# THE DANCER AND THE DANCE: AN ESSAY ON COMPOSERS, PERFORMERS, AND INTEGRITY RIGHTS

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*The* Copyright Act *was recently amended to give clearer protection to an artist's "integrity right": that is, her right to have others leave her work intact. The author, a lawyer and a professional musician, examines the application of this right to musical compositions. This is a complex issue because the rights of two artists, the composer and the performer, must be balanced. Mr. Rudoff argues that integrity rights should and do apply to composers, and proposes guidelines for their enforcement.*

*La Loi sur le droit d'auteur a récemment été modifiée et protège plus clairement le droit moral qui permet à l'auteur d'interdire toute modification apportée à son oeuvre. Avocat et musicien professionnel, l'auteur examine en quoi le droit au respect de l'oeuvre s'applique aux compositions musicales. Le problème est d'autant plus complexe qu'il est impératif de protéger les droits de deux artistes, celui du compositeur et de l'interprète. Mark Rudoff soutient que le droit au respect de l'oeuvre s'applique bien au compositeur et propose des directives à cet égard.*

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## I. INTRODUCTION

O body swayed to music, O brightening glance,
How can we know the dancer from the dance?

W.B. Yeats
"Among School Children"

A painter can sue to prevent his work from being defaced. This simple proposition represents integrity rights in their simplest form. The right to maintain the integrity of an art work has been part of Canadian copyright legislation since 1931, and its application to visual works has been clarified by recent amendments to the *Copyright Act*.[1] Integrity

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1. R.S.C. 1985, c. C-42, as am. *An Act to Amend the Copyright Act and to Amend Other Acts in Consequence Thereof*, R.S.C. 1985 (4th Supp.), c.10. Unless otherwise indicated, section numbers refer to the amended Act.

rights in a musical work are more elusive, for unlike a painting, a composition has no real life until it is performed. In approaching integrity rights problems in music, one must somehow disentangle the composer from the performer: that is, one must differentiate, first, between the performance and the work and, second, among the types of alterations to the work which may occur in performance. This paper is a discussion of the composer's right to the integrity of her composition with a particular focus on the nexus between composer and performer.

The reader will notice that my discussion is confined to so-called serious music. The reason is that integrity issues are more sharply defined in relation to music of this type. The pertinent difference between commercial and concert music is that composers of the former are rarely as specific in their directions to the performer. A popular song may consist of no more than a melody line over an outlined chord sequence. Thus the line between performance and arrangement is blurred and it is difficult or impossible to determine when the performer has taken undue liberties.[2] None of this suggests that only serious music should enjoy moral rights protection. In the case of popular music, however, there will be problems establishing the composer's case. At a minimum, the right to the integrity of a musical work stands for the principle that a performer may not treat a composition as mere raw material. This principle respects equally all forms and styles of music.

## II. DESCRIBING A CANADIAN INTEGRITY RIGHT

An artist's right to the integrity of her work may be thought of as protecting three interrelated interests. In the narrowest view, the right protects the artist's ability to ply her trade. Her economic success depends on her reputation in the marketplace, which in turn rests on her works being seen as she created them. A distorted or mutilated work could damage her reputation so as to compromise the success of future works.[3] On this

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The author's right to the integrity of her work is one of two moral rights described in s. 14.1(1). The section also refers to the paternity right, that is, the right of the author to have his name associated with his work. Continental law protects at least two other moral rights: the right to reconsider or withdraw a work (*droit de repentir*), and the right to decide if and when a work is ready to be unveiled (*droit de divulgation*). A recent discussion of Continental *droit moral* is found in V.K. Reeves, R.G. Bauer & S. Lieser, "Retained Rights of Authors, Artists and Composers under French Law on Literary and Artistic Property" (1985) 14:4 J. of Arts Management and L. 7.

In this paper, "integrity right" and "moral right" should be understood as referring to the author's right to prevent distortion, mutilation or modification of her work. The Act's new s. 28.2(1)(b) also gives a remedy for use of a work "in association with a product, service, cause or institution," but I deal with this only in passing.

2. See R.G. Benson, "Legal Protection for Arrangements of Musical Works: A Modern Perspective" (1988) 22 C.P.R. (3d) 97.

3. D. Vaver, "Authors' Moral Rights – Reform Proposals in Canada: Charter or Barter of Rights for Creators?" (1987) 25 Osgoode Hall L.J. 749 at 753-54 [hereinafter "Authors' Moral Rights"]; W.J. Braithwaite, "From *Revolution* to *Constitution*: Copyright, Compulsory Licences and the Parodied Song" (1984) 18 U.B.C. L. Rev. 35 at 58.

view, moral rights are premised on "the idea that the moral interests and economic interests are so closely related that they must be protected as a unit."[4]

At the next level, integrity rights acknowledge that an intimate bond exists between a creator and his creation:

> When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use.[5]

Even though the artist has given up ownership and possession of his work as a physical object, he remains attached to that part of it which bears his creative stamp. His right of integrity is protected because "[a]ny assault on the work by another is as much a trespass on the author's rights as is a trespass to his or her body or tangible property."[6]

In the largest sense, an integrity right protects society's interest in having its art works preserved and respected. A work has value beyond that to its creator and its owner:[7]

> The machinery of the state is available to protect "private" rights in part because there is thought to be some general benefit in doing so. Thus the interests of individual artists and viewers are only a part of the story. Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from. To revise, censor, or improve the work of art is to falsify a piece of the culture. We are interested in protecting the work of art for public reasons, and the moral right of the artist is in part a method of providing for private enforcement of this public interest.

If our culture is to remain honest and vital, art works must be displayed as they were created, irrespective of the wishes of someone who happens to enjoy possession of the piece.[8]

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4. P. Amarnick, "American Recognition of the Moral Right: Issues and Options" (1983) 29 Copyright L. Symp. 31 at 37.

5. M.A. Roeder, "The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators" (1940) 53 Harv. L. Rev. 554 at 557. See also A. Sarraute, "Current Theory on the Moral Right of Authors and Artists Under French Law" (1968) 16 Am. J. Comp. L. 465 at 465.

6. "Authors' Moral Rights," *supra*, note 3 at 752.

7. J.H. Merryman, "The Refrigerator of Bernard Buffet" (1976) 27 Hastings L.J. 1023 at 1041. Professor Merryman earlier observes:

> On the level of individual interest there is more at stake than the concern of the artist and his heirs for the integrity of his work. There is also the interest of others in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted and "unimproved" by the unilateral action of others, even those with the most impressive credentials. We yearn for the authentic, for contact with the work in its true version, and we resent and distrust anything that misrepresents it.

