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INTELLECTUAL PROPERTY AND MORAL RIGHTS

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ABSTRACT

The study finds that in both national laws and international agreement, the clear global trend is towards greater recognition of Moral Rights for a broad range of creative works. A consideration of Moral Rights on the international scene reveals a pervasive dilemma. On the one hand, awareness of authors' moral interests, particularly in the environment of new technologies, appears to be mounting. On the other hand, international negotiators seem to have reached a stalemate in their efforts to develop a harmonization program specifically for Moral Rights. The hullabaloo over authors' moral interests runs deep. Clarification of this characteristic of intellectual rights at the international level will require the resolution of complex and fundamental conflicts which are divergent legal traditions, the appropriate social role of creative authorship, and the very logic of internationalization, itself. In spite of the need for caution, there is encouraging evidence that Moral Rights are seen by many countries as a valid and useful means of protecting culture. The flexibility and range of the doctrine has been proven through diverse legislative and judicial treatments. At a time when culture is at once most vulnerable and most vital, every means of helping it to flourish must be fully explored. The challenge of international efforts will be to achieve recognition for Moral Rights while allowing the doctrine to continue to grow and change as the international legal community becomes ever more diverse. The Moral Rights development in India depends maintenance of great flexibility towards the continuously shifting social equilibrium in cultural sphere. Encouragement of individual creativity is a close corollary of modernization. The protection of author's Moral Rights is to stabilize the position of creators in conditions of general poverty and situations of uncertainty. Arguably, India has better prospects in pursuing in this area of potential growth. initiative at both the international and domestic spheres, needs simultaneous execution. What needs to be understood and imbibed is the already existing jurisprudence of the Berne Convention which foresaw the interdependent nature of economic and Moral Rights and obligations while somehow renegotiating politically sound but logically impaired initiatives like the non-conformity clauses in TRIPS which have the effect of forestalling domestic initiative. With the greater than before acceptance of Moral Rights for creative works, including music, in common law nations, such as the U.K.'s new Performances Regulation, India has both challenges and opportunities on the international Moral Rights front.

KEYWORDS

intellectual property, moral rights.

INTRODUCTION

 Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author¹

Intellectual property Law ensures and preserves the economic interest of their creators, but for creative individuals in addition to the pecuniary rights, it is the Integrity of the Work and the Paternity of the Work that requires protection. These rights in whole are called MORAL RIGHTS. The term Moral Rights denotes the non-pecuniary personal involvement of creator in his work, beyond the scope of commercial/financial interest.

Much influenced by the Kantian and Hegelian belief that authors retain general rights of personality that should survive market exploitation of the external work, civil law traditions provide extensive Moral Rights protection.²

The Berne Convention (Article 6bis) provides: "Independently of the author's economic rights, and even after the transfer of said rights, the author shall have a right to claim the authorship of the work, and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." It requires member countries to grant to authors: (i) the right to claim authorship of the work which is right of paternity and (ii) the right to object to any distortion or modification of the work, or other deprecating action in relation to the work, which would be prejudicial to the author's honor or reputation, (right of integrity). The Convention necessitates the owner to be independent of the author's economic rights, and to continue with the author even after transferring of economic rights.

Moral Rights laws always are in a vibrant source of scholarly controversy. Some critics advocate the expansion of the right whereas others chafe any expansion and advocate the scaling back to already existing Moral Rights. An author in chorus, exercises economic rights and Moral Rights in relation to his intellectual creation and it is the only case of coexistence of both over the same object. This simple coexistence results in a close relationship between both the rights, where exercise of economic rights may be influenced by Moral Rights. Regulation of the author's Moral Rights emphasizes that the entire system of regulations in the area of intellectual property has not been set for the enhancement of the commerce with new intangible assets but to protect the authors who are part of the international commerce.

