MORAL RIGHTS OF AUTHORS IN INTERNATIONAL COPYRIGHT OF THE 21st CENTURY: TIME FOR CONSOLIDATION?

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ABSTRACT

This thesis provides an insight into the current position of moral rights of authors and outlines the perspectives of the doctrine of moral rights in international copyright regime of the 21st century. Such survey is particularly urgent at a time when the doctrine of *droit moral*, one of the most contentious and controversial issues in copyright, is now in an international spotlight again. The recent decade has seen two contradictory trends in the field of international copyright. The 1994 Uruguay Round saw the emergence of new global intellectual property regime, embodied in the TRIPs Agreement, which elevates copyright into a new stage of development by linking it for the first time with international trade and technology and by substantially widening the scope of its governance. However, this new instrument is almost exclusively concerned with protecting the rights belonging to owners, endorsing the 'sanctity of property', but practically eliminating the protection of the original creators' non-economic, moral rights. Against this background, the 1990's have witnessed an unprecedented commitment to the protection of artist's moral rights in countries that in the past were the strongest opponents of any such notion within their copyright regimes.

The question of moral rights has always been considered an issue where a wider international consensus is impossible due to the traditional rift between civil law's authors' rights and common law's copyright philosophies. However, in a world where the protection of intellectual property is increasingly viewed on an international basis - of necessity, because of technological and economic developments - a global consensus on this issue is inevitable. By reviewing the justificatory schemata underlying the doctrine of *droit moral* and by analyzing the recent statutory developments in several common law jurisdictions in this arena, as well as the concession made by moral rights-devout civilian jurisdictions, this thesis shows that the gap between the two systems is no longer insurmountable. The analysis reveals that despite the underlying philosophical differences, a substantial degree of convergence of copyright and author's rights is occurring, and outlines the sites of consolidation which can serve as a basis for a possible future international agreement on this issue.

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Introduction

This thesis attempts to examine the current position of moral rights of authors and their prospects in a globalized society of the 21st century, where copyright, the "most sacred property", is faced with the challenges of technology and international trade. The need for such analysis is particularly urgent given the recent conflicting developments in the field of moral rights. On the one hand, the doctrine of *droit moral*, one of the most outstanding issues in copyright, appeared to have suffered a serious blow when excluded from the ambit of the GATT's 1994 TRIPs Agreement: an agreement that marks a new era of international intellectual property and whose current and potential subscription base immensely widens the reach of this new international intellectual property governance. As the consequence of the exclusion from the ambit of TRIPs, moral rights, *inter alia*, are deprived of the benefit of the enforcement and dispute resolution, one of the most outstanding features of this new regime. Given the unique ability of moral rights, as the only branch of intellectual property, to retain some ability to ensure that the use of copyrighted knowledge object accords with the intent of the original creator, this development seems rather worrying. Paradoxically, the exclusion of moral rights from the newly established international copyright regime comes at a time when the doctrine experiences an unprecedented revival in national law around the globe. In the last decade or so, moral rights found its way into the copyright laws of many common law countries, which have previously staunchly resisted the penetration of any moral right notion into their laws. Canada was the first country to implement a comprehensive moral rights legislation in 1985. Between 1989 and 2000, statutory moral rights were introduced in

Great Britain, New Zealand, India and Australia - all of which are major producers of cultural products. Although the way and fervour with which those countries performed this task varies, the very fact of this large-scale statutory recognition of moral rights signifies that moral rights have an enduring core of validity and an undeniable place in modern international copyright.

The central question of this thesis is thus what such newly emerging international standard for moral rights entails: what are the sites of consolidation where consensus has been reached or is within reach; what areas continue to raise controversy and how can this be overcome.

In order to answer these questions, we must look deeper into the justifications underlying the moral rights doctrine. Revisiting both the traditional as well as some less traditional justificatory schemata that are believed to lie in the core of copyright and author's rights, Chapter I explores whether and to what extent these justifications still reflect the realities of modern copyright. In particular, three different aspects of moral rights that on the first blush appear unrelated but yet are mutually intertwined are singled out: the 'individualist' authorial function concept conceived in the 18th century; the social dimension of authorship; and the largely undervalued human rights aspect of moral rights. It is argued that the idea of 'romantic authorship' that underpins the moral rights doctrine, although much contested today, is nevertheless too deeply entrenched in our copyright laws to seriously contemplate its elimination. Quite on the contrary, in the evolution of copyright, the romantic notion of authorship has undergone many transformations and has proven to be flexible enough to be employed in extending the protection to new categories of creations and creators. It is further submitted in the second part of this chapter that

although author's rights were conceived as individualistic autonomous rights reflecting the author's self-expression, strong author's right in the form of moral rights can greatly contribute to maintain and promote social values as diverse as the preservation of cultural heritage, pluralism of expression and the authenticity of voices in the media - values that appear to gain a degree of urgency in contemporary society. Finally, the perception of author's work as the extension of his personality is discussed in the last part of Chapter I. It is concluded that the humanistic element of author's rights seems to be largely forgotten or underestimated, yet it is not only clearly reflected in the Berne Convention itself, but it is also expressly endorsed by several international human rights instruments as well as by numerous civilian constitutions. In the conclusion of this chapter, a critical look reveals the shortcomings of some of the arguments of the author; it is acknowledged that not all justifications carry an equal weight in furthering the cause of moral rights and as such may be refutable. It is nevertheless concluded that the strength of the moral rights doctrine does not lie as much with each single justification scheme but that it is rather their complexity and combination that makes a strong cause for moral rights.

Chapter II reflects on the position of moral rights under and after the TRIPs Agreement. The justifications of the moral rights exclusion as well as the potential negative implications of the exclusion provision are analyzed, with respect to both international trade and the 'psychological' impact of such exclusion on the future of international moral rights. The failure to address the question of moral rights in the global WTO/TRIPs context is put into the perspective of the ongoing struggle to harmonize moral rights within a regional, European Union context.

After briefly discussing the concept of moral rights in its breadth, Chapter III focuses on the right of integrity as the most contentious of all moral rights. The right of integrity is chosen as it illustrates best the issues and controversies arising with respect to moral rights in general. First, the existing international framework for moral rights, Article 6*bis* of the Berne Convention, its legislative history and deficiencies are reviewed. This is followed by a comparative analysis of the most important (and controversial) aspects of the integrity rights in a cross-section of jurisdictions. The jurisdictions explored for the purpose of the comparison are of both civil law family, with a strong moral right tradition (represented mainly by France and Germany) and of common law family, which accepted moral rights only relatively recently (represented by Australia, Canada, Great Britain, New Zealand and, to some extent, the United States). The integrity right is dissected into several elements, such as the scope, aesthetic/subjective elements, character of the right, limits both inherent and imposed by legislators. The scrutiny of those elements than reveals how the respective countries implement its obligation under Article 6*bis*, i.e., to what extent they surpass its standards and to what extent they fail to live up to it. It also uncovers new, *de facto* emerging sites of consensus or potential consensus on some of the most contentious issues, issues that are not directly addressed by Article 6*bis*, such as the admissibility and scope of waivers, site specific art, destruction, or works and beneficiaries excluded from the ambit of protection. At the same time, the analyses critically acknowledges those problems where consensus seems to be beyond reach at the very moment and highlights questions that remain unanswered. It is concluded that the gap between the typically author-based, subjective-centred author's rights philosophy present in civilian jurisdictions and the subject-matter, publisher/producer-centred

copyright system philosophy of common law is no longer insurmountable and that there is a continuous shift from the previously dogmatic opinions about what should be authors' rights and what copyright. The pragmatic stance to moral rights, evident in the interpretation and judicial endorsement of moral rights, can particularly help to bridge the two system's different philosophies and soften their alleged irreconcilability.

Chapter 1

Three perspectives on moral rights

A. The authorial function

Moral rights, by linking authors with their works, create a special privileged relationship between the creator and the result of his creative or intellectual endeavour. Underlying the doctrine of *droit moral* is the concept of authorship, a concept commonly linked by scholars with the growth of Romanticism in the Western Europe of the 18th century.[1] A brief discourse into the concept of authorship and of the separation between the privileges of authorship and the rights associated with the ownership of copyright (a relationship described by Foucault as "the solid and fundamental unit of the author and the work"[2]) will clarify the current standing of moral rights in the arena of contemporary copyright law.

The development of moral rights is commonly traced to the particular socio-economic environment of the mid-18th century: the growth of literacy and the development of book publishing and industry.[3] The vision that emerged from these developments continues to be known as the romantic concept of authorship, a concept that views a creative work as the product of the unique qualities of its author's mind, qualities that are beyond

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[1]The link between modern concepts of authorship and the historical forces of Romanticism is examined in detail by M. Woodmansee in *"The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'"* (1984) 17 Eighteenth-Century Studies 425 at 427-38, 444-48.

[2]M. Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993) at 1.

[3]Woodmansee, *supra* note 1 at 430-48. These were, according to Woodmansee, the currents of Romanticism. Underlying these influences, the impulse that nourished the emergence of the notion of authorship is believed to be the strain of "possessive individualism that was responsible for the acquisitive, expansionist, and colonial activity that we associate with early capitalism in England." P. Jaszi & M. Woodmansee, eds., *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, NC: Duke University Press, 1994) at 6.

ownership. [4] The distinctive quality of the author's function is the creation of an original work, which is the extension of the author's individuality, the product of his genius. This romantic perception of an author empowers the latter to control the use by others of his self-expression. The theory of the autonomy of self-expression is thus central to the construct of authorship. This new vision has found its way into copyright thought; copyright norms, it was thought, should assure such autonomy by giving authors continuing control over their works in ways which transcend the economic exploitation of a copyright.[5] Ultimately, the concept of Romantic authorship has come to dominate perceptions of creativity in Western, industrial society.[6] Although the concept has been greatly extended since the 18th century – photographs, sculptures, sound recordings, films and choreographic works are all defined as the work of authors and granted copyright protection – the concept of authorship remains essentially the same as in the time of its conception.

The authorship theory, apart from its emphasis on the autonomy of self-expression, also presupposes 'originality' as the very essence of a creative work. This reliance on originality means that copyright law comfortably embraces works manifesting a personal authorial presence, but encounters far more difficulty accommodating works at once high in commercial value but low in personal authorship.[7] The deeply entrenched requirement of originality is particularly at stake when it comes to compilations of data or 'works of

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[4] *Ibid.*

[5] P. E. Geller, *"Must Copyright Be Forever Caught Between Marketplace and Authorship Norms?"* in B. Sherman & A. Strowell, eds., *Of Authors and Origins* (Oxford: Clarendon Press, 1991) at 159.

[6] As P. Goldstein expressed it, "copyright, in a word, is about authorship. [It] is about sustaining the conditions of creativity that enable the individual to craft out of thin air, and intense, devouring labour, an Appalachian Spring, a Sun Also Rises, a Citizen Kane". Rose, *supra* note 2 at 132.

[7] Rose, *supra* note 2 at 135, citing J. C. Ginsburg. Ginsburg advocates discarding the current unitary system of copyright and having one for works high in personal authorship and a second for works low in personal authorship.

facts'. The 1991 landmark US Supreme Court decision in *Feist Publications, Inc. v. Rural Telephone Services*[8], which re-emphasized the need for at least a minimal degree of creativity in having a work qualify for copyright protection, is a striking manifestation of the ideological entrenchment and the impact of this decision continues to be fiercely debated.[9]

In the discourse of copyright, the goal of protecting the rights of the creative author is proudly asserted even as the notion of author-genius is drained of content. This contradiction, however, was implicit already in the moment of modern copyright's formation in the 18th century: although condensations, compilations, and other works of common nature were protected under the Statute of Anne, the arguments made for literary property still invoked the special claims of authorship.[10] The eighteenth-century lawyers and commentators were certainly aware that it is not only genuine authors who take shelter under the umbrella of literary property, but if "learning" were to "flourish", as the Statute of Anne asserted, even the less creative ones who laboured to produce useful works had to receive some protection. The same rhetoric is frequently employed today when an attempt is made to reconcile the tension between the construct of the creative genius and the mundane reality of most copyrighted material. As one commentator points out, "a circus poster may not rise to the artistic level of a Mary

[8]*Feist Publications, Inc. v. Rural Telephone Services Co., Inc,* 491 U.S. 111 S. Ct. 1282, 113 Ed. 2d 358 (1991). By increasing the threshold of originality for copyrighted works, this decision is believed to have struck the final blow to the 'sweat of the brow' doctrine.

[9]In the context of the United States, for example, P. Jaszi, *ibid* at 38, argues that the main challenge to concepts of authorship comes from the realities of contemporary polyvocal writing practice – which increasingly is "collective, corporate and collaborative."

[10]Rose, *supra* note 2 at 137.

Cassatt. But for authorship to flourish, those who seek to be authors must receive the same welcome as those who succeed as authors."[11]

1. Modern pressures on the Romantic construct of 'authorship'

Changing circumstances, both technological and social, now provide for 'authorship' and 'works' of a radically different kind from those foreseen in classical copyright legislation. New methods for the creation or production of cultural products have resulted in new categories of 'authors' and 'works' that can only with difficulty be assimilated into the traditional concepts. The romantic and individualistic assumptions inscribed in copyright are now being challenged on many fronts.[12] Probably the most debatable effect of these romantic assumptions about authorship is that they obscure important truths about the protection of cultural production. As Northrop Frye remarks, all literature is conventional but in our day the conventionality of literature is "elaborately disguised by a law of copyright pretending that every work of art is an invention distinctive enough to be patented".[13] Frye argues that the persistence of the discourse of original genius implicit in the notion of original creativity not only obscures the fact that cultural production is always a matter of appropriation and transformation, but also elides the role of publishers

[11]P. Goldstein, *"Copyright. The Donald C. Brace Memorial Lecture"* (1991) 38 J. Copr. Soc'y 109 at 116.
[12]Probably the most famous piece of scholarship on 'authorship' is Michel Foucault's essay *"What Is an Author?"* The emergence of the idea of 'authorship' is contested by Foucault as "neither natural nor inevitable" – he argues that it represented only one possible means to the end of constraining the "proliferation of meaning". Similarly, M. Woodmansee argues that the Romantic notion of author handed down to us from the 18th century never has been particularly apt to the realities of the writing process. See generally M. Woodmansee, *"On the author Effect: Recovering Collectivity"* (1992) 10 Cardozo Arts & Ent. L. J. at 279. Jaszi, *supra* note 3 at 32 argues that unlike the events in the late 18th century Germany, the first introduction of the "author" into English law had not been the outcome of any philosophically-grounded argument for "authors' right" as such. He maintains that the 18th century efforts to establish copyright reflected no concern whatsoever about the situation of working writers and that the Statute of Anne of 1710 was the result of lobbying by and for established London-based publishers and booksellers seeking new weapons against down-market competition spawned by the proliferation of print technology.
[13]Rose, *supra* note 2 at 2. See also P. Jaszi in Jaszi & Woodmansee, *supra* note 3 at 11.

and producers in cultural production.[14] The notion of authorship clearly proves ungenerous to non-individualistic cultural productions like folkloric works, which are rarely the products of a solitary, originary "authorship" on the part of one or more discrete and identifiable "authors".[15] The "individualisation" of authorship is a Western concept that does not take into account creative efforts of community or group authorship, or anonymous authorship.[16] The realities of collaborative and corporate authorship, in which many copyright works are now being produced, as well as the phenomenon of computer-generated works, seem to contradict the monolithic view of the author as an living and breathing individual and inspired genius. The issue of authorship of and protection of works created with the assistance or intervention of a computer in particular presents great uncertainties because the nexus between man and work becomes obscured. The faith in solitary, originary Romantic 'authorship' also seems to ignore the value of non-conforming cultural production, such as work resulting from successive elaboration of an idea or a text by a series of creative workers, occurring perhaps over years or decades.[17] Modern copyright law, focusing exclusively on the potential for harm

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[14] *Ibid.* at 135.

[15] P. Jaszi in Jaszi and Woodmansee, *supra* note 3 at 38. However, the concept of authorship in non-Western countries is a very diverse and complex phenomenon. While some cultures appear to be dominated by community or group frameworks for creativity, other traditions are strongly individualistic. See E.W. Ploman & L.C. Hamilton, *Copyright: Intellectual Property in the Information Age* (London: Routledge & Kegan Paul, 1980) at 4 –5.

[16] In particular, contemporary copyright laws that are based on the individualistic Western concept of authorship do not recognize the communal aspects of most aboriginal art and, consequently, fail to compensate the serious spiritual or religious damage caused by unauthorized reproduction of such art.

[17] B. Kaplan, cited in Jaszi & Woodmansee, *supra* note 3 at 29, argues that before copyright's law acceptance of Romantic authorship was complete, copyright actually encouraged the creation of popular adaptations of pre-existing works, on the ground that "an abridgement preserving the whole of a work in its sense is an act of understanding, in the nature of a new, meritorious work". He also puts forward an argument for a reconfiguration of copyright rules which would take a fuller account of collaborative creative practices. The problem of multiplicity of authors and other contributors is particularly dramatic where dozens or hundreds of authors and/or contributors are present, such as in case of directories, indices and databases. The new response to these "low authorship works" seems to be a call for neighbouring rights or *sui generis* protection regimes. It is, however, hard to draw the line between cases of multiplicity of authors where no identifiable author can be distinguished and where purely industrial interests justify a

to the interests of the 'original' author, generally reserves the privilege of producing derivative works that incorporate or modify protected pre-existing works to those who obtained copyright permission.

This particular aspect of the 'author effect' is being attacked and the romantic conceptions underlying it challenged in large part by three anti-author movements: Anglo-American literary theory[18], post-structuralism and postmodernism.[19] For post-structuralists, the historical claim that the author ideology was the product of a particular epoch leads to the general philosophical point that authors as originators do not exist now and indeed never existed. It pronounces the "death of the author", claiming that our age must do without such a concept.[20] Postmodern artists have accepted the death of the author as a basic tenet; however, when they act upon that belief, through the technique of appropriating the work of others by imitating, copying and incorporating previous works of art, they frequently run afoul of copyright law.[21]

Copyright also slights basic components of cultural production, barring protection to things like rhythms most characteristic of both traditional musical forms and certain contemporary forms such as rap and hip-hop. The postmodern rationale which contends that modern creative expression is necessarily contingent upon the lease and appropriation of previously existing works of art and expression applies to works

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neighbouring rights/*sui generis* regime of protection from the cases of multiplicity of authors where one can still identify at least one or several main authors who make the most important creative inputs, as in the film industry or music production.

[18]This includes the works of literary theorist such as the previously cited Northrop Frye or Harold Bloom.

[19]Post-structuralism (especially the works of Michel Foucault, Roland Barthes, and Jacques Derrida) and postmodernism are two of the most influential intellectual and artistic trends of the 20th century that have attacked the 'author' concept by undermining its philosophical foundations.

[20]E. Fukumoto, *"The Author Effect after the "Death of the Author": Copyright and Postmodern Age"* (1997) 72 Wash. L. Rev. 903 at 904.

[21]The goal of copyright in Anglo-American theory is to promote the progress of science through the granting of limited monopolies to authors. For postmodern artists, the means of copyright law (the granting

involving digital sampling.[22] In rap and hip-hop music, proponents of digital sampling argue that the controversial practice of employing the work of another without permission is an important vehicle for the proliferation of African-American art and values: pastiche and digital sampling represent a critical position for modern African-American music artists. Moral rights in particular, by placing too much authority in the original author, are seen as a formidable obstacle for an artist who wishes to appropriate past works and reuse it for new creative purposes.[23]

Although the notion of authorship is increasingly subject to the scrutiny of critical theory, the concept seems to survive unharmed into the 21st century. Despite all the attacks undermining its philosophical justifications, this Romantic paradigm is inevitably present in every aspect of modern copyright law.[24] There is no doubt that authorship has played

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of exclusive rights to authors) have become destructive of the end - the progress of the arts, as it ultimately inhibits some of the art's most daring and innovative practices. See Fukumoto, *supra* note 20 at 905.

[22]Digital sampling, a technique that facilitates the capture, manipulation, re-production of recorded sounds, while still a relatively recent trend, has nonetheless a rich cultural history. The practice began as a Jamaican art form known as "dub". Jamaican disc jockeys, making use of mobile sound systems, would create live and mobile discotheques in which they would blend a variety of previously recorded works and improvise lyrics over these mixed recordings. This early variety of musical sampling was introduced to the United States in 1967 by Jamaican-born disc jockey, Kool DJ Herz. M.G. Passmore, *"A Brief Return to the Digital Sampling Debate"* (1998) 20 Hastings Comm. & Ent. L.J. 833 at 837-8.

[23]Moral rights protection against digital sampling is believed to have a profound impact on both hip-hop music and rap. These two unique and definitive hallmarks of African-American culture might be jeopardized if digital sampling artists are to be prohibited from expressing their philosophy and creativity through their music. See B.G. Williams, *"James Brown v. IN-Frin-JR: How Moral Rights Can Steal the Groove"* (2000) 7:3 Arizona J. Int'l & Comp. L. at 651, or D. Sanjek in Jaszi & Woodmansee, *supra* note 3 at 11. Sanjek argues that digital sampling is a legitimate form of modern artistic expression which "elevates all consumers to potential creators", yet is not seen as independent creation but as civil and criminal wrong. However, there are also very opposing views according to which moral rights, by placing so much emphasis on non-pecuniary interests, have the potential to serve minority innovators, a potential that cannot be found or substituted by other copyright law norms. See K. J. Greene, *"Copyright, Culture & Black Music: A Legacy of Unequal Protection"* (1999) 21 Hastings Comm/ Ent L.J. 339 at 391. Greene contends that Black artists, for example, have traditionally produced original works even without financial incentives and that for this reason, the traditional incentives theory underlying the concept of copyright is irrelevant to the formation of Black art.

[24] See for example, C. May, *A Global Political Economy of Intellectual Property* (London: Routledge, 2000) at 135, or P. Jaszi in Jaszi & Woodmansee, *supra* note 3 at 9. Jaszi points out that the teaching of literature and composition to which future lawyers are exposed continues to reinforce this Romantic notion, despite the growing recognition that most writing today-in business, government, industry, the law, sciences and social sciences-is collaborative.

an instrumental role in the development of much of the 18th and 19th century copyright doctrine and reached its peak in the adoption of the 1886 Berne Convention for the Protection of Literary and Artistic Works, an international agreement grounded in thoroughly Romantic assumptions about creativity. In the 20th century, it has been employed to justify the extension of copyright protection on new, less traditional works of art such as commercial photography[25], or the content of broadcast programming.[26] Far more recently, lawyers and judges have invoked the vision of the Romantic "author-genius" in rationalizing the extension of copyright protection to computer software. The conceptual challenge to copyright posed by computer technology has been submerged in an insistence that programs are no less inspired than traditional literary works, and that the imaginative processes of the programmer are analogous to those of the literary 'authors'.[27]

By the same token, it is evident that soon after its introduction into the law of copyright, the notion of "authorship" became a malleable concept frequently deployed on behalf of publishers rather than writers.[28] The so-called "work for hire " doctrine provides an even

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[25]Photography had perplexed 19th century lawyers who saw the machine, rather than human agency, as the source of the photographic image. In *Burrow-Giles Lithographic Co. v. Sarony*, a case involving a studio portrait of Oscar Wilde, the court resolved the dilemma by stressing the analogies between photography and more traditional forms of creative enterprise and concluded that photographs such as the one in question should be viewed as "representatives of the original intellectual conceptions of the author". 111 U.S. 53 (1884) in Jazsi & Woodmansee, *supra* note 3 at 33.

[26]Thomas Streeter, in Jaszi & Woodmansee, *ibid.* at 12-13, suggests that the ideology of individual creativity has helped to mask the essentially "bureaucratic imperatives" that dictate the content of broadcast programming.

[27]As a result of this rationalizing, computer software, typically a collaborative work, benefits from copyright protection in most jurisdictions. However, there is a general reluctance to attribute moral rights protection to this category of copyrightable works. This shows how the bringing of computer programs under the umbrella of copyright laws required a substantial stretching of the concept of authorship. It also demonstrates how arbitrary the system of copyright is: on the basis of "authorship", it denies or marginalizes the works of many creative people, such as folkloric works, while at the same time it provides intense protection to other clearly collaborative works, such as computer programs.

[28]See generally A. Dietz, *"Copyright in the Modern Technical World: A Mere Industrial Property Right?"* (1991) 39 J. Copr. Soc'y 83, or J. C. Ginsburg, *"A Tale of Two Copyrights: Literary Property in the Revolutionary France and America"*, (1991) 147 (Jan.) R.I.D.A. 125. One of the most puzzling questions

more dramatic example of the ways in which the ideology of "authorship" has been manipulated. This rule, which is most commonly part of the jurisprudence of common law countries, awards ownership of a work produced within the scope of employment to the employer.[29] The necessities of commerce have produced a construct according to which the employer (or, in certain circumstances, the commissioning party) is defined as the author and thus "cast as the visionary" while the artist is treated as "a mere mechanic following the orders".[30] This goes directly against the *droit d'auteur* of most civilian jurisdictions, and therefore is not considered a 'good business practice' by them.

It is submitted by yet another group of the opponents of strong author's rights, the representatives of entertainment and music industries, that author-based protection inevitably fails to deal with the strains on copyright resulting from advances in technology. Authors' rights, it is argued, are premised on the ability of the author to control reproduction and distribution of the copyrighted works and modern technology

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in copyright history is why the publishers accepted that a right of protection against piratical copying by trade rivals should be rooted in the act of authorship in the first place. W. R. Cornish in *"Authors in Law"* (1995) 58 Modern L.R. 1 at 3 argues that the London stationers and booksellers needed the respectability which connection to authorship conferred and that in order to avoid the general mistrust against them, they accepted that the initial title to protection must lie with the author for his act of intellectual creation and, if stationer wanted it for himself, he must take an assignment of the 'copy'. Publishers' invocation of authorship as a rationale for the extension of their own effective monopolies, however, did not always succeed: in the 1774 decision of *Donaldson v. Beckett*, as M. Rose, *supra* note 2 at 97-99, has documented, London publishers lost their hard-waged battle to establish perpetual copyright as a kind of "natural right of authorship", thought only barely.

[29]By contrast, the French and most continental copyright systems generally insists on the principle that the "author" is the actual physical creator of the work and that the creator's status as an employee or commissioned party in no way effects authorship or initial title to copyright. See, for example, Ginsburg, *supra* note 28 at 1020.

[30]P. Jaszi, *"Towards a Theory of Copyright: The Metamorphoses of 'Authorship'"* (1991) Duke L. J. 455 at 487-9. In what Jaszi refers to as a "reverse-twist on individualistic authorship", the identification of employer as author is more than a crude, instrumental fiction-rather, it is a logical (if perverse) working out of the underlying assumption that the essence of authorship lies in original, creative genius. If the essence of 'authorship' is inspiration, then it is the employer's contribution as the motivating factor behind that works that matters, rather than the mere drudgery of the employee. *Ibid.*

has rendered such premise untenable.[31] The argument in favour of disposing of the old concept of author's rights is often put forward by those who seek to ensure an effective copyright protection for 'low authorship' works in the film and music industries, such as, for example sound recordings. However, historical realities show that authors' rights were never really 'premised' on the ability of author to control reproduction and distribution of their works, as this function has almost always been fulfilled by literary and music publishers who were frequently the real (economic) copyright owners, even in author's rights countries.[32] Therefore, industrial economic interests have never been ignored by the copyright system and only in the late 20th century (and to a big extent still only *de lege ferenda*), are authors beginning to claim an adequate share in the profits of the cultural industries. Moreover, those who wish to declare the concept of authorship dead seem to overlook the fact that, to some degree at least, industry does depend on the protection given to authors in order to secure sufficient protection for itself. For example, the periods of protection are commonly calculated *post mortem auctoris*. Apart from the 'natural' rights and needs of authors and their families, there seems to be no other justification for the protection of copyright products stretching for 50, 70 or in some countries even 120 years after the author's death.[33] If it was not for the 'outdated' Romantic concept of authorship, why should companies in the entertainment industry benefit from ever longer terms of protection for certain categories of works (as they are

[31]See N. Turkewitz, *"Authors' Rights Are Dead"* (1990) 38:1 J. Copr. Soc'y 41 at 42. Neil Turkewitz is the counsel for the Recording Industry Association of America, Inc. See also Cornish, *supra* note 28 at 2, who responds to Turkewitz's proclamation on the death of author's rights by saying that Turkewitz only succeeds in demonstrating how much he wishes [author's rights] were dead.

[32]In this respect at least, author's right through most of the 18th and 19th century were indeed a romantic concept rather than a real enforceable right.

[33]Dietz, *supra* note 28 at 86. More and more American copyright advocates urge a further term of extension to life plus seventy year, as is the European standard, even though such expansionism is difficult to reconcile with the American economic model of copyright. See the discussion below at 43.

constantly lobbying for)[34], when in other fields of industrial property 15, 20 or 25 years of protection are the maximum? In summary, it is not just modern technology which introduces industrial interests into the copyright system; they have been within the system from the beginning and played a dominant role for a long time. The fact that industry directly profits from the 'romantic' concept of authors' rights raises a question whether it should not grant the authors a fairer share in the exploitation of their work.[35]

No matter how much the Romantic authorship may have been deployed over the history of Anglo-American copyright to serve the interests of employers, publishers and other distributors of literary and artistic works, the role that this doctrine played in shaping the legal doctrine of moral rights overrides any potential critique of the malleability of the 'authorship' construct. The moral rights doctrine, long a dominating feature of continental legal culture with a traditionally good record of adherence to the cause of author's rights, has only relatively recently made its way onto the scene in most common law countries.[36] As might have been expected, publishers, software manufacturers, and recording and motion picture companies have been less than enthusiastic about new legal rules which would give authors the unprecedented rights to insist on proper attribution of

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[34]See generally Turkewitz, *supra* note 31.

[35]See Dietz, *supra* note 28 at 87.