8. Amarnick, *supra*, note 4 at 35, argues that full legal protection of artistic integrity should encompass the broadest range of interests and goals :

> My premise is that the moral right should be conceived of, not solely as an expression of an artist's personal interest in his work and his honour, but a conglomeration of several other interests as well: the

It is easy to see that the interests I have described are not fully complementary and may sometimes even conflict. Pieces by the late American sculptor David Smith were commercially more successful unpainted than in their original painted state, but Smith was so strongly wedded to the painted conceptions that he formally disowned pieces from which the paint had been stripped.[9] The film score of *Kramer vs. Kramer* brought new customers into record stores looking for *anything* by Vivaldi, but took liberties with the works it adapted. Film treatments of novels, approved of or even written by the author, frequently offend many who read the originals.

I submit that a legal right founded chiefly on the artist's connection to her work extends the surest protection to both the artist's economic interest and the public interest in the work's integrity. Though an artist may choose to compromise her economic position in order to maintain her aesthetic principles, there is no situation in which a right protecting her personality as expressed in her work will not also protect her economic stake. In addition, society's interest in the integrity of its art works is served by leaving enforcement of the right to those with the strongest interest in protecting them.[10] Not only is this the method by which our liberal society guarantees its cherished values, there is a more cogent aesthetic justification. Only the artist can judge whether a distortion damages her message or whether a modification strengthens it. In the extreme case — painting a moustache on the Mona Lisa[11] — there is little disagreement that the original is mutilated. But where alterations are less dramatic and the work perhaps more experimental, to argue over whether or not there has been any damage to a work's integrity is to argue over tastes. A vibrant artistic culture is defended by protecting the unique voices of creators, and only they know how their works should speak.

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> society's interest in maintaining the integrity of its cultural artifacts, its interest in having accurate information about the authorship and content of the art it consumes, and a spiritual or moral interest in instilling respect for the creative process and its products. These interests may not be isolated from the goals of financial encouragement and dissemination of creative work; the needs of the entrepreneurs who are responsible for this dissemination and encouragement must be considered as well in all cases of moral rights conflict.

9. *Ibid.* at 33. See also Merryman, *supra*, note 7 at 1039ff.

10. In L.L. Van Velzen, "Injecting a Dose of Duty into the Doctrine of Droit Moral" (1989) Iowa L. Rev. 629 at 644, the author argues:

> Apart from the rights of individual artists, the preservation of original works of art represents an important societal interest. This interest is best protected by granting moral rights to individual artists. An artist would preserve her work more zealously than an art owner because her name, not the owner's, is on the work. Giving artists legal protection to preserve their work benefits artists and society because the art will be maintained as the artist intends. This will be a symbol of individualistic values to future cultures.

11. See *Snow* v. *The Eaton Centre Ltd.*, *infra*, note 58.

A regard for the bond between creator and work is, I suggest, the primary theme of the *Copyright Act's* moral rights provisions. The rights attach to the author.[12] The author can waive but cannot assign the rights,[13] and may also consent to treatment of the work that would otherwise infringe her moral rights,[14] all of which suggests that the rights support the author's wishes. The author may make a specific bequest of her moral rights, thereby designating as a kind of artistic executor a person who understands and is dedicated to the author's artistic vision.[15]

That the right attaches to the author, rather than the copyright owner, suggests that the scheme contemplates more than mere economic protection. Consider a piece of music that has been sold to a publisher.[16] The publisher's stake in the economic value of the composer's reputation may be as great as that of the composer himself, but the *Act* gives the publisher no moral rights. Indeed, the *Act* does not permit the rights to be transferred to a manager, a person who would have the greatest possible economic interest in the artist's reputation and is, in fact, employed to protect the artist's economic interest.

It is also clear that the *Act* does not protect the public interest as such. It does not leave room for a public interest group, for example, to complain about damage to a work. No one can restrain an artist from making changes to her own work.[17] Further, since moral rights are coterminous with copyright, there is no protection afforded the integrity of works in the public domain.[18] In all likelihood, a time limitation was enacted rather for commercial convenience than out of any deep thinking on the relationship between artists and art works. It may, however, embody the principle that enforcement of a right of integrity rests on the artist's subjective feelings about his work. The artist might communicate those feelings to a sympathetic heir, but they cannot be said to inspire an action by a member of the public at large.

It remains to consider the nature of the integrity right. Writers most often describe it as a personal rather than a proprietary entitlement.[19] However, if one examines the operation of the integrity right under our *Copyright Act*, it resembles nothing so much as

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12. S. 14.1(1). Author is not defined in the Act, but has been defined in Canada as "the person who expresses the ideas in an original or novel form": *John Maryon International Ltd.* v. *New Brunswick Telephone Co.* (1982), 141 D.L.R. (3d) 193 at 244 (N.B.C.A.).
13. S. 14.1(2).
14. S. 28.1.
15. S. 14.2(2). If no bequest is made, the rights follow, first, any copyright residing in the author, or, second, "any other property in respect of which the author dies intestate." Significantly, moral rights devolve upon a copyright owner only upon the author's specific bequest.
16. The regime under which music is sold and distributed is described in P. Sanderson, *Musicians and the Law in Canada* (Toronto: Carswell, 1985) at 31-37.
17. California legislation protecting visual art works does contemplate this possibility. See R.D. Gibbens, "The Moral Rights of Artists and the Copyright Act Amendments" (1989) 15 Can. Bus. L.J. 441 at 448-49.
18. Traditional droit moral theory holds the right of integrity to be perpetual: see "Authors' Moral Rights," *supra*, note 3 at 766-67. Gibbens, *ibid.* at 464, argues, "There seems to be little reason, other than convenience or the German monist theory, why copyright and moral rights must share the same duration." Some 25 nations with moral rights regimes give integrity rights in perpetuity.
19. E.g., "Artists' Moral Rights," *ibid.* at 772-73.

a statutory restrictive covenant attaching to creative property. It may be enforced not only against the transferee who receives a work from the author, but against all later owners and users during the term of the copyright. The right is tied to the life of the property (i.e., the copyright), not that of the author.[20] The author may bequeath the right or bargain it away. He may enforce his right with the full range of remedies, including injunctive relief and damages.[21] In effect, the purchaser or user of an art work or copyright takes subject to any claim that its author may have in the work's integrity.[22]

American and English law have, until recently,[23] rejected moral rights *per se* and treated violation of integrity through author's actions for defamation, invasion of privacy, and unfair competition.[24] Under these common law analogues to moral rights, the author's right is certainly personal.[25] However, Canadian law brought moral rights under the *Copyright Act*, presumably as a form of copyright.[26] In the same way that copyright bars activities by the owner of a *res* that infringe the copyright, the moral right bars the owner of the copyright or the *res* from activities which infringe the moral right. Arguably, moral rights stand for exactly what we think of as the fundamental property entitlement: the right to exclude others from interfering with what we own.[27]

Two practical ramifications flow from how we characterize moral rights. First, it may affect the availability of injunctive relief, keeping in mind that a *quia timet* injunction will often be the only meaningful remedy where moral rights infringement is at issue.[28] Second, and more important, the characterization affects the treatment of whether a

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20. S. 14.2(1).

