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Moral Rights in a Common Law Context
More Illusory than Real?

LLM Research Paper
Laws 545 Intellectual Property

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2 December 1996

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Abstract

The Copyright Act 1994 introduced moral rights into the New Zealand legal system. Moral rights are a civil law