[36]The reason why 'moral rights' reasoning failed to penetrate the common law countries earlier goes to the justificatory scheme of copyright traditionally relied on in common law jurisdiction which is in tension with that of 'authors' rights'. The common law countries rationalized copyright to be a limited monopoly designed to serve the public interest by promoting investment in the creation and distribution of works of the imagination. Justice Stewart, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) cited in Jaszi & Woodmansee, *supra* note 3 at 33, puts the matter this way: "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labour. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." The same sentiment is expressed in the Copyright Clause of the U.S. Constitution. This so-called "incentive" theory – probably the most commonly articulated public policy underlying copyright -seems to be in conflict with any proposal that would enhance protection at the public user's expense, including the restrictions on re-use of copyright works implied in any moral rights scheme. However, it would be misleading to present moral rights as an entirely aesthetic concept lacking any pecuniary dimension. Moral rights and the integrity right in particular serve

their works and to object when those works are modified in connection with or even subsequent to their commercial exploitation. But despite organized resistance from the publisher and entertainment industry, the latter-day counterparts of the eighteen century London booksellers, the idea of moral rights has gained a toe-hold even in the most 'moral-right resistant' jurisdictions such as the United Kingdom or the United States, albeit in a much restrictive form compared to the continental standard.[37] The recent development of moral rights strikingly echoes the ideologies and sentiments of its Romantic origins in the 18th century. As senator Markey commented on the introduction of the Visual Artists Rights Act in the U.S. 101st Congress:

> "Artists in this country play a very important role in capturing the essence of culture and recording it for future generations. It is often through art that we are able to see truths, both beautiful and ugly. Therefore, I believe it is paramount to the integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist."[38]

Every time an extension of legal protection is rationalised by appeal to authorship, one cannot leave unnoticed a certain irony of contemporary intellectual property: many 'authors' who invoke the law's protection against 'unrespectable' users are themselves practiced "cultural *bricoleurs*".[39] Yet, despite such ironies, the position of authorship in modern copyright law seems to be etched in stone. Even legal scholars who object to the

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to protect artists' reputational interests, which can have a strong pecuniary character. This aspect of moral rights is discussed in Chapter 2, p.55.

[37]The UK Copyright, Design and Patents Act of 1988, which introduced moral rights for the first time into the British copyright laws, restricts the categories of works that may benefit from moral right protection and provides for a large basis for waivers. In the U.S., it is only visual artists who benefit from certain moral rights under the 1990 Visual Artists Rights Act. See below, Chapter 3, p. 119-128.

[38]135 Cong.Rec. E2227 (daily ed. June 20, 1989), statement of Rep. Markey, quoted in Visual Artists Rights Act of 1990, H.R. 514, 101st Cong., 2d sess.1, 6 (1990).

fact that aesthetic ideology should dictate what objects merit protection as work of authorship, concede that the elimination of the concept or any fundamental change in orientation would be extremely difficult to accomplish.[40]

The instance of moral rights is the most significant example of how the Romantic conception of "authorship" is displaying an increasing measure of influence and ideological autonomy in the legal framework of 'incentive-based' copyright. Even as scholars within and outside the legal field elaborate far-reaching critiques of the Romantic concept of "authorship", recent statutory and judicial developments world-wide show that the concept of authorship is not only too deeply entrenched in our copyright laws to seriously contemplate its removal, but, on the contrary, that this Romantic vision is experiencing an unprecedented revival and that common law countries are reaching out to embrace the full range of its implications.[41] In the last decade, we have witnessed the adoption of moral rights in the United Kingdom, New Zealand and most recently, in Australia.[42] Perhaps the most evident manifestation of the fact that the concept of authorship shows no sign of abating on the international scene is the United States' two relatively recent acts of subscription to this concept: the hundred year delayed accession to the Berne Convention in 1988 and, even more significantly, the enactment of the Visual Artists' Right Act in 1990. The landmark US Supreme Court decision in *Feist*, which denied copyright to factual compilations because of the lack of the requisite

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[39]This is a term used by D. Sanjek in Jaszi & Woodmansee, *supra* note 3 at 11, describing the lawsuits of Michael Jackson and Madonna.

[40]See Jaszi, *ibid.* at 10.

[41]May, *supra* note 24 at 135, commenting on why copyright did not attract nearly as such strident criticism during the TRIPs negotiations as for example patents, contends that the romantic author is largely accepted as the expressive actor in international copyright nowadays and that rewarding individuals for expressive work, at least on first examination, produces much less constriction in the social pool of knowledge and is therefore less of a concern to international negotiators.

[42]See the text accompanying footnote 100.

'creative spark', is a particular example of the continuing validity of the Romantically derived concept of authorship and originality. These recent developments in diverse jurisdictions all around the globe suggest that the construction of the author as the bearer of special legal rights and cultural privileges remains with us and is gaining strength more than ever.

The evident and intimate link between the notion of authorship and the doctrine of moral rights, despite the challenges it is exposed to, has proven to fulfill one important function: by giving the authors and creators a certain degree of control over the use of their works even after the transfer of their economic rights, it manages to alter the imbalance between the increasingly stronger rights of corporate intellectual property rights owners and the diminishing rights of the original creators. Part B will show that in addition to catering to the private -however legitimate- interests of creative individuals, moral rights are also capable of serving broader public interests.

B. Social dimension of authorship

The authorial function in copyright is certainly not something that is primarily seen as 'social'. Rather, since the emergence of the 'author' in the eighteenth century,

> "Inspiration [has come] to be regarded as emanating not from outside or above, but from within the writer himself. 'Inspiration' [has come] to be explicated in terms of original genius, with the consequence that the inspired work was made peculiarly and distinctively the product-and the property-of the writer."[43]

[43]Woodmansee, *supra* note 1at 427.

This is not to say that the question of access and availability by the members of the public did not present a concern to the contemporaries.[44] However, the view that the rights of the author take precedence over any concerns about the availability of their work, eventually prevailed, because free availability would be a theft of an individual's expression of the author himself. The theory of autonomy of self-expression thus seems to contradict any notion of social function of authorship. Quite on the contrary, strong author's rights, if anything, are frequently seen as an impediment to a dissemination of works to the public and branded "amoral and asocial".[45] This is the case in those (primarily common law) jurisdictions where copyright is framed as a socially-oriented scheme whose aim is to create incentives and climate conducive to the production of works of authorship. Copyright protection confers benefits on authors, and by doing so, enhances the country's scientific and cultural heritage. The public interest is paramount in common law copyright schemes[46] and seems to be at odds with personalist doctrine within copyright such as the moral rights, which are based on the notion that the work incorporates the personality of the author because the authorial persona permeates and pervades the work and that, consequently, any attack on the work constitutes an attack on the personality of the author himself. Such a deeply personalist justification seems alien

[44]In answer to the objection of publishers that expansion of copyright protection would tend to check the circulation of literature, and by so doing would prove injurious to the public, W. Wordsworth wrote: "[What] we want in these times, and are likely to still want more, is not the circulation of books, but of good books, and above all, the production of works, the authors of which look beyond the passing day, and are desirous of pleasing and instructing future generations... Deny [such protection] to him, and you unfeelingly leave a weight upon his spirits, which must deaden his exertions; or you force him to turn his faculties...to inferior employments." W. Wordsworth to the editor of the Kendal Mercury, cited in Jaszi & Woodmansee, *supra* note 3 at 5.

[45]Turkewitz, *supra* note 31 at 41.

[46]The first copyright law, the 1710 English Statute of Anne enunciates a public benefit policy of copyright law, stating its purpose as "the encouragement of learned men to write useful books". Similarly the U.S. Constitution, Article I, section 8, clause 8, provides: "Congress shall have power...to promote the Progress of Science and Useful arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

to copyright systems which stress the public benefit of the communication of works to the public[47] and the creation of further incentives to create in the name of cultural and scientific progress. The demands for greater access to cultural and intellectual works and the free flow of information seem to collide with the notion of strong rights of authors.

Yet, although not primarily social, the authorial function, projected into the moral rights doctrine, can greatly contribute to the public interest in several ways. One strong argument for moral rights is that protection of creators' interests in attribution and integrity is indeed one factor that may induce authors to create work, as it enhances the climate in which they create a work of authorship. Few would suggest that writers and artists only create to enjoy the rewards – this is only a small element in the concept of the creative individual. Authors who feel secure that they will receive name credit for their work or artists who can rely on the continued, unmutilated existence of his work of art may find this knowledge more conducive to creative activity than an immediate material gain.[48]

Moral rights have an important role in the struggle against commodification of cultural products and the subjugation of art to the forces of consumerism. These forces not only ignore or underestimate the interests of authors but also cause the works of literature and arts to degenerate in their legal identity into common consumer goods as *"Cassis de*

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[47]Turkewitz, *supra* note 31 at 41. The author contends that society's interest is not in the creation of works *per se*, but in their communication to the public. Author's rights systems, according to Turkewitz, mistakenly assume that society has an interest in promoting authorship for its own sake.

[48]See for example J. C. Ginsburg, *"Moral Rights in a Common Law System"* (1990) 4 Ent.L.R. 121 at 122. Ginsburg argues that for many creators, the non-pecuniary rewards such as recognition and hoped-for immortality through preservation of the work are of a greater importance than any material reward. M. Holderness in *"Moral Rights and Author's Rights: The Keys to the Information Age"* (1998) 1 JILT 1, online: Journal of Information Technology and Law <http://www.elj.warwick.ac.uk/jilt/infosoc/98_hold/> (last modified: 27 February 1998) at 2.1. even argues that the lack of integrity right may have a direct negative impact on creation: according to the author, a distributed work which is not an accurate reflection of an author's skill discourages learned people from composing – or at least getting an advance for- future works.

Dijon".[49] Currently, the creator is often subsumed into a mere "content provider" and artistic achievements are accordingly classed as mere material objects that can be bought and sold like any article of commerce. Strong *'droit d'auteur'*, where implemented, reinforces an important belief that an artist's work is not just a commodity but a spiritual reflection of his or her community values. In this sense, moral rights reflect the relationship between society and its creators, and the social values which are associated with art and artists. The recognition of moral rights in copyright law and jurisprudence may also, albeit indirectly, contribute to the creation of a general attitude of respect on the part of the public towards works of importance for national cultures and their creators.[50] Adoption of moral rights sends a message that a society cares about creation, and about authorship.[51] Where incorporated into the law and duly enforced by the judiciary, moral rights are capable of enhancing the status of creative and intellectual products in our society and promote a respect for cultural values, which is increasingly endangered by the commercialization of cultural objects. Moral rights doctrine can be employed in promoting and preserving domestic culture because it assigns priorities to culture and cultural and intellectual creations on the basis of their non-economic value to

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[49]M. Fiscor, *"Economy and authors' rights in the international convention"*, opening note, ALAI Study Days: *"Economy and authors' rights in the international conventions"*, Geneva, 1994 (ALAI Switzerland, 1994) [hereinafter ALAI Documents 1994]. This is a result feared by many European commentators and lawyers. This fear, nourished by the cultural domination of the United States, is played down by some US commentators as "European paranoia". See R. Conlogue, *"Whose work is it anyway? U.S. and European media industries can't seem to settle a cultural rift over actors' rights"*, Globe and Mail, January 9, 2001, online: InfoTrac (Gale Group) <http://web6.infotrac.galegroup.com/itw.infomark/> (last modified: 10 March 2001).

[50]M. T. S. Rajan, *"Developing Countries and the International Copyright Regime: The Neglected Issue of Cultural Survival"* (LL.M Thesis, UBC Faculty of Law 1999) [unpublished] at 121.

[51]Ginsburg, *supra* note 48 at 122.

society.[52] Moral rights can thus become an important element in the development of coherent cultural policies.[53]

The fact that moral rights reflect a view of the place of art and artists in society and as such should be taken into consideration in forming the state's cultural policies, is gaining recognition even among legislators in common law countries. As E. Kennedy observed,

> "In our country, as in every other country and civilization, artists are the recorders, and preservers of the national spirit. The creative arts are an expression of the character of the Nation – they mirror its accomplishments, warn of its failings, and anticipate its future."[54]

J. Merryman uses a similar rhetoric in his comment on the Bernard Buffet case, stressing the public interest element of moral rights:

> "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 the private enforcement of this public interest."[55]

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[52]Moral rights, however, may have important economic implications, too. J. Dine points out that while moral rights are not directly connected to questions of the economic returns from creative works, they perform an important risk -and –cost – allocating function, by balancing the risk associated with the misuse of a creative work between the author and the user, or distributor. J. Dine, *"Authors' Moral Rights in Non-European Countries: International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls"* (1995) 16 Mich. J. Int'l L. 545 at 577-82.

[53]On the importance of moral rights for the cultural policies in developing countries, see Rajan, *supra* note 50 at 119. Rajan argues that in developing countries, moral rights provide a degree of flexibility in the implementation of copyright systems, and allow these countries greatly expanded opportunities to incorporate their traditions into copyright legislation, and, at the same time, to renew their traditions in the light of present needs.

[54]133 Cong. Rec. S11, 502 (daily ed. Aug.6, 1987), statement of Senator Edward Kennedy presenting the Visual Arts Rights Act to the Senate, S.1619, 100th Cong., 1st sess., (1988).

[55]J. Merryman, *"The Refrigerator of Bernard Buffet"*, (1976) 27 Hastings L.J. 1023 at 1040.

The right of integrity in particular is an apt example of how a moral right can gain a 'social' dimension that extends beyond the importance of an individual work belonging to a particular author. The subject matter of the right of integrity is the preservation of the integrity of the work, and it may also encompass a general right of preservation.[56] Clearly, not only may the author have his 'selfish' interest in the preservation of his work, but the general public benefits from the preservation of cultural works, and the maintenance of their integrity. In the second half of the 20th century, a big change has occurred in public opinion about the preservation of mankind's cultural heritage: what was considered acceptable in the 19th century, the "elginisme that resulted in the desecration of the Parthenon" and which led to the modern feud between Britain and Greece concerning the fate of the marbles resting in the British Museum, has given way to international and national policies designed to keep art treasures intact.[57]

The right of integrity may greatly contribute to the preservation of the work as part of the country's cultural heritage, especially where works of major importance are involved or where the author is an important cultural figure. The public interest in not having aspects of its culture falsified is further emphasized in those jurisdictions which, while entrusting the author and his or her heirs with the power to vindicate moral rights during the term of copyright, vest the later exercise of those powers in a governmental agency dedicated to the preservation of the country's cultural heritage. As C.A. Berryman points out:

> "The right of paternity and integrity denote a collective cultural interest in preserving the work itself; otherwise, why would a state enact provisions

[56]Rajan, *supra* note 50 at 121. The right of integrity, however, is generally not believed to prevent outright destruction of the work. See, e.g., S. Ricketson, *The Law of Intellectual Property* (Melbourne: The Law Book Company, 1984) at para 15.57. For opposing view, see A. Dietz, *"The Moral Rights of the Author: Moral Rights and the Civil Law Countries"* (1995) 19 Colum.-VLA J.L. & Arts 199 at 224.

specifically protecting integrity when artists have defamation weapons at their disposal? The public has a legitimate interest in ensuring that its cultural works are preserved as their creators intended so that their inherent cultural value will not be lost or distorted. Some states recognize interest by directly creating a public cause of action for integrity violations."[58]

The right to integrity thus promotes the public interest due to its role in conservation of works of the visual arts. It also fulfills an important public function to the extent that it avoids misrepresentation of deformed or altered works as those of an aggrieved artists or author.[59]

One of the characteristic features of copyright is the distinction between the creation on one hand and the dissemination, commercialization and commodification of the products of intellectual and artistic labour. This division, which is accentuated in the industrial and post-industrial society, is reflected in the tension between economic and non-economic interests involved in creative and intellectual works. Moral rights are situated at this curious conjunction of interests. True, the essential stimulus for the legal development of moral rights has undoubtedly been admiration of the great creative talents of the past, if

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[57]D. Vaver, *"Authors' Moral Rights and the Copyright Law Review Committee's Report"* (1988) 14 Monash U. L.Rev. 284 at 287.

[58]C.A. Berryman, *"Toward More Universal Protection of Intangible Cultural Property"* (1994) 1 Intell. Prop. L. 293 at 319. For example, Italy's 1941 statute provides for enforcement by "competent State authority". California pioneered a public interest regime for moral rights protection with its art preservation enactments of 1979 and 1982 and the Preamble to California's Art Preservation Act cites both protection of the author's reputation and preservation of the integrity of cultural and artistic property as objectives. On the contrary, there is no such provision in the extremely 'personalist' French law or in Germany, where such a provision was eschewed in the post-war legislation, apparently out of nervousness about state supervision of culture. See J. Berg, *"Moral Rights: A Legal, Historical and Anthropological Reappraisal"* (1991) 6 I.P.J. 341 at 348. Even today, some commentators fear that the state's decision to offer moral rights protection is likely to influence whether and what artists will produce, thereby dramatically increasing the state's power to define what actually qualifies as art. See e.g., J.A. Frazier, *"On Moral Rights, Artist-Centred Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law"* (1995) 70 Tulane L.R. 313 at 313, or P. Loughlan, "*Moral rights (a view from the town square)*" (2000) 5:1 Media & Arts Law Review 1 at 7-11.

not always present. The high claims of the first Romantics have sustained the spread of copyright in general, and ideas of moral rights in particular. But throughout the time, author's rights have gained a new dimension stemming not so much from the aura around the creative genius, but from the deep social, cultural response to their actual work.[60] Although they were conceived and continue to exist as individualistic rights which represent a particular relationship between the creator and his work and which are primarily designed to protect various types of non-economic interests the author may have in his work, moral rights encompass a number of potential 'social effects'. These effects may have broad implications for the state of cultural heritage, extending beyond their immediate effects on the author. Pure copyright theory, undiluted by moral rights, does not create incentives to *preserve* work, its quality and integrity. The 'social' function of moral rights is thus to generate an awareness of how creative and intellectual works should be treated and to allocate the responsibility for acting in the interest of cultural works to the artistic and intellectual community, through its individual members.[61] Moral rights are, in large part, about society's commitment to the creation and, in particular, preservation of creative works – a commitment that eventually benefits all of us and that is not readily captured by a pure investment model of copyright.

1. Cultural diversity

The loss of cultural diversity is a growing phenomenon that affects many regions all around the world. The doctrine of moral rights has the potential to contribute to the

[59]Ginsburg, *supra* note 48 at 122.
[60]This believe in the 'new dimension' is expressed for example, by Cornish, *supra* note 28 at 9: "There are those who choose to treat the Romantic vision as in some way imposed on dim perceivers; but there is a

discourse on cultural matters in diverse cultural environments. Through their emphasis on the non-economic features of artistic and intellectual creation, moral rights open possibilities for diverse cultural attitudes to be accommodated within the framework of copyright law. First of all, the existence of moral rights encourages the perception that works are created by living, breathing individuals, that he or she is not a mere 'content provider'. This is increasingly important in a world where cultural products are more and more often seen as any other commercial commodity without any other dimensions. The U.S., where the export of cultural products (which include films, books, and computer software) is now the country's largest export industry [62], are the foremost example of this trend. The ownership and control of the U.S. informational and cultural industries, intellectual property, and the means of embodying and disseminating cultural and informational products is controlled by a few dominant corporations. Communication scholars, analysts, and executives agree that a handful-six to ten vertically integrated communications companies – will soon produce, own and distribute the bulk of the culture and information circulating in the global marketplace.[63] Copyright rules which underestimate or restrict the rights of the individual creators greatly facilitate the concentration in media ownership and commodification of human intellectual and artistic creativity, as cultural artefacts and informational goods are transformed into investment instruments similar to real estate, bonds or stock. Such commodification is predicted to

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larger faith (I am happy to belong to it) which believes that its own judgement in appreciating the arts and honouring artists is not unduly conditioned by the manipulators of bourgeois values."

[61]Rajan, *supra* note 50 at 129.

[62]See Conlogue, *supra* note 49. American entertainment industry views with scepticism the crusade against commodification of cultural products, pointing out that it is an "easy luxury for Europeans who do not make much money exporting their cultural products." This debate raises a question: Is the U.S. giving the world what it wants, or is it teaching consumers to want it products?

[63]See R.V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview Press, 1977) at 34-68.

lead to an even greater concentration of copyright ownership in the hands of the global cultural industries.[64] The profit orientation of the latter accompanied by their never-fading attempt to gain outright control of all content and nullify all potential authors' rights towards the work, leads them produce and distribute homogenous cultural products. The indisputable public benefit that flows form the enactment of the right of attribution and integrity is that it serves a bulwark against such homogenization of artistic and creative expression and suppression of the individual voices of diverse authors by media corporations.[65]

2. Authenticity, consumer protection, and accountability

The concentration of power in the hands of a few corporations is particularly worrisome in the context of the ownership and dissemination of information. In the new media environment, it is already often difficult for the information 'consumers' to verify whether they received the authentic product they are seeking. The right of attribution and integrity furthers an important public concern in the authentication of works in media as it affords the fullest possible public information about the source and content of the work. The public has an interest in knowing who is the author and the attribution right, by protecting the authorship, is the warrant of the authenticity of the work. Moreover, the

[64] *Ibid.* at 226. In his detailed analysis of the relationship between communications, ownership and culture, Bettig outlines the far-reaching consequences of the concentration of copyright ownership, claiming that the market power of the cultural industries fosters the erosion of national, regional, ethnic, and group autonomy and undermines democratic participation in cultural expression, which, in turn, leads to inequalities between people and nations.

[65] Holderness, *supra* note 48 at 1. See also E. Herman, cited in Bettig, *supra* note 63 at 36, who speaks of so-called "marginal" or "meaningless" diversity that results from concentrated media ownership and control, or Guback, also cited in Bettig at 38, who argues that within capitalism motion pictures are manufactured and sold as commodities "with regard neither for the medium's instructive capacity, its ability to be used for social transformation, nor its potential for contributing to solutions of society's problems."

reverse side of the attribution right helps avoid public deception, as it prevents misattribution of the author's name to works the author did not create. The impact of the right of attribution and integrity is two-fold. First, it provides for a 'consumer protection' against unauthentic, 'pirated' products. The public is entitled to be told the truth about a work's authorship and is entitled to have the work in the form the author intended it to reach his or her public. As with trademarks, the choices consumers of art, literature, music and drama exercise about what they wish to read or see depend upon whether or not they react, or have in the past reacted, favourably to a creator's work or his or her general repute: this assessment can be made fairly only if consumers have an accurate information about the work and the author available to them.[66] In this sense, moral rights help to create and maintain a market in which consumer choice is more accurately channelled.

Second, with the right to identification as an author of a work comes personal responsibility for its content. This is particularly significant in the case of news reporters, whose work is necessarily subjected to major alterations and editing. While editing is an essential part of the news production, it is capable of materially distorting the truth and reality-sometimes with grim consequences.[67] Controversial editing by publishers has in the past been disclosed by famous composers and musicians, particularly of scores by Mozart, Schubert and Verdi. These and other practices in the music industry, such as the previously mentioned controversial doctrine of 'work for hire', have even evoked an international outcry for "free[ing] music, its composers and performers and the concert

[66]Vaver, *supra* note 57 at 288.

[67]Holderness, *supra* note 48 gives a colourful account of a recent life-threatening situations to which BBC reporters in Afghanistan were exposed as a direct result of inaccurately translated and altered new reports.

societies, from the sordid protection of the publishers."[68] The existence of the attribution and integrity right, although at first sight impracticable for certain categories of works, serves to discourage such distortions.

The threat of distortions or non-attribution of a work is particularly accentuated by the imbalance of bargaining power between authors and economically much more powerful publishers and producers. The competition among authors for limited publication opportunities makes them even more vulnerable to the pressures of the latter. For authors generally there is an excess of supply relative to demand of the global publishing industry for raw materials, and most authors find getting published a major problem.[69] The situation on the publishing market requires writers to bow to the pressure and forego their exclusive rights in the interest of getting published. Needless to say, wherever the possibility exists, such pressure will always be applied. Absence of moral right protection, exacerbated by the uncertainties created by the development of new media and dissemination channels, means that publishers and producers will try to "buy in bulk in relation to authors, and sell piecemeal to each other and to distributors and disseminators"[70], depriving authors of control of access after the first business transaction they make about their work.

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[68]Administrator of the Orchestre de la Suisse Romande's appeal to the international community, 1963 UNESCO Report cited in Ploman & Hamilton, *supra* note 15 at 192.

[69]May, *supra* note 24 at 138. The author maintains that getting published constitutes a bigger concern for authors than any concern over piracy or the theft of their expression. He also gives example of the publishing practices in some prestigious magazines such as Condé Nast, where the freelance writers' exclusive rights are effectively curbed by contracts which limit author's rights to mere 90 days after which the publisher can resell their work without their knowledge or necessary reward.

[70]G. Karnell in *"The Moral Right of the Author"*, ALAI Congress: *"The Moral Right of the Author"*, Antwerp, 1993 (ALAI Paris, 1994) [hereinafter ALAI Documents 1993] at 58. Karnell criticises the media giants who build their empires on acquired rights but who "lead a much more clandestine public life than authors" and thus do not show up for public criticism regarding pricing and accessibility of the kind that individual authors would be exposed to should they claim, for example, remuneration related to a certain use of his work or seek legislative efforts to enlarge the protection of authors' rights. Similarly, Ploman & Hamilton, *supra* note 15 at 192, aptly point out that even though the exclusive rights of authors are being

This imbalance in power between publishers and authors is ratified to some extent in those countries which recognise an inalienable moral right of integrity and paternity. Without moral rights, authors have nothing to bargain about. Even with moral rights, authors are not assured of furthering their interests; the existence of moral rights will not prevent publishers and producers from applying pressure on writers to forego their rights; nevertheless, it will enable the authors to retain at least some ability to control the fate of their work and to have a stronger position in the bargaining process. Granting authors moral rights may also engage the court's jurisdiction to monitor waiver clauses for restraint of trade, unconscionability, undue influence and the various other devices available at common law or equity to remedy abuse of bargaining power.[71] As R.V. Bettig points out,

> "[W]ithin capitalism, where the means of communication are privately owned, artists' and authors' rights generally must be surrendered in order to get a work produced, distributes, and exhibited. Moral rights...give them some say in how this gets done."[72]

3. The 'brave new world' of technology

The authenticity of documents and works of art is also a matter for a wider policy concern in the light of the unprecedented technological developments. By its very nature, the exploitation of works and other protected matter through digital technology affects the authenticity of works. Once digitized and exploited over the networks, the ease of

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put in the foreground of the problem of access and monopoly, the real source of the monopoly danger is not the author, but the publisher.

[71]See generally D. Vaver, *"Authors' Moral Rights-Reform Proposals in Canada: Charter or Barter of Rights for Creators?"* (1987) 25 Osgoode Hall L. J. 749.

manipulation allows almost anyone to retrieve the protected work, alter it in a large number of ways (re-work, re-colour, re-zoom...) and then make it available once again to the public in its revised form. Works can be compressed by means of digital technology; cinematographic works colorized or shown on TV screens either with black ribbons on the top and the bottom or with the sides of the pictures cut. Technology currently also permits, for example, the rapid manipulation of still photographs so that the resulting illustration could be accepted by many readers as an actual representation of reality - this raises a serious concern over the remaining credibility of news photography in a society where democracy is founded on citizens voting based on reliable information supplied by independent sources; it also casts deep shadow over the evidential value of photographs in court proceedings.[73] The real-time manipulation of moving pictures opens up alarming possibilities for manipulation of content in the area of advertising. Other practices worth mentioning are, for example, the splicing-up of movies or the compression of feature-length films for video or airline viewing.

Last but not least, electronic publications raise the question about the authenticity of a work published on-line: how can we be sure that this work is what it says it is?[74] The standard technological solution – digital signatures, self-evident assertions of authorship and valuable new tools in the area of e-commerce, are of little help when it comes to works with literary or artistic content. Digital signatures use the mathematics of encryption to generate as assertion that a particular author created a document in a

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[72]Bettig, *supra* note 63 at 241.

[73]Holderness, *supra* note 48 at 2.2. Each individual element in photographs or motion pictures can, via new computer-controlled special effects like "morphing", be removed, changed, displaced or mutilated without major effort and without immediately visible trace that a change has been made.

[74]Electronic publication poses many new threats on the rights of freelance authors. See for example *Tasini v. New York Times Co. (Tasini III)*, 206 F.3d 161 (2n Cir. 1999), in which the court upheld that a freelance

particular form; cryptography, however, has nothing to say about the validity of the original assertion. The rights of identification and integrity together may provide a more satisfactory legal framework for such assertions, subjecting any false assertions to a potential civil action by the actual author. In all cases where a work is produced by an individual, a strong and enforceable moral right of paternity and integrity is a simple public guarantee of the individual's personal responsibility for the content.[75] A reporter, documentary filmmaker or photographer who has strong moral right has the option to protest the distortions and manipulation with his or her work and sue a publisher or producer who distributes a manipulated distortion of his work.

Digitisation, together with interactivity and electronic availability of information multiplies the risks of a violation of both authors' and other right holders, moral rights considerably. In view of these new risks, it is even more urgent to strengthen moral rights (or recognise, where they do not exist). The requirement of "prejudice to the honour or reputation of the author", commonly articulated in national moral rights laws as well as in Art.6*bis* of the Berne Convention, sets an appropriate balance between public use of digital products and technology on the one hand, with the need to preserve the integrity of the work on the other, with some modifications being permissible.

Certain pessimists infer from all the technological developments that they quite simply herald the imminent demise of authors' rights.[76] Yet seems reasonable to hope for a less

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author no longer automatically transfers the electronic copyright in the article to a publisher unless a written contract specifies additional compensation or express consent for electronic publication.

[75]Holderness, *ibid.* at 2.3 bitterly complains that the lack of moral rights for news reporting in the UK has the effect that whenever a newspaper reporter turns in a reasonably balanced story, he or she maybe certain that it will be re-written on the sub-editors' desk to fit the perceived 'line' of the proprietor or the marketing department. "Fatalism and abnegation of personal responsibility are encouraged at every stage", he concedes.

[76]See, for example, Turkewitz, *supra* note 31at 42, who asserts that author's rights are 'dead' due to the inability of the author to further control the fate of his work. Indeed, the radical loss of the ability to control

gloomy future for authors. First of all, the technology makes it generally difficult to apply the traditional system of copyright /author's rights, be it civil law or common law, in which the rule is to subject the use of a work by others to its author's authorization. The challenge of technology is not a completely new phenomenon and so far, copyright laws proved to respond well to the challenges.[77] The latest sudden bursting of new technologies is just another in the row of technology-specific problems. Author's protection can and will continue to exist in the brave new world of technology (*inter alia*, because in practice "authors will prove hard to kill"[78]) if the diversity of real situations is taken into account. The new digital threat to the moral interests of authors only increases the need to defend moral rights. New technical means of controlling, legally enforced, are but a part of the solution.[79] It may involve building in means of ready identification, of encryption and of securing quick permission. There is a wide consensus that to withstand the challenges of technology, authors will have to confer the exercise of their rights and the representation of their interests to collective societies of authors, composers and artists.[80] The march towards collective administration of rights, sparked by digitization, is already well under way. With the growing importance of the digital possibilities,

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the dissemination of works and their integrity poses a great threat to the traditional relationship between the author and the work.