21. S. 34(1.1).

22. Vaver, in "*Snow* v. *The Eaton Centre*: Wreaths on Sculpture Prove Accolade for Artists' Moral Rights" (1983-84) 8 Can. Bus. L.J. 81 at 92 [hereinafter "*Snow* Comment"], concluded the old s.12(7) stood for the proposition that "ownership of art imposes responsibilities different from those attending ownership of ordinary commodities."

23. Some American states have introduced legislation to protect the integrity of visual works: see Van Velzen, *supra*, note 10. On the introduction of moral rights into English copyright law, see A. Tettenborn, "Copyright Law Reform – English-Style" (1989) 4 I.P.J. 353.

24. See Roeder, *supra*, note 5.

25. But in *Gilliam* v. *American Broadcasting Companies*, 538 F.2d 14 at 24 (2d. Cir. 1976), the judgment reviews U.S. decisions based on the common law analogues and comments that "such decisions are clothed in terms of proprietary right in one's creation...."

26. If moral rights are not a form of copyright, the moral rights provisions of the Act may be unconstitutional to the extent that they establish a federal civil remedy. See P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 412-13.

27. See W.J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory" (1989) 41 Stan. L. Rev. 1343 at 1354-55. The reluctance to treat moral rights as proprietary may be related to wider ambivalence about intellectual "property" in general. Moral rights, like copyright itself, lack the "thingness" that, as Professor Gordon points out at 1346-47, legal scholars and lay people alike associate with property.

In a similar vein, Gibbens, *supra*, note 17 at 443, makes these observations :

> Property rights represent a relationship not between the owner and a thing, but between the owner and other individuals in reference to the thing. In the end, property rights are seen today merely as a bundle of rights fashioned to further societal ends. There is nothing predetermined about their scope or content.

28. See Gibbens, *ibid.* at 468-69.

distortion is "to the prejudice of the honour or reputation of the author" contrary to s. 28.2(1).[29] If moral rights are personal, then actual damage to the author's reputation is the gravamen of the action. If, on the other hand, moral rights are proprietary, the phrase stands for an area of exclusion from the basic restriction against distortion — a kind of moral rights version of fair dealing defining actions which do not truly prejudice the interests of the author.

The larger significance of the distinction is that a moral right conceived of as property maintains the focus of the law on the work itself. Sarraute reduced moral rights to one essential idea: "After many redistillations, the moral right of the author has come to be understood as having as its main object the assurance of respect for the work of art...."[30] Discussing the integrity right in personal terms distracts us from that object, while a right imagined as property better mirrors the society's and artists' concerns.

## III. INTERLUDE

> A note on notation. Unlike the painter's action which produces an absolute product, transcription of musical ideas from mind to paper is only approximate. Which is why there are as many interpretations of a given work as there are interpreters; why composers themselves, even the most accomplished, veer from the text; and why, according to trends, pieces are played faster or slower or stricter or freer. The simpler the music, the harder to notate; there is more variance in Haydn-playing than in Schoenberg. Metronome marks don't help much, except in practicing. The only precise tempo indication is *presto possibile*. The vaguest is *con moto*. Meanwhile the Mona Lisa smiles unchanging through the centuries.[31]

Every writer experiences the difficulty of producing even a paragraph of prose that says something a reader will understand. The composer's task is more challenging still. She works in a language whose symbols only imperfectly capture her concept. She must then rely on an intermediary to convey that concept to the listener.

The salient difference between a musical composition and a novel or a painting is that it must be realized in order to be communicated to its audience. A musical performance is an intricate interaction between a composer and a performer, both of whom are creative artists in their own right. The composer commits to paper a text representing, within the limits of musical notation, her idea. The performer attempts, within the limits of his technical skill, to persuade an audience of the truth of the composer's idea. But he does not succeed in this when he mechanically reproduces the black dots on the page (even if such a thing were possible). The work is fully realized only when the performer breathes his own creative personality into the performance.

Composers do not always trust performers to get it right. Igor Stravinsky welcomed the chance to transcribe his own performance to a piano roll: "In order to prevent the

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29. I further discuss the meaning of this phrase in the fourth section of the paper.
30. *Supra*, note 5 at 466.
31. American composer Ned Rorem in "The Piano in My Life" (1981), in *Setting the Tone* (New York: Coward-McCann, 1983) 17 at 30.

distortion of my compositions by future interpreters, I had always been anxious to find a means of imposing some restrictions on the notorious liberty, especially widespread today, which prevents the public from obtaining a correct idea of the author's intentions."[32] Arnold Schoenberg was less concerned with performers who took liberties than with those who failed to prepare. He wrote the following to Edgard Varese:[33]

> What offends me equally, however, is that without asking me whether you *can and may* do so, you simply set out a definitive date for my *Pierrot Lunaire*. Have you already got a suitable speaker, a violinist, a pianist, a conductor, etc.? How many rehearsals do you mean to hold, etc., etc. In Vienna, with everyone starving and shivering, something like 100 rehearsals were held and an impeccable ensemble achieved with my collaboration. But you people simply fix a date and think that's all there is to it!

Neither are performers always respectful of a composer's opus. Maestro Erich Leinsdorf writes,[34]

> There is a large and influential school of thought whose adherents believe that compositions are merely vehicles for performers. It has existed at least since the days of Franz Liszt. Some critics subscribe to this philosophy, others deplore it.

The predominant view, however, respects the artistic integrity of both composer and performer. A composer expects his work to grow in the hands of a creative interpreter. The irascible Schoenberg accepted that only the basic relationships, the "musical idea," could be fixed: "But all other things – dynamics, tempo, timbre and the character, clarity, effect, etc., which they produce – are really no more than the performer's resources, serving to make the idea comprehensible and admitting of variation."[35] A conscientious performer, meanwhile, feels a duty toward the composer and the work:[36]

> According to Schnabel, the fundamental relationship of an interpreter to his task rests on his inborn urge towards expression and his feeling for shape. Humility toward the printed score is a foregone conclusion. The performer thus necessarily seeks the ideal of making music which shall be both absolutely faithful and yet completely unfettered. A composition, more than its presentation, ranks supreme in the hierarchy of art, and the performer must be guided only by it. Within those confines, however, he is free, active and formative in a way that is his own special privilege.