The rise of digital technology has made authors' moral interests particularly susceptible to disregard, infringement and abuse. The continued relevance of Moral Rights will depend upon the awareness of the public and their support that is ever more closely involved in the creative work of authors and artists. The impact of internationalization on Moral Rights should therefore be assessed in light of the special prospects and challenges for creative expression in the Digital Age.³

KINDS OF MORAL RIGHTS

Moral Rights are a continental concept of European. According to this concept there are mainly three rights:

1. *Droit a law Paternity* (The right to Paternity): this right bestows author the right of authorship of his artistic or literary work. Author may prevent others from using his name in their works.
2. *Droit Respect de l'oeuvre* (The right of integrity): this bestows the author the right to prevent alternation, mutilation or distortion and other action that may dent the author's honor or reputation. This right arises in the case of assignment and after assignment when any person who creates such form of distortion or mutilation which is against author's reputation or honor.

¹ Universal Declaration of Human Rights, Article 27(2)

² For a Kantian approach to copyright, see Kim Treiger-Bar-Am, Kant on Copyright: Rights of Transformative Authorship, 25 CARDOZO ARTS & ENT. L.J. 1059, 1062 (2008) ("Kantian theories can be used to illuminate the theoretical justifications for an authors' rights perspective on copyright in the United States and United Kingdom.")

³ The essential role of the public in maintaining the viability of copyright in an environment dominated by digital technology is pointed out by JAL Sterling "Philosophical and Legal Challenges in the Context of Copyright and Digital Technology" (2000) 31:5 IIC 508, 525. The importance of public support for protecting Moral Rights, in particular, is explored in detail in M Sundara Rajan "Moral Rights in the Digital Age: New Possibilities for the Democratisation of Culture" (Jun 2002) 16 Int'l Rev L, Computers & Tech (forthcoming).

RELATION BETWEEN PROTECTION INTELLECTUAL CREATIONS AND FREEDOM OF COMMERCE ETC.

Justification of author's Moral Rights substantiation in intellectual property regulation is unswervingly related to the relation between protection of authors' intellectual creations, on the one hand, and freedom of ideas, freedom of commerce, freedom of access to research, freedom, freedom to knowledge of expression and information, on the other hand⁴. In terms of values protected by the legal system, the interests of the author are in contradiction to the interests of other legal subjects that will take advantage of and enjoy the intellectual creation based on the above mentioned right to freedoms. However, this contradictory position is more theoretical or potential because, in practice, there is often a query of identifying the rapport between the author of intellectual creation and other persons he enters into contractual relations with, and thus acquire the right to use the intellectual creation.

Regulation of author's Moral Rights emphasizes the fact that author's status and person take precedence over others who have acquired or claim a right over it, the creation which is protected, having an intrinsic value, closely related to the author's person, autonomously of his social exploitation, including distribution.

KIND OF PROTECTION THAT COPYRIGHT GRANTS

Copyright usually reflects two sets of interests which are Economic Rights and Moral Rights. The Economic Rights of the author enable him to earn a living from his work. Copyright thus endows the author the exclusive right to authorize others to use his work under agreed terms and to take action against not permitted uses. Economic rights are acknowledged by copyright laws worldwide and generally cover all relevant commercial activities. The authors characteristically have also a *non-pecuniary* interest in his work, markedly to decide if their works should be made open at all, to claim authorship, and to object to any use of the protected work that can be prejudicial to the work's integrity. These prerogatives are referred to as the author's 'Moral Rights'. These Moral Rights constitute characteristic of the civil law tradition. Other legal systems, such as of common law countries, protection may be granted for such rights on a legal basis outside of copyright, for instance under tort, unfair competition and contract law.

REMEDIES WHEN RIGHTS ARE INFRINGED OF THE RIGHT OWNER

The owner whose right have been infringed may resort to the civil remedies by the respective National law to make the unlawful doings stop and to get compensated for the prejudice suffered. The Court may make the infringer thwart his illegal activities by means of an Injunction. If the activity which is leading to infringement has caused financial loss to the right owner, the court may also be asked to reward damages, including punitive or exemplary damages.