[77]Reprography and home taping are only two illustration of the evolution of copyright law which has devised ways of dealing with these new technologies.

[78]Cornish, *supra* note 28 at 16.

[79]Within a digital net, for example, it is relatively easy to identify and control the first insertion of material; the great problems are with subsequent users. Partial systems of monitoring are already being marketed. Cornish, *ibid.* at 15. However, until procedures are introduced that permit effective national and international control in Internet communication, it seems that the values of moral rights for authors are under an imminent threat.

[80]See, for example, A. Francon, *"Authors' Rights beyond Frontiers: A Comparison of Civil Law and Common Law Conception"*, (1991) 149 RIDA (Jul.) 2 at 13-15, or Cornish, *supra* note 28 at 15-16. Cornish is convinced that what is needed above all, should authors survive, is a series of collective solutions which offer authors a slate of opportunities: once they have agreed to digital storage of their work, authors should be able to choose: they may license for unfettered use; or for use only in unaltered form; or on case-by-case basis.

combined with the growing difficulties in enforcing these rights, collecting societies will probably have to redefine their role as the administrators of economic rights of authors and consider also protecting the moral rights of the latter. Such solution will not eradicate the threats to the integrity and authenticity of works completely, but they may prove one practical way of preserving the individuality of the author and showing that the collecting societies are able to adapt to the challenges of the new digital technology. In addition, the continuing conceptual integrity and practical relevance of the author' right of both attribution and integrity will also depend on the knowledge of his public, and on their willingness and ability to assist him in maintaining the quality of his work.[81] Here resurfaces the 'social' aspect of strong and enforceable moral rights: their role in promoting respect for cultural and artistic values and their potential to create a general awareness of and consensus on how creative and intellectual interests should be treated.

C. Human right dimension

The theoretical and historical origins of *droit d'auteur* as well as the evolution of the doctrine in the course of the 20th century reveal an important humanistic element, thereby linking author's rights to the concept of human rights. This element, although its existence is generally acknowledged by commentators, does not typically attract the attention (other than of a purely historical interest) of copyright scholars or lawyers, perhaps for its obscure character and 'inappropriate' place in [intellectual] property law, and its implications are thus largely underscored.

[81]Rajan, *supra* note 50 at 135. Rajan suggests that the author is no longer an isolated individual placed on a pedestal, but rather "the author and his public meet with a new degree of closeness and a new potential for

1. Humanistic aspects of the theoretical basis for moral rights

There are different formulations of the conceptual basis of copyright law, some of which are still very influential today, providing the larger philosophical framework within which moral rights have been related to the copyright regime. The traditional property law concept (copyright as special kind of property, which extends the traditional principles of ownership to incorporeal works) does not explain some significant anomalies in the development of copyright law: unlike property ownership, ownership of copyright is a non-perpetual, non-exclusive right, which cannot be acquired by prescription, accession and adverse possession. In addition, property law has no correlative for the inalienability of moral rights.[82] Moral rights thus cannot be accommodated within this framework. Rather, moral rights fit the description of "personality" rights, a Kantian theory[83] of literary creation as an expression and extension of the author's personality, hence coming within the regime of rights developed to protect individual freedom. In this way, moral rights are part of an author's personality or personal identity in much the same manner as the relationship of parent and child. Any 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[84]. One practical ramification of the debates on various property and personality theories is the distinction between the doctrine of moral rights, based on the Kantian personality theory, and copyright in its strict economic sense, which was formulated on the property analogy.[85]

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exchange, through the possibilities for cultural democratization offered by communications technologies."

[82]Berg, *supra* note 58 at 349.

[83]Vaver, *supra* note 71 at 752-54 attributes the philosophy of moral rights to Kant and Hegel.

[84]*Ibid.*

[85]France is the foremost example of the 'dualist' theory. Germany, on the other hand, adopted a monist legal framework of personality rights (*Urheberpersonlichkeitsrecht*) as the single basis for both its copyright law and creator's moral right. This German monism required tailoring both moral rights and

2. The evolution of *droit moral*

Scholars have sought the origins and justifications for moral rights in the earliest periods of recorded history, but there is a general consensus that their modern roots lie in the 18th century French Revolution.[86] During that time, jurists sought to abolish any notion that *droit d' auteur* was royal privilege, as it was in the *ancien régime*. Early legislation established the principle that *droit d' auteur* was a natural right, arising simply from the author's act of creation.[87] These laws were drafted and enacted in a general climate formally recognizing natural rights, including the "sacred"[88] right to property enunciated in the Declaration of the Rights of Man. Although *droit moral* did not emerge directly from the statutes of this era, but from judicially created doctrines that developed slowly in the 19th and early 20th century, *droit moral* did arise from the spirit of these laws and from the philosophy of individualism which accompanied the French Revolution.[89] To this day, France's passion for moral rights protection is being associated with the revolutionary fervour of that time:

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contractual assignment of exploitation rights to fit one unified legislative scheme. In order to achieve that, German law compromised perpetuity of the moral rights by limiting them to its term of copyright protection, as well as the free alienation of pecuniary rights by restricting *inter vivos* transfer to specific editions or series of performances rather than outright assignment of copyright. E.J. Damich, *"The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors"* (1988) 23 Ga. L.Rev.1 at 27.

[86] See, for example, R. J. DaSilva, *"Droit Moral and the Amoral Copyright: A Comparison of Artist's Rights in France and the United States"* (1980) 28 Bull Copr. Soc'y 1, or R. Sarraute, *"Current Theory on the Moral Rights of Authors and Artists Under French Law"* (1968) 16 Am. J. Comp. L. 465. Berg, *supra* note 58 at 356, however, puts forward an argument that control over disclosure, attribution, and integrity of artistic and literary works existed for centuries prior to the development of modern conceptions of individual rights and neutral legal order in which moral rights are now articulated.

[87] DaSilva, *supra* note 86 at 9. DaSilva is referring to the enactments that took place between 1791 and 1793.

[88] Le Chapelier, the greatest exponent of author-oriented rationales for copyright, declared that "the most sacred, the most legitimate, the most unassailable, and...the most personal of all properties, is the work which is the fruit of a writer's thoughts." Report of Le Chapelier to the revolutionary parliament, cited in Ginsburg, *supra* note 28 at 1007.

[89] Sarraute, *supra* note 86 at 465.

> "One can hardly begin a study of *droit moral* without pausing to observe the inexhaustible reverence with which French jurists approach the subject of author's rights. Pierre Recht accurately has observed, "When *droit moral* fanatics discuss moral rights, they take the attitude of a religious zealot talking of sacred things, or a Girondin reading the Declaration of the Rights of Man."[90]

French dualism freed the judiciary to develop *droit moral* in comparative isolation from contractual and public policy issues arising from the grant of exploitative rights, rendering moral rights, at least in theory, personal, perpetual, inalienable, and unassignable. The rights were deemed to inhere in the natural person of the creator of the work, and not in the work itself.[91] The foundation of the moral rights in the creative personality

> "is a profoundly romantic characterization of the artist, perhaps conjuring up visions of poets in garrets, burning their lyric masterpieces for heat in the icy Parisian winter, or of Walt Whitman, crying out to the corporeal world, "I celebrate myself, and sing myself'. Yet it is because of this characterization of the author and his art that French law feels a need to protect the honor of the author's personality and the integrity of his work. The author has, in a sense, made a gift of his creative genius to the world: in return, he has a right – a moral right – to expect that society respect his creative genius."[92]

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[90]DaSilva, *supra* note 86 at 7.

[91]*Ibid.* at 13. The "human imperative" is also present in the French Code on Intellectual Property 1992, which states that *"l'auteur d'une oeuvre de l'esprit jouit sur cette oeuvre, du seul fait de sa création, un droit..."*("The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, a right...) (Art. L.111-1). Similarly, the German Urheberrechtsgesetz (Copyright Act) 1965 refers to *"die Urheber von Werken..."* (the author of works) (Art.1), and says that *"Urheber ist der Schöpfer des Werkes"* (the author is the creator of the work) (Art.7).

3. The humanistic philosophy of the Berne Convention

Pierre Recht's comparison of moral rights to the Rights of Man, declared in the heyday of the French revolution, is not merely a euphemistic analogy. The belief in the natural, inalienable rights of authors and creators to be rewarded for the fruits of their efforts and inspiration and to have the right to control any reworking of their ideas and expression has found its way to the first international instrument regulating copyright, the 1886 Berne Convention on the Protection of Artistic and Literary Works. The Convention is clearly built upon, and it has by and large taken its directions for development from, a philosophy of human rights. It centres its provisions about protection not on the literary and artistic work, its designated subject matter, but on the protection of the rights of authors, who create the work. The objective of the Convention is set in Art.1 as "the protection of the rights of authors in their literary and artistic works", within a Union whose member countries have declared themselves in the Preamble to be "animated by a desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works".[93]

The Preamble and the first article make it clear that the primary concern here is the persona of the author. The rest of the Convention as well shows no signs of having been influenced by copyright macroeconomics (the most general aspects of economic reasoning applied to copyright), which is inherent to the Anglo-American copyright model. The convention does not speak about "incentives to create" to "promote the progress of arts and science" – values stressed by the advocates of a utilitarian theory,

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[92] *Ibid.* at 12.

[93] Berne Convention for the Protection of Literary and Artistic Works, 9th September 1886, 826 U.N.T.S. 221, online: WIPO Homepage <http://www.wipo.org/eng/iplex/wo_ber0_.htm> (last modified: 15 October 2001). Article 1 and the Preamble, respectively.

which seeks an economic balance between needs for invention and creation, on one hand, and needs for diffusion and access, on the other. It is rather built upon the natural right view, which assigns ownership of mental creations to their inventors under the precept that failure to do so constitutes theft of the fruits of their genius. It advocates reward *per se*, independently of any thoughts about the incentive effects or economic costs and benefits of regulation. There is nothing said in the convention about competition, and nothing more specific about any relation to a market than words about "normal exploitation" (as in Article 9) and wordings within the descriptions of rights and limitations such as "for teaching" or "public" about performances (as in Articles 10(2) and 11 respectively). Only exceptionally do we find, as in Article 14 *bis* (2), rules related directly to contracts, and then only for films.[94]

The sentiments underlying the Convention are echoed, on the European continent, in the decisions of the European Court of Justice. In the *Phil Collins* case, the Court acknowledged the importance of moral rights, stressing that these allow the authors to oppose any mutilation, deformation or other manipulation and alteration of their work which may be detrimental to their reputation.[95] In the *Magill* judgment, the court went

[94]This is not to say that the Convention is not concerned with public interest at all. The issue about free flow of information, as much as competition issues do not mix in, are handled within the detailed provisions of the Convention.

[95]Joined cases C-92/92 and C-326/92 (20.10.1993), *Phil Collins and Imtrat Handelsgesellschaft mbH und Patricia Im-und Export Verwaltungsgesellchaft mbH v. EMI Electrola GmbH*, GRUR Int. 1994, 53, paragraph 20. This decision is caused a landslide in international copyright law, because the ECJ ruled that copyright and related rights fall within the scope and application of the EC Treaty within the meaning of Article 7 (nowadays Art. 6), containing the principles of non-discrimination against Community nationals and also that this prohibition of discrimination may be directly invoked before national courts by an author or by an artist from another Member State in order to demand that they be accorded the same protection which used to be reserved to national authors and artists.

even further, holding that the essential function of copyright is to "protect the moral rights in the work and to ensure a reward for the creative effort."[96]

4. The recognition of authors' rights in international human rights instruments

The natural right view of an author's creativity finds recognition in two major international human rights instrument: the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESC). UDHR makes the following assertion in Article 27 (2): "Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is an author." Although the Universal Declaration has no binding force in a strictly legal sense, it certainly represents a high degree of moral authority. Article 27, in particular paragraph 2, was moreover almost literally incorporated into Art. 15 (1) of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations on December 16, 1966. As an international treaty subscribed by over 90 countries from all over the world-in particular a great number of European countries - this Covenant has legal force among its member states. The "protection of the moral and material interests" of authors of any scientific, literary or artistic productions or works, therefore, forms part of commonly accepted standards of human rights today. Viewed from this perspective, author's rights not only contain a human rights element: they are human rights themselves.

[96]Case T-69/89 (1991) 4 CMLR 5 in Karnell, *supra* note 70 at 59. The analysis of copyright's function by Ploman and Hamilton, *supra* note 15 at 178-9, also seems to imply that moral rights are among the most important goals of copyright; at the same time, the authors consider in detail an argument of S. Bryer that moral rights are insufficient to justify a system of copyright protection, as a whole.

Certainly, moral rights are not standard human rights. Their pure natural law character was to a certain extent compromised by the trade-offs between states, which were necessary for common-law and civil law countries to agree to a certain mutually acceptable standard that would form the basis of the Berne Convention. The rights in creative productions lay evidently some way below the hallowed ground of human rights universally acknowledged.[97] It is also clear that "chopping paintings is in fact different from chopping bodily parts"[98] with different social and legal responses on the part of international community. Yet the spirit of natural rights is retained and taken seriously in many European jurisdictions where author's rights are guaranteed constitutional protection and where an infringement of these rights may border upon the infringement of the constitution.[99]

5. The expansion of the 'natural law' aspect of copyright

Finally, there is an evidence that the 'natural right' aspect of copyright is rapidly expanding into jurisdictions which traditionally built their copyright laws on the economic model. The recent adoption of moral rights in the United Kingdom, New

[97]Cornish, *supra* note 28 at 2. There is also a certain paradox present in the formulation of artists' rights in the UDHR: while paragraph 2 stresses the rights of authors to the protection of moral and material interests resulting from their work, paragraph 1 declares the right of everyone to "freely participate in the culture of the community, to enjoy the arts and to share in scientific advancement and its benefits" – a goal that is frequently at odds with strong author's rights. This fact makes some denounce the declarations as mere masks to commercial reality. See Ploman and Hamilton, *supra* note 15 at 207.

[98]Vaver, *supra* note 57 at 286, arguing that to equate mutilation of art and literature with maiming is nothing but a picturesque metaphor.

[99]U. Loewenheim, *General Debate*, ALAI Documents 1993, *supra* note 70 at 87. Author's rights enjoy a special statutes for example, in Germany, Austria, Hungary, the Czech Republic and Slovakia, where the comprehensive copyright as a whole-thus not only *droit moral* as such – is inalienable *inter vivos*. Consequently, the author can only grant so-called concessions (licences) of rights to use a work. It can, however, be transmitted by inheritance to the legal successor of the author. See A. Dietz,: *"Legal Principles of Moral Rights (Civil Law)"* in the ALAI Documents, *supra* note 70 at 62. In the Czech Republic, however, a new Copyright Act is under way which will replace the current monistic conception of a unity of personal and material authors' right with a dualistic conception of independent personal and

Zealand, Australia and, to some limited extent, the United States, is a direct endorsement of the natural rights philosophy.[100] Indirectly, the 'natural right' influence can be traced in the fact that more and more common law copyright advocates lobby for an extension of the term of copyright to life plus 70 years, already accomplished in Germany and some other European countries. In the United States, the lobbying fell on fertile ground and on October 27, 1998, President Clinton signed the Sonny Bono Copyright Term Extension Act[101], lengthening the duration of copyright protection to life plus seventy years for individual authors and ninety-five years for works for hire. Such expansionism, as it was submitted above, is difficult to square with the 'economic' model of copyright, which justifies protection only insofar as it promotes social welfare by providing an incentive to create and/or distribute new works. It follows directly, however, from the 'natural law" model, in which copyright merely confirms a pre-existing entitlement.[102] This latter model, which for almost two centuries now dominates authors' rights discourse in Continental Europe, is now increasingly exerting a shaping pressure on the Anglo-American law of copyright. Because the extension of the term of copyright is largely viewed as necessary to keep up in international trade competition with the Europeans, it will be interesting to see how the United States will respond in the future if the EU decides to lengthen the term of copyright protection even further and at what point this "keeping up" rationale will have to cede to the limitations imposed by the U.S.

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material authors' rights. Despite this change, the right to protection of authorship remains a constitutionally protected right.

[100] See the UK 1988 Copyright, Designs and Patents Act, ss.77-89, New Zealand 1994 Copyright Act, ss. 94-110, Australian Copyright Amendment (Moral Rights) Act 2000, Schedule 1, and the Visual Artist Rights Act of 1990, 104 Stat. US 5128; 17 USC 10, Chapter 3, *infra* note 31.

[101] Sonny Bono Copyright Term Extension Act, 112 Stat. At 2827, discussed in I.S. Ayers, *"The Future Global Copyright Protection: Has Copyright Law Gone Too Far?"* (2000) 62 U. Pitts. L. Rev. 49.

[102] P. Jaszi in Jaszi & Woodmansee, *supra* note 3 at 5.

Constitution, whose Copyright Clause specifically grants the exclusive rights to authors for a "limited time".

6. Conclusion: the case for *droit d'auteur*

The concept of authorship, and its fruit, the doctrine of moral rights, face new challenges as we enter the new millennium. In this chapter, an attempt was made to build a case for moral right and to prove that moral rights have an enduring core of relevance and validity. It is submitted that despite the fact that the concept of authorship finds itself under permanent - and one might say increasing - attacks in the world of global economy and new technologies, the concept remains very deeply entrenched in modern copyright laws. It has accommodated to the challenges of new technology, such as photography, broadcasting or the invention of computer software. It served as a justification of the expansion of copyright protection to new kinds of works and it is invariably used to justify the extension of the term of copyright protection. Most importantly, the idea of individual authorship gave rise to the concept of moral rights. The latter doctrine is indispensable in modern copyright law, as it helps to rectify the increasing divide and imbalance between the rights of copyright owners (often large corporations), and the original creators. In addition, moral rights have an enduring core of validity as they fulfil an important public interest function. The doctrine has a great potential in the struggle against commodification of culture and cultural products. It can shape the attitude of the society towards its culture and promote social values which are associated with art and artists. Preservation of national cultural heritage is furthered by moral rights legislation. The right of integrity in particular and its public enforcement is an important tool of the

state's cultural policies in attaining this goal. Both the right of integrity and paternity, where implemented and enforceable, promote cultural diversity and serve as a bulwark against global homogenization of artistic and cultural expression, exercised by highly concentrated and converging entertainment and information industries. The protection of authorship via moral rights is a warrant of the authenticity of the work; it also promotes personal responsibility for the content of the work-a factor of great significance in the modern news production. The realities of the publishing market and the advance of new technologies make the adoption and effective enforcement of these rights even more urgent. If nothing else, moral rights are capable of altering the bargaining power between the authors and artists and those who exploit their works.

Finally, moral rights' enduring core of validity lies in their humanistic origins. The historical and social circumstances of their birth suggest a close link with the fundamental 'rights of man'. This perception of moral rights as natural rights of authors forms the background of the Berne Convention, the foremost international agreement on author's rights of world-wide application to this day. The understanding of the natural right character of author's rights and of their primary function within copyright is moreover being endorsed by the decision of the European Court of Justice. Above all, the natural right character of author's rights finds recognition in two major international human rights instruments: the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights. On this basis, many jurisdictions afford author's rights constitutional protection.

At the same time, a critical look at the justifications underlying the moral right doctrine reveals its shortcomings. The concept is clearly a product of very specific historical and

social circumstances and such as does not always reflect the realities of the artistic and copyright progress. The concept of authors' rights, with its emphasis on individuality, formality and minimal originality disfavours for example traditional folkloric production, collaborative and polyvocal writings or the most innovative forms of artistic expression.[103] Having this in mind, it can be argued that this concept, the heritage of French and German judicial doctrines of the 19th century, no longer reflects the reality and should be discarded as such. Certainly, our copyright system does not exist in a vacuum but in a concrete social, cultural and economic milieu. Such as, it should be vigilant to reflect the context in which it finds itself and consider the impacts on the contemporary and constantly evolving ways of cultural expression.

From a practical point of view, it can be argued that the capacity of authors to control the uses of their works once the economic rights are assigned is drastically reduced when it comes to digital storage and manipulation with these works. The viability of the moral rights concept comes under threat with the growing ease with which works can be altered in the digital era. Hence, one may question whether we should strengthen moral rights in order to bounce off at least some of the impacts of digitalisation, or whether the diminished ability of authors to control the fate of their works should be accepted as an inevitable reality which we have to concede to and which justifies the disposing of the moral rights doctrine altogether.

Even the strongest argument for moral rights, i.e. its indisputable role in protecting society's interests in preserving the integrity of its culture shows certain flaws under a scrutiny. While this is by far one of the strongest justifications for moral rights, deploying "private" moral rights of authors and creators in the battle for the preservation of the

[103]For a very opposing view, see footnote 23.

country's cultural heritage is but one way of achieving this overall public interest. There is also the sensitive question of moral rights being potentially misused as a strategy of the state's affirmative culture; as a legal construct which could be employed in promulgating particular political values and practices.

Despite these shortcomings, the doctrine of moral rights, is experiencing a revival in national laws of many countries and it has recently found a place in the copyright legislation of several common law countries which previously resisted the pervasion of any 'natural right' notion into their copyright laws. This is an unmistakable sign that author's rights have a strong legitimacy for the copyright of the 21st century.

Chapter 2

Moral rights and the TRIPs Agreement

The Uruguay round of GATT multilateral trade negotiation in 1994 resulted in an agreement to regulate and protect trade-related aspects of intellectual property rights (IPRs). This landmark agreement, TRIPs[1], brought the whole of intellectual property into the trade regime overseen by the new World Trade Organization. With the introduction of TRIPs, the entire international system of intellectual property rights, including copyright, is now in a new stage of development. The TRIPs surpasses the pre-existing, WIPO-administered international intellectual property protection standard in many respects. For the first time, copyright and other IPRs are being linked with trade and, to some extent, technology. The major shift that the TRIPs Agreement represents, however, is the move to a more effective and stringent dispute resolution and enforcement mechanism for intellectual property within the organisational structure of the WTO. It is for this reason that this agreement is being hailed as the "most significant development in international intellectual property law in this century".[2] Given the fact that joining the WTO automatically involves accession to the TRIPs Agreement, the scope of the new intellectual property governance is widened considerably.

Yet, this new regime does not satisfactorily resolve one of the most outstanding issues in copyright - the protection of author's moral rights. While the general climate concerning the protection of moral rights is clearly changing in a positive direction in the last decade

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[1] *Agreement on Trade-Related Aspects of Intellectual Property Rights,* Annex 1C to the Agreement Establishing the World Trade Organization, 15 April 1994, 33I.L.M.1197 (entered into force 1 January 1996), online: WTO Homepage <http://wto.org/wto/legal/finalact.htm> (last modified: 26 July 2001).

[2] M. Blakeney, *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (London: Sweet & Maxwell, 1996) at *v*.

or so, resulting in a recent statutory recognition of this doctrine in several common law countries, the practical exclusion of moral rights from the scope of the TRIPs Agreement (and thus, their exclusion from the enforcement and dispute resolution mechanisms) obscures the importance and the status of moral rights in international copyright. Since the TRIPS Agreement requires the members to accede to the material standard of the Berne convention except for moral rights, the exclusion of moral rights seems to be the single defining feature of the new copyright regime. This outcome is particularly worrisome in the light of the fact that copyright law is the only branch of intellectual property that has retained some ability to ensure that the use of a copyrighted knowledge object accords with the intent of the creator. This ability, maintained through the moral rights doctrine, is now endangered under the TRIPs Agreement.

A. Exclusion of moral rights from TRIPs

The TRIPs agreement is significant in the unprecedented extension it represents for the rights of the owners of IPRs, at the detriment of the original creators. If there was any doubt that the TRIPs Agreement is about ownership rather than creation, it is crucial to note that though moral rights were widely recognized in a large number of jurisdictions in continental Europe[3] and their adoption was under way in several other (common law)

[3]In the EC system it may well be that the essential function of copyright are the rights of the authors. The E.C. Draft of the TRIPs Agreement proposed adoption of all Berne Convention rights without qualification. The European Commission acknowledged in its Follow-Up to the Green Paper on Copyright and Neighbouring Rights that "copyright included entitlement of an economic nature and entitlements of a moral nature and that "moral rights spring from he fact that the work is a reflection of the personality of the author". See *EC, Communication from the Commission: Follow-Up to the Green Paper, Working Programme of the Commission in the Field of Copyright and Neighbouring Rights*, COM (90) 584 final [hereinafter *Communication 584*], online: The European Union On-Line <http://www.europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&Dosld=105548> (date accessed: 2 June 2001) at 34. See also the *Magill* decision, Chapter I at 34, where the European Court of Justice held that the essential function of copyright is to protect moral rights in the works and to ensure a reward for the creative effort.

jurisdictions at the time of the TRIPS negotiations, those rights are practically excluded from the ambit of the agreement. While Article 9 prescribes that members shall comply with Arts.1-21 and with the Appendix of the Berne Convention, as revised in 1971, it exempts the members from the compliance with the moral rights standard set by Berne.[4] The agreement does not mention the question of moral rights directly; it alludes to them in Article 9 which notes that "members shall not have rights or obligations under this agreement in respect of the rights conferred under Article 6*bis* of the [Berne] Convention or of the rights derived therefrom" (i.e. the moral rights clause). Thus, it does not actually preclude the recognition of moral rights; it only notes that these rights are not conferred by the TRIPs Agreement itself. In essence, this means that those member states that do acknowledge moral rights obligations in their own legislation are not absolved from exercising them; TRIPS does not relieve them of those obligations. At first blush this seems to indicate that moral rights may still gain a wide exposure as an area of freedom and flexibility for those countries which traditionally do have or are willing to adopt protection for moral rights, and that it allows them to modify their scope in a "Berne-plus"[5] fashion, should they wish to do so. This presumption is rendered invalid by another provision of the TRIPs Agreement which requires that no protection of rights

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[4]See Art. 9 (1) of the TRIPs Agreement, *supra* note 1. The creation of the 'TRIPs-Berne' arrangement also raises the questions as to the compatibility of the two instruments, each of them grounded in a different philosophy. While the Berne Convention is clearly an artist-centred piece of legislation, with the emphasis on author's natural rights in creation, the TRIPs Agreement is free of any such notion and is a clear endorsement of the copyright economics favouring the owner of IPRs.
Note also that the WIPO Copyright Treaty, adopted by the Diplomatic Conference in Geneva on December 20, 1996, online: WIPO Homepage <http://www.wipo.int/treaties/ip/copyright/index.htm>(last modified: 15 October 2001), provides in a language similar to the TRIPs Agreement that contracting parties are to comply with Articles 1 to 21 and the Appendix of the Berne Convention. Unlike the TRIPs Agreement, however, the WIPO Treaty does not exclude Article 6*bis* of the Convention from this obligation. Thus each state bound by the WIPO Copyright Treaty is bound to provide protection of the moral rights as provided in Article 6*bis*, even if such state is not a member of the Berne Convention.

over and above the minimum laid down in the agreement should conflict with the rights held to constitute the minimum.[6] The retention of moral rights by the creator of the particular intellectual property after its economic rights have been transferred enables the creator to retain some control of the future use of his work. The TRIPs Agreement, however, favours the holder of the transferred rights over the moral right of the creator and therefore if such matter were to come to a dispute, the moral right would be identified as an impediment to the rights of the current owner. In other words, "the rights of knowledge capitalists (and owners) are favoured over the rights of knowledge producers."[7] Although alone amongst all the countries involved in its opposition, the United States managed to have moral rights excluded from the TRIPs agreement, thereby marking a great victory for U.S. entertainment industries and rights owners.[8]

One of the main reasons for dissatisfaction among countries with the pre-TRIPs IPRs regimes is believed to be the lack of effective enforcement and dispute resolution procedures under the Berne and the Universal Copyright Convention. With TRIPs, the United States in particular hoped that these contentious issues could be dealt with through

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[5]The terms "Berne-plus" and "Berne-minus" is used by C. M. Correa in *"TRIPs Agreement: Copyright and Related Rights"* (1994) 25 I.I.C. 543 at 544.

[6]Art. 8 of the TRIPs Agreement, *supra* note 1. This article sets out the provisions for protection against the abuse of intellectual property rights by right holders. However, it contains an important limitation: any measures taken by members states always have to be consistent with the provisions of the TRIPs agreement. This limitation will in many cases renders the option provided for by Art. 8 illusionary.

[7]C. May, *A Global Political Economy of Intellectual Property Rights* (London: Routledge, 2000) at 73.

[8]S. Fraser in *"Berne, CFTA, NAFTA & GATT: The Implications of Copyright Droit Moral and Cultural Exemptions in International Trade Law"* (1996) 18 Hastings Comm/Ent L.J. 287 at 314. Fraser blames the competitiveness of American entertainment industries in the international mass-media market as a factor determining U.S. policy on moral rights. Similarly, A. A. Caviedes in *"International Copyright Law: Should The European Union Dictate Its Development?"* (1998) 16 Boston U. Int'l. L. J. 165 at 200 maintains that the weight of copyright development within the common law countries combined with the political power of those countries that would face the most loss, namely film and music producers, proved to be too great an obstacle for the moral rights provisions. See also May, *supra* note 7 at 80-82, who criticizes the unprecedented level of U.S. "knowledge-utilising" industry lobbying in the GATT negotiations.

GATT. [9] Countries had every reason to complain: as all multilateral treaties on authors' rights abided by the principle of national treatment, the level of protection the work could be expected to maintain usually depended on the country where the protected work was located. This explains, for example, why some cases brought under moral rights principles in the United States have been lost, but have been won in a different country. Yet, although the Berne Convention abides by the principle of national treatment, it also provides for certain minima by which Union members must abide. One such example is the minimalist moral right clause in Article 6*bis*. However, when countries did not abide by the minima, the administrative agent (WIPO) of the Convention, being toothless, could not effectively obtain compliance. This unsatisfactory situation was to a great extent taken care of by the TRIPs Agreement: by providing for dispute resolution procedure within GATT, namely Articles XXII and XXIII, there now exists an effective forum to resolve potential disputes – all except for moral rights disputes. Such a half-hearted result hardly fits with the overall objective of TRIPs to provide a harmonized legal framework for one single intellectual property regime as a part of a trade regime[10], since certain type of disputes with potential negative consequences for international trade will be left out from the TRIPs' mechanisms. The prominent intercontinental moral rights disputes of the past and the threat of a new wave of disputes arising from the uses of digital technologies, which increase the ease of dissemination and infringement, prove that such scenario should be taken seriously.[11]

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[9]Fraser, *supra* note 8, *ibid.*

[10]The preamble to the TRIPs Agreement, *supra* note 1, states that the signatories desired "to reduce distortions and impediments to international trade...and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade...".