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32. I. Stravinsky, *An Autobiography* (New York: W.W. Norton, 1962) at 101.
33. H.C. Schonberg, *The Lives of the Great Composers* (New York: W.W. Norton, 1970) at 570.
34. E. Leinsdorf, *The Composer's Advocate: A Radical Orthodoxy for Musicians* (New Haven: Yale University Press, 1981).
35. "Mechanical Musical Instruments" (1926) in L. Stein, ed., *Style and Idea: Selected Writings of Arnold Schoenberg* (Los Angeles: University of California Press, 1984) 326 at 326. Schoenberg later concludes, at 328:

> So, insofar as the mechanization of music (a rather infelicitous expression, unfortunately) states as its main aim the establishment, by composers, of a definitive interpretation, I should see no advantage in it, but rather a loss, since the composer's interpretation can by no means remain the finally valid one.

36. K. Wolff, *Schnabel's Interpretation of Piano Music* (New York: W.W. Norton & Co., 1972) at 15.

Though it is true that a musical text must be interpreted, let me be clear on the meaning of interpretation. A musical score includes a set of instructions that are absolute; that is, they have an exact meaning to every musician. I will refer to these as the "core" of the text. A piece has a certain number of measures. Instrumentation is a specific direction. Pitch is notated exactly. A performer who cuts part of a piece, or rewrites it for another instrument, or changes notes, is not interpreting the work but is consciously altering what the composer created.

There is other information in the score which does require interpretation in the true sense. Dynamics cannot indicate an exact volume, they are always relative. Tempo is never absolute. Articulation and even rhythm are more or less fluid. Unlike those in the core, directions in the penumbra of interpretation can lead the most faithful interpreter to a performance that is markedly different from what the composer imagined when he wrote the score.

Lawyers are familiar with the concept of interpretation. A lawyer will appreciate that, like a statute, a musical work may be closely or loosely drafted to control the performer or encourage her to exercise her judgment. For example, a metronome indication (which tells the performer that a piece should be played at a rate of so many beats per minute) is a more precise indication of tempo than is the word *allegro* (generally understood to stand for a fast tempo). Lawyers will also understand the role that convention and context have in interpretation. A dotted rhythm means something quite different depending on whether the style of the work is French baroque, German classical, or swing jazz.[37]

Analyzing a score in terms of core and penumbra clarifies the roles of the composer and the performer in the realization of a composition. In musical terms, neither has to compromise essential artistic values. The composer maintains control over the concrete aspects of his text, while the performer enjoys complete freedom to interpret that text in a manner true to her musical sensibilities. To use lawyer's jargon, it defines areas of exclusive jurisdiction.

From this musical discussion I wish to draw some preliminary conclusions about the nature of legal integrity rights in musical works. First, the necessary act of performing a composition does not extinguish the composer's creation: a musical work is just as fully developed a product of its author's imagination as is a painting or a novel. Second, a musical performance combines the creativities of the composer and the performer, hence any formulation of moral rights must respect the legitimate artistic interests of each. The performer owes a duty to the music she performs, but the composer cannot expect his work to be performed exactly the way he imagined it. Third, every composition has a

37. Parenthetically, the significance of convention in musical interpretation is an excellent justification for limiting the term of moral rights. Performance practice has varied widely from era to era and continues to evolve with the development of new techniques and technologies. So it may be beyond doubt that *Hooked on Classics* is an offensive violation of the integrity of the works it adapted, but there is no agreement on whether or not Bach's keyboard music is mutilated when it is performed on a twentieth-century piano.

core of definite directions, within which any alteration is not actually interpretation but modification of the work. Outside of that core is a penumbra, directions whose execution depends entirely on the performer's interpretive skill and judgment. This distinction allows us to analyze whether and to what extent a performer has distorted, mutilated or modified the composition.

## IV. SHOULD THERE BE AN INTEGRITY RIGHT IN A COMPOSITION?

Having analyzed how integrity rights *can* be applied to musical works, I need to discuss briefly whether they *should* apply. Critics argue that integrity rights in musical works should be limited or excluded. One writer points out that if a composer has the right to restrain an infringing performance, the performer may be barred from doing exactly what he has purchased a licence to do.[38] However, it is accepted that the integrity right in a painting will prevent its owner from distorting the piece. A performer, as a mere licensee, could not enjoy greater rights over a composition. By analogy, the law should require the performer to respect the integrity of a composition as an implied condition of his licence to perform it.

It is argued that a performance cannot infringe an integrity right because "the transient quality of a single performance minimizes the injury, if any, to the composer."[39] However, I have proposed that a performance is no more than the means by which a composition is displayed to the public. For the members of an audience who hear a distorting performance, that hearing constitutes their impression of a work. If temporary alterations to a sculpture can be restrained, so should be even a single performance that presents a distorted conception of a composition.

There is a similar argument that protection from distortion in performance is not necessary because the original remains intact.[40] This argument rests on the fiction that the composition itself is not affected by the performance, again a misunderstanding of the nexus between work and performance. From the audience's point of view, the performance is the work. That the physical score is untouched is irrelevant. The damage

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38. Braithwaite, *supra*, note 3 at 60, comments, "it seems illogical to have a statutory scheme which permits the positive licensing of a particular activity yet at the same time makes it possible to enjoin the licensee from doing that which he is licensed to do." As convincing as this sounds, when one examines further it becomes clear that the difficult issue with licences is always defining the outer limits of the licensee's rights. Environmental law practitioners are perhaps the most familiar with this problem.

For a description of the licensing scheme for performance rights within the *Copyright Act*, see Sanderson, *supra*, note 16 at 26-28.

39. Roeder, *supra*, note 5 at 571. Roeder admits that a recording, because it constitutes a permanent document with potential to expose the composer infinitely, could injure a composer. Since I believe that even a performance has the potential to infringe a composer's rights, I go further. A recording is no more than a fixed version of a performance and, accordingly, any of the moral rights principles engaged by a musical performance should apply *a fortiori* to a recording.