POSITION OF MORAL RIGHTS IN EUROPEAN UNION

In the international drive towards the standardization of copyright norms, one feature of copyright law remains noticeably exempt. This is the area of *droit moral*, or "Moral Rights," which offers legal protection for the individual, moral interests of authors and artists in their works. The international recognition of the Moral Rights of authors is found on Article 6bis of the Berne Convention of 1971. It is generally undisputed that France has offered the most advanced protection of Moral Rights, including the rights of resale royalties, retraction, integrity, attribution, and disclosure, as well as protections against misattribution, excessive criticism, and attacks on the creator's personality.⁵ Moral Rights in the U.K. did not develop as readily as their French counterparts, likely due to differences between the early legal systems in the U.K. and France. The 1709 Statute of Anne was the first codified copyright law that established an author's ownership of a creation for a fixed term.⁶ Moral Rights have generated constant international controversy, and efforts to harmonize protection have been consistently unsuccessful. International copyright standards have chiefly been developed through three distinct processes: the TRIPs/WTO system, the World Intellectual Property Organization (WIPO)⁷ and the Copyright Harmonization Directives of the European Union, whose international influence exceeds their regional effects.⁸ From ancient Greece to Renaissance Italy and 19th century France, the Moral Rights of artists are a European tradition. The first legal recognition of Moral Rights dates back to the decision of the civil court of the Seine in 1814⁹. In 1967, participants revised the Berne Convention to protect certain Moral Rights after the death of the author, extending the protections until the economic rights in the work expired.¹⁰

Moral Rights in the Berne Convention in 1928 were introduced, they have not subsequently been dealt with unswervingly in international processes for harmonizing or standardizing copyright law, but Moral Rights have in a sense become "internationalized" through a different dynamic. There is no European Union legislation covering the Moral Rights of artists. Indeed, the European legislator, when regulating economic rights, has left this side of copyright to the Member States.¹¹

The concrete presence of Moral Rights on the international copyright scene suggests a degree of international consensus regarding Moral Rights, that it should be protected. A widely-acknowledged reason for hesitation about Moral Rights has been a extent of concern about their economic effects and the common-law countries have been most fearful about the practical consequences of pioneering protection for Moral Rights into systems that traditionally emphasize economic rights. Copyright harmonization in the EU, and standardization in TRIPs, are primarily commercial undertakings, whose main purpose is to facilitate the free flow of information, knowledge and culture across borders for economic purposes. They are based on the principle of reducing the costs and inconveniences arising out of inconsistent standards of protection in different jurisdictions. The most powerful members of the EU, France and Germany, are the heartland of Moral Rights doctrine and involves a much greater potential for developing a Europe-wide appreciation of Moral Rights. In spite of this commitment at the level of policy, and an apparently more favorable regional environment in which to develop Moral Rights, The EU has not made significant progress in harmonization. In 1988, the United Kingdom recognized Moral Rights independently when it passed the Copyright, Designs and Patents Act ("CDPA").¹²

INDIAN POSITION ON MORAL RIGHTS

Provision related to Moral Rights has been given Indian Copyright Act, 1957 as well. These rights are parallel and independent of the author's economic rights. The Moral Rights of a work can even remain with the creator after their death. This provision closely reflects the provision of Article 6bis of the Bern Convention.

⁴ Olteanu, E., G., (2010) – Copyright and Technological Progress in The Romanian Journal of Intellectual Property Law, 7th year, no. 2

⁵ Kwall, supra note 2, at 12; Lee, supra note 20, at 803-04; Liemer, supra note 2, at 46 n.30; Susan P. Liemer, How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 7-8 (2005); Swack, supra note 48, at 364 n.24; Zabatta, supra note 15, at 1104. See supra notes 38-41 and accompanying text

⁶ The Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), available at <http://www.copyrighthistory.com/anne.html>. See also Holland, supra note 128, at 223.