B. Need for one single harmonized regime

As national barriers disappear, distinctions between national systems become anomalous and the need to adopt common approaches increases. The problems posed by globalization and the current technological developments require internationally unified, harmonized solutions. Bringing intellectual property, and in particular copyright, into the realm of world trade hails a new era of regulating IPRs, which requires clear and equal standards of protection. The importance of the TRIPs accord is enormous: currently there are about 142 signatories to the TRIPs Agreement with some dozen further prospective members hoping to join.[12] Moreover, joining the WTO automatically involves accession to the TRIPs agreement. This means an unprecedented degree of exposure for the TRIPs-based copyright in virtually all parts of the world.[13] In this sense, TRIPs becomes the new Magna Charta of intellectual property. Failing to effectively address moral rights is a failure to address one of the most significant issues in copyright, considered by many jurisdictions the very core of any copyright and endowed with constitutional protection similar to the one guaranteed to human rights. One can argue that it is too late to achieve a compromise on the protection of moral rights because the original division in legal thought occurred so long ago.[14] Yet, the exclusion of moral rights from the new international IP regime seems almost anomalous now that jurisdictions all around the globe are accepting moral rights as an indispensable part of their copyright laws and are

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[11]See the John Huston's colorization saga or the Shostakovich case, *infra* note 16.

[12]See <http://www.wto.org/english/thewto_e/whatis_e.htm>. The data are as of July 26, 2001. (The site has not been updated since, however, at the time of writing of this Chapter, the long awaited accession of China to the WTO was approved on November 10, 2001, with a formal entry anticipated in mid December.)

[13]The WIPO-administered treaties were traditionally under-subscribed. Although their subscription has increased significantly in the past decade, the majority of agreements overseen by WIPO, with the exception of the Paris and the Berne Convention, have on average between 20-50 signatories. See May, *supra* note 7 at 68 and <www.wipo.org/treaties/general/parties.html#1>.

ready to face its implications. Achieving a common international standard on moral rights would not be easy even at this stage of development, given the divergence in approach between common law and civil law countries. Finding a compromise now at this junction, however, may in fact be the least painful measure in the face of future inter-continental disputes over authors' rights.

C. Moral rights: trade-related or barriers to trade?

The most common argument put forward to justify the exclusion of moral rights from the TRIPs ambit is branding moral rights as "non trade-related".[15] Yet, the distinction made this way by the TRIPs Agreement between what is and what is not trade-related seems rather arbitrary. It is hard not to see the link of moral rights and trade-two landmark intercontinental moral rights disputes show that moral rights and trade go hand in hand. Both the *John Huston* case and *Shostakovich* case[16] illustrate that insisting on moral rights in one country and not recognizing moral rights in other country can amount to a trade barrier, a "third generation" trade barrier.[17] The uncertainty about the scope of

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[14] See Caviedes, *supra* note 8 at 200.

[15] See, for example May, *supra* note 7 at 77-78.

[16] See *Asphalt Jungle,* Cass. Civ. I, May 28, 1991, (1991) 149 R.I.D.A. 197 and *Shostakovich v. Twentieth Century Fox Film Corp.*, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd,* 87 N.Y.S.2d 430 (App.Div. 1949), discussed in G. Dworkin, *"The Moral Right of the Author: Moral Rights and the Common Law Countries"* (1995) 19 Colum.-VLA J.L. & Arts 229 at 237. In the first case, the heirs of director and filmmaker John Huston won an injunction in France halting the broadcast of a colorized version of his black and white classic "Asphalt Jungle", while failing to secure such protection in the United States. In the Shostakovich case, the plaintiffs, a number of renowned Soviet composers, were unable to convince a US court that the use of their musical compositions, adapted to a film which portrayed the Soviet Union on a negative light, created harm cognisable under moral rights. However, they were successful in obtaining an injunction in France. Thus, in both cases, the plaintiffs' moral rights claims were rejected and relief denied by U.S. courts, while in France, where stronger protection to moral rights is accorded, they both obtained satisfaction - on the same facts.

[17] An expression used by T. Cottier, ALAI Study Days: *"Economy and authors' rights in the international conventions",* Geneva, 1994 (ALAI Switzerland, 1994) [hereinafter ALAI Documents 94] at 76. For example, by not adhering to the Berne Convention in full, and by ignoring rights recognised in most other nations, the United States continues to leave the door open for other nations to refuse American initiatives to improve international protection for American authors. See M. B. Gunlicks, *"A Balance of Interests: The*

moral rights protection for works that circulate the globe may again, in the future, lead to lengthy, international litigation or even prevent someone from distributing his work in a country where there are no guarantees that his work will not be distorted. Similarly, varying waiver regimes with regard to moral rights might prove detrimental to international trade with cultural products. In the international exploitation of, for instance, audiovisual works problems might arise as between jurisdictions where a certain contractual freedom is admitted and where contracts may modify or even override moral rights and others where that is not the case.

To assert trade-relatedness of some intellectual property and non trade-relatedness of other intellectual property thus seems to serve only as a claim for those rights to be legitimately included within or excluded from the legal structure governing the world trade.[18] The orthodox designation of moral rights as purely non-economic and thus non-trade-related is flawed; it seems to be based on terminological convenience rather than the reality and to ignore the economic considerations inherent in moral rights. Although the interests protected by moral right doctrine are primarily 'personality' interests, they can also have a distinctly commercial character. The right to be acknowledged is clearly vital for an author professionally working in the copyright field, for whom the attribution of his name serves to procure new business to him. The attribution right is thus inextricably linked with the increase of his revenues. Similarly, the right of integrity is important particularly for freelanced contractors whose livelihood depends on the continuous, unmutilated existence of their works. Insisting on the integrity of their works

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Concordance of Copyright Law and Moral Rights in the Worldwide Economy" (2001) 11 Fordham Intell. Prop., Media & Ent. L. J. 601 at 605-6.

[18]May, *supra* note 7 at 77-78, maintains that the importance of the term 'trade-related' is that it makes explicit the central concern of the negotiators from the developed states: the need to legislate for an

is done primarily or at least complementarily in view of their saleability. The implementation of moral rights might be explained by the necessity to protect the market value of existing works and the 'reputational externalities' of artists.[19] But whether economic considerations or a purely "moral" outrage of the author at the way his or her work is being treated (as was the case of Mr. Shostakovich) is at stake, the result might be the same: the lack of recognition or unenforceability of moral rights in certain jurisdictions may eventually have the negative consequence of inhibiting distribution of works of art and culture in such countries or, as we have seen, give rise to lengthy and costly litigation with an unpredictable outcome.

One has nevertheless also to consider an argument whether the existence of moral rights per se is not a factor that might contribute to stifling international trade. First, it may be argued that the successful invoking of moral rights – such as in the case of colorization of black and white films, of commercial breaks in film broadcast on television- can generate restrictions on the economic use of works already made public. Second, it is the gospel of free trade which seems to be at odds with the notion of moral rights. There is an undisputed tendency in international relations to promote free movement of economic goods. In the European Union free movement of goods and services is at the core of the Treaty of Rome which established the European Community common market. Cyberspace and the new information superhighway it presents will provide the stimulus for expansive economic growth and create new markets for information industries. In this context, the mere existence of moral rights that brings about the liability for modification,

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economically valued knowledge as a commodity. May asks a question whether 'trade-related IPRs" is better or even different term to "IPRs" and concludes that IPRs are always trade-related.

[19]See H. Hansmann & M. Santilli, *"'Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis"* (1997) 26 Journal of Legal Studies 95 at 102-105. The authors suggest that the right of

both real and digital, of works may disrupt the free flow of goods, services and information within the information/entertainment industry. This is traditionally the position of US entertainment industry whose representatives oppose moral rights because they perceive them as barriers to the free movement of entertainment products. Large investment in film production and distribution is encouraged by reduced barriers to trade in entertainment "because of the certainty that the [product] will be able to move freely and flexibly throughout the marketplace, without any interruption in marketing sequence."[20] The fact that there has been comparatively greater commercial success in the creative industries in common law countries where moral rights are weak seems to prove the point.[21]

Yet, while a certain tension between author's rights and the policy to encourage free flow of expressive materials is undeniable, it seems that it is the disparity in national treatment of moral rights - rather than the mere existence of those rights - that is capable of inhibiting the distributability of works and suppressing the incentives required to fuel the flow of new products in both the traditional and interactive environment. Finding a way to overcome this disparity may be the key to the solution of the problem. This view has been recently adopted, at least to some extent, by the European Commission, which on several occasions addressed the question of harmonisation of moral rights throughout the

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integrity serves, in important part, to protect not just artists' personal feelings about their creations but, in addition, their reputational interests - interests that have a strongly pecuniary character.

[20] J. Valenti quoted in T.E. Nielander, *"Reflections on a Gossamer Thread in the World Wide Web: Claims for Protection of the Droit Moral right of Integrity in Digitally Distributed Works of Authorship"* (1997) 20 Hastings Comm/Ent. L.J. 59 at 96-7.

[21] K. Acheson & C. Maule, *"Current Copyright Issues with an International Aspect – Moral Rights, Copyright and Related Rights: The International dimension"* (1994) 19: 3-4 Canadian Journal of Communication, online: Canadian Journal of Communication <http://cjc-online.ca> (last modified: 18 May 1995). The authors note that the moral right "flexible" environment provided by contractual protection of creator's rights have contributed to success in the U.K. and the U.S. as compared to the continental countries. This assertion, however, is buttressed by the fact that a great deal of creative talent flows into London and Hollywood. *Ibid.*

Community. In 1992, the Commission held a hearing in the European Community to determine whether moral rights created any significant barriers to trade. In its 1995 Green Paper on Copyright, the Commission noted that

> "In an interactive environment such as that of the information society, where it will be very easy to modify and adapt existing works, one vital consideration will be the author's moral rights, including the right to object to any unauthorized modification of his work and to claim the right of author's paternity. These rights are handled very differently in different legal systems, and give rise to serious controversy."[22]

At that time, however, the Commission determined that "moral rights did not pose any real problem as far as the Single Market was concerned."[23] Nevertheless, the Commission has decided to re-open the question:

> "Differences in the level of protection in the Community are gaining Single Market relevance in the Information Society. Digitalisation and interactivity, by its very nature, will lead to substantial increase in alterations of works and other protected matter, which will also affect moral rights. As these works will, as a general rule, be destined for community wide exploitation, differences between Member States' legislation in the fields of moral rights may lead to significant

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[22] *EU Green Paper on Copyright and Related Rights in the Information Society* COM (95) 382, online: The European Union On-Line <http://europa.eu.int/comm/off/green/index_en.htm>(date accessed:2 June 2001).

[23] *EC, Communication From the European Commission: Follow-up to the Green paper on Copyright and Related Rights in the Information Society*, COM (96) 586 final (20.11.1996) at 28 [hereinafter Communication 586], online: The European Union On-Line <http://europa.eu.int/ISPO/infosoc/legrec/docs/com96586.html> (date accessed: 2 June 2001). This allegation, however, received an energetic response, *inter alia*, form the National Union of Journalists. See M. Holderness, *"Moral rights and Authors' Rights: The Keys to the Information Age"*, Refereed article (1998) 1 JILT online: Journal of Information Law and Technology <http://elj.warwick.ac.uk/jilt/infosoc/98_1hold/> (last modified: 27 February 1998).

barriers to their exploitation, notably in the field of multimedia products and services."[24]

The conclusion of the follow-up to the Green Paper was thus that the issue of moral rights, particularly in the digital context, would have to be watched closely. The Commission proposed to study the issues to determine if disparities in national laws create significant obstacles for the exploitation of protected subject matter in the Information Society, which might require action at the Community level, most notably with respect to integrity of such protected matter. It seems though that in order to persuade the Commission that harmonisation is both desirable and necessary, cases where the exploitation of works is hampered by different terms of moral rights protection may need to be found. The basis for such cases certainly exists in principle; authors may be unwilling for their works to be distributed in a country where arbitrary changes may be made to their works.[25] Not only authors, but also publishers and producers in the mainstream continental countries have a strong argument that for example the United Kingdom and Ireland at present constitute an offshore zone with weak moral right standard to their economic detriment.[26]

Although there has not been yet a case before the ECJ where the lack of moral rights in one European country has hampered the free flow of goods and services, in the international context, the cases of the Russian composer Shostakovich and John Huston's *Asphalt Jungle* prove that such litigation with a potential impact on trade and unrestricted, smooth distribution of works is not merely an imaginary construct, but a real

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[24] *Ibid.*

[25] Holderness, *supra* note 22 para 5, gives the example of French director Bernard Tavernier, who insists that his films be transmitted without commercial breaks; his power to enforce this stipulation in his home country is based on a human right, but in the UK, for example, would depend solely on economic clout.

threat. The Commission was aware of such threat and noted disputes in national courts, particularly involving cinematographic works.[27] Its decision to reopen the study of whether the disparity in the moral rights treatment poses a barrier to the Community Single Market illustrates the growing importance of this policy concern.[28] This conclusion applies not only in the EU context, but also in an international context, in the light of what was said about the growing world - wide trend to promote free movement of goods and services. The realities of Internet, digital distribution and interactivity only underscore the need to overcome the disparities in national laws and to establish a workable international regime.

D. The future for moral rights after TRIPs

The exclusion of moral rights from the TRIPs Agreement is frequently being played down as a merely 'political issue' and the focus on the absence of moral rights as "overstating the minimum, the smallest part of the TRIPs Agreement and through that overstatement overshadowing its value."[29] Yet, the downplaying of moral rights by the TRIPs accord is a reason for concern. The uncertain final effect of the de facto exclusion and the precarious situation in which authors now are placed are not a question of

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[26]*Ibid.*

[27]Communication 584, *supra* note 3 at 34-35.

[28]Up to this date, however, the European institutions failed to incorporate moral rights into its law. The latest EU initiative in the field of copyright, the *EC Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, online: The European Union On-Line <http://www.europa.eu.in/eur-lex/en/lif/dat/2001/en_301L0029.html> (date accessed: 7 September 2001), expressly excludes moral rights from its scope. It comes as rather disappointing that the Directive, which strengthens greatly the protection of the copyright owners, publishers and producers in the digital environment, pays no attention to the plight of the original creators. The tendency of the EU to constantly avoid the issue of authors' rights has generated a criticism among legal scholars who labelled this approach as "authors' rights without authors". See H.C. Jehoram, *"European Copyright Law - Ever More Horizontal"* (2001) 32:5 I.I.C. 532 at 536.

[29]E. Simon, ALAI Documents 94, *supra* note 17 at 72.

"religious debates", but a question of social justice.[30] The agreement aims to produce a singular globalized conception of the legitimate protection of intellectual property through harmonisation of the effects of diverse legislation across members of the WTO.[31] Excluding moral rights from the scope of what is a "legitimate protection" may be detrimental to the status of moral rights internationally. As A. Dietz expressed it:

> "At least psychologically we face the situation that the most modern and the most important and comprehensive text of intellectual property in the future expressly excludes "rights or obligations" concerning moral rights and this is a very doubtful result indeed. At the same time the new instruments for strengthening protection in the framework of dispute settlement and enforcement, which make the TRIPs Agreement so strong and attractive, of course, will not be available for moral rights. From a very pessimistic point of view this could, therefore, appeal as a final stroke to the protection of moral rights."[32]

The situation for moral rights seems to be even aggravated by the tendencies to reduce, by the application of the conflict of law rules[33], even more the position of the authors in those countries where special protective and binding rules help to establish certain equilibrium between the creators and the copyright owners.

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[30]A. Dietz, *"Copyright in the Modern Technological World: A Mere Industrial Property Right?"* (1991) 9 J. Copr. Soc'y 83 at 86. Dietz advocates a new, more balanced and socially just relationship between creative people and powerful producers when it comes to bargaining power and the share in the profits of the cultural industries.

[31]May, *supra* note 7 at 85.

[32]A. Dietz, ALAI Documents 94, *supra* note 17 at 76.

[33]*Ibid.* However, the situation may change rapidly when it comes to moral rights infringements committed in cyberspace. The Berne Convention provides for the general choice of law principle that the law of the country where protection is sought governs claims sounding in copyright and moral rights (Art. 5). However, the permeability of the Internet makes it somewhat difficult to pinpoint when and where a work has been digitally made accessible or modified. As a result, the laws of almost 100 countries have potential application to infringement claims and there are concerns that a country with the broadest possible protection for moral rights may serve as a magnet for claims and that an extensive forum shopping will take place. See Nielander, *supra* note 19 at 88-94.

In summary, there is a non-negligible tendency in present law, regional and national, to sell out authors' rights. Yet, there is a hope for a less bleak future for moral rights. The opposition to moral rights by the US entertainment and other knowledge-utilising industries, the driving force behind the TRIPs, should not be taken for an ambivalence of the whole international community towards moral rights. In the same year that moral rights were set aside in the GATT framework, the Executive Committee of ALAI, an international organization representing authors and creators, adopted a resolution on moral rights which stressed the need to guarantee authors worldwide a truly effective status through the acknowledgement and protection of moral rights interests, invoking the Universal Declaration of Human Rights as the cornerstone of the protection.[34] Meanwhile, several common law countries amended their copyright legislation to expressly include moral rights, albeit in a somewhat restricted form. The recent statutory recognition of moral rights in the UK, New Zealand, Australia, India and even the United States, albeit just for a certain category of works, is an unmistakable sign that the quest for an effective and truly international moral rights standard need not, and should not, be given up. There is no doubt that establishing such regime will be a daunting task: consensus will have to be found with regard to controversial issues such as the scope of moral rights, the question of their waivability, the standard for defining damage to honour and reputation, and many other. One thing, however, is already clear: the efforts to establish a globally viable moral rights standard still occupy and shall continue to occupy a prominent position through international copyright debates. In the light of the recent developments in the field of moral rights, ignoring this issue or sweeping away the

[34] *Resolution on Moral Rights*, ALAI Executive Committee, January 29, 1994 in ALAI Congress: *"The Moral Right of the Author"*, Antwerp 1993 (Paris: ALAI 1994) [hereinafter ALAI Documents 93] at 560.

possibility of new negotiations would be obscuring the realities of moral rights' enduring and newly found legitimacy and validity.

With technological development and globalization, copyright is stepping into a new era of development. Consideration of problems on the international level and the creation of international standards involves an appreciation of both the common law and civil law systems, and a readiness to adopt harmonized solutions which will take the traditional approaches of these systems fully into account. It may well be that possible solutions will require conceptual work and bilateral negotiations between the United States and the European Union before the matter will again be ripe for multilateral negotiations within the WTO. [35] The need to bridge the existing differences between these two systems of protection of authors' rights stems from the reality which is surrounding us: the tendency towards uncontrolled dissemination of authors' works, and widespread and increasing disregard for authors' rights. This is especially so now in the era of modern technologies when the ease of the dissemination and modifications is such that the public begins to believe that the authors' works should circulate freely for everyone to use. Unity of concept in the two systems is essential for divided they will fall prey to forces of consumerism which ignore the interests of authors. The more the production and the distribution of works of literature and arts depend mainly on financial power, the more the quality of work production is reduced to the criteria of rentability. As one commentator pointed out, "I fear that only the money-making Hermes will arrive in the tomorrowland whereas the cultural creativity and production will be swept away in the air".[36] Yet, as the next Chapter will show, such grim predictions may not materialize after

[35]T. Cottier, ALAI Documents 94, *supra* note 17 at 21-22.
[36]M. Ficsor in ALAI Documents 93, *supra* note 32 at 4.

all as moral rights are on march in many countries which are in the forefront of cultural production. This gives us a hope that even if TRIPs should push aside Berne as the prominent copyright treaty, it will not push aside the agenda of moral rights.

Chapter 3

International moral rights in the 21st century: sites of consolidation

A. Introduction

The developments in the field of moral rights in the last decade bear the mark of two simultaneously occurring yet contradicting trends: first, the practical exclusion of moral rights from the ambit of the GATT administered TRIPs Agreement of 1994, and, against this background, a thrust of national copyright laws towards the protection of author's non-economic interests occurring in several jurisdictions world-wide. One possible explanation for the recent favourable legislative developments in the area of droit moral in common law jurisdictions is the proliferation, starting in the 1980's, of other legislation in support of artists' rights, particularly in the United States.[1] One may also speculate that the increased legislative activity in the fields of moral rights ensuing after the adoption of the TRIPs Agreement is to a big extent attributable to both the authors' growing awareness of the legal treatment accorded to their colleagues in civil law countries and the improved international exchange of artistic ideas, greatly facilitated by modern technology and the 'information highway' provide for by the Internet. Whatever the real motivation is, the recent legislative incorporation of moral rights into the copyright law of several Commonwealth common law jurisdictions strengthens the perspective that international copyright should encompass both economic and moral rights within a composite whole.

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[1]Significant state advances for the rights of fine artists in the United States included resale royalty statutes, e.g., Cal. Civ. Code § 986 (Deering Supp. 1981), protection for art in public buildings, e.g., Cal. Gov't Code §§ 15813-15813.8 (Deering Supp. 1981), and protection for the reproduction of limited edition prints, e.g., N. Y. Gen. Bus. Law art. 12 (h) (Mc Kinney supp. 1981). See K. Gantz, *"Protecting Artists' Moral*

In the light of such contrasting developments, one has to naturally ask what the current international standard for the protection of moral rights is. How did the countries, which incorporated moral rights into their legislation only recently, fulfil the obligation posed by the Berne Convention: did they favour a "Berne-plus" or a "Berne-minus" approach? What is the relevance of Article 6*bis* in the aftermath of TRIPs? Does this provision still represent a relevant standard, given its history of non-compliance[2] and the fact that the "state-of-the-art" in the field of copyright is now believed to be represented by the TRIPs accord, rather than the Berne convention?[3] The status of moral rights in international copyright is ultimately shaped by an evolving international consensus, as reflected in the activities of national legislators. Currently, however, the scope and interpretation of moral rights varies among common law and civil law jurisdictions: we have seen that harmonizing the law is not an easy task even within a regional context. However, the struggle to determine whose policies concerning intellectual property, including the question of the moral rights of authors, will dominate the international legal order, does not falter but is fierce as ever.

This chapter will therefore examine what the approach of states to the problem of moral rights is, what can potentially form the basis of a larger consensus and which issues

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Rights: A Critique of the California Art Preservation Act as a Model for Statutory Reform" (1981) 49 George Washington Law Review 873 at 877.

[2]The major shortcoming of the WIPO-administered treaties is the lack of effective enforcement mechanisms. Certain cases of non-compliance have become notorious in the history of the Convention, notably that of the common law countries' failure to protect moral rights to the extent required by Article 6*bis*. The Convention contains no provisions dealing expressly with the question of breach and has no formal sanctions that may be applied against defaulting countries. Moreover, national responses are deemed inadequate given the fact that governments determine their courses of action against a far wider background of considerations and may therefore be unprepared to press too hard for a solution because of the fear of an unwelcome response by an errant state in some other area. It was therefore hoped that the machinery of GATT would be utilised for the purpose of establishing an enforcement mechanism which all GATT members would be subjected to in case of non-compliance. See S. Ricketson, *The Berne Convention for the Protection of literary and Artistic Works* (London: Kluwer, 1987) at 827 and 829.

[3]See Chapter 2, p. 1.

remain beyond consolidation. The focus of the chapter is on the moral right of integrity, which is both the most important of the moral rights from a practical standpoint and the one that best illustrates the issues raised by moral rights in general; the paternity (attribution) right is not specifically dealt with in this chapter.[4] After a brief introduction to the field of moral rights in general, a comparative analysis of the integrity right provision will offer the reader an insight into how various jurisdictions, both civil and common law, deal with issues arising with respect to the integrity right. The jurisdictions chosen for this analysis were predominantly those of the United Kingdom, Canada and Australia (as representative of the common law position)[5] and France and Germany (as representative of the civil law). However, references to other jurisdictions are also included where the author deemed such reference relevant either as an illustration of a specific issue or as a support of a particular thesis.

B. Moral rights: beyond the minimalist concept

Moral rights can encompass a number of protections for authors, some of which are more and some of which are less widely recognized in national laws. The first question is thus, which rights could qualify as moral rights and be accepted such as internationally. Many civil law jurisdictions[6] recognize a wide range of moral rights, including, *inter alia*, the

[4]Thus, where a certain statement or conclusion applies to both the integrity and the paternity right, the term "moral right", as opposed to just "integrity right", is being used.

[5]For example, the position of New Zealand, referred to on several occasions, reflects to a great extent the statutory regulation of moral rights in the United Kingdom. The U.S. Visual Artists' Rights Act 1990 is referred to where the author finds it relevant; the exclusion of this act from a more detailed analysis is due to the fact that the United States have not yet adopted comprehensive moral rights legislation on a federal level; the VARA as well as state legislation recognizing moral rights has generally been confined to a circumscribed variety of tangible artefacts. India, which implemented moral rights legislation in 1994, is not included in the study.

[6]Notably, France is considered to be in the vanguard of protection of artists' rights. The French *droit d' auteur* is a concept so broad that French scholars dispute whether it really can be called a property right at

so-called right of divulgation (sometimes also referred to as a right of publication). This right enables the author to have complete authority over the decision to publish, sell, unveil, or by any means make his work public. It has received its most celebrated endorsement in the landmark case of *Whistler v. Eden* as early as in 1898 when the Paris Court of Appeal upheld that so long as artist was dissatisfied with his work, he could not be compelled to deliver it, despite contractual arrangements to the contrary. This decision reflects the deeply rooted French perception of the artist as an absolute master of the decision to disclose his work, even when the right of disclosure would impair contractual obligation. A divulgation right can also be found in Italian, Swiss, Spanish and German law and in the last two jurisdictions is autonomously granted to foreign authors,[7] independently of their situation under convention law – a feature that reflects the human right content of the divulgation right, for normal economic exploitation rights are usually made dependent on the existence of an obligation under bilateral or multilateral treaty.

There are many practical limitations to the exercise of a divulgation right in the legislation that provide such a right. These can be summarized as follows: first, such a right can seldom be asserted without indemnifying for another party's contract or property rights and, second, its application is often limited in certain cases, notably for cinematographic and collaborative works, where such a right would be highly impracticable.[8] Yet, this right has not gained international recognition and is unlikely to achieve such recognition in the future, clearly because, from the perspective of copyright jurisdiction, the inequities which the right to disclosure potentially creates are too great. It

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all. From the extensive literature on this topic, see R.J. DaSilva, *"Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States"* (1980) 28 Bull. Copr. Soc'y 1.

[7] A. Dietz, *"Legal Principles of Moral Rights (Civil Law)"*, General Report, ALAI Congress: *"The Moral Right of the Author"*, Antwerp, 1993 (ALAI Paris, 1994) [hereinafter ALAI Documents 1993] at 58-59.

is also possible to argue, however, that such a right is required to be protected, by implication. The basis for this argument can be found in the Berne Convention itself. Although it does not make any reference to a divulgation right, it contains provisions dealing with exceptions to copyright protection in Articles 10 and 10*bis*, which in essence are concerned with uses of works that are publicly disclosed. An implication can be thus drawn that corresponding exceptions should not be allowed in the case of unpublished works. The effect of this interpretation would be to grant, impliedly, protection to the right of the author to control the disclosure of his work to the world.[9]

Secondly, there is a substantial overlap between the right to disclosure and the economic right of distribution. This right (or, rather, several modes of this right) are protected by the Berne Convention[10] and in many Union countries it is either conferred by the law (e.g. in Germany) or through expansive judicial interpretations given to the right of reproduction (France and Belgium). In Canada, for example, the so-called first distribution right, i.e. the right to make copies of the work or a substantial part of it available to the public, is one of the economic rights expressly conferred on authors by the statute.[11] Many European Union States, as well as for example California or Chile, also allow artists to recapture a percentage of an art work's price on resale.[12] This aspect of a distribution (or, publication) right is sometimes called *droit de suite*, the resale right. While it is expressly provided for by the Berne Convention, there is a great deal of

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[8]This is the case for example in France. DaSilva, *supra* note 4 at 23.
[9]Ricketson, *supra* note 2 at 476.
[10]*Ibid.* at 403. The convention recognizes three modes of the distribution right: article 14(1), which confers a separate right of distribution with respect to cinematographic adaptations and reproductions; article 14ter, which contains an optional provision concerning the *droit de suite* in respect of original works of art and manuscripts of written works; and article 16 which provides for the seizure of infringing copies of works.
[11]Canadian Copyright Act, R.S.C. 1985, c. C-42 as am. in Consolidated Intellectual Property Statutes and Regulations 2000 (Scarborough, Ont.: Carswell 2000), ss. 3(1), 4(1) & 2.
[12]D. Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 122.

controversy surrounding this right and many jurisdictions opted not to incorporate this right into their legislation. Some scholars, recognizing the essentially "moral" origin of this right, consider it as a third category of *droit d'auteur*. International pressure is mounting to make this right more widespread. However, with the exception of the *droit de suite*, the problem with employing the distribution right in defence of authors' interest is that it is an economic right and as such can be exercised by the owner against the author's interests when, for example, the copyright has been assigned or has first vested in someone other than the author, for example his employer.

The rights to repent or withdraw a work made public seem less developed internationally and there is understandable amount of scepticism about their theoretical and practical foundations. They are officially recognized in France, Germany[13], Italy, and Spain but as they are rarely invoked, there is very little pertinent case law. Scholars and commentators frequently dispute the nature of the rights and parameters of their application; it is for example arguable that the *droit de retrait* and *droit de repentir* cease to exist once the property is alienated.[14] It is widely agreed, however, that the right to withdraw a work once finished or make changes to it can cause many practical difficulties, and place an unrealistic burden on publishers, distributors and lawful owners of the work in question. Not surprisingly, where such a right is provided for in national law, the law usually imposes extensive limitations on the exercise of the right and, as in the case of the divulgation right, the exercise of the right to withdraw or modify a finished work is

[13]In Germany, this right is entitled "the right of revocation by reason of change of conviction" and is regarded as a separate and specific type of moral right. S. 42 of the German Copyright Act 1965 (*Gesetz über Urheberrecht und Verwandte Schutzrechte*) per J.A.L. Sterling, *World Copyright Laws* (London: Sweet & Maxwell, 1998) at 287.