40. Van Velzen, *supra*, note 10 at 674.

done to a piece by distorting it in performance is, from the standpoint of those who heard the performance, permanent.[41]

If anything, musical works are more vulnerable to abuse than are more concrete literary and visual works. I return to Ned Rorem: "Excepting drama, music is the only art to require mediation between producer and consumer; and drama is less bound to interpretation since it is more visual than visceral and makes sense to one who reads it".[42] A performer can, through arrogance or inattention, grossly distort a piece without the listener's being aware; as distinguished from the case of the defaced sculpture, the listener has no accessible "original" for comparison. Hence a listener who says he dislikes, does not understand, or is unmoved by a new piece cannot know whether is was the piece or the performance that did not make sense. If composers blocked shabby or distorted performances of their compositions, perhaps new works would be better appreciated than is now the case. All of which is to say that the rationale for integrity rights in visual and literary works applies no less strongly to music.[43]

## V. ESTABLISHING INFRINGEMENT

My objective to this point has been to offer a rough sketch of what an integrity right in musical work should look like. The rest of the paper aims to fill in the substance of the action for infringement of that right. A composer who believes that her right to the integrity of her work has been infringed will have to prove two elements: first, that the composition has been "distorted, mutilated or otherwise modified" and, second, that the distortion, mutilation or modification was "to the prejudice of the honour or reputation" of the composer.[44]

### A. DISTORTION, MUTILATION OR MODIFICATION

By way of setting the stage for a discussion of what "distorted, mutilated or otherwise modified" means in respect of a musical work, consider four possible performances of Opus, a hypothetical recent orchestral composition:

> In Vancouver, Opus is performed by a dedicated new music ensemble. The conductor works in close consultation with the composer as he prepares and invites her to attend and comment on rehearsals. The instrumentalists, specially selected because they are keen about contemporary music, not only master their

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41. One might argue that the damage is not permanent since the audience has the hope of someday hearing an undistorted performance. In reality, however, few modern works receive more than a handful of performances, and those will usually be in different centres. Furthermore, the single distorted performance might discourage a listener from hearing the work again and equally discourage other performers from programming the work.

42. "Composer and Performance" (1959) in *Setting the Tone*, *supra*, note 31, 324 at 324.

43. On the general applicability of moral rights to musical works, see D.P. Tackaberry, "Look What They Done to My Song, Ma: The Songwriter's Right of Integrity in Canada and the United States" (1989) 10 Eur. Int. Prop. Rev. 356 at 358-59. Tackaberry's review of the relevant law leads him to conclude, "Clearly, a moral right of integrity rests in the composer of a musical work."

44. S. 28.2(1)(a).

individual parts, but have ample rehearsal time. Not surprisingly, the performance is excellent. The audience responds warmly and Opus receives fine reviews.

An orchestra in Calgary performs Opus on one of its regular subscription concerts. The conductor is generally enthusiastic about the work and both he and the musicians adopt a professional approach to its preparation. The conductor does, however, make some changes to the slow, dramatic second movement. He cuts one section that he feels is unduly repetitious. He also writes a bass saxophone solo into the first bassoon part since there are no bass saxophone players available in the city.

In Toronto, the conductor devotes much time and attention to Opus. The composer attends the dress rehearsal, however, and is stunned by what she feels are bizarre interpretations of her score. Some brass passages in the first movement which she had indicated were to be played loudly sound overblown and raucous. And though she did indicate "Very Fast" as the tempo for the last movement, the conductor takes it at a tempo that is unplayable for the instrumentalists. For his part, the conductor is insulted that she should suggest changes to his performance and closes their post-rehearsal conference with a tirade about how composers never know what they want. The audience greets the performance with polite applause and one critic describes Opus as "confused and cacophonous."

The conductor in Montreal is less concerned about Opus than he is about the Mahler symphony on the program. Not only is he not conversant with the score, but he never gets around to working on Opus, the Mahler having turned out to be a more ambitious undertaking than he had anticipated. The only rehearsal the work gets is a read-through at the dress rehearsal. During the performance, both conductor and musicians get hopelessly lost in the rhythmically intricate last movement. Reviews the following day deplore the composer's "lack of design or direction".[45]

The Vancouver example, I need hardly point out, represents an ideal performance; a faithful and painstaking realization casts both the performers and the work in their best light. Every composer hopes his music will be so carefully performed. It would be unreasonable, however, to expect all performances to meet this standard.

The Calgary example shows a performer making changes to the core of the work. Though these changes are by definition modifications, it remains an issue whether the conductor is entitled to make them. The Calgary conductor departed from the score for solid artistic and practical reasons. His decision to shorten the second movement was in the interests of making Opus sound better. Transcribing the bass saxophone solo was necessary if the work was to be performed at all.

There is American law which supports the conductor's position. The *Gilliam* court noted, "Courts have recognized that licensees are entitled to some small degree of latitude in arranging the licensed work for presentation to the public in a manner consistent with the licensee's style or standards."[46] One might also argue that when a composer licenses

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45. Any Canadian composer will recognize each of these as an experience she has had. Please note that the cities are named for ease of reference only. These hypotheticals do not in any way represent the actual attitudes or practices of the conductors and musicians in Vancouver, Calgary, Toronto and Montreal.

46. *Supra*, note 25 at 23.

a work for performance, she impliedly consents to modifications required to make the performance possible.[47] However, Canadian courts should be cautious when considering American authorities in this area. American law has resisted the moral rights movement and has tended to support the interests of exploiters over those of creators.[48]

There is Canadian authority for holding performers to a stricter standard. Most persuasive on the point is the new section 28.1, which states, "*Any* act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights" (emphasis added). In *Patsalas* v. *National Ballet of Canada*, the Ontario High Court allowed that a choreographer must expect some variation from his intention when he did not himself direct a production, but this variation was only that attributable to the impossibility of conveying exact choreographic instructions.[49] That is, the court did no more than make the allowances necessary for realizing an imperfect text. The court in the *Maryon* case found no moral rights infringement when the defendant building owner departed from the plaintiff engineer's design, but this was justified on the ground that the design was unsafe — clearly a more pressing concern than an artist's offended sensibilities.[50]

Furthermore, it is not unreasonable to hold a performer strictly to the core directions. It is the performer's choice to program a work. A performer who is uncomfortable with its construction may ask the composer to make modifications[51] or simply choose not to perform it. When a performer makes unilateral changes to a composition, his acts are analogous to those of a sculpture's owner who repaints it to match his living room. Even a modification to make the performance possible is not, in my opinion, justified. Such a modification makes a conclusion that it is better to perform the work in an altered form than not to perform it at all. This judgment rightfully belongs to the composer.

In any event, the key determination may not be whether there has been a modification but whether the modification is significant enough to be actionable. Even the American view holds that the range of permissible alteration is limited:[52]

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47. See Roeder, *supra*, note 5 at 570-71. In S.P. Ladas, *International Protection of Literary and Artistic Property* (New York: Macmillan, 1938) at 589, the author states: "A change of the form of the work necessitated by technical reasons must be considered as authorized by the author who consented to such reproduction." This is raised in the context of how musical works may be dealt with when they are being recorded, but query whether it applies more generally.

