir, orchestra, ballet and state companies, in addition to the consent of the soloist, conductor and producer, shall suffice for the purposes of granting consent for publication, communication, fixation, reproduction and distribution, broadcasting the fixation]. If a group has no such representative, the consent of the performers belonging to that group shall be replaced by the consent of the leader of the group.276

If an elected representative may exercise a bundle of individual performers' rights on behalf of a collective, and if an individual may not unreasonably withhold consent, it is not a vast conceptual reach to say that a community's traditional decision making processes, including the operation of customary law governing the underlying subject matter, could be deferred to in establishing many terms. These terms might include the acceptable scope of consent to fixation, the terms of subsequent use and dissemination of a performance of an expression of folklore, and the exercise of moral rights—in particular in determining and acting upon derogatory treatment.277 This approach would build upon the move towards Indigenous communal moral rights278 and, in particular, would encourage


275 The Rapporteur General's report of the Committee of Experts responsible for preparing the Hague draft of the Rome Convention noted the concern about group performances:

It was also pointed out that it might be wise to provide for separate consents in the case of soloists performing with an orchestra. On the other hand, experts from the broadcasting interests spoke of the impossible situation of broadcasting organizations if a multiplicity of consents had to be sought.

THE HAGUE, supra note 145.

276 § 801(1) UrhG.

277 See, e.g., § 83(2) UrhG. This German law implicitly recognizes collective moral rights interest: "If a work is performed by several performers together, each performer shall take the others into due account when exercising the right [to prohibit any distortion or other alteration of his performance of such nature as to jeopardize his standing or reputation as a performer]."

recognition of the distinct standing of communities *as such*, along with judicial recognition that "[e]vidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system."\(^{279}\)

The culmination of this trend would be recognition that a performance could not just be an expression of a traditional culture, but could also embody or articulate the customary law that defines how the cultural expression should be disseminated and protected. The performance may directly express the sense of cultural integrity and connectedness for which the exercise of moral rights provides some protection. The performance of an expression of folklore may itself be intertwined with a community’s sense of equity. A ritual confrontation or trial that is received by the community in part or on one level as a traditional performance may be part of the administration of justice, and the undertaking of the performance may itself be a process of the reestablishment of equity. In Tiwi society, "[t]he crowd enjoys the spectacle which makes the law tangible."\(^{280}\) This view of the law is a deep and robust convergence of aesthetics and equity, and perhaps a still higher conception of nobility of interpretation of the law.

The domestic legislator should be conceived of as an active participant within the interpretative community that sets the practical bounds to a treaty’s impact. The closer interpretation cleaves to underlying principles of balance and equity, and the more it seeks to carry them out directly. Legal defense of treaty obligations will likely be more robust in a defensive context. Also, interpretation will likely be more influential when a policymaker is considering legislative choices under a treaty as a positive contribution to international interpretative discourse, thus restoring a degree of nobility to the act of interpretation. Similarly, extending the scope of performers’ rights within the IP system provides a basis for stronger recognition of traditional performance, which gives the legitimate performers of traditional cultural expressions say over the capture, use, and treatment of their performances in a way that reinforces the normative and moral essence—indeed the nobility—of these interpretations of their cultural identity.

\(^{279}\) Bulun Bulun, supra note 273.