[14]For the position of various civil law jurists on this issue, see DaSilva, *supra* note 6 at 24.

subject to an obligation to indemnify the other party for both the actual loss and the profit missed.[15]

All the above characteristics of the right of divulgation and the right to withdraw/modify reveal that such rights not only can create an undue burden on contracting parties and their legal rights, but are largely illusionary due to the range of practical limitations imposed on them even in those jurisdiction that formally recognize them. Hence, these rights are of little pertinence in most modern copyright laws and certainly beyond a realistic (or even desirable) international standard. Our discussion will therefore be directed towards one of the two moral rights most widely recognized, which is part of the Berne Convention standard: the right of integrity.

C. The right of integrity under the Berne Convention

The legal foundation for the international protection of moral rights up to this date is Article 6*bis* of the Berne Convention on the Protection of Literary and Artistic Works. The right of integrity, which is thought to be the most important aspect of *droit moral*, is aimed at preventing unauthorized alterations and changes of the copyrighted work. In essence, the right of integrity gives artists continuing property rights in their work after its sale. The relevant part of Article 6*bis* stipulates that the author, independently of his economic rights and even after the transfer of the said rights,

> "shall have right to object any distortion, mutilation or other modification, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation."[16]

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[15] *Ibid.*

The scope of the obligation under this Article is hence potentially wide, as it covers both the changes to the actual work (i.e., distortion, mutilation or other modification) as well as the way the work is presented to the world (i.e., other derogatory action). This two-tier protection is important bearing in mind 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 it is given to it by the performers or in the way it is presented. The right is, however, not unconditional: the exercise of this right is dependent upon a proof of some identifiable injury to the author's honour or reputation. This proviso imposes an evidentiary burden on the author, requiring him to show that his honour or reputation has sustained damage. However, it is not clear whether the test should be a subjective or an objective one, and which criteria should be taken into account.

The general character of this provision and a certain degree of vagueness suggest that this provision was primarily designed to serve as a framework for national legislation[17] rather than an exhaustive substantive standard; it also illustrates that the final text of this provision was arrived at after long deliberation and presents a hard-fought compromise.[18] As a result, the Convention fails to satisfactorily resolve certain issues pertaining to moral right protection, leaving them to the laws of the respective member states dealing with their moral right obligation under Berne. The Convention makes no reference in respect of the means for fulfilling the obligations conferred by Art. 6*bis*, i.e., whether such protection has to be conferred within the sphere of copyright or whether it would suffice

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[16]Berne Convention for the Protection of Literary and Artistic Works, 9th September 1886, 826 U.N.T.S. 221, online: WIPO Homepage at <http://www.wipo.org/eng/iplex/wo_ber.htm> (last modified: 15 October 2001), Art 6*bis*.

[17]Interestingly, in Belgium the provisions of Art. 6*bis* are directly applied. Dietz, *supra* note 7 at 72.

if other areas of the domestic law in question provide for a materially similar protection. For instance, the Convention makes no reference in respect of whether the rights can be assigned and/or waived by the author- questions, as we will see, that are crucial for determining the actual scope of moral rights protection in practice. The article provides for the exercise of moral rights even after the author has parted with his economic rights; while this confirms the alleged independence of moral rights from their economic counterparts, this is not quite the same thing as providing that the former are inalienable. It does not indicate whether the exercise of the rights is absolute or whether it should be subject to some test of reasonableness or practicality;[19] neither does it give any guidelines whether the right of integrity also covers an outright destruction of the work.[20] Similarly, it is not clear whether "any action" in relation to the work encompasses the relocation of a work made for a particular place – an issue which has raised a substantial debate world-wide. The words "other derogatory treatment" and "prejudice to honour or reputation" imply a highly subjective standard, which does not receive further explanation or qualification. Finally, the question of remedies is fully left to the domestic laws of the member states.

Paragraph 2 of Article 6*bis* provides for a minimum period of protection for moral rights, which is equal to the term of protection for economic rights. The latter are protected, under Article 7, during the life of the author and at least 50 years after his death. This is again just a minimum standard of protection and member states may (and many do)

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[18]For the legislative history of Article 6*bis*, see Ricketson, *supra* note 2 at 456-467.
[19]A condition required by national legislation of, for example, Canada or Australia. See below at p. 85-87.
[20]Most likely, Art. 6*bis* will not be sufficient to protect literary and artistic works from outright destruction. This can be inferred from the intention expressed by the delegates to the Brussels Revision conference who generally did not consider destruction of the work to "relate to the author's moral interests." Ricketson, *supra* note 2 at 8.109.

choose to extend the term of protection for moral rights beyond the expiry of economic rights.

D. The right of integrity: in search for a standard

1. Scope

The first question goes logically to the scope of the right of integrity. The language of the Berne Convention is sometimes paralleled by the language found in the statutes of countries that recognize the right of integrity; sometimes, however, individual jurisdictions deviate from the Berne's phrasing in various ways that expand, contract or clarify its reach. On the one side of the scale there is the all-embracing French formulation of integrity as a general right of respect for both the author and his or her work. Article L.-121 of the French Intellectual Property Code provides that "author shall enjoy the right to respect for his name, his qualification and his work."[21] This famous French formulation thus embraces both the integrity of the work in the narrow sense (i.e. the right of an artist to preserve the work from any material alterations and mutilations) as well as the integrity of the creator, the respect for his name and his authorship. The right is formulated as an absolute one: there is no reference to prejudice to the author's honour or reputation in the French Code. The practical effect of this is, as the extensive case law demonstrates, that it is, as a general rule, to the opinion of the author that the court will pay heed in determining whether the right has been infringed, and the author does not have the burden of proving prejudice sustained to his honour or reputation.[22]

[21]Law on the Intellectual Property Code (Legislative Part) (No.92-597 of July 1, 1992), as amended, [hereinafter French Intellectual Property Code], Art. L.-121-1, per Sterling, *supra* note 13 at 284.
[22]*Ibid.* at 285.

The breadth of the French right of respect is vividly illustrated in French case law. In the now classic case of *Shostakovich*, French court granted the famous Soviet composer Shostakovich and three other eminent Soviet composers the right to prevent a filmmaker from using their music in an anti-Soviet espionage film, a claim previously rejected by US courts.[23] The plaintiffs successfully contended, *inter alia*, that the use of their music in a film which was so politically objectionable cast upon them a false imputation of disloyalty to their country. This, they claimed, not only constituted defamation but also violated their "moral right".[24] The broad basis for integrity infringement under French law certainly benefited Samuel Beckett who objected to his play *Waiting for Godot* being played by an entirely female cast. Despite the absence of any damage to an original, physical text or score, the author's moral rights were justified by the argument that from the point of view of the audience the work and the performance become one and the damage inflicted upon the work by a particular 'distorting' performance or interpretation may therefore be permanent.[25] The probably most extreme example of moral rights reach is the decision of another French court, which refused to permit the addition to a book of even a complimentary (!) preface on the integrity grounds.[26] This illustrates the fact that French law does not necessarily require a prejudicial derogatory action as a prerequisite of infringement of the work's integrity.

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[23]Compare *Soc.Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Americaine Twentieth Century*, Judgement of January 13, 1953 [1953] 1 Gaz. Pal. 191 [1954] D.A. with *Shostakovich et al. v. Twentieth Century Fox Film Corp.*, 80 N.Y.S. 2d 575 (Sup. Ct. 1948).

[24]While the New York Court paused to consider the issue, it was at loss to find any standard by which to test such a claim and the complaint was dismissed. The court held that "in the present state of our law, the very existence of such [moral] right is not clear". *Ibid.* at 579.

[25]See *TGI Paris 3e ch Oct 15, 1992*, 155 Revue Int'l du Droit d' Auteur (1993), cited in T. Cotter, *"Pragmatism, Economics and the Droit Moral"*(1997) 76 North Carolina Law Review 1, footnote 62.

[26]W. R. Cornish, *Intellectual Property,* 4th ed. (London: Sweet & Maxwell, 1999) at 393.

French copyright law is concerned with protecting the work from conception to final solution. Contrary to pre-existing contractual arrangements, the right to respect was successfully invoked, for example, to refuse to supply an original[27] or to enforce a completion of an original to the author's design.[28] But nowhere was the breadth of the right to respect illustrated more strongly than in the case of *Gallimard v. Hamish Hamilton*[29] where this right was interpreted by French courts as to allow an artist or his representatives a right of action against excessive criticism. In what might be considered an extreme application of the integrity right even in terms of French jurisprudence, the court granted damages to the estate of Albert Camus against his publishers when its British sub-licensee extensively criticized the writer's personal integrity in one of its books. Although this may be rightly considered a rather isolated decision even in terms of the liberal French moral right jurisprudence, it nevertheless demonstrates the potential perils of the integrity right in France where the protection extends to the personal integrity of its author in unprecedented terms. In this respect, the French version of the right to integrity has broader cultural and social implications than its counterparts in other civilian jurisdictions. It also inevitably raises a question as to whether it is appropriate and desirable for copyright law - a property law in essence - to act as substitute for the defamation torts in protecting one's personal integrity, let alone any consideration of free speech or legal justice.

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[27]In an early case in France, James McNeill Whistler was held entitled not to deliver a portrait with which he was dissatisfied to its commissioner, even though he had exhibited it. See *Eden v. Whistler* D.P. 1900 I 497, discussed in Cornish, *supra* note 26 at 394.

[28]A case when courts have ordered the commissioner of a space sculpture and the commissioner of a television series to complete work on the author's design or script, once execution has begun. See *Renault v. Dubuffet* [1983] E.C.C. 453 and *Affair TF1*, 116 R.I.D.A. 1983 (Apr.) 172, respectively.

[29]*Gallimard v. Hamish Hamilton* [1985] E.C.C. 574..

The breadth of the integrity right in France is unique in worldwide terms.[30] Most jurisdictions currently favour a more "modest" scope of integrity right, which is to a greater or lesser extent aligned with the standard set out in Article 6*bis*, i.e. integrity restricted to the concept of an objectionable treatment, subject to the test of some identifiable prejudice. Common law jurisdictions in particular seem to prefer a concept of integrity right, based on a narrowly defined definition of derogatory treatment. The respective provisions of the British CDPA, the New Zealand Copyright Act and the most recent Australian moral right amendment to the Copyright Act all take as a starting point a statement that authors have the right "not to have [their] works subjected to a derogatory treatment".[31] This is then followed by a statutory definition of what constitutes a derogatory treatment. The definition contained in the British CDPA is the narrowest one, restricting 'treatment' to "addition or alteration to, deletion from or adaptation of a work", which, in turn, is deemed derogatory if it amounts to "distortion or mutilation of the work is otherwise prejudicial to the honour or reputation of the author or director."[32] The definition of derogatory treatment in the New Zealand Copyright Act is identical.[33] The problem with such a narrow definition is that it practically excludes other

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[30]The jurisprudence of the French courts, ever innovative, has always been exploring the possibility of according the authors as wide a protection as possible. Ricketson, *supra* note 2 at 458.

[31]U.K. Copyright, Designs and Patents Act 1988 as amended (U.K.), 1988, c.48, section 80(1), in A. Christie & S. Gare, *Blackstone's Statutes on Intellectual Property*, 5th ed. (London: Blackstone Press Limited, 1999) [hereinafter U.K. CDPA 1988], Australian Copyright Amendment (Moral Rights) Act 2000, No. 159, Schedule 1-Moral rights of authors, ss. 195 AI and 195 AJ, online: Australian Legal Information Institute <http://www.austlii.edu.au/sgibin/disp.pl/au/legis/> (date accessed: 1 July 2001) [hereinafter Australian Copyright Act 2000], and New Zealand Copyright Act 1994, no. 143, s. 98 and 99, online: The Knowledge Basket (New Zealand's Research Archive) <http://rangi.knowledgebasket.co.nz/gpacts/public/text/1994/an/143html> (last modified: 24 July 2000) [hereinafter New Zealand Copyright Act 1994].

[32]U.K. CDPA 1988, *ibid.* s. 80(2).

[33]New Zealand Copyright Act 1994, *supra* note 31, s. 98-99. This Act is almost entirely based upon the British 1988 CDPA. See P. Brudenall, *"The Australian Copyright Amendemnt Bill: a Report"*, Commentary (1997) 2 JILT, online: Journal of Information Law and Technology <http://elj.warwick.ac.uk/jilt/copyright/97_2brud/> (last modified: 30 July 1997).

actions, potentially derogatory, which do not fall within the definition of 'treatment'. So, for example, it may not be an infraction of this right to place a work in a context which subjects it to criticism or ridicule (e.g. if an artist work is exhibited among works of much higher quality to demonstrate the inferiority of the work in question, or vice versa- a work (or a reproduction thereof) of a famous author exhibited in a department store's window display)[34]; neither would it prevent the presentation of work in objectionable form or in objectionable circumstances. It would certainly not give an author a cause of action if his publisher also published a piece of critical piece of him or his work; but then we agreed that the law ought not to subject a publisher to a special degree of dependence beyond the need to observe the law of defamation.[35] On the other hand, artists like Michael Snow might not have been able to object to the hanging of Christmas decoration on his work had he only had such a narrow provision for derogatory treatment in his disposal. Such and similar actions would, on the contrary, be actionable under Canadian or Australian moral right provisions, which more faithfully follow the language of the Berne Convention.

Australian legislators proved particularly meticulous when it comes to defining derogatory treatment, providing for three separate, although very similar, definitions of derogatory treatment for three different categories of work: literary, dramatic and musical (s. 195AJ), artistic (s.195AK) and a specific definition for derogatory treatment of cinematograph films. These definitions distinguish between "material distortion of,

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[34]See *Bernard-Rousseau c. Societe des Galeries Lafayette* (March 13, 1973, Tribunal de grand instance de Paris, 3e ch. 13) cited in R. D. Gibbens, *"The Moral Rights of Artists and the Copyright Act Amendments"* (1989) 15 Can. Bus. L. J. 441 at 452-3. In this case, Rousseau's granddaughter sought to restrain the Paris department store Lafayette from using reproductions of her grandfather paintings as a window display. The court found that the use of the paintings in this manner harmed Rousseau's reputation and violated his moral right.

[35]Above at p. 12. See also Cornish, *supra* note 26 at 393.

mutilation of, or alteration to the work in a way prejudicial to the creator' s honour pr reputation, and "doing of anything else in relation to the work that is prejudicial to the author's honour or reputation". This extremely broad let out clause comes as rather surprising from a common law camp and, presumably, would extend even to those cases covered by the French right of respect (including excessive criticism on the part of publishers) which otherwise fall short of requirements of derogatory treatment modelled upon Article 6*bis* of Berne. In addition, the definition of derogatory treatment in relation to artistic works under Australian law specifically encompasses "an exhibition in public of the work that is prejudicial to the author honour or reputation because of the manner or place in which the exhibition occurs", thereby explicitly addressing the situation described above when a work is exhibited in an unsavoury or unflattering context. The fact that this qualification was explicitly added to the definition of derogatory treatment of artistic works also suggests that the let out clause (the doing of "anything else in relation to the work that is prejudicial...") was intended to cover a much broader range of potential objectionable treatments than merely a placement of the work in a prejudicial setting, which is separately provided for. Thus, for example, subjecting a work to ridicule other than by public exhibition or using a work in order to promote a dubious cause would all be easily accommodated within the meaning of the clause.

The Canadian provision, while it is far more restricted than its Australian counterpart (and even Article 6*bis* itself) in that it does not have any such let out clause, nevertheless takes into account circumstances when the work is prejudiced without suffering from material distortion or mutilation but where derogatory treatment takes the form of an objectionable use of the work. Section 28.2 (1)(b) is concerned with the prejudicial

impact on the artist's reputation caused by the use of the work in association with a product, service, cause or institution. Probably the most typical example that comes to mind would be the use of an artist's work, name or image in advertising or in promoting causes or institutions of which the author disapproves of or which he finds offensive and distasteful. Thus, for example, using the lyrics of a song as advertising gimmick for Nike or similar commodities (instead, let us say, an anti-drug campaign) would infringe moral rights under this provision. One may also speculate that had this provision been in force in 1978, a plaintiff, known for his political activism regarding the separation of Quebec whose song had been reproduced by the record producer in an incomplete manner so that this version was in fact representing Canadian unity, would have certainly won his moral rights lawsuit.[36] Political involvement of the author appears to be an important element to be taken account of under this provision. In such case, authors and composers with claims similar to the one of the Soviet composer Shostakovich would have a ground for their action under this provision. Again, here we enter an area of copyright law which borders on and to a certain extent overlaps with the protection of rights in personalities.[37]

a. The requirement of identifiable prejudice

The common denominator of all integrity right provisions is the requirement of some identifiable prejudice; the only exception in this respect is France, where moral rights are conceived as discretionary rights, the exercise of which must not be justified in detail –

[36]See *Le Nordet Inc. v. 82558 Canada Ltée*, [1978] Que. S. C. 904.
[37]R. G. Howell, L. Vincent & M. D. Manson, *Intellectual Property Law. Cases and Materials.* (Toronto: Edmond Montgomery Publications Limited, 1999) at 390. Thus, one may argue that such rights can be vindicated through, for example, defamation law instead.

apart from cases of apparent misuse.[38] The requirement of prejudice appears to be the most problematic part of the integrity provision. First, the question is what is the prejudice measured against. The Berne Convention speaks in Art. 6*bis* of prejudice to the author's honour or reputation. This formulation is a result of a compromise as common law countries repeatedly sought to avoid reference to any wider concept, such as 'the spiritual' or 'moral interests of the author'. Honour and reputation seemed to be more objective concepts, being analogous to the kind of personal interests which are protected by actions for defamation.[39] It was thought that prejudice to the author's moral or spiritual interests' would raise more subjective issues, as the author himself will inevitably be the best judge of what affects him in relation to his work.[40] Nonetheless, even the words "honour and reputation" are highly subjective. For example, it raises a question of the scope of honour and reputation: does it refer only to the honour or reputation of the author as an author, or more generally, to his or her honour or reputation as a man or woman? This distinction may be crucial in cases like the previously mentioned case of Albert Camus; it is also conceivable that certain distortions, such as faulty reproductions or typographical errors and similar errors which indicate a poor writing style will be damaging to the author's reputation as an author, but not his reputation as a person. Other changes, which misrepresent an author's opinion and

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[38]A. Dietz, *"The Artist's Right of Integrity Under Copyright Law – A Comparative Approach"*, (1994) 25 I.I.C. 179 at 183. Even in France, an author cannot make unreasonable demands based solely on his moral rights. See for example *Lichtenstein v. KS Visions*, Cass.civ. 1 re, Mar. 19, 1996, 1996 Bull. Civ. I, No. 137, in M. B. Gunlicks, *"A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy"* (2001) 11 Fordham Intell. Prop., Media & Ent. L. J. 601 at 639, footnote 232. In this case, a contract determined that the work in question should be tailored to the custom and usage of the medium. The author created a work substantially longer than specified and refused to shorten the work based on her moral right to integrity. The publisher made a good faith effort to market the work, but could not. The court then held that the author could not demand specific performance of the contract.
[39]Ricketson, *supra* note 2 at 471.
[40]*Ibid.*

beliefs, may not be damaging to the reputation of the author as an author, but may shed a negative light on the author's personality, if, for example the author supports some extreme opinions or ideology. Or, conversely, one cannot rule out that in some circumstances, certain misrepresentations of an author's stance might even falsely enhance the author's standing, at least among a section of the general public. In the report of the *rapporteur général* of the 1971 Brussels Conference, we read that " ...the author should be protected as a writer just as much as in his capacity as a personality on the literary scene." This, according to the *rapporteur général*, can be implied from the clause in Art. 6*bis* that the author may object "to any other [prejudicial] derogatory action": in the *rapporteur*'s view, this implies any action likely to be prejudicial to the man (emphasis added), as a result of his work. [41] However, this assertion is of little assistance in determining the test for prejudice. Would not it be more practicable then to measure the criterion of prejudice against the author's moral interests in the work? Such broad qualification, however, is rarely found in the integrity right clause; Germany being an exception. Here, the integrity right - the right of an author to forbid degradation (*Entstellung*) of his work is conditioned by proof of prejudice to the "lawful intellectual or personal interests in his work".[42] But the German law also provides that the author is bound by good faith to accept necessary alterations.[43] The terms used in the German provision on the right to integrity - "justified interests", "good faith", "necessary alterations", "interests of others" - clarify that the author's 'lawful interests'are indeed limited. Moreover, the custom and usage of the respective industry must also be taken

[41]Ricketson, *supra* note 2 at 471.
[42]German Copyright Act 1965, *supra* note 13, sec. 14.
[43]*Ibid.*, sec. 39 (2).

into account when assessing an alleged harm to those interests.[44] All these factors thus restrict the seemingly broad qualification of the interests protected by the integrity provision.

The overwhelming majority of jurisdictions faithfully follow Art.6*bis* in that it requires an identifiable proof to either the author's honour or reputation. One may thus conclude that the international standard departs from the 'ideal' absolute and discretionary character of integrity represented in the French law or from the all-embracing clause of vague "moral and spiritual interests" of an author. Yet, the Berne Convention, while it purports to set out a reasonable and desirable standard of prejudice, fails to provide further guidance as to what qualifies as an objectionable distortion of artist's work and what falls outside such definition. It does not give any guidance what test should be employed in balancing the interest of the author and the interests of the alleged infringer. It appears that the test, which is by its nature eminently subjective, may include some objective criteria.[45] The practice and case law throughout jurisdictions has already imposed many differentiating criteria, such as the nature and the purpose of the work (i.e. whether the work is predominantly artistic or utilitarian), or the nature and extent of the mutilation and how far the latter is irreversible.[46] The extent of exposure, i.e. the size of the intended audience, would certainly be one consideration. The status of the author, i.e. whether the author created the work in an employment relationship or as a self-employed person or whether a commissioning party had a decisive influence on the final result of

[44]Gunlicks, *supra* note 38 at 642.

[45]In the high-profile Canadian moral right case of *Michael Snow v. The Eaton Centre, Ltd* (1982) 70 CPR (2d) 105 (Ont. HC), O' Brien J considered the requirement of prejudice of the honour or reputation of the author to be interpreted to "involve a certain subjective element or judgement on the part of the author so long as it is reasonably arrived at." However, in yet another Canadian case, *Prise de parole Inc. v. Guérin, éditeur Ltée* (1995), 66 CPR (3D) 257 (FCTD), Denault J expressly modified this to include "an objective evaluation of the prejudice based on public or expert opinion."

the creation will undoubtedly play an important role, too. Finally, the courts always tend to take into consideration the possible consequences for the professional life of the author.[47]

A question of some importance which has been raised in relation to the requirement of prejudice in Art. 6*bis* is whether it applies to each of the different acts listed in para (1), or only to one or some of them.[48] One possible interpretation of this article (insisted on by some to be the intention of the drafters of the Rome Conference in 1920, when this provision was introduced for the first time) is that the requirement of prejudice is applicable only in the case of "other modifications", while any distortion or mutilation was, of itself, sufficient to violate the right of integrity. In other words, only when "other modifications" were in question had the courts to satisfy themselves on the question of prejudice. Although there was some support for this view,[49] the majority opinion of commentators is convinced that it is unlikely such distinction could have been intended in view of the fact that the main objective of pro-moral rights delegates at the Conference was to arrive at formulation that would be acceptable to the common law countries.[50] However, the minority view is for example reflected in Canadian law, which exempts certain categories of works from the requirement of prejudice. The so-called 'fine arts' exception of the Canadian Copyright Act does not require a proof of prejudice where a painting, sculpture, or engraving is distorted, mutilated, or otherwise modified – in such cases, prejudice is deemed to have occurred and the court is not required to make an

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[46]See Dietz, *supra* note 38 at 183-185.
[47]*Ibid.*
[48]Ricketson, *supra* note 2 at 472.
[49]The distinguished French commentator Prof. Desbois argued that otherwise the question of whether a brutal mutilation was an infringement would be left "to the tyranny of public opinion". H. Desbois, *Le droit d'auteur* (1st ed., 1950), Nos 571 and 572, cited in Ricketson, *ibid.*
[50]*Ibid.*

aesthetic judgement as to whether the artist's reputation has been harmed.[51] This provision reflects a public interest in the preservation of fine arts, over and above any private interest in reputation or personality.[52] However, it appears logical that this "deeming" presents only a rebuttable presumption since not every single act of modification of a work will necessarily be an objectionable modification that debases the work; one has to take into account the value of artistic freedom in creativity and the interest in proliferation of new artistic, musical and literary trends, which often build upon the existing art: if the right to integrity were absolute, we would never have parody and pastiche, postmodernist and post-structuralist art, jazz, techno, rap or hip-hop.[53] An artist's natural sensitivity should not interfere with the sort of experimentation that is the hallmark of much artistic progress; as D. Vaver pointed out, "the reputation of both Leonardo da Vinci and the Mona Lisa remains intact, despite Marcel Duchamp's representation of her with an added moustache and goatee, and our understanding of art is enriched by the implications of Duchamp's iconoclasm."[54] It is also noteworthy that the debate over limiting the requirement of prejudice still lingers in Canada.[55]

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[51]Canadian Copyright Act, *supra* note 11, s.28.2 (2).

[52]However, if this presumption is correct and this provision reflects a public interest in the preservation of fine arts then it seems rather perverse to simultaneously countenance within the same provision the destruction of fine art.

[53]For a detailed discussion on how the classical copyright doctrine has penalized the most innovative artists in blues, jazz and rock, see K. J. Greene, *"Copyright, Culture & Black Music: A Legacy of Unequal Protection"* (1999) 21 Hastings Comm/Ent L.J. 339 at 382-383.

[54]Vaver, *supra* note 12 at 162. The reference here is to the moustached Mona Lisa reproduction (entitled "L.H.O.O.Q") by Marcel Duchamp (1887-1968), the founder of the post-World War I artistic movement of Dadaism, which, in part, stood as for anti-art and was a reaction to the senseless destruction caused by the war. See G. J. Yonover, *"The "Dissing" of Da Vinci: the Imaginary Case of Leonardo v. Duchamp: Moral Rights, parody, and Fair Use"* (1995) 29 Val. L. Rev. 935 at 937, 942 and 967. Even today, Mona Lisa remains to be perhaps the most reproduced image in all art: *"The Mona Mailart Show"*, online: Geocities (Smallville Funny Farm & Tabloid Trash) <http://www. geocities.com/SoHo/7022/monasho3.htm> (last modified: 12 November 1996), depicting digitally manipulated e-mail postcards of distorted images of Mona Lisa, illustrates exceedingly well the perils the right of integrity is exposed to in a cyberspace.

[55]See the text accompanying note 56.

There is another remarkable feature which is common to both Canadian and Australian moral rights provisions: in an apparent attempt to strike down vexatious claims (enough has been said about the natural oversensitivity of an author), both laws subject finding infringement to an additional test of reasonableness. While in Canada such test was conceived in the course of judicial interpretation[56], Australian legislators opted for an express statutory formulation and have tackled this task in a very meticulous and precise manner. S. 195AS of the Australian Copyright Act stipulates that the moral right of integrity is not infringed if derogatory treatment or other action was "reasonable in all the circumstances". The criteria to be taken into account in determining the reasonableness of such action include the nature of the work, the purpose for which the work is used (i.e., the utilitarian or aesthetic quality of the work), the manner and the context in which the work is used, any practice in the relevant industry as well as any practice contained in a voluntary code of practice in the relevant industry. Whether the work was made in the course of employment or under contract for the performance of services for another person is also to be considered. Finally, the courts will be looking at whether the treatment was required by law or was otherwise necessary to avoid a breach of another law. If the work has two or more authors, the views of both of them will be taken into account. In the case of a cinematograph film, an additional criterion will be whether the primary purpose for which the film was made was for exhibition at cinemas, for broadcasting by television or for some other use. It is evident that these criteria overlap to a large extent with those developed by the judiciary for assessing prejudice except that

[56]See N. Tamaro, *The 2001 Annotated Copyright Act* (Toronto: Carswell, 2001) at 333, referring to the requirement of the 'reasonable nature of the author's claim' discussed by De Grandpré J in *Céjibé communications inc. v. Construction Cleary (1992) inc.* (15 septembre 1998), no. C.S. Longueil 505-05-000511-953 (C.S. Qué).

the latter are more detailed and systematically classified. The wording of the section also suggests that this list is not meant to be exhaustive. This can also be inferred, albeit indirectly, from a clause in paragraph 4 of the section, which deals with derogatory infringing actions in form of reproducing, publishing, performing, transmitting and making adaptations of a work. Paragraph 4 stipulates that a person who does any of these acts in respect of a work that has been subjected to derogatory treatment does not, by doing that act, infringe the author's integrity right if he establishes that it was reasonable in *all the circumstances* to do that act (emphasis added).

The public interest dictates the necessity to balance the test for infringement with the eminently subjective criteria of prejudice or reasonableness: what it seeks is an appropriate balance between public uses of the work on the one hand, and the interests of the artists on the other. By permitting some, 'reasonable' or 'non-prejudicial' modifications, the law avoids the creation of unjust and burdensome constraints on the use of works already in the public domain. This aspect resurfaces as particularly topical in the age of the Internet and digitalization, when the ease of manipulation with copyright works is unprecedented; the test of prejudice to the honour or reputation of the author as well as the test of 'reasonableness' are crucial to achieving the balance between public uses of digital products and technology and an artist's interest in the integrity of his work.[57] Yet, it is not always clear where precisely the desirable balance lies; in Canada, a debate ensued recently as to what interests in fact the prejudice requirement protects: a parliamentary subcommittee considering the aspects of copyright in the information age considered the interest to be protected by this presumption "was the need that the *history*

of art be preserved"[58] (emphasis in original). Accordingly, the subcommittee recommended that the presumption of prejudice should be limited to an original work-not to alterations or modifications made to a copy, whether digital or otherwise – a recommendation that has not been realized thus far.

Finding a reasonable and enforceable standard for the right of integrity is a daunting task as the standards seem to vary greatly throughout jurisdictions. Yet a careful examination reveals that a common pattern is palpable: a standard of a broadly defined derogatory action prejudicial to the artist' s honour or reputation, measured against both subjective and objective criteria. The French model, while it at first sight offers the most comprehensive protection that goes well beyond what the Berne Convention requires, is neither desirable not workable as an international standard: it is too burdensome in that it is capable of unjustly curtailing the legal rights of lawful copyright owners, licensees or public users of the author's work. It represents a very rare approach to the protection of author's interests in the integrity of their works, and it appears that its conception and development was conditioned and shaped by historical forces peculiar to France. It purports to protect values otherwise protected by the rights in personality, namely defamation laws. In this respect, the scope of the right to respect as formulated in French copyright law and theory, is unique. Moreover, it is hard to establish to which extent the

[57]See R. G. Howell, *"Canada Report"*, in M. Dellebeke, ed., *Copyright in Cyberspace: Copyright and the Global Information Infrastructure*, ALAI Study Days, Amsterdam, 4-8 June 1996 (Amsterdam: Otto Cramwinckel, 1997) at 269.
[58]See Information Highway Advisory Council Secretariat, *Copyright and the Information Highway: Final Report of the Copyright Sub-Committee* (Ottawa: March 1995).

right is in fact enforced in France and to which extent this 'ideal' model of protection is merely illusionary.[59]

While the French version of integrity seems too extreme to find any broader acceptance internationally, it is acknowledged that the right of integrity has to be capable of encompassing a broad range of objectionable treatments, especially with regard to the treatment in digital environment, whose potential we cannot fully assess yet. It does not suffice to define a derogatory treatment in terms of material 'alteration'. In this respect, the English, and its corollary, the New Zealand model seem too narrow and incapable of capturing the range of potential infringing actions that can be committed with respect to a work.