One also must wonder if the principle is now obsolete. The "technical reasons" he refers to were those inherent in the extremely primitive recording technology: consider, for example, that long works had to be arbitrarily broken up to fit on 78 RPM discs. Far from being a compromise, most musicians today expect recordings to be technically more accurate than live performances.

48. Roeder, *ibid.* at 557-58. See also Tackaberry, *supra*, note 43.

49. (1986), C.P.R. (2d) 105. The action was not based on statutory moral rights but considered comparable terms in the choreographer's licensing agreement with the company.

50. *Supra*, note 12.

51. Note again that the author may consent to modifications: s. 28.1.

52. Ladas, *supra*, note 47. See also Roeder, *supra*, note 5 at 571. I argue later that this is the consideration intended by the qualifying phrase "to the prejudice of the honour or reputation of the author" in s. 28.2(1).

> The scope of permissible changes is governed by the technical reasons [which necessitated the changes], customary practice, and good faith. Ordinarily, the author should be asked to approve the changes or make them himself. The changes should not be such as to alter the substance or the character of the work.

The Toronto performance demonstrates a quite different problem. There the conductor adhered to the score but arrived at an interpretation at odds with what the composer expected. But the penumbra of interpretation belongs exclusively to the performer. First of all, nothing the performer does in this realm can be said truly to change the work. Performing would be a hazardous business were a performer potentially liable for an interpretation which is supported by the score but is not to the composer's liking. Second, and more important, allowing a composer to control interpretation would infringe the performer's freedom of expression.

There is one possible exception to this principle. A work will be distorted by a perverse interpretation which mocks the composer's intention.[53] The performer's interpretive freedom is founded on a root obligation to exercise his musical judgment. In practice, of course, the performer has as much at stake in presenting a fine performance as does the composer, so to present a ridiculous performance would have to be a deliberate act. Therefore, a composer would have no action against any good faith interpretation which is supported by the score.[54] The composer who complains that his work was interpreted in a distorting fashion would have to demonstrate an intention to alter the substance of the work.

The Montreal performance stands for the problem of distortion of a work by a shabby performance. A badly played work will be heard as something different from what the composer thought she was writing. It may be that the worst damage is done in this fashion; certainly it is the most common way for compositions to be mutilated. At the same time, a composer could not have a right of action against a merely inept performer. The performance licence does not specify which performers may perform the work. Besides, technical perfection in music is not an absolute; a composer will find flaws in the work of even the most skilled virtuoso.

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I am not convinced that "customary practice" is a reliable guide. Moral rights protection is, after all, aimed at giving creators relief from some customary, but aesthetically deficient, practices.

53. Ricketson, *infra*, note 67 at 468-69, discusses the extent to which a work may be distorted through interpretation, even though no actual modifications are made:

> It is equally possible that a work may be distorted, mutilated or otherwise modified in the course of its performance or communication to the public, through the particular interpretation that is given to it by the performers or in the way it is presented. Thus, a competent actor may readily transform a tragedy into a farce, and vice versa, without changing a word of the written text....

54. See Wolff, *supra*, note 36. Compare s. 28.2(3)(b).

It is fair to require of a performer reasonable skill and care in the circumstances.[55] In the Montreal situation, a composer might argue that the conductor breached this standard when he failed to rehearse a work that he had undertaken to perform; that is, the conductor's liability would not be based on the mere fact of a bad performance. On this test, a composer has no action against a performer who simply is not capable of playing any better. However, the performer who prepares negligently could be found to have infringed the composer's moral rights. This test forgives a performer who simply has a bad night, but not one who deliberately ignores his duty to the work.

## B. PREJUDICE TO THE COMPOSER'S HONOUR OR REPUTATION

It is clear that some divergence from the composer's ideal is inevitable and even desirable. The difficult issue in integrity rights is determining when alterations to a work become actionable. Professor Merryman frames the issue this way: "Is there a convenient line to be drawn between the kinds of mistreatment of the artist's work that ought to be legally prevented and other kinds for which, in order to protect freedom of expression or other overriding social interests, no such legal remedy is available?"[56] It is this line that section 28.2(1) attempts to draw:[57]

> The author's right to the integrity of a work is infringed only if the work is, *to the prejudice of the honour or reputation of the author,*
>
> (a) distorted, mutilated or otherwise modified; or
>
> (b) used in association with a product, service, cause or institution.

This has been interpreted to be a requirement that an author prove actual damage to her reputation arising out of changes to her work.[58] However, I propose an alternative

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55. In *Clevenger* v. *Baker Voorhis & Co.*, 168 N.E.2d 643 (1960), the Court found that a book that would be attributable to the plaintiff was so poorly edited as to be defamatory. Conversely, the court in *Geisel* v. *Poynter Products*, 295 F. Supp. 331 at 357 (S.D.N.Y. 1968), rejected plaintiff's claim that dolls based on his cartoon drawings damaged his reputation, finding instead that "the execution of defendants' dolls was done with great care, skill and judgment by a qualified designer and manufacturer."

56. *Supra*, note 7 at 1033.

57. (Emphasis added.) The 1988 amendments repealed R.S.C. 1970, c. C-30, s.12(7), which read:

> Independently of the author's copyright, and even after the assignment, either wholly or partially, of the said copyright, the author has the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the work that would be prejudicial to his honour or reputation.

58. D. Vaver, "The Canadian Copyright Amendments of 1988" (1988) 4 I.P.J. 121 at 128 [hereinafter "Copyright Amendments"]; Gibbens, *supra*, note 17 at 449. Braithwaite, *supra*, note 3 at 56, reached the same conclusion on the old s.12(7).

Only one reported case has given consideration to the honour or reputation issue. In *Snow* v. *The Eaton Centre Ltd.*, O'Brien J. took the view that "the words 'prejudicial to his honour or reputation' in s.12(7) involve a certain subjective element or judgment on the part of the author so long as it is reasonably arrived at." The Eaton Centre owned a large piece depicting geese in flight and decorated it with ribbons as part of its Christmas display. The Court accepted sculptor Michael Snow's complaint, supported by affidavits from other artists, that the ribbons made his work look ridiculous

interpretation which I believe better harmonizes with the Act's scheme for protecting moral rights. The parenthetical phrase, "to the prejudice of the honour or reputation of the author," should be read not as a separate proof requirement, but as modifying what follows: "distorted, mutilated or otherwise modified." The legislation wants the court to ignore trivial alterations.[59] A significant modification, one which changes the work's character or impact, has the effect of making the work say something that its author did not intend it to say.[60] It is in this sense that modifications that go to the essence of the work prejudice the author's honour or reputation while superficial alterations do not. In short, "to the prejudice of the honour or reputation of the author" sets a threshold for actionable alterations.