⁷ The most important recent initiatives of WIPO are the WIPO Copyright Treaty (n 1 above), and the WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference on December 20, 1996 [hereinafter WIPO Performances Treaty]. Available online: WIPO Collection of Laws for Electronic Access (n 1 above).

⁸ The European Union has adopted six copyright harmonisation directives to date: the Computer Programs Directive (n 1 above); Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (27/11/1992), OJ L346/61; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (06/10/1993), OJ L248/15; Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (24/11/1993), OJ L290/9; Databases Directive (n1 above); and Directive 2001/29/EEC of the European Parliament under the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (22/06/2001), OJ L167/10. The directives are all available online through the EU database of Community Legislation in Force, Eur-Lex: < (date accessed: March 19, 2002).

⁹ F. Fouilland, Le droit moral de l'auteur en droit français, Université Jean Moulin – Lyon III, 2003.

¹⁰ Sheila J. McCartney, Moral Rights Under the United Kingdom's Copyright, Designs and Patents Act of 1988, 15 COLUM.-VLA J.L. & ARTS 205, 210 (1991).

¹¹ B. Navarre, Législation communautaire et droits des artistes interprètes, Dissertation, Université Libre de Bruxelles, 2009.

¹² Jennifer B. Pfeffer, The Costs and Legal Impracticalities Facing Implementation of the European Union's Droit de Suite Directive in the United Kingdom, 24 NW. J. INT'L L. & BUS. 533, 552 (2004).

The language in section 57 is of wide propensity and includes not just literary works but also visual and audio manifestations, is for the protection of two Moral Rights:

- The authors right of attribution, and
- his right to the integrity of his work.

1. THE RIGHT OF ATTRIBUTION/PATERNITY

The right of attribution or the right of paternity is the right of owner to claim authorship/ownership of their works. It aims to determine whether and how the name of the owner shall be affixed to the work. Three separate albeit related positions have been established. First, that it is the owners right to be made known to the public at large as the creator of the work. If the owner so desires, the name must appear on all copies in addition to advertising and other publicity for the work. Second, that an author can thwart others from usurping the work by naming another person as the author. This, in a way, permits the author to prevent the plagiarism of the work. Finally, an owner of a copyrightable work can prevent others from wrongfully attributing to him a work he has not done. Moreover, this protects the author from false attribution of authorship and from being named as the author of a work that has been mutilated.

2. THE RIGHT TO INTEGRITY

The right of integrity has been called the most essential moral right. The concept of the right to integrity is that since the work of art is an expression of the artist's personality so misrepresentation, dismemberment or distortion, of the work mistreats an expression of the artist's personality, affects the identity of the artist, his personality and honor, and thus impairs a legally protected personality interest. This right provides owners with a right to forbid modifications of their works devoid of their consent regardless of whether the alteration would negatively impact or objectively perk up the work.

In *Amarnath Sehgal v. Union of India & others*¹³, the Hon'ble Court provided remedy for infringement of the special rights or Moral Rights of the owner. It was held in this case that copyright is a bundle of rights, which the author can exploit, independently for economic benefit any exercising these rights.

Section 57, in the vein of Article 6bis, provides for the protection of the above mentioned two rights. A finding that the authors right of integrity has been violated depends upon finding damage to the owner's honor or reputation, mistreatment of the work is not prima facie an infringement, as the Indian law is unclear if artistic work should be determined by objective criteria or subjectively, as per the authors own perception of alteration and impact on his reputation. The commissioner's right of privacy in respect of photograph or film made for private and domestic purposes.

Under section 57 of Indian copyright, an author has the right to claim the authorship of the work. He has also right to for restraining the infringement or to claim damages under section 55. The special protection of the copyright can be claimed even after the assignment of the copyright. The scope of protection for the right of integrity under sec 57 exceeded the extent of the right of integrity under art. 6bis and makes specific remedies available to the author in case of a violation of his Moral Rights, and is applicable only to those situations where the treatment of the author's work causes prejudice to his honor and reputation.