A let-out clause such as the one adopted in Australian law might seem too broad and uncertain, yet it seems to be the best solution available. Such clause ensures that, for example, inappropriate adaptations of a work or the presentation of a serious work of art in a manner which derides the author or his known views, as well as the reproduction of artistic material in association with a 'low' cause will be captured. It is based on a realistic assumption that it is impossible to predict (and thus enumerate for) all the ways in which a work and its author's honour or reputation can be distorted. Canada and Australia could in this respect serve as a bridge between common law and civil law, because their respective courts (in Canada) and legislators (in Australia) have apparently been willing to look to civil law jurisdiction when considering the scope of the integrity right. The test of reasonableness and practicality as exercised in Canada and as adopted in Australia, together with the widely accepted test of prejudice measured against both

[59]DaSilva, *supra* note 6 at 12, for example, asserts that as idealistic as the statute may seem, in practice the scope of the rights has proved to be far more limited, due to numerous exceptions.

objective and subjective criteria, seem to provide for the necessary counterbalance against vexatious claims of oversensitive artists. Ideally, such balance should be established by judicial review on an *ad hoc* basis rather than by less flexible statutory means; the statutory criteria for reasonableness or, potentially, prejudice, should only serve as a guideline.

2. Destruction

There has been uncertainty in national laws as to whether destruction of a work violates the author's right of integrity. The Berne Convention is silent on this issue.[60] Yet, the question whether a total destruction of a work amounts to integrity infringement is of a crucial importance for original works of art. The problem of destruction also highlights some of the conflicting interests affected by the integrity right. In general, one would presume that artists would prefer not to have their work destroyed, even after they have sold the work. Besides the personal loss that the author may feel at an act of destruction, it also has consequences for the general public as it becomes impossible to determine the accuracy of any copies of the work that remain. The first conclusion is thus that both the author and the public at large are best served by preservation of the work. Moreover, viewed from a pecuniary point of view, an artist's work often serves as an advertisement for the others, and its merits also tend to be reflected positively, by association, in the

[60]The question of destruction was specifically raised at the Brussels Revision Conference. While destruction was not eventually included in the list of acts prejudicial to the author's honour or reputation, the matter was referred to in one of the *voeux* adopted at the end of the Conference. This reads as follows: "Notwithstanding that article 6bis of the Convention, while it allows the author to object to any distortion, mutilation or other modification of his work, or to any other derogatory action in relation to the same work which is prejudicial to his honour or reputation, does not forbid in express terms the destruction of works, the Conference expresses the view that the countries of the Union should introduce, in their domestic legislation, some dispositions prohibiting the destruction of literary and artistic works." Ricketson, *supra* note 2 at 470.

value of the artist's other works. In this respect, a destruction of one of an artist's works may reduce the value of the others - including works not yet sold or even produced by the artist.[61] One can, however, also foresee a situation when the pecuniary interests of an artist might be better served by the destruction of some of his works: an economic analysis of the problem reveals that destruction of one of an artist's works increases the scarcity value of the others, and in this respect tends to increase their market value. [62] Another element here is the cost of preserving a work of art, which may render the preservation economically (and hence 'socially') inefficient. This consideration would then justify the preservation of only those works of art where the benefit of their preservation exceeds the costs of their preservation.[63] However, applying a purely economic rationale to the problem of destruction of artistic works is hardly tenable in the light of the predominantly non-pecuniary interests and values the right of integrity is designed to protect.

The law on this issue does not appear to be settled and is subject to ongoing academic discussion.[64] Even the courts in the most moral right-devout jurisdiction, France, held on

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[61]H. Hansmann & M. Santilli, *"Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis"* (1997) 26 The Journal of Legal Studies 95 at 111.

[62]*Ibid.* The authors characterise the scarcity value in the following manner: "Scarcity value here has two different components: First, there is the usual quantity/trade-off from conventional price theory: as supply is reduced for substitutable goods, the market price for those goods increases. Second, there is the possibility that works of art are a form of "collectable" good whose value to its owner derives in significant part simply from its scarcity - which is to say that the utility that a given painting yields to its possessor (and not just the price for which he can sell it) is inversely proportional to the number of other works of art similar to it that are in existence. If the paintings of a given painter exhibit the latter characteristic, then it is possible that, even if it were costless to preserve all of them, destruction of one of them would be socially efficient."

[63]*Ibid.* The authors argue that since in the vast majority of cases, the artist in question will never establish a reputation of any significance, and his work will never have a meaningful resale market, the costs of preserving his work could well exceed any modest reputational benefits that preservation would yield.

[64]A certain pioneer role is being played by Switzerland, whose Copyright Act of 1992 introduced an express provision against the destruction of protected works. Dietz, *supra* note 38 at 191. Similarly, Sec. 603 of the U.S. Visual Artists Rights Act 1990 [codified at 17 U.S.C.A. §106A, West Supp. 1992], online: Legal Information Institute <http://www.4law.cornell.edu/uscode/17/ch1.html> (last modified: 1 February

several occasions that the right to prevent alteration or mutilation of a work does not include a right to prevent complete demolition of it and denied relief to an artist whose work was destroyed by its owner.[65] Similarly, the issue remains unresolved in Germany and is vividly illustrated by a high-profile case involving a work of a famous artist Otto Herbert Hajek. While the court of first instance ordered the owner of a building to remove the distortion that had resulted from the partial removal of Hajek's work, the appeal court overturned this decision and held that full-destruction - even step by step- of the remaining parts of the artist's overall concept did not amount to distortion, since here the work of art no longer exists, and so the honour and reputation of the author can no longer be prejudiced.[66] The traditional position of common law countries is less ambiguous; in Canada, for example, not only do the art owners have no duty to preserve or restore inventory, but it is believed that total destruction does not violate moral rights.[67] As far as other common law countries are concerned, the US Visual Artists' Rights Act of 1990 presents a notable exception as it stipulates for a limited right against destruction of works of visual art. By contrast, destruction will most likely not be considered a derogatory treatment under the narrowly tailored provisions of the UK CDPA 1988 or the New Zealand Copyright Act 1994, although no relevant jurisprudence has developed yet in these countries.

2001) [hereinafter VARA 1990] amends the existing section 106 of the Copyright Act, 17 U.S.C., and provides for a limited right against destruction of works of visual art.

[65]See DaSilva, *supra* note 6 at 33. The author also gives an example of a court decision which, on the contrary, confirmed that a transferee of an art work has no right to destroy it, concluding that the law on this issue is more than ambiguous.

[66]*Decision of December 8, 1981*, 1982 Film und Recht (FuR) 510 and *Decision of August 3, 1982*, FuR 513 in Dietz, *supra* note 38 at 190-191. However, the elastic nature of the German Copyright Act indicates that an author can act against "willful" destruction of his work. Gunlicks, *supra* note 38 at 647.

[67]See *Gnass v. Cité d' Alma* (3 June 1977), (Que. C.A.) [unreported] [*Gnass*], discussed in D. Vaver, *"Authors' Moral Rights in Canada"* (1983) 14 I.I.C. 329 at 341 ff.

The finding that in most jurisdictions the total destruction of a work will most likely not breach the moral right of integrity seems difficult to reconcile with the core values protected by the integrity right - the preservation of culture and the history of art and the reputation of the author. It appears that the rationale for the distinction between destruction and mutilation is ironically being found in the social basis of moral rights, i.e., in the need of the creator for protection of his honour and reputation. The argument in such cases boils down to "out of sight, out of mind"; while it is presumed that to present to a public the artist's work deformed or mutilated is capable of harming his reputation, the destruction of the work does not have such result as the author's reputation cannot be damaged by something that the public cannot perceive. This is a very arguable conclusion as it may well be that the artist's reputation and honour, particularly in the case of a professional artist, depends in a certain way on the integral existence of his works of art, be it only in their capacity as reference works for other possible commissions. In this respect, destruction constitutes the ultimate form of mutilation.

A pioneer role in the field of the integrity right as far as a total destruction is concerned is being played by the U.S. Visual Artists Rights Act of 1990. This act, at least in its restricted field of application, grants the right to visual artists "to prevent any destruction of a work of recognized stature" whereby "any intentional or grossly negligent destruction of that work" is declared a violation of that right.[68] The integrity right, however, is limited only to works of "recognized stature". The law also deals with the preservation of architectural works. In accommodating the interests of owners of

[68]17 U.S.C. sec. 106A(a)(3)(B), *supra* note 64. In *Carter v. Helmsley - Spear Inc.*, 861 F. Supp.303 (SDNY.1994), 71 F. 3d 77 (2nd Cir. 1995), the court held that for the visual art to be of recognised stature, the stature must be recognised by art experts, other members of the artistic community, or by some cross section of society.

buildings incorporating murals and sculptures, the law establishes a dual regime, dividing building-incorporated artworks that cannot be removed from the buildings without causing "destruction, distortion, mutilation or other modification of the work," from incorporated artworks that can be removed without substantial damage. If the works fails in the first category, then a building owner who wishes to renovate or destroy the building (and hence damage and destroy the incorporated artworks), may do so without the artist's permission. However, if the artwork can be removed from the building, then an owner who wishes to renovate or destroy the building must notify the artists and him three months to remove the work, at the artist's cost. This division of building-incorporated artworks into removable works, to which integrity rights attach (but for whose exercise the artist must pay) and unremovable works, to which no integrity rights attach, seems to resolve the conflict between property rights in the building and moral rights in the work in the owner's favour and in effect prevents the artist from "holding the building hostage to the artworks."[69]

An innovative approach to destruction, which seems slightly more favourable to artists than the US legislation, can be found in the new Australian copyright legislation. Unlike many of its counterparts, Australian legislators did not seek to avoid the painful question of destruction but managed to establish a reasonable compromise between the interests of the author and those of the legal owner. The destruction of a moveable artistic work will qualify as infringement if the author or the person representing the author did not have a reasonable opportunity to remove the work from the place where it was situated. In case of the destruction of buildings, such destruction will not constitute infringement of an

[69]J. Ginsburg, *"Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990"* (1990) 14:4 Colum.-VLA J. L. & Arts 477 at 486.

artistic work that is affixed to or forms a part of the building in the following circumstances: first, if either the owner of the building, after making reasonable inquiries, cannot discover the identity and location of the author or a person representing him or, second, if the owner of the building does properly notify the author or a person representing the author within a prescribed period. The notice must inform the author or his representative about the intention to carry out destruction, allowing the author or his representative to seek access to the work for the purpose of making a record of it and/or consult in good faith with the owner about the demolition. If the owner of the building complies with all these requirements, the later destruction of the building is not considered a breach of the integrity right.

The provisions of the US VARA of 1990 and in particular the detailed rules concerning the destruction of works of art adopted in the Australian Copyright Act have to be applauded because they constitute first attempts to extend the right of integrity as to incorporate a right to prevent destruction. While the US provisions are somewhat overcautious in that they require that the interests of the creator eventually yield to the interests of the owners, its Australian counterparts seem to break a new ground in the understanding of destruction. Not only do the relevant provisions give some space to possible negotiations between the creator and the work owner; they are overall favourable to the artists because the statutory language suggests that destruction of a work is presumed a breach of the integrity right unless other statutory obligations are fulfilled, thereby shifting the burden of carrying out these obligations and the burden of proof that the requirements have been complied with upon the owner.

3. Site-specific art

An issue closely related to destruction of works of art is their relocation and/or the change of the environment in which they are located. The first situation has been known as the so-called "site-specific art", art that is designed for a particular architectural environment. While such works can be removed from their sites without damage to their physical integrity, the separation from the site may aesthetically 'destroy' them by eliminating their artistic and architectural context. The second situation has been at times referred to as "negative space" issue. The idea is that the artist's moral rights should extend beyond the work to include the surrounding environment as well and that as a result, not only should the work not be moved (as in the case of a site-specific art), but the surrounding environment also cannot be changed. What may seem as an extreme extension of artist's rights and an encroachment on the public domain and/or on others' property rights, is seen by others as a necessary protection of an artist's reputation, which could suffer if his artwork is exposed to the public in a fashion not envisioned by him and not authentic to his true intention. The idea of "negative space" is explained by T. Hoving, former director of the Metropolitan Museum of Art in New York, in the following terms:

> "A work of art only exists within a context, and what creates any work of art is the tension between the positive space - i.e., the objects, or the figure, and the negative space - i.e., the space surrounding the objects, or the ground. The concept is the same whether the work is on canvass or on the side of the building. This concept of positive and negative space is a central one in the history of art. For example, the use in ancient Chinese scroll paintings of blank areas of canvas

or paper to create an effect of clouds or mists predates Western art by thousands of years. Since the development of abstract art, the relationship between positive and negative space has become more complex and equivocal, but is no less central to the idea of artistic creation..." [70]

While this interpretation of negative space sounds perfectly reasonable and quite convincing from the artistic- aesthetic point of view, attaching to this notion of negative space protection under moral right law would in effect grant an unprecedented privilege to the author to control not only the uses of his work, but also the development of the surrounding environment. Such extended integrity right is bound to ultimately cut against the public interests.[71]

The Berne Convention is silent with respect to the question of relocation and site-specific works and only a relatively small number of jurisdictions adopted specific provisions that deal expressly with this issue. Under Canadian law, for example, the relocation of a work, the relocation of the physical means by which a work is exposed or the physical structure containing a work, as well as preservation efforts made in good faith, do not *by that act alone* (emphasis added) constitute a distortion.[72] In Canada thus, the right of owners of public artwork to relocate works to placate offended public sensibilities, at

[70]Affidavit of T. Hoving cited in Gibbens, *supra* note 34 at 457. Gibbens maintains that such extended protection would soon price these forms of art entirely out of existence.

[71]*Ibid.* Gibbens points out that such extended protection would soon price these forms of art entirely out of existence.

[72]Canadian Copyright Act, *supra* note 11, s.28.2 (3). This provision would seem to confirm a prior New Brunswick Court of Appeal decision, which upheld that Canadian copyright law does not prohibit alterations being made to an architectural work for reasons of public safety. Thus, in Canada, the extent of the protection accorded by the author's moral rights can vary depending on the type of work in question. See *John Maryon International Ltd. v. New Brunswick Telephone Co.* (1982), 141 D.L.R. (3d) 193 (N.B.C.A.).

least as long as the new site still allows some public showing, is confirmed by statute.[73] By contrast, the right of an artist to prevent a relocation of his work or even to object to changes made to the environment in which the work is placed is recognized in some continental European jurisdictions. A Dutch artist, for example, could convince a Dutch court that the intention of the Dutch community of Eijsden to construct a fountain next to his sculpture made some years before was an infringement of his moral right of integrity.[74] In the words of the judge, it was relevant to note that an artwork is not exclusively determined by its physical outer form, but also by the intention of its author; the judge expressed his belief that an artwork may take its meaning from the site for which it was made and from the manner in which it was placed on the site.[75]

Similarly, German jurisprudence recognises that an infringement of the author's right to integrity is also possible by simply placing the work in a prejudicial context without directly mutilating or otherwise changing the work as such.[76] Nevertheless, German copyright theory addresses the issue only in general terms and there is no fixed general rule to follow; as a result, every case will probably be decided on its own merits. This conclusion finds some support in a case decided by the Berlin Court of Appeal in 1991. This case, which very much reflects the actual political situation in Germany after reunification, involved a dispute over a statute of Lenin created by Russian sculptor Nikolaj Tomskij. The heirs of the sculptor tried to prevent the city authorities of Berlin from removing the Lenin monument situated in former East Berlin. Weighing the interests of both sides, the court concluded that it was no longer tolerable to keep Lenin's

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[73]Vaver, *supra* note 12 at 163. Referring to the previously mentioned case of *Gnass v. Cité d' Alma, supra* note 67, Vaver ironically observes that no attempt is made to reconcile the provisions on relocation with the outcome of *Gnass*, where public sculptures were 'relocated' at the bottom of a local river.

[74]*Decision of March 11, 1992*, 1992 Informatienrecht/AMI 152, cited in Dietz, *supra* note 38 at 192.

monument and that when the artist had executed the commission of the monument several years before, he should have been aware that he served "certain propagandistic purposes of hero veneration."[77]

Similarly, French law does not explicitly address the question of site-specific art. However, the breadth of the French right of respect and the existing case law indicate that an owner cannot remove or alter an immovable artwork attached to his premises without the consent of the author, especially if the public has access to the work.[78]

America had its own high-profile case concerning the relocation of a site-specific artwork in the case of Richard Serra's 'Tilted Arc'. This work, described on one occasion as "a large curved slash of rusting iron"[79] interrupting a plaza in front of the International Court of Trade in New York City, was intended to be a provocative piece of public art, but this provocation was so successful that the public demanded that the work be removed and the plaza restored. Despite the artist's claims that he had designed the work for that particular plaza, and that the work would lose its meaning in another site, Tilted Arc ultimately was removed.[80] This decision was delivered before the adoption of the VARA in 1990. Although the act does not specifically deal with site-specific art, it may have direct consequences for claims concerning such art. It has been previously noted that the Act makes a distinction between removable works, to which some integrity rights

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[75] *Ibid.*
[76] *Ibid.*
[77] *Ibid.* at 193.
[78] Gunlicks, *supra* note 38 at 647, citing *Les Compagnos de l'Art mural.*
[79] Ginsburg, *supra* note 69 at 486. The artist's own account of the incident is described in R. Serra, *"Tilted Arc Destroyed"* (1990) 14:2 Nova Law Review 385.
[80] *Ibid.*

attach,[81] and unremovable works, which fall outside the scope of any integrity claim. Consequently, were an author to insist that his work is so site-specific that its removal constitutes at least a spiritual "mutilation," the author would have no integrity claim, for the artists himself would himself have classed the work as "unremovable" in effect, and therefore outside the ambit of the integrity right. If, on the contrary, the artist acknowledged that the work could be removed, then at least he would be able to reclaim the work from the owner and prevent its destruction.[82] Hence, in practical terms, the rights of a visual artist under the VARA are substantially limited.

Australia is yet again in the vanguard of integrity right protection with its detailed provisions dealing with the relocation of artworks and site-specific art. Section 195AT (4A) and (4B) specifically deals with the removal or relocation of a moveable artistic work that is situated at a place that is accessible to the public, and was made for installation in that place. Removal or relocation of such work is not considered an infringement of the author's integrity right in respect of the work if the remover complies with certain prescribed requirements. Those are identical with the requirements imposed on a building owner who has an intention to make a change in, or the relocation, demolition or destruction of, a building of which another person's artistic work is a part or to which it is affixed. The remover (or the building owner) has an obligation to make reasonable inquiries into the identity and location of the author or his representatives to inform him about his intention. If those fail, a subsequent action undertaken by the remover (building owner) will not constitute the infringement of the artist's integrity

[81]As illustrated in *Carter v. Helmsley-Spears Inc.*, *supra* note 68, where the court held that the removal of a sculptural work that is incorporated in the lobby of an office building would violate the rights of the artist under the visual Artists Rights Act of 1990.
[82]*Ginsburg, supra* note 69 at 486.

right. If the author or his representative, however, are identified, the remover (building owner) has to serve them with a written notice within a prescribed time, informing them about the intention to carry out removal or relocation and give the author or his representative an opportunity to have access to the work. Once allowed access, the author of the work may either make a record of the work or consult in good faith with the remover (building owner) about the fate of his work, or both. Thus, the author is presented with an opportunity to save his work and reclaim it if he opposes its relocation and if the consultations with the remover or building owner fail; at the very least, he can make a record of the work before it is removed. This way, at least the history of art is preserved.[83] Alternatively, he may require that his identification as an author be removed from the work should it be removed or relocated. All these alternatives give him at least some say in and control over the fate of his work, while subtly balancing his interest and sensibilities with those of the larger public.

Opinions on one of the most important issues with respect to the scope of the integrity right such as the destruction and relocation of an artwork vary greatly. At one end of the spectrum, from the aesthetic point of view, relocation or destruction always constitutes an irreparable harm of the artist's moral interests in the work. This view justifies the express endorsement of artist's absolute right to control the integrity of his work even when this should encroach on the interests of the owner or the public. Needless to say, such a standpoint is problematic, not only because harm caused to the author by relocation and even destruction is very hard to measure or assess in legal terms. The uprooting of a site-specific art from its natural environment is certainly a sensitive thing from the point of

[83]See text accompanying note 56.

view of the artist's integrity right; however, the expropriation by the artist of the surrounding environment is equally discomforting. Another question is whether removal and relocation should have a different regime as destruction. One conclusion that can be drawn from our examination of different jurisdictions is that destruction and relocation are often treated differently, despite the fact that they both constitute one of the gravest forms of interference with the artist's artwork. Ironically, total destruction apparently continues to be less offensive than relocation or handing the work back to the artist. Australian legislation is an exception to this as it treats both the total destruction and the relocation as equally grave, outlining strict conditions that must be complied with in order for the work owner to demolish or relocate such work without risking to face an integrity infringement claim. In a very convincing manner, the law seeks to strike a balance between the private (author's) interests and those of the general public, while leaving enough space for the court's consideration of the particular circumstances of the case in question. Such a solution is the most realistic and practicable as it places the least burden on public interests.

In America, the drafters of the VARA opted for a solution based upon distinction between types of work, i.e. those removable and those that cannot be removed, and accorded a different level of protection to each category. This, in effect, provides for a less balanced outcome, which favours the rights of the owners over those of the creators. It also distinguishes between architectural works (which are accorded a privileged treatment) and other works of visual art. While the rationale behind this distinction is comprehensible, the provisions eventually work toward the detriment of authors of visual artwork, thereby rendering the protection, especially with respect to site-specific (i.e.,

"unremovable") artworks, merely illusionary. Whether this was an intention of the drafters or just an accidental outcome is unclear.

4. Duration of moral rights

An important element of moral right protection is their duration. The history of the Berne Convention reveals that this was one of the most debated issues in the process of the adoption and subsequent modifications of Article 6*bis*. Under para (2) of this article, moral rights should be protected for at least the duration of the author's economic rights. This is, however, considered a minimum standard of protection. The Convention had to adopt a neutral line here on the juridical basis of moral rights, that is, allow for the limit of the term of protection in those jurisdictions where moral rights are intimately tied with the economic rights and should therefore expire when the latter do. A number of Berne Union states, where moral rights exist independently of economic rights, protect moral rights in perpetuity.[84] The question of protection extending *post mortem auctoris*, and, in particular, who in such cases should be entitled to exercise the author's moral rights, nevertheless continues to be debated. The current article 6*bis* is inconclusive as to the way in which moral rights are to be protected *post mortem auctoris*. This suggest that countries are left with a discretion in this respect and that where post mortem auctoris protection is allowed, national legislation in the country where protection is claimed may stipulate the persons or institutions who are to exercise these rights in that country.[85] While in most cases it will be the heirs of the author, the protection of author's rights after his death may well be entrusted to a government agency concerned with the preservation

[84]Particularly France and countries whose legislation has been influenced by that of France, such as Senegal, Benin, or Central African Republic. See Ricketson, *supra* note 2 at 474.

and promotion of culture or another appropriate public body. Paragraph (2) lays down no stipulation in this regard, but it is worth noting that at both the Brussels and the Stockholm Conferences, where proposals for protection of moral rights in the period after expiry of the economic rights were made, a number of delegations expressed the opinion that this should be a matter for regulation by public law and policy rather than private law.[86]

Undoubtedly, the most expansive frame for protection of the right of integrity operates in perpetuity. French theory endorses the superiority of moral rights over their economic counterparts by, among other things, declaring perpetual protection to moral rights expressly by the law.[87] Under French law, *droit moral* survives both the *droit patrimoniae* and the author's life. The principally perpetual nature of moral rights does attract substantial criticism and the grant of perpetual protection has been declared a "juridical heresy" for "nowhere else in French law does a personal right exist in perpetuity."[88] To the credit of French law, it must be noted that the law does not completely ignore the potential for abuses of moral rights after author's death which the perpetuity concept creates, and that the law has some safeguards to prevent such abuses.[89] The reduced number of persons able to sue for infringement of moral rights is an

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[85]*Ibid.*

[86]The proposals were introduced by Austria, Hungary and Czechoslovakia at the Brussels Conference in 1948 and by Bulgaria, Greece and Portugal at the Stockholm Conference in 1967. See Ricketson, *ibid.* at 466 and 474.

[87]French Intellectual Property Code 1992, *supra* note 21, Art. L-121-1. The right to respect, with its three aspects, is stated to be "perpetual, inalienable and imprescriptible".

[88]DaSilva, *supra* note 6 at 15, quoting Pierre Recht.

[89]In particular, it was feared that the broad scope of the divulgation right can be easily misused when exercised (or non-exercised) by authors heirs. Thus, the law endows the courts with power to interfere in cases of the abuse in the exercise of moral rights by the author's heirs. The author himself may prevent such abuse by transferring his moral rights by will to a third party. For details, see DaSilva, *ibid.*

additional factor that makes perpetuity of their protection considerably less important.[90] Moreover, notwithstanding the theoretical perpetuity, French courts have shown a reluctance to enforce them after the expiration of the copyright. In 1997, for example, the Cour de Cassation held that a painter who copied the work and signature of the nineteenth century artist, Toulouse-Lautrec, for sale, did not violate Toulouse-Lautrec's moral rights by copying the signature.[91]

Perpetuity of moral rights is further declared in Belgium, where moral rights exist as long as there are certain persons, normally members of the family of the author, who have the mission to protect author's rights in *nomine auctoris*, and in Italy, where moral rights may be exercised by the author's family or by government authorities even after the work has passed into the public domain. Since the author's personality "lives on" in the work, the purported link to the author exists so long as the work can be communicated to the public.[92] In Denmark and Sweden, the integrity right may be enforced in perpetuity where cultural interests and values are at stake. In one case before the Danish Ministry of Culture, a grant from the Danish Film Institute to the production of a film on the life of Jesus Christ was cancelled on the grounds that the film would be an infringement of the moral rights of the authors of the Bible.[93]

The concept of perpetuity of the above civil law countries stands in a sharp contrast with the German approach. German copyright theory builds upon a monistic, or 'synthetic' interpretation of copyright. The monistic theory sees the rights that compose copyright,

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[90]French courts are extremely reticent in accepting actions of persons other than family members of the author, in particular those of collecting societies. Dietz, *supra* note 7 at 69.

[91] *Le Procureur Général près la Cour d' Appel de Paris v. Sxxxx*, Cass. Crim. June 11, 1997, No. 96-80.388 in Gunlicks, *supra* note 38 at 654.

[92]A. Dietz, *"Moral Rights and the Civil Law Countries"* (1995) 19 Colum.-VLA J. L. & Arts 199 at 213.

[93]*Ibid.* at 214-215. The author noted that both the Danish and Dutch positions are now obtaining a less strident tone regarding the power of the State to watch over the integrity of works of art and literature.

i.e. both the economic and the moral rights, as a complex integrated unity.[94] This perception of copyright shows a natural tendency to stop moral right protection together with copyright as a whole. Moral rights thus, being an integral part of copyright, end together with it 70 years after the death of the author.[95]

A brief look at the situation in common law countries reveals that here moral rights, where incorporated into law, end either together with economic rights or with the death of the author himself.[96] This has been historically the position of common law jurisdictions which opposed the extension of the term of protection for moral rights *post mortem auctoris*. Any extension of the protection beyond the author's life would require changes to their laws, as actions for defamation did not usually survive the author.[97] The Convention yet again established a compromise to accommodate the precarious position of the common law countries. Para 2 of Article 6*bis* requires the maintenance of moral rights for at least the term of the economic rights, but subject to the following qualifications: those countries whose legislation, at the moment of their ratification or accession to the new Act does not provide for the protection after the death of the author of all the rights set out in para (1), i.e., the right to paternity and the right to integrity,

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[94]See Dietz, *supra* note 7 at 63, referring to Professor's Ulmer's interesting comparison of copyright with a tree, whose trunk is a symbol of the integrity of moral and economic potentials. Even if its 'economic branches', i.e., manners of use, are 'cut off', there is always a chance that from the old stem new economic branches will grow which the author can then make subject to new exploitation contracts. In other words, the author always retains some economic elements of the original copyright granted to him, forming together with the inalienable moral rights "the integrated and insofar inalienable stem of copyright." *Ibid.* at 64.

[95] S. 64 of the German Copyright Act 1965, *supra* note 13 at 288.

[96]Under the British CDPA as well as under the New Zealand Copyright Act, moral rights, safe for the right of false attribution, expire with copyright. The false attribution right expires 20 years from the death of the author. Similarly, under Canadian Copyright Act and under the new Australian legislation, moral rights of integrity and paternity continue in force until copyright ceases to subsist in the work. Australian law, however, provides for one important exception to this rule: an author's right of integrity in respect of a cinematograph film continues in force only until the author dies (s. 195AM).

[97]These were the arguments of the British and Irish delegates to Stockholm conference in 1967. It was also made clear by a British delegate and a US observer that any requirement to protect moral rights after the

might provide that some (i.e., one) of these rights after his death cease to be maintained. This escape clause not only benefits the common law countries but this concession also benefits those countries that prior to this amendment provided for *post mortem auctoris* protection for only one of these rights, typically the paternity right. Such countries would be entitled to take advantage of this clause and continue to deny such protection in respect of the other right. Although the formulation seems to reveal certain flaws and invite different interpretations, it is agreed that this formulation now imposes a specific obligation on Union countries to protect some (i.e., one) of these rights after the author's death.[98] Such outcome, while certainly an advance on the position prior to the Stockholm Act, is nevertheless just a half-hearted solution to the question of the term of protection: it essentially protects only 'one' type of moral right after the death of the author and does so in a rather arbitrary manner, leaving the decision which of the two moral rights should enjoy this privileged protection to the national legislator. Not only does the provision fail to unify the situation with respect to moral right duration among the Berne Union countries; it seems to create an array of possible interpretations and outcomes, thereby deepening the divide between national standards of protection.