This interpretation is supported by the second branch of section 28.2(1), a new provision which speaks to use of a work "in association with a product, service, cause or institution." This section gives the artist control over the context in which his work is presented, even where it is not altered.[61] On traditional *droit moral* theory, a court's concern would be whether the work was used in a way that it became commercial in character.[62] Alternatively, the section may be a narrower protection against false attribution of endorsement. In neither approach, however, would actual damage to the artist be relevant.[63] Rather, an author would have to show that the association was such that his work would appear to be commercial in character, or that he would appear to the public to be endorsing the product. That is, the prejudice arises out of the way in which

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and ordered them removed. O'Brien J. did not appear even to consider whether Snow had actually been defamed. His reasons speak of the possibility of prejudice and the focus of the discussion is on the extent to which the sculpture was distorted by the ribbons.

59. Except in the case of visual works. See *infra*, note 65 and accompanying text.

60. See Roeder, *supra*, note 5 at 569: "The doctrine of moral right finds one social basis in the need of the creator for protection of his honour or reputation. To deform the work is to present him to the public as the creator of a work not his own and thus make him subject to criticism for work he has not done...." This passage was cited in *Gilliam*, *supra*, note 25.

61. "Copyright Amendments", *supra*, note 58 at 128.

62. See Gibbens, *supra*, note 17 at 452-53.

63. It is difficult to imagine how actual damage could be made relevant under s. 28.2(1)(b). The only possibility is that a composer would only have an action where her work was associated with objectionable views. This interpretation raises the disturbing prospect of moral rights being used to silence unpopular opinions. See Gordon, *supra*, note 25 at 1351-52.

In *Shostakovich* v. *Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (S.C., 1948), aff'd 87 N.Y.S.2d 430 (C.A., 1949), music by several eminent Soviet composers was used in the soundtrack of *The Iron Curtain*, a movie about Russian spies in Canada. The composers claimed that use of their music in a film whose theme was "unsympathetic to their political ideology" was, *inter alia*, a violation of their moral rights. The court actually considered the pure moral rights action, but decided there were too many open questions for it to be available on these facts. The issue of which uses of a work would be objectionable was especially problematic (at 578-79):

> So, too, there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be?

Merryman, *supra*, note 7 at 1039, notes that the composers succeeded when they brought the same action before a French court.

the work is dealt with.[64] The two branches of section 28.2(1) must be subject to the same proof requirement. The single test of whether the character of the work has been changed is that which best fits both branches.

That prejudice to reputation stands for a threshold and not actual damage to the author is further supported by the later stipulation of deemed prejudice:[65]

> In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

There is no reason to single out visual *artists* as a class exempt from having to prove actual damage. As discussed earlier, however, visual *works* can be set apart in that they are seen by the world exactly as they were created. Section 28.2(2) takes notice of the fact that even minor changes will detract from a visual work and can never be justified. By contrast, literary and musical works are subject to adaptation and performance. Because both processes require some flexibility, the strict protection accorded visual works would be inappropriate. All that deeming prejudice does in the case of visual works is to relieve the visual artist from having to show that the damage is significant, but the composer or writer must show that the detraction from the work has been significant enough to warrant a remedy. This comparison evinces a concern for the extent of damage to artistic works, not types of harm to artists.

Considering prejudice to the author's reputation as a threshold question is also consistent with interpretations of the parallel provision in the *Berne Convention for the Protection of Literary and Artistic Works*. Article 6bis, the grandfather of the *Copyright Act* section 28.2,[66] reads:[67]

> (1) Independently of the author's copyright, and even after the transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.

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64. The Act's French text also tends toward this interpretation. It speaks of a work being distorted or used "d'une manière préjudiciable à l'honneur ou à la réputation de l'auteur" — that is, where the manner of treatment is prejudicial.

The utility of making the distinction along these lines is evident in an age where the arts are dependent on commercial support. A composer should have an action if his piece finds its way into the background of a television commercial. However, he should not be able to withdraw his work from a program because he objects to one of the concert's sponsors. In the first case, the character of the work has been changed. In the second, the work is being treated as he intended.

65. S. 28.2(2).

66. Compare note 57. As part of its implementation of the 1928 Rome Revision, Canada added s.12(7) to the *Copyright Act* in 1931. The 1988 revisions were a further attempt on Canada's part to fulfil its obligations under 6bis. See Gibbens, *supra*, note 17 at 445-46.

67. Continental droit moral jurisdictions had pressed for language referring to the author's "moral interests," but British representatives complained that the phrase had no meaning in the common law. The resulting compromise is still less than precise. See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London: Centre for Commercial Law Studies, Queen Mary College, 1987) at 471-73.

It has been suggested that "honour and reputation" was purposely left open to both objective and subjective interpretations.[68] Amarnick goes further:[69]

> This provision does not imply that an artist who claims that his moral right has been violated must show that he has actually lost standing in the community as a result of the alteration. Rather, it provides a ceiling on the artist's ability to use the doctrine to protest minor changes made by the transferee of the work.

Further, an interpretation that requires proof of actual damage gives only uneven protection to art works, for it distinguishes art works according to classes of artists. The work of a composer who is not yet established could be freely tampered with since he has no reputation to be damaged.[70] An established composer will have no complaint since no mutilation of a single work could do damage to his overall reputation.[71] As well, a piece by a composer who does not depend on his compositions for his livelihood might not enjoy any integrity right.[72] Ultimately, an actual damage test suggests that only works and artists that are commercially successful will be protected. To the extent that moral rights exist to promote the public interest in the integrity of its art works, requiring an artist prove actual damage to her reputation as a condition of enforcing moral rights hinders that objective.

Considering actual damage also forces a judge to make exactly those purely aesthetic judgments that Canadian copyright law has studiously avoided. It would be open to a performer to argue that, even if he did take liberties with a piece, his performance improved the original and so caused no damage to the composer.[73] Every action alleging

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68. *Ibid.*

69. *Supra*, note 4 at 45. Vaver states, "The object of the qualification was plainly to screen out *de minimis* modifications which did not alter the public impression of a work": *Snow* Comment, *supra*, note 22 at 100.

70. Tackaberry, *supra*, note 43 at 362, appears to argue that this should, in fact, be the rule.

71. See M. Berg, "Moral Rights and the Compulsory License for Phonorecords" (1979) 46 Brooklyn L. Rev. 67 at 85.

72. It is fair to say that most Canadian concert music is composed by musicians who earn their living not directly from their compositions, but from performing or teaching. Consider also that there have always been amateurs who have made profound contributions to the growth of music. In this century, the most notable of these would have to have been Charles Ives, a first-rate composer who supported his habit by selling insurance.