The court has taken view in the case of *Mannu Bhandari v. Kala Vikas Pictures Ltd.*¹⁴ where the dispute related to author's moral right came before the court. In this case the plaintiff, Mannu Bhandare, author of Hindi novel 'Aap ka Bunty', assigned some rights which in turn raised objection as to the title of the movie which was resolved by the parties. In the novel, at the end, the child is admitted in hospital by his natural father while in the movie it was showed that the child died due to starvation, and the author claimed that it was against her integrity and honor. It was held that subject to the provisions of section 5, the contract of assignment has to be read. It held that the remedy of a restraint order or damages can be claimed even after the assignment of either wholly or partially of the said damages. Further, it was held that the terms of the contract of assignment of the copyright is evidently overridden by the section 57 of the Copyright Act.

Section 57(l) (c) prohibits any kind of distortion or mutilation of the authors work. Furthermore, Section 27 provides the bundle of rights, which are in tune with the international treaties & agreements.

In the case *K.P.M.Sundaram v. Rattan Prakashan Mandir*¹⁵, suit was instituted against the defendant's for injunction restraining them from prompting, publishing and the specified books, accounts and rendition for the illegal increase made by the defendants for all unauthorized publications and for damage under the provisions of sections 5 and 57. The plaintiff had granted sole and exclusive right to publish, print and trade the work. Prima facie it was held that it did not assign the copyright but created a revocable license in favor of defendants to publish and sell the works and the balance of favor to show the same. The defendant was thus restrained from publishing, printing and selling the plaintiff till the disposal of suit.

Describing the aspects of Moral Rights protect the interest of the owner in maintaining their reputation and standing. In India, the ruling and statues of the courts indicate the presence of the right of integrity and paternity rights only as Moral Rights. Though the legislation in this regard has been restricted in the Indian statute on copyright, the Hon'ble Courts are favoring a wider interpretation of these rights.

CONCLUSION

In both national laws and international agreement, the clear global trend is towards greater recognition of Moral Rights for a broad range of creative works. A consideration of Moral Rights on the international scene reveals a pervasive dilemma. On the one hand, awareness of authors' moral interests, particularly in the environment of new technologies, appears to be mounting. On the other hand, international negotiators seem to have reached a stalemate in their efforts to develop a harmonization program specifically for Moral Rights. The hullabaloo over authors' moral interests runs deep. Clarification of this characteristic of intellectual rights at the international level will require the resolution of complex and fundamental conflicts which are divergent legal traditions, the appropriate social role of creative authorship, and the very logic of internationalization, itself. In spite of the need for caution, there is encouraging evidence that Moral Rights are seen by many countries as a valid and useful means of protecting culture. The flexibility and range of the doctrine has been proven through diverse legislative and judicial treatments. At a time when culture is at once most vulnerable and most vital, every means of helping it to flourish must be fully explored. The challenge of international efforts will be to achieve recognition for Moral Rights while allowing the doctrine to continue to grow and change as the international legal community becomes ever more diverse. The Moral Rights development in India depends maintenance of great flexibility towards the continuously shifting social equilibrium in cultural sphere. Encouragement of individual creativity is a close corollary of modernization. The protection of author's Moral Rights is to stabilize the position of creators in conditions of general poverty and situations of uncertainty. Arguably, India has better prospects in pursuing in this area of potential growth.

initiative at both the international and domestic spheres, needs simultaneous execution. What needs to be understood and imbibed is the already existing jurisprudence of the Berne Convention which foresaw the interdependent nature of economic and Moral Rights and obligations while somehow renegotiating politically sound but logically impaired initiatives like the non-conformity clauses in TRIPS which have the effect of forestalling domestic initiative. With the greater than before acceptance of Moral Rights for creative works, including music, in common law nations, such as the U.K.'s new Performances Regulation, India has both challenges and opportunities on the international Moral Rights front.

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¹⁴ AIR.1987 Del 13

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