There appears to be very little agreement on the proper duration of moral rights, which consequently continues to remain one of the most contested issues with respect to moral rights. Nothing illustrates better the division of the international community over this issue than the proceedings of the 1967 Stockholm conference, where the proposal for

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death of the author would provide a further barrier to accession by the USA. Ricketson, *supra* note 2 at 466.

[98]Ricketson, *ibid.* at 475. Ricketson discusses one possible interpretation of the clause in paragraph two as implying that a country which did not provide the for *post mortem auctoris* protection of either of the moral

perpetuity was rejected only by 14 votes to 11, with 5 abstentions. As the situation has not changed since, it seems that any attempt to set a unanimous and unequivocal term of protection once and for all for all countries is doomed to fail. One of the reasons is presumably the fact that the divide here is not formed along the traditional lines of common law versus civil law, but is of a more complex nature. Instead, the underlying copyright philosophies, i.e. the monistic perception of copyright law as a complex indivisible unity, will always clash with dualistic theory which sees moral and economic rights separately and which accordingly endows each category with different faculties and different privileges. This is then accentuated by the clash between the 'human rights' perception of moral rights, which can easily be reconciled with perpetual protection, and the economic incentive theory, under which any perpetual term of protection is unthinkable.

For these reasons, the protection for the integrity right will most likely remain uneven, with a substantively divergent scope of protection afforded to artists under various national regimes. Insisting on a perpetual protection for moral rights as an international standard would be untenable and unrealistic, given the differences in the author's right/copyright philosophy among jurisdictions, and their understanding and construction of the position of moral rights within their structure of law. While such protection would undoubtedly serve a public purpose of the protection of monuments and other cultural goods against destruction and misuse after the copyright in the work has expired, this objective can be equally served by public and administrative laws and cultural policy measures. Thus, the current Berne standard, i.e. the retention of the minimal threshold of

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rights referred to in para (1) is now under the Stockholm Act obliged to protect both, but rejects this interpretation as too restrictive.

copyright-long protection should be retained. However, the necessity of the 'escape' clause in para (2) should be reconsidered. This clause is clearly arbitrary and unnecessary, as many of the common law countries which previously had a reason to object a *post mortem auctoris* protection for moral rights now provide for a term of protection equal with the economic rights. This does not rule out, however, a future determination whether a shorter term of protection, (e.g., one equating to the lifetime of the author) might not be practicable with respect to certain categories of work, such as cinematograph films or computer programs, which either require or are typically subject to adaptations over time. Such matter could be left to the discretion of the domestic legislation.

5. Inalienability

Nothing has caused as much ado in the field of moral rights as the debate concerning their (in)alienability. This is indeed an issue of central importance, as moral rights might be just a declaration on a piece of paper if the law allows for these rights to be easily disposed of. By the same token, a certain flexibility in dealing with moral rights seems to be inevitably forced by the practices within the entertainment industry. The permissibility of waivers remains one of the most controversial questions surrounding moral rights and there is no international consensus on the question as the Berne Convention is, yet again, diplomatically silent on this issue. While Article 6*bis* para (1) provides that moral rights may be exercised even after the author has parted with his economic rights, this wording simply confirms the independent and separate existence of moral rights, a quality different from their inalienability. The lack of express prohibition is usually seen as a

tacit consent to waivers, although it has also been at times interpreted as requiring inalienability.[99]

There is no consensus on the question of alienability even among the civil law countries. Some national laws expressly provide that moral rights are both inalienable and imprescriptible. A closer look at the laws and judicial practices, however, frequently reveals that such declarations of inalienability are merely noble declarations. This is clearly the case of French law[100], which declares moral rights to be inalienable and imprescriptible and emphasizes the transcendent importance of this principle, sometimes in terms so strong as to compare the renouncing of moral rights to "moral suicide".[101] However, not only is this statutory declaration of inalienability riddled with exceptions in respect of films and collaborative works, but as a matter of practice, contract clauses which allow for the waiver of moral rights are relatively frequent, and French courts are said to have enforced such clauses in many situations.[102] There is nevertheless a widespread agreement that French courts do not and would not sanction an *a priori* waiver.[103] The true criterion for the decision whether a waiver is null or void therefore appears to be the fact whether the author had to sign abstract and general clauses on the (future) modification of his work without having the possibility to ratify them, at least *ex posteriori.*

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[99]Hansmann & Santilli, *supra* note 61 at 124, footnote 80. One of the reasons for the latter conclusion is that the Berne Convention insists on the inalienability of *droit de suite*, a *sui generis* moral right.
[100]And, in a very similar manner, also Italian and Spanish law. Dietz, *supra* note 7 at 73.
[101]DaSilva, *supra* note 6 at 16, quoting Prof. Desbois.
[102]*Ibid.*
[103]See Dietz, *supra* note 7 at 74, or DaSilva, *ibid.* DaSilva argues, relying on French authorities, that if a contract contained a clause requiring a transfer of the moral right as condition of employment, such contract would be unenforceable.

By contrast, legal provisions in other civil law countries[104] allow for moral rights to be waived by contract or waiver under some circumstances. German law, in particular, seems to be the most lenient among civil law jurisdictions on the issue of contracting in relation to moral rights. German copyright law has no direct provisions on alienability or inalienability of the attribution and integrity right it provides for. Neither does it contain any specific provision with regard to waivers. The lack of such express provisions is being interpreted by some commentators to the effect that waivers are indeed permissible in situations when the author is fully aware of the extent of what he accepts, in particular in *post factum* situations, where distortion or change of the work have already taken place, or are concretely explained and the author has to decide whether to accept them or not.[105] By contrast, general abstract clauses directed to future unknown changes and distortions are not honoured by German courts. In practice, *de facto* waivers are quite frequent and when considering a moral right injury, German courts proceed on the basis of the 'balance of interest' theory and take into consideration, *inter alia*, what is the established practice in certain industry circles or sectors.[106]

Common law jurisdictions have never had problems with permitting waiver of moral rights where such rights are legislated for. Quite on the contrary, allowing for moral rights to be waived seems to be a *sine qua non* for the acceptance of the moral right doctrine by copyright jurisdictions. This is the case of Great Britain, where moral rights may be waived when a signed instrument is completed by the author. This has the practical effect of preventing an author from reaching past the assignment of his right to

[104]Compare, for example, the respective provisions of the Danish, Dutch and German Copyright Acts in Campbell, *supra* note 64 at DEN-16, NET-11, and GER-19, respectively.
[105]ALAI Documents 1993, *supra* note 7 at 507.
[106]*Ibid.*

create an adapted work by assertion of his right to integrity based on his objection to the way in which the work was used by the assignee or licensee.[107] Moreover, the UK CDPA 1988 allows blanket waivers with respect to both existing and future works and also permits the benefit of any waiver, whether broad or narrow, to run to subsequent purchasers of the work.[108]

In New Zealand, moral rights may be waived, either in relation to specific works or works of a specified description which are in existence, in progress or to be commenced.[109] In this respect, the New Zealand law diverges from the British copyright regime, which it otherwise copied almost literally, and provides for a more restrictive, work-specific framework for waivers.

Canadian law allows authors to waive moral rights even without written consent.[110] While assignments or exclusive licences for copyright need to be in writing, waivers of moral rights do not. A waiver thus may even be implied. This conclusion also finds support in case law. In *New Brunswick Telephone Co. v. John Maryon International Ltd.*, an engineer tried to complain about changes made in his design work for public safety reasons, even though his contract said nothing about moral rights.[111] Although the implication was fairly made in that case, the principle that allows waivers to be implied may be applied in rather less obvious cases.[112] The potential for abuse is clear. Moreover,

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[107]T.E. Nielander, *"Reflections on a Gossamer Thread in the World Wide Web: Claims for Protection of the Droit Moral Right of Integrity in Digitally Distributed Works of Authorship"* (1997) 20 Hastings Comm/Ent L.J. 59 at 73.

[108]Section 87 of the U.K. CDPA 1988, *supra* note 31, states that any of the moral rights conferred by the Act, other than the false attribution right, can be waived by an instrument in writing signed by the person giving up the right.

[109]Campbell, *supra* note 64 at NZ-15.

[110]Section 12.1 (2) of the Canadian Copyright Act, *supra* note 11, succinctly states: "Moral rights may not be assigned but may be waived, in whole or in part."

[111]*New Brunswick Telephone Co. v. John Maryon International Ltd.* (1981), 33 N.B.R. (2d) 543 (C.A.).

[112]Vaver, *supra* note 12 at 166. See also N. Tamaro, *supra* note 56 at 333.

the omission of the requirement for a waiver to be in writing is difficult to understand in the light of s.12 (4), which requires that any copyright assignments must be in writing. This clear shortcoming seems to be balanced by a judicial requirement that for a waiver to be valid, the renunciation of the author's prerogatives must be expressed in "clear and unequivocal terms" and be based on "enlightened consent".[113] The "reasonable nature of the author's claim"[114] is another criterion that Canadian courts would take into consideration when a waiver is contested in the court.

In Australia, the new Copyright Act provides for a person to waive in writing all or any of his moral rights, if such waiver is genuine and is given in relation to specified acts or omissions or specified classes or types of acts or omissions. A waiver may only relate to a specific work or works that exist when the waiver takes place or specified works or works of a particular description the making of which has not begun yet or that are in the course of being made.[115] Where works are made in the course of employment, the waiver may relate to future works that are to be made by the employee in the course of his or her employment.[116] The inclusion of a specific provision for a blanket consent in the employment context raises the issue whether a non-employee author may provide an exhaustive consent in other context should he wish to do so. Considering that moral rights are intended to empower the author, such consent would probably be valid if the

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[113]*Goulet v. Marchand*, J.E. 85-964 (S.C.) in Tamaro, *ibid.*

[114]See *Céjibé communication inc. v. Construction Cleary* (1992) *inc.* (15 septembre 1998), no C.S. Longueil 505-05-000511-953 (C.S. Qué.) (De Grandpré J.) (on appeal), in Tamaro, *ibid.*

[115]Section 195 AWA (1) - (3) of the Australian Copyright Act 2000, *supra* note 31. Note that the consent provisions relating to film or works included in film are less rigorous than the consent provisions relating to other works - the provisions do not expressly require the consent to be genuinely given, and a consent may be given in relation to all or any acts or omissions and does not have to be given in relation to specified acts or omission or classes or types of such acts or omissions (s. 195 AW). In addition, the act provide that the authors of a film may enter into a written co-authorship agreement pursuant to which each of them agrees not to exercise their right of integrity in respect of the film except jointly with other authors (s. 195AN).

[116]Section195 AWA (4), *ibid.*

other conditions are satisfied, i.e., if such consent is proved to be genuine and the author addressed his mind to each and every act, omission and work specified in the onset.

The act further introduces a rebuttable presumption that a waiver of moral rights for the benefit of the owner or a prospective owner of copyright in the work extends to his or her licensees and successors in title, subject to a contrary intention expressed in the waiver document.[117] It is conceivable that such an indication could, for example, be based on the degree of author's reputation or on the kind and importance of the work in question.

The most notable aspect of the moral right amendment, however, is an express provision on a waiver made under duress or as a result by misleading statements. Such waiver clause is declared void by the act. This clause adds to the general requirement of genuineness and represents an explicit statutory acknowledgement of the typically weaker bargaining position of an author, unique and virtually unprecedented among existing copyright laws.

Possible approaches to the problem of moral rights waivers range broadly from the concept of absolute inalienability on the one end of the spectrum and the full, unrestricted alienability on the other. In the middle, there would be regimes that proclaim moral rights non-transferable but waivable and provide for various degree of waivability.

A tempting explanation for making moral rights entirely inalienable lies in their human rights dimension. On a more practical level, complete inalienability would offer the artist the most complete, "impenetrable " protection of his interests in the work. In effect, this would not mean that an artist cannot consent to acts that would violate his moral rights,

[117]Sections 195AW(5) and 195 AWA (5) of the Australian Copyright Act 2000, *ibid.* An almost identical provision can be found in the Canadian Copyright Act, *supra* note 11, s. 14.1(4).

but rather that he cannot bind himself to such a waiver - that is, he cannot enter into an enforceable agreement not to change his mind in the future and seek a judicial remedy for the violation. Such an inability of the artist to grant a binding waiver is likely to inhibit many owners from acts that would clearly violate the artist's moral rights. Artists themselves may have an interest in being bound not to waive their rights as it puts them into an entirely different bargaining position the consequence of which could be an increase in the prices they receive for their works in general.[118]

Yet, despite the apparent attractiveness of such solution, a closer look at the laws governing this subject in different jurisdictions reveals that modern moral rights regimes cannot do with a concept of absolute inalienability of moral rights for practical reasons. Despite noble declarations to that effect in various civil law copyright statutes, such concept no longer represents the reality even in the most fundamental moral right countries. Legal provisions or judicial decisions in those jurisdictions usually provide at least some limitations of the integrity right by waiver or contract. Such concessions are particularly necessary in the film, publishing and IT industry. Nonetheless, the admissibility of waivers and other limitations on moral rights is still treated very cautiously in the civilian jurisdictions. This is reflected, *inter alia*, in the carefully constructed narrow clauses that allow waiver and that are typically restricted to existing, specific works or other specific circumstances. As a result, abstract or too general waiver clauses or clauses on future modifications would not survive a judicial review and would in most cases be declared null by the courts.

At the other extreme of the scale would be an unrestricted waivability, a concept which would assume that the rights are waived unless explicitly reserved by the artist. Since

[118]See Hansmann & Santilli, *supra* note 61 at 128.

such regime appears not to exist, we are left with the golden middle ground: a regime that proclaims moral rights non-assignable[119] but allows for a certain degree of waivability. The difference from a regime that presumes moral rights are waived unless expressly asserted is that the requirement of an explicit consent to a waiver (particularly if a written form is required) alerts the artist to the possibility of retaining the rights or of insisting on greater compensation if he agrees to the waiver. There is some evidence that artists do not waive their moral rights routinely in jurisdictions that permit waiver and that the alertness to the possibility of (not)waiving moral rights creates a degree of psychological pressure for the parties to refrain from full waiver in some circumstances.[120] Moreover, the necessity to expressly consent to a waiver opens up an opportunity for courts to scrutinize such waivers and to interpret them narrowly and against the party that drafted them, which is not likely to be the artist but rather the purchaser of the work.

Most common law countries that protect moral rights seem to follow the 'intermediate' model which takes a more lenient stance towards the waivability of moral rights. The difference between them is to be found the degree and form of waivability they permit. In some cases, even informal, tacit, implied waivers are allowed by the law. Implied waivers can be particularly troublesome in cases where the copyright owner contracts away the adaptation rights to another party which may then claim that the waiver of moral rights was necessary implicit in and consistent with prior practices. The dangers of such broad bases for waivers are imminent: the author or creator is usually in a weaker bargaining position and thus very vulnerable to the pressure exercised by the economically stronger

[119]The rule which makes the rights non-assignable but waivable evidently seeks to bar the transfer of the rights of integrity and paternity to parties other than the current owner of the copyrights to the work and the beneficiary of the waiver. The fragmentation of moral and ownership rights could frustrate valuable uses of

party, typically a large publishing or production company. Needless to say, wherever the possibility of waiving moral rights exists, such pressure will always be applied, resulting in contract frequently struck between unequal partners.

The business reality suggests that the ease of commercial exploitation of works will always require at least some flexibility in dealing with moral rights. The core of the problem is thus not a dilemma between a contracting out provision or no such provision, but rather how the particular problems connected with waiving moral rights can best be handled. This involves finding a fine balance between private autonomy and social interests inherent in moral right legislation: should the relationship between the artist and the society be governed by an off-market (specific legislative targeting) or a near-market (negotiated waiver) regime?[121] There is an undeniable public interest in the preservation of art and in the authenticity of works of authorship that can be secured by moral rights. However, it remains an open question whether these interests have to be necessarily trumpeted through the moral right doctrine or depend solely on the admissibility or non-admissibility of contractual waiver. Secondly, while it is acknowledged that in the relationship between an artist and the purchaser/copyright holder the former will usually be the weaker bargaining party, it is also conceivable that an artist may sometimes gain from waiving his rights by receiving a higher price.[122]

Should moral rights be more than just a mere declaration, any internationally acceptable moral right standard will have to allow for some flexibility in dealing with moral rights, which would require a reasonable waiver regime. The question of waivers should be

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the work. It is for this reason that all jurisdictions that recognise moral rights make them nonassignable to third parties who lack a copyright in the work. *Ibid.*

[120]*Ibid.* at 127-8.

[121]Gibbens, *supra* note 34 at 467.

specifically addressed by a carefully drafted legislation that would set up basic rules regarding the conditions under which contracting of moral rights would be admissible. These narrowly tailored rules should require formality and be person(s)-specific and reasonably time-specific. Blanket or general waivers regarding future works should be disallowed, subject to possible specific regimes for works made in the course of employment or works prepared under contracts for commercial use. Ideally, such regime would ensure that waivers do not run with the work and that the artists can execute a waiver only in relation to specific alterations undertaken by specific individuals. Such approach would provide an assurance that the artist has specifically approved the alteration in question. This, in turn, would provide a more careful protection of the interests protected by the moral rights doctrine, while increasing the costs of obtaining waivers.[123] Judicial review can then ensure that moral rights waivers are interpreted restrictively[124] and subject waivers to close scrutiny, depending on the type of work and the type of the violation complained of. Particularly, where basic human rights and freedoms of the author are called in question, waivers that encroach upon such rights should be invalidated.[125] As a counterbalance, a test of the reasonability of the author's claim would ensure that moral rights are not used by the author as a shield in an otherwise vexatious claim.

The intention of the author and the circumstances under which he contracted out his moral rights should always be the paramount consideration to the courts. Explicit rules to

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[122] *Ibid.*

[123] *Ibid.*

[124] Courts may sometimes restrict a waiver by construing it to cover only changes that do not prejudice the author's honour or reputation. It is however questionable to what extent explicit language in the waiver instrument would oust this qualification. See Vaver, *supra* note 12 at 166. Also, the breadth of the integrity right could be a factor: if we interpret the right to integrity to extend to any alteration whatsoever, then making the right unwaivable would in all probability prevent many potentially efficient transactions.

that effect, i.e., rules regarding actions motivated by misleading statements and actions under duress such as those incorporated in the Australian act would greatly reinforce the position of the author or creator.

Prior attempts in several common law jurisdictions to incorporate moral rights obligations through contract attest the ineffectiveness of such solutions.[126] Neither is absolute inalienability of moral rights effective, as we learn from countries that try to live up to this 'ideal'.[127] Moral rights have a specific nature: unlike the property rights in a corporeal object, whose alienation can be signified by giving over of the object, the renunciation of moral rights cannot be always analysed in strictly tangible terms.[128] The violation of these rights can in some cases touch on the author's religious or political convictions or similar values protected in human rights legislation. As such, these rights cannot be left entirely to the contractual autonomy of the parties involved. Where a waiver regime is established, it should be restrictive to ensure that the already weak position of the author in any private contractual regime is not further aggravated. It may not and will not prevent the economically stronger party from seeking moral rights waivers wherever such possibility arises; such a measure can nevertheless provide some guarantee that moral rights provisions will not be easily swept away by a simple insertion

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[125]Tamaro, *supra* note 56 at 334.

[126]Gibbens, *supra* note 34 at 446. The author gives an example of the 1970's ill-fated attempt in New York to secure an artist's moral rights through standard form private agreements. The 1971 Projansky Draft Model Agreement was the first standartized agreement, followed by the Jurist Draft Model Agreement; both also dealt with *droit de suite*. Gibbens also points out the that the Australian Copyright Law Review Committee recommended in 1959 that moral rights were best regulated by contract. The recent moral right legislation in Australia, which establishes a moral right framework unprecedented among common law jurisdictions, shows how the views of the Committee have changed over time.

[127]The inalienability of moral rights is nevertheless still faithfully adhered to in modern copyright laws in some civil law countries, which respect the century of tradition for protection of author's right on the Continent. For example, the new Romanian copyright law provides that moral rights may not be waived or alienated. See H. Jones, *"Improving Copyright Protection"* (1996) March 1, Law Int'l 6. Cf. a similar provision of the Czech Copyright Act in Campbell, *supra* note 62 at CZE - 19.

[128]Tamaro, *supra* note 56 at 335.

of an extra paragraph in the transfer and sale agreement between the purchaser and the artist.

6. Limiting the scope of moral rights: persons and works excluded from the protection

a. Beneficiaries of moral rights and moral-type rights

In all jurisdictions, the artist, and only the artist, is given the right to enforce the artist's right of integrity during the artist's lifetime.[129] Although this is not a perfect arrangement - the artist may have interests that diverge from those of the other owners of his work, or of the public at large - there seems to be little practical alternative to making the artist the guardian, during his lifetime.[130] The main question thus arises with respect to the exercise of the right after the artist's death. The Berne Convention Art *6bis* provides in para (2) that after the death of the author, moral rights shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. It will be typically heirs, but the reference to "institutions" suggests that national legislation may determine that certain public institutions responsible for the preservation of art may be endowed with the right to exercise an author's moral rights after his death. [131] The extension of standing to parties other than the heirs seems to be particularly desirable where the heirs are not interested in exercising the rights or where they live in a

[129]Hansmann & Santilli, *supra* note 61at 121.

[130]There is, for example, a danger that an artist who has reached the end of his productive career and who finds himself in a financial need, might be tempted to accept payment from the owner of one or more of his works to waive his right to integrity in circumstances where the benefits from the waiver are smaller than the collective harm imposed by such waiver. See T. J. Davis, Jr., *"Fine Art and Moral Rights: The Immoral Truth of Emotionalism"* (1989) 17 Hofstra L. Rev. 317 at 358-359. See also Hansmann & Santilli, *ibid.* The authors toil with the idea of giving enforcement powers to the owners of the work, but reject this option immediately, *inter alia*, because of the inherent conflict of interests as well as the danger of nuisance litigation, opportunistic holdups and the transaction costs of securing waiver.

community far removed from the relevant works of art. The extension of enforcement powers is also beneficial in the situation when the interests of an artist's heirs diverge among themselves or diverge from the interests of the current owners of the work and of the public at large.[132] In California, Massachusetts and Italy, this problem has been addressed by granting the standing to other interested parties, such as organizations acting in the public interest (California) [133] or to a public official (Massachusetts and Italy).[134] It is also worth noting that a similar provision was rejected in Germany, apparently out of fear that it might open up a possibility for the government to "steer" the culture.[135] Most countries nevertheless insist that only individuals can benefit from moral rights protection.[136] This position is in line with a strict interpretation of moral rights as the extension of the artist himself, his personality, or even his 'soul'.[137]

The question of whether public bodies should be involved in the exercise of moral right is indeed controversial: one hand, reliance on private enforcement may prove inadequate in certain circumstances, for example, where there are no heirs or where the heirs are inactive. If one of the underlying justifications for moral rights is the preservation of art as a public good, it seems reasonable that part of the burden inherent in attaining this goal should reside with a public institution. On the other hand, the idea of the public

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[131]See the discussion above at p. 39.

[132]See, for example, *Museum Boutique Int'l v. Picasso*, 880 F. Supp. 153 (S.D.N.Y. 1995) (dispute among Picasso's heirs about commercial licensing).

[133]California Art Preservation Act, California Civil Code, Art 989(c) (West Supp. 1985).

[134]Massachusetts Moral Right Statute, Mass.Ann. Laws, c.231 Art 85S(g) (West 1985) and Italian Copyright Act (Law No. 63 of April 22, 1941, as amended), article 23, in Campbell, *supra* note 64 at ITA 22-23. In Italy, the governmental rights of enforcement coexist with those of the artist's heirs after his death.

[135]Gibbens, *supra* note 34 at 463.

[136]See, for example, the explicit assertion in s. 190 of the Australian Copyright Act 2000, *supra* note 31, according to which "only individuals have moral rights".

[137] See D. Ciolino, *"Rethinking the Compatibility of Moral Rights and Fair Use"* (1997) 54 Washington & Lee Law Review 33 at 35: "Moral rights protect an artist's work as his spiritual child, an outgrowth of his soul..."

involvement in the exercise of moral rights is clearly at odds with the concept of moral rights being a natural extension of the artist's personality.[138]

Apart from authors and creators of literary, musical, artistic and dramatic works[139] and their heirs, national laws of many civil law countries grant moral rights to other categories of persons, such as performers. French law provides that a performer has the right to respect for his name, qualification (*qualité*) and his performance (*interprétation*). This inalienable and imprescriptible right is attached to the performer's person, and may be transmitted to his heirs.[140] German copyright law similarly provides that the performer has the right to prohibit any distortion or other alteration of his performance where this would injure his status or reputation as a performer. The right expires on the performer's death or 25 years after the performance if the performer dies within that period.[141]

A significant development on the field of moral rights is the recognition of moral rights of performers in the 1996 WIPO Performances and Phonograms Treaty.[142] Article 5 of the Treaty provides for moral rights for performers in the form of a right of paternity and a right of integrity. Those rights are designed in a form slightly different from that of authors; for instance, the identification of the performer in connection with his performances may be omitted 'where the omission is dictated by the manner of the use of the performance' and, furthermore, as regards the right of integrity, there is reference only

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[138] *Ibid.*

[139] This definition usually includes the authors of cinematograph films, a category that may include the director(s), screenwriter(s) and even producers, if they are individuals and not a body corporate. See for example s. 191 of the Australian Copyright Act 2000 or s. 9(2) (ab), s. 77 and s. 80 of the U.K. CDPA 1988, *supra* note 31.

[140] Article L.212-2 of the French Intellectual Property Code 1992, *supra* note 21 at 294.

[141] Section 83 (1) of the German Copyright Act 1965, *supra* note 13 at 294-295.

[142] WIPO Performances and Phonograms Treaty and Agreed Statements on the WIPO Performances and Phonograms Treaty (adopted by the Diplomatic Conference in Geneva on December 20, 1996), Art. 5, online: WIPO Homepage <http://www.wipo.int/treaties/ip/performances/index.htm> (last modified: 15 October 2001), provides for the moral right of integrity and paternity, albeit limited to live aural performances or performances in fixed phonograms.

to the 'reputation' (and not to the honour). Performers' moral rights are further limited to rights in live aural performances or performances fixed in phonograms; after the performer's death, they should be maintained at least until the expiry of the economic rights. However, Article 5 para (2) provides an escape clause for those countries whose legislation does not provide for a post mortem protection of performer's rights. This escape clause is identical with the one incorporated into Article 6*bis* of the Berne Convention: it enables the countries in question to provide in their legislation that one of the moral rights will, after the performer's death, cease to be maintained.

Despite its limitation, this provision is a great a step forward in the field of moral right protection. For the first time, performers are included into the category of moral rights beneficiaries by an international instrument. It means that countries which up to now did not have an equivalent protection will have to guarantee these rights as a condition of adherence, thereby substantially increasing the exposure of performer's moral rights in the international arena.[143]

b. Other categories of beneficiaries

By definition, moral rights are generally limited to the original creators of the work of art and only since relatively recently is the concept being expanded to embrace the performers as well. By contrast, producers, broadcasting organisations, and publishers have not up to the present been granted moral or moral-type rights in national laws or international or regional instruments. One exception to this is German copyright law,

[143]As of October 22, 2001, there were 50 signatories to the treaty but only 26 countries have ratified the treaty so far. *Ibid.* Ratification will oblige countries such as Great Britain or Canada to enact a provision granting the rights of attribution and integrity for the performer. Performer's moral rights, on the other

which grants certain moral-type rights to the producers of a cinematographic film. Section 93 of the act, which deals with the prohibition of gross distortions or other gross injuries with respect of cinematographic works, obliges the author who exercises this right to take into account the rights of other persons, in particular those of the producer. Article 94(1) of the German Copyright Act then confers on the producer a right to prevent any distortion or shortening of the visual/sound recording which may prejudice his legitimate interests therein. The right, together with the economic rights of the producer, expires 50 years after publication or public communication of the recording, or 50 years after production if not published or publicly communicated within that period. Although this right is specifically granted to the producers of a cinematographic work (i.e., not the producers of sound recordings, for example), it establishes an interesting precedent for the expansion of the pool of moral right beneficiaries.

c. Works exempted from protection

Moral rights waiver is not the only thing that limits the scope of moral rights. Many national regimes allow for permutations of protection relating to the types of works that can benefit from moral rights, especially the integrity right. Most notably, the concept of moral rights under the UK 1988 Copyright, Designs and Patent Act has evoked substantial criticism[144] for being riddled with numerous exceptions and limitations as to the categories of works covered by moral rights. This is particularly so with respect to the

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hand, are currently being recognized in a large number of countries. See Sterling, *supra* note 13 at para 51.00 *et seq*.

[144]The fact that there are so many types of work left outside the ambit of moral rights protection raises a doubt about the conviction of the drafters of the desirability of moral rights in British law. See J. Ginsburg, *"Moral Rights in Common Law System"* (1994) 4 Ent. L.R. 126 at 129. See also Australian *Discussion Paper: Proposed Moral Rights Legislation for Copyright Creators* (Canberra: Australian Govt. Pub.

integrity right, which does not apply in relation to (a) computer programs or computer generated works, (b) translation or certain other arrangements of a musical work, (c) any work made for the purpose of reporting current events, (d) publication in a newspaper, magazine or periodical or encyclopaedical work, or any unmodified subsequent publication therefrom.[145] In addition, under the sub-heading 'qualification of rights in certain cases', the CDPA provides for yet another group of exceptions which comprises works made in the course of employment, Crown and Parliamentary copyright works and works in which the copyright is originally vested in an international organisation.[146]

But even the most moral rights devoted countries such as France have assumed a somewhat more relaxed position and allow for certain exceptions in the treatment of moral rights in respect to certain categories of works such as cinematographic works or computer programs. The French legislators of the 1957 Copyright Act introduced some restrictions on moral rights in the film sector. While the authors can exercise their moral rights individually or collectively, they cannot exercise a right against each other to prevent the completion of a film. As a consequence, the moral right of integrity of a film author can only be asserted when the final version of the film has been established by agreement between the director and the producer.[147] In the same way, the German law provides in Article 93 of the Copyright Act that authors of a cinematographic work can

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Service, 1994) at 74. The drafters of this proposal perceived the U. K. model for moral rights as unsuitable for Australia exactly due to the large number of limitations contained in the act.