73. In Berg, *supra*, note 71 at 86, the author comments:

> The moral rights concept includes the right of an author to control the use to which his creation is put. A subsequent use that is not objectively offensive but runs counter to the wishes of the creator thus violates the composer's moral rights.... In a discipline such as music, where personal preferences are diverse, it is easy to conceive of a poorly made version of a work, which, though not heinous enough to be considered actionable under either unfair competition or defamation theories, might cause considerable anguish to the sensibilities of the creator.

Droit moral rejects any argument that someone other than the artist can "improve" an artist's creation: Reeves et al, *supra*, note 1 at 19.

Vaver, in his *Snow* Comment, *supra*, note 22 at 92-93, argued that s.12(7) left room for a later owner or user to improve a work. Now, however, s.28.2(2) deems prejudice in the case of any

moral rights infringement, then, would require a court to consider which of two variants of a work is superior — a task for which it is poorly equipped and which it likely has no desire to undertake.[74] A threshold of modification test is not without aesthetic implications, but the judgment will be a more objective, straightforward one.

I submit, then, that as a matter of consistent statutory interpretation and policy, the phrase "to the prejudice of the honour or reputation of the author" in section 28.2(1) tells a court that it can only find infringement of the author's right to the integrity of a work if the extent or quality of alterations is so significant that they change the essence, character or impact of the work.

Whether changes to or distortions of a composition meet the threshold will depend on the way and the extent to which they affect the work. As I suggested earlier, modifications to the core of the text should be treated strictly. The law wants to recognize the subtle nature of musical expression — its "visceral" quality — and trust the composer's conviction that each detail contributes to the overall impact of her work. One distinguishing feature of new music is its use of experimental forms, colours and effects. A contemporary score may specify an exotic instrument, or use a new technique on a traditional instrument. The composer may map out how the musicians are to be arranged on the stage or ask them to interact with the audience. In a music that is not constructed on foundations of melody and harmony, modifications by a performer may be less tangible than if he rewrote the notes in a more traditional score. The performer cannot, however, assume that these modifications have any less effect; it is not her prerogative to decide what in the score is not important.

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modification of a visual work. There is no reason in principle why a defence of improvement should not be available where the work is a painting, but should be where changes are made to a piece of music.

74. Before the recent amendments, the definition of "architectural work" included the requirement that the building or structure have an "artistic character or design." In *Hay and Hay Construction Co. v. Sloan* (1957), 12 D.L.R. (2d) 397, 27 C.P.R. 132, the Ontario High Court heard the defendant builder argue that the plaintiff architect's design lacked artistic character and, therefore, was not the subject of copyright. Stewart J. declined to accept an interpretation of the Act that required him to decide whether a building was artistic or inartistic. Instead, he concluded, at 402, that a proper construction of the Act called for him to "consider the intent of the creator and its result." The judgment includes a disquisition on the transient and subjective qualities of aesthetic opinion leading Stewart J. to the conclusion that courts have no business judging art (at 401):

> The legal approach is, as a rule, to elevate precedent and to view innovations somewhat askance. The function of the Judge has always been to weigh evidence and propound existing law. In the arts evidence of aesthetic values is, as a rule, merely the heated opinion of prejudiced adherents.... I think it unlikely that any Legislature would be so addle-pated as to appoint the judiciary to decide whether Frank Lloyd Wright, Palladio, Pheidias, Corbusier or the plaintiff had produced buildings of artistic character or design in the sense that they are artistically good or artistically bad.

The 1988 amendments replace the old definition with one that raises no aesthetic considerations:

> "architectural work of art" means any building or structure or any model of a building or structure.

A composer may be able to express the extent of modification in strictly mathematical terms, as in a cut of one minute from a five-minute movement.[75] As another alternative, evidence might be led to demonstrate what effect a certain alteration would have on the reasonably sophisticated listener. (By definition, any alteration or distortion that would be noticeable to an audience is one that affects the work's impact.) However, the remedy should not be limited to modifications that an audience could readily identify. It must be borne in mind that the audience lacks the composer's basis for comparison. Current technology makes it possible to electronically reproduce the sounds created by acoustic instruments so accurately that even the sensitive lay listener may not be able to distinguish between the two. It should be still be open to the composer to argue that a "sampled" violin sound is not truly identical to the acoustic sound, or that the electronic performance lacks the energy that is generated by live musicians.

When the complaint is with the performer's interpretation, the key determination will be, as I argued earlier, whether the performer deliberately distorted the composition. An interpretation would have to depart markedly from the composer's expectation and affect a significant portion of the work before it could change the character of the creation. Indeed, if a conscientious performer finds her interpretation within the text it cannot be said to offend the work, even if it offends the composer.

Where the composer complains of a poor performance, she should have to show an extreme departure from her imagined standard. The range of what is considered an acceptable performance is extremely broad. Some flawed execution is to be expected. A work would only be affected by serious, noticeable mistakes involving a significant portion of the work. Further, it would have to be demonstrated that the performer performed well below the standard that could be expected of that performer in the circumstances.

## VI. CONCLUSION

The *Copyright Act* amendments have generated a fresh, energetic integrity rights debate. However, the discussion could easily become a matter of strictly academic interest. The Act permits an author to waive his moral rights. It should come as no surprise to lawyers involved in the arts that waiver clauses have already found their way into the boilerplate of artists' contracts. As Professor Vaver has pointed out, "Ultimately, moral rights advocates may have scored little more than a Pyrrhic victory in Canada, unless authors are able strenuously to resist the pressure for waivers that user groups will seek to impose upon them."[76]

My broad purpose in this paper has been to describe a scheme of integrity rights that makes musical and legal sense. The reader has no doubt noticed my partisan belief in the utility and value of a robust integrity right. It should also be clear that integrity rights

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75. In *Gilliam*, *supra*, note 25 at 19, the court noted that the defendant's editing removed approximately 27 per cent of the original. The court considered this important to its conclusion that the defendant's modifications changed the character of the plaintiffs' work.

76. "Copyright Amendments", *supra*, note 58 at 132.

stand as a bar only to naked exploitation; a balanced integrity rights regime poses no threat to the conscientious musical presenter.

It is to be hoped that interested lawyers will take a role in breathing life into composers' integrity rights. We must appreciate that a composer may consider her power to protect her work more important than the money she might earn by allowing it to be distributed. Accordingly, we must understand the law available to secure that protection. Absent that understanding, creative artists will be deprived of the voice given them by the *Copyright Act* in protecting the health of our music.