[145]For a complete list of exceptions, see the U. K. CDPA 1988, *supra* note 31, s. 81 (2) –(5). Compare also with the exceptions to the right to object to derogatory treatment under the New Zealand Copyright Act 1994, *ibid.*, s.100, which faithfully copy the U.K. model.

[146]*Ibid.* s. 82. While the laws of France and Germany allow a number of specific exceptions to moral rights for works created in the course of employment, they do not amount to a blanket exception comparable with the one under the CDPA. See Gunlicks, *supra* note 38 at 651-2.

[147]Arts. 15 and 16 of the Copyright Act of 1957, now Arts. L-121-6 and L-121-5 of the French Intellectual Property Code 1992, *supra* note 21. Indeed, film seems to be the exception to almost everything under the French law.

only prohibit gross distortions or other gross injuries of the work or of their contribution to it and must take the interests of other contributors as well as of the producer into account.[148] This way continental law attempts to balance the interests of parties involved when determining a violation of the right to integrity for films.

The rationale behind these limitations seems to be clear: the personal character of *droit moral* can be cumbersome in the case of collaborative works, for each collaborator could assert (or waive) his or her moral right to the detriment of all the others. This could prove particularly troublesome in the case of a cinematographic work, where the attributions are numerous. Another significant element behind these restrictions seems to be the large amount of investment in the film production; this is certainly a factor that the drafters of such restrictions had in mind and which the courts are likely to consider when deciding on questions on moral rights.

In spite of that, the protection of the integrity right in the field of cinematographic works gains a particular urgency at the moment: the rapid development of new technologies greatly endangers the integrity of cinematographic works. Colorization, compression, slicing-up movies or the insertion of commercials are but a few examples of possible distortions. Hence, legal restrictions on moral rights in the film sector should be drafted carefully as to not override the legitimate interests of the creators. The case law of those civil law countries that allow for such restrictions demonstrates that they are interpreted narrowly as not to amount to total elimination of moral rights in the film sector.[149]

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[148]Dietz, *supra* note 38 at 184.

[149]A classical example is the one of the John Huston's colorization saga, Chapter II, p. 54, footnote 16. Dietz, *supra* note 38 at 185, reports a decision of the Munich Court of Appeals of September 26, 1992), granting moral rights protection to an Italian film composer whose music composition used in the Italian TV series was, without his consent, drastically shortened and replaced by the music of another composer in the German version of the series on Christopher Columbus. Such an approach is in a sharp contrast with the

Similarly, in the case of computer programs, their exclusion from the moral rights ambit purportedly answers certain practical concerns: the need of frequent alterations and the collective nature of the creation of such works. Computer programs in particular often undergo modifications and the possibility of a moral rights claim might inappropriately hamper such enhancement. As with films, computer programs are often products of a team rather than an individual and thus it is often difficult if not impossible to distinguish their author for the purpose of attributing moral rights.

The UK approach seems to present one extreme end of a scale, as the authors of computer programs have no moral rights whatsoever in the works they create. At the other end of the scale, computer program authors retains all moral rights in the program under the German Copyright Act, which contains no provision cutting down the author's moral rights in this area. The employer will be able to exercise economic rights, unless otherwise agreed, but it will be necessary to make an arrangement with the author of the program, even where he is employee, as to the way in which the moral rights will be exercised.[150] Between the two extremes lies the provision of the French Intellectual Property Code, under which the author of the computer program cannot prevent the adaptation of the program within the limit of the rights which he has ceded (i.e., with respect to the licensees of the program), nor can the author exercise the right of revision or retraction.[151] It would appear that nevertheless, the computer program author retains

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situation in the US, which up to this date successfully resist any notion of moral rights for the creators of cinematographic works, thanks to heavy lobbying of the U.S. film industry.

[150]Sterling, *supra* note 13 at 291.

[151]These changes were first introduced by the Copyright Amendment Law in 1985 and are now incorporated into Article L. 127-7 of the French Intellectual Property Code 1992. The Spanish Copyright Act of 1987 deals with this problem in a very similar manner. See C. Clark, *"Moral Rights"* in ALAI Documents 93, *supra* note 7 at 258-9.

the other moral rights undiminished.[152] A unique approach is heralded by the Dutch who, while not expressly excluding computer software from the ambit of moral rights protection, chose instead to subject the exercise of such rights to a test of 'reasonableness'. This test requires that an author must not be put in a position to place unreasonable obstacles in the path of a program's successful exploitation.[153]

While practicality might require certain restrictions to a moral rights protection with respect to computer programs, a blanket-form exclusion of the British type seems to be hard to reconcile with the fact that computer programs are no less the result of a great deal of creativity, genius and skill than any other literary or artistic work. Similarly, the professional reputation of their authors will be associated with them and is at stake here. From this perspective, an unconditional exclusion of computer programs from the ambit of integrity right may appear anomalous.[154] On the other hand, such exclusion appears to be sanctioned by the EC Directive on the Legal Protection of Computer Programs, which entirely eliminates moral rights of the author with respect to computer programs. [155] While this Directive seems to reflect the contemporary economic realities created by the copyright industry, discussed above, it did not escape harsh criticism by author's rights

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[152]Sterling, *supra* note 13 at 291.

[153]Clark, *supra* note 151 at 258.

[154]I. Bainbridge, *Intellectual Property,* 4th ed. (Financial Times Pitman Publishing: London 1999) at 109.

[155]*EC Directive 91/250/EEC of the European Council of 14 May 1991 on the legal protection of computer programs*, online: The European Union On-Line <http://europa.eu.int/eurlex/en/lif/dat/1991/en_39/L0250.htm> (date accessed: 2 June 2001). While the Directive establishes that Member States should accord protection to computer programs under their copyright laws as 'literary works', it also states that the exclusive rights of the author to prevent unauthorised reproduction of his work have to be subject to a limited exception in the case of a computer program to allow modifications necessary for the use of the program by the lawful acquirer. It also sanctions acts of reproduction and translation by the user as 'legitimate and compatible with fair practices' and as not requiring the authorisation of the rightholder.

purists as not merely "throwing out the baby with the bath water", but as "drowning the baby".[156]

Another controversial exception to moral rights protection under the UK law includes newspapers and periodicals. The main concerns were that the editors, and in some circumstances publishers and proprietors, legally responsible for the contents of their newspapers, must be able to exercise control over its contents. Problems could ensue, for example, if a journalist could assert an integrity right to object to modification of an article which was potentially defamatory and for which the editor would be liable.[157] Publishers also expressed a concern that moral rights would be capable of delaying or even preventing the publication of a work and that frequent insistence by journalists to publish a by-line would reduce available space for news and cultural events coverage and detract from the clarity in presentation of the newspaper page, possibly reducing readership levels.[158] The justifications for their total exemption, given in the EC Hearing by the Newspaper Society, were accepted by the UK Government. Their substance, however, is not agreed by the International Federation of Journalists.[159] While it cannot be denied that granting moral rights for journalists is burdensome[160], the broad exclusion of all composite works from moral rights protection is hardly justifiable. What was originally meant as a so-called "Reader's Digest clause"[161] has been transformed into a

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[156]G. Karnell, *"The Berne Convention Between Authors' Rights and Copyright Economics"* in ALAI Study Days: *"Economy and authors' rights in the international conventions"*, Geneva, 1994 (ALAI Switzerland, 1994) [hereinafter ALAI Documents 1994] at 65.
[157]Clark, *supra* note 151 at 258.
[158]*Ibid.*
[159]*Ibid.*
[160]The exemption of news from the ambit of moral rights seems to be in line with the Berne Convention. See Article 2(8) of the Berne Convention, *supra* note 16.
[161]The *Readers Digest* made a representation to the UK Government that their books-to which ten, sometimes hundreds, of authors contribute short chunks of text which is then strained and mashed into *Readers Digest* prose-cannot in reality be subject to the moral rights of paternity or integrity. The

dangerously wide-sweeping provision: certainly, those who provide a substantial contribution to an encyclopaedia, yearbook or other important work of reference have exercised sufficient creativity, skill and judgement to entitle them to reap the fruits of their efforts in a manner similar to the authors of other literary works. The same can be said with respect to certain musical arrangements and, particularly, translations: incomprehensible or distortive rendition of a work in another language, more than anything else, is very likely to cause serious harm to the author's honour and reputation.

7. The right of adaptation and the integrity of the work

An important practical limitation to the concept of moral rights is the economic right of adaptation. For example, the Berne Convention provides for an economic right of the author to authorize adaptations of his works, which includes "adaptation, arrangements and other alterations" that incorporate expressions from the artist's original work.[162] The artist's personal right of integrity in a work remains with him and may be asserted, even where adaptation has been authorized, if the adapted version of a work does not capture the essence of the underlying work or is offensive to the author. Where a law allows for moral rights to be waived, such waiver would most likely be sought to ensure that no integrity claim is made by the author with respect to the adapted work.[163] On the contrary, in those jurisdictions where any assignment or waiver of moral rights is void, a

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Government accepted the argument and then came back with a much wider exception of ss. 79 & 81. See Clark, *supra* note 151 at 257.

[162]Berne Convention, *supra* note 16, article 12.This right can be found in most copyright jurisdictions. In the U.S. copyright law, for example, the right is characterized as the exclusive right to "prepare derivative works based upon the copyrighted work". See §17 U.S.C. 106(2) (1990), *supra* note 64.

[163]A particularly complex situation may arise in cases where the beneficiary of the adaptation right claims that a moral right waiver was necessarily implicit in and consistent with prior practices between the parties. Ginsburg, *supra* note 144 at 129.

licence which grants consent to modifications to a work will most likely be insufficient to shield the end user from liability for violation of the integrity right.

In general, the adaptation right provides artists with the possibility to control the derivative uses of their work. By deciding what, if any, types of adaptations or derivative works they will license, individual artists can choose for themselves how much control they wish to have over the fate of their work. However, the very essence of the adaptation right requires that the author who allows adaptation of his work must give the adaptor certain room to manoeuvre. The major question which remains unresolved is where to draw the line between what is permissible adaptation and what already amounts to distortion of the work, and hence, to the breach of the integrity right. To draw such distinction would require a highly subjective assessment based on largely aesthetic criteria. Certain kinds of art, in particular the so-called 'appropriation' art, in fact functions only by the use of pre-existing images.[164] The subsequent work by an alleged moral rights violator might be a collage or montage, which uses fragments of earlier art works or a parody in which the original work is distorted in some way for the purpose of the parody. Such and similar art practices challenge ideas of authorial control; strong moral rights in particular can be viewed as a potential obstacle to such alternative discourses in art.[165] The position on the creation of a new work using a pre-existing work of art is bound to vary greatly among jurisdictions; countries with strong moral rights tradition would be particularly prone to seeing such subsequent interpretations and re-

[164]Niel Shaumann provides the following definition of 'appropriation art' in *"An Artist's Privilege"* (1997) 15 Cardozo Arts and Entertainment Law Journal 249 at 252: "...a post modern technique using images fundamental to a culture (and therefore not created by the artist, who creates from the standpoint of an outsider) to make a point about that culture."

[165]See Chapter 1 at pp. 9-12. See also P. Loughlan, *"Moral Rights (a view from the town square)"* (2000) 5:1 Media & Arts Review 1 at 5-8.

contextualisations of the work by others (albeit lawful holders of the adaptation right) as an infringement of the integrity right.[166]

One conceivable way of ensuring that moral rights do not stifle alternative or innovative forms of art may be offered by the doctrine of fair use. The exercise of moral rights could be limited by copyright's fair use doctrine, a doctrine that permits the otherwise unauthorized use of a copyrighted work for socially desirable purposes such as criticism, comment, news reporting, teaching, research, or parody.[167] This unique approach was chosen by the drafters of the U.S. VARA: section 106(A)(a) makes explicit that the right of integrity conveyed by this legislation is subject to section 107's fair use defence. If the fair use defence is given a wide scope, extending beyond the traditional 'fair use' components such as parody and encompassing other appropriative art practices in general, then the original author's moral rights would yield to the right of the subsequent artist. In other words, the interpretation of fair use would have to be broad as to presume that the subsequent artist's use is fair when integrity rights are at stake. Such presumption would effectively shift the burden of proof in moral rights cases from the defendant-second artist to the plaintiff-the original artist.[168]

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[166]In the Netherlands, for example, a cabaret singer who had altered the lyrics of the plaintiff's song during her performance was enjoined from doing so in any future performance on the basis that she had destroyed the atmosphere of the song by her low humour and had thereby infringed the plaintiff's integrity. See *Pres Dist Ct Amsterdam 21 Dec 1978* discussed in J. Merryman, *"The Refrigerator of Bernard Buffet"* (1976) 27 Hastings Law Journal 1023 at 1030-1031. Another example of a civilian jurisdiction's approach to parodic discourses in art is the Samuel Beckett case, discussed above at p. 74.

[167]The fair use doctrine, often termed an 'equitable rule of reason", permits users of copyrighted works to engage in otherwise infringing conduct if their use of the copyrighted work is "fair" in the light of all of the circumstances. Uses favoured by the fair use doctrine include those for purposes of criticism, comment, news reporting, certain educational purposes or parody. The American fair use doctrine has on some occasions been characterised as *'sui generis'*; the concept of fair dealing, found for example in Canadian or British copyright law, is a similar but not an identical construct. See Ciolino, *supra* note 137 at 36-37, 62.

[168]U.S. case of *Campbell v. Acuff-Rose Music, Inc.,* 114S. Ct. 1164, 11 74 (1994) established that fair use should be viewed as an affirmative defence that a defendant, parodist or not, had to plead and prove. Yonover, *supra* note 54 at 997, argues that the shifting of the burden of proof in moral right-fair use cases is not foreclosed by s. 107 of the VARA.

While on the first blush this may appear as an ideal means of resolving the tension between an artist who claims moral rights and a parodist or other artist whose work is based upon the appropriation and modification of the first artist's work, there are several shortcomings to this concept.[169]

The very link of a copyright-economic doctrine with a moral rights-personalist doctrine presents a problem from a doctrinal point of view. Fair use is a doctrine born of intellectual property law for the purpose of permitting certain non-rivalrous uses of intangible copyrighted works. Moral rights, however, are significantly different from copyright's economic exclusive rights which fair use doctrine is designed to trump in certain circumstances: moral rights are primarily 'personal' rights, which arguably deserve greater respect (and hence, less deference to fair use) than ordinary copyright exclusive rights.[170] Just on the contrary, if moral rights are components of the artist's personality, then mere [intellectual] property rights, such as those conferred upon certain users by the fair use doctrine, should yield in the case of conflict. In addition, it is evident that the fair use doctrine was conceived to achieve fundamentally different goals than the moral rights doctrine is designed to foster: while fair use doctrine is justified largely by the goal underlying copyright law in general, i.e., that of promoting the creation of new works of authorship, moral rights are absent any of such 'incentive' aspect. Rather, moral rights justification revolves around the promotion of artistic respect and preservation of art.[171] The juxtaposition of such two incompatible doctrines is not only troublesome on the

[169]The Congress itself has expressed ambivalence about the viability of the fair use defence in the moral rights arena. See H.R. Rep. No. 514, 101st Cong., 2d Sess. 22 (1990) in Yonover, *ibid.* at 990-991. The stark contrast between the resulting statutory language and the legislative history of the act illustrates the act's somewhat hasty passage in Congress - VARA passed on the very last day of the 101st Congress as a part of a larger bill authorising eighty-five new federal judgeships. See Ciolino, *supra* note 137 at 52, footnote 98.

[170]Ciolino, *supra* note 137 at 37.

doctrinal level but potentially on a practical level as well: it is not clear whether the application of the fair use doctrine to limit moral rights, apart from sacrificing the (largely non-utilitarian) interests protected by moral rights, would necessary further the (largely utilitarian) goals of the fair use doctrine and copyright in general.[172] Finally, the viability of such a concept cannot be tested as there has been to this date little litigation brought under the only existing model, the VARA. Thus, the assessment whether the fair use doctrine is capable of achieving the 'proper' balance between the protection of the artist's moral rights and the fairness of an alleged infringer's use remains merely a theoretical one. It is nevertheless worth noting that no other jurisdictions that recognise personality-based moral rights limit those rights through a doctrine analogous to fair use, except maybe the German doctrine of good faith.

Should we strive to construct a truly international concept of moral rights, we have to accept the fact that this concept would be subject to many limitations with respect to the persons, works and activities protected. The predominately personalist character of moral rights implies that most probably, only the artist himself (during his lifetime) and his

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[171]See generally Chapter I.

[172]During the congressional debate over VARA in 1989, several commentators expressed their scepticism over the compatibility of fair use as a restriction of moral rights. Professor Ginsburg noted:
"The bill would subject the integrity and attribution rights to the s. 107 fair use exemption. I believe this is inappropriate. What is 'fair' about mutilating an original (or a limited edition)? What public policy does it advance; what public benefit does it secure? Fair use generally concerns the productive use of a prior work in the creation of a new expression. Under the bill as drafted, one can certainly mutilate a multiple (one of over 200) to make a point (parodistic or otherwise) about a work; what social need is there to destroy the original? Similarly, what is "fair" about denying authorship credit, or falsely attributing an artist's name?..." See *Moral Rights in Our Copyright Laws: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Admin. Of Justice of the House of Comm. On the Judiciary, 101st Cong. 89 (1989)*, statement of Professor J. C. Ginsburg. Lawyer Peter Karlen similarly commented: "I don't see how the [fair use] factors enumerated at section 107 particularly relate to these rights of artists." *Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 253 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 101st Cong. 105-106 (1989)*, statement of Peter H. Karlen.

heirs (after the artist's death) can execute his moral rights. The extension of moral rights to persons other than the artist might be beneficial in certain circumstances - e.g., situations where the artist at the end of his productive career or in a financial need disregards his moral rights to the detriment of himself or even the public at large. However, such "guardianship" would be a rather cumbersome and impractical solution, which might create a greater evil than if the artist is left to make his own decision. As far as *post mortem auctoris* protection is concerned, the alternative of public enforcement is worthwhile considering. Here, an option should be given to those states that are willing to endow some of their public institutions responsible for the preservation of culture to exercise the rights, as is currently done under the Berne Convention. It would be up to the countries to delimit the powers of the heirs and the public institutions in this respect. Moreover, it is given that in all countries that have legislation protecting the national cultural heritage, enforcement powers pass to a public authority once a work has fallen within the protection of that legislation.

The application of moral rights in the time when modern technologies impact the creation of literary and artistic works requires the adjusting of the doctrine with respect to certain categories of works. Such limitations appear inevitable to ensure that moral rights do not stifle artistic and technological progress. For this reason, some countries choose to exclude certain categories of works from the ambit of moral rights protection. This is particularly the case of computer programs, which otherwise usually acquired the status of literary works, and films. In these two fields, the concept of author's right has not been able to withstand the erosion of modern copyright realities and had to yield to the interests in exploitation and scientific progress. However, while different set of rules may

be necessary in the light of the economic and legal characteristics of the specific sectors concerned, such as the audiovisual or software sector, a large-scale restriction on moral rights as the one envisioned by the UK copyright law and its New Zealand counterpart may sweep too broad.

Finally, moral rights concepts will always be at odds with the right to make creative adaptations and other derivative works. Here, the legitimate interests of the original artist in the integrity of his creation may clash with the interests of others who wish to utilise the first artist's work in their own creative endeavours. The boundary between the moral right of integrity and the economic (and thus transferable) adaptation right are rather blurred. Clearly, not all derivative uses and interpretations have the same transformative potency or are equally valuable. Drawing the line between 'desirable' (and hence potentially permissible) derivative uses, such as parody, and the 'less valuable' (commercial, tasteless, obscene etc.) uses which unjustly infringe the integrity of the work inevitably requires an inherently aesthetic judgement. The fair use doctrine appears on the first blush as an attractive solution to the problem. It is hard to envisage, however, how this would work in practice. The only such existing model, the U.S. Visual Artists Rights Act of 1990, has produced no relevant case law yet. Moreover, the American concept of moral rights differs from other common law and civil law concepts. Unlike traditional moral rights, the U.S. federal moral rights do not and were not intended to protect the intangible work of authorship embodied in the VARA-protected artefact.[173]

[173]In enacting VARA, Congress made clear its antipathy to the extension of copyright law to embrace general moral rights. As a result, explicit and implicit limitations on the VARA integrity right render it unequal to its civil law origins. M. B. Nimmer & D. Nimmer, *Nimmer on Copyright,* vol.3 (New York: Lexis Publishing, 2000) § 8D.06 at 8D-63.

These rights relate only to the original artefact in which the artist fixed the work.[174] Accordingly, the fair use doctrine under VARA does not prevent others from making non-infringing copies of the underlying work of authorship and then distorting, mutilating, or otherwise modifying any of the new copies. For this reason it has only a very limit use as a counterbalance to the integrity right.

Further, on a theoretical level, resolving the dilemma of the integrity right and derivative uses through the fair use doctrine raises the issue of the compatibility of these two doctrines with a manifestly different purpose. Thus, from a doctrinal point of view the conflict between justifications for each of these doctrines casts serious doubts on the viability of such concept.

[174]Ciolino, *supra* note 137 at 59 and Nimmer & Nimmer, *supra* note 173 at 8D.02[D][5], 8D-30.

Conclusion

This thesis attempted to explore the prospect of creating an international standard for moral rights, and in particular, the right of integrity, in the aftermath of TRIPs. In the first part, we revisited and re-assessed the justificatory schemata underlying moral rights. The analysis revealed that the central theoretical justification remains the projection of the author's personality into the work, and thus, world: the romantic notion of authorship took hold. This, however, would of itself not justify the need for moral rights; it is only when combined with the role moral rights play in the preservation of cultural legacy, authenticity and plurality of artistic expression and voices in the media that the legacy of the doctrine is substantiated. Most importantly, the perception of author's rights on the par with human rights, endorsed in several international legal instruments, helps to build a strong case for the retention and further extension of moral rights in international copyright.

Turning from theoretical justification to the real world, we discover that moral rights are on the march. This comes as rather a surprise given their recent *de facto* exclusion from the TRIPs Agreement, the new Magna Charta of intellectual property. While the decision to downplay moral rights issues in this WTO instrument - the result of the U.S. lobbying- is a serious blow to the doctrine, the emerging sentiment within the EU and among a number of common law countries urging the strengthening of moral rights shows that moral rights, after all, might be winning the battle.

A majority of countries in the world recognise moral rights.[175] However, the trend of the moral rights rebirth is unprecedented in common law countries. The steps undertaken by those jurisdictions towards the recognition of *droit moral* are small and cautious in some cases, large and brave in other. The combination of forces of technological progress and globalization will require governments to work more closely in the field of international copyright and author's rights. Thus far, it has been thought that the path to co-operation in the area of moral rights was blocked by the irreconcilable divide between common law and civil law author's rights philosophies. This assertion is now exposed to a challenge. The growing international interest in moral rights reflects a greater awareness of their potential as an important factor in tempering the economic and trade orientation of international copyright law, and encouraging a renewed focus on cultural and social benefits of moral rights. While differences in copyright theories remain, these are no longer insurmountable. The comparative analysis in Chapter III of the civil law and common law take on moral rights as shaped by the influences of technology and globalization reveals that there is an increasing harmony, and even a striking similarity, between the way moral rights (and, in particular, the integrity right) are treated in those jurisdictions. These developments may eventually generate a more integrated international system, where the civil law and common law approach to author's rights complement each other more fully.

The right of integrity was chosen to demonstrate that the gap between the author's rights and copyright tradition with respect to the issue of moral rights might be smaller than it appears. Re-emerging from this exploration are certain patterns and elements that are capable of forming a minimal standard for the protection of the integrity of authors'

[175] Gunlicks, *supra* note at 604.

works on a global scale. There are, however, some remaining 'grey areas' where at present consensus seems to be out of reach.

First of all, a very fine balance will have to be struck when outlining the scope of the integrity right. On the one hand, the right has to be defined broadly enough as to be capable of encompassing a wide range of potential prejudicial treatment of a work. Especially with respect to the treatment of works in a digital environment, we cannot fully assess the scope of potential prejudicial actions. Therefore, restricting the derogatory treatment to a limited number of material alterations will not suffice. On the other hand, too broad an integrity right might impose undue burdens on the rights owner and the public. This negative effect, however, could be successfully mitigated by the requirement of identifiable prejudice to the author's honour or reputation. This test would take into account objective and subjective criteria such as the nature and purpose of the work, the nature and extent of the mutilation, its irreversibility, the extent of exposure and the status of the author, the probable impact on the professional life of the artist, based on expert opinion as well as the opinion of the author. However, these criteria should not be exhaustive. A test of reasonability, based on the nature and purpose of the work and its audience as well as the practices in the relevant industry, offers an additional layer of protection.

The issues of destruction and site-specific art can no longer be avoided but have to be specifically addressed in any international instrument. This is because these are very frequent cases with respect to which the violation of the integrity right is being invoked. The failure of the Berne Convention to deal with these issues has created a great degree of uncertainty as well as a pool of inconsistent case law across jurisdictions. Destruction

in particular should be seen as an ultimate form of derogatory treatment of a work; the 'out of sight out of mind' rationale is misguided as the artist's reputation often depends on the physical existence of his work, be it only as points of reference. The legitimate interests of the author which are at stake when a destruction of his work is considered should be given recognition, at the very least to the extent that the author is enabled to negotiate the destruction and/or remove the work where such negotiations fail.

Similarly, when an artwork is created for a specific location, the creator should have a say when the owner intends to remove or relocate the work. Relocation is a grave interference with the work that was designed for a particular environment and should be subjected to strict conditions that the relocator has to fulfill. Within a reasonable time framework, the owner should be obliged to locate and inform the artist or his representatives about the intention to relocate his work; this should be followed by good faith consultation between the owner and the artist, leading to the decision about the fate of the work. In any case, the author should be allowed to reclaim the work, make a record of it or require that his identification as an author be removed from the work should it be relocated. Although these alternatives may not be fully satisfactory from the point of view of the affected artist, they do constitute some improvement on his current position with respect of site-specific art. Not only do they give him at least a minimal control over the fate of his work, but they also do not encroach too much on the legal rights and legitimate interests of the rights owner and the public.

The question of duration of moral rights would be best addressed, at least for the time being, by retaining the current minimal threshold, i.e., the term of duration that equals to the duration of the economic rights. It is unlikely that a proposal for perpetuity would

find any significant support at this stage; moreover, we have seen that perpetuity is often declared but not always exercised in practice. The aims perpetuity purports to achieve, such as the protection of the national cultural legacy, can be equally met by means of public law. Moreover, the continuous trend to extend the term of copyright benefits moral rights whose term, as a consequence, is being extended simultaneously. However, it is proposed that the clause in para 2 of Art. 6*bis* which gives a 'back door' to those common law countries that do not provide for *post mortem auctoris* protection should be removed as arbitrary and redundant at a time when the major common law countries this clause was intended for now provide for *post mortem auctoris* protection for both moral rights.

As with perpetuity, an absolute concept of inalienability of moral rights is no longer tenable. For practical reasons, even the most moral-rights devout nations yielded to the pressures of the fast growing entertainment and technology industries and provide for some kind of waiver regime. While the commercial exploitation of works requires such concessions, an unrestricted waiver regime would grossly undermine the whole philosophy of moral rights. We must not forget that the author is usually in a much weaker bargaining position and the law should therefore guarantee him some protection against unscrupulous exploitation by production and publishing corporations. Thus, any waiver regime should be narrowly tailored as *ad hoc*, persons and works specific. Blanket waivers regarding future works should not be permitted. In any case, waivers should be interpreted restrictively. A violation of the author's moral rights could touch on the author's religious or political convictions; in such cases where basic human rights and freedoms are called into question, a narrow interpretation of waivers is particularly desirable.

As far as beneficiaries of moral rights are concerned, the law sees a tendency to expand the categories of persons entitled to benefit from moral rights. Recently, we have witnessed the extension of moral rights for the first time to performers on the international level; at the time of writing, this extension of protection still constitutes a commitment to be met for countries such as Canada or the United Kingdom. Further extension involves the enforcement powers after the author's death being granted in some jurisdictions to public institutions. Despite the undeniable benefits of such a solution, there are some downsides to the involvement of the state in the exercise of authors' personality rights, the concern about the state attempting to "steer the culture" being the major one. Indeed, the fear that the moral rights doctrine could be deployed as an instrument of affirmative culture has led some jurisdictions to limiting moral rights strictly to individuals. For this reason, the proposition of public enforcement of moral rights should not be mandated as an international standard.

The exclusions of certain types of works from the ambit of moral rights protection is another, less satisfactory tendency we can observe in some national copyright laws. As with liberal waiver regimes, exclusion clauses are a back door to diminish the scope and thus the viability of moral rights. While certain concessions might be necessitated in cases of works of a collective nature that require frequent modification, such as the computer programs, no justification exists for an en masse exclusion of other works that are clearly the product of a creative genius.

Finally, we have to acknowledge that no right of integrity is ever absolute, as the right of adaptation necessarily implies some room to manoeuvre has to be given to the owners of this right. The line between 'fair', non-infringing derivative uses and those that violate

the artist's integrity right is hard to define as it is based solely on an aesthetic judgment. The fair use doctrine is one possible way of tackling this issue, although the deployment of this copyright doctrine within the framework of personalist moral rights is problematic from the doctrinal point of view. We must not forget that eventually, it should be moral rights that ultimately override economic rights, not vice versa.

The optimism that the gap between civil and common law regarding moral rights can be bridged stems form the basic fact that the laws of most nations in the world, including common law countries, are predicated on the notion that copyright serves to protect the interests of the individual author. This element might be more strongly pronounced in civilian jurisdictions that hold moral rights to be the most important element of copyright. However, both families of law depart from a common ground: the protection of authors as the paramount goal of their copyright laws. By the same token, both common law and civil law systems recognize the interests of the public and copyright owners, such as publishers or film producers. Accordingly, both limit moral rights as to reflect those interests, be it through statutory means or judicial interpretation, while still protecting the work from unjust uses. Hence, no compelling reason seems to exist to prevent the creation of an international consensus on the question of moral rights. Modern challenges to author's rights are unprecedented and can only be successfully tackled at the international level. This, in turn, is only possible if the major copyright producing and consuming nations agree on the most fundamental rights of an author in his work. The recent developments in the moral rights arena in some of the major copyright producers and consumers countries openly invite to such a task. The appreciation of the growing similarities between the continental and the common law approach to moral rights may

hold significance for formulating a new modern international moral rights standard. By identifying the sites of consolidation, this thesis lays a basis for the emerging platform of congruity that should facilitate the future formulation of mutually acceptable principles for the protection of works of authorship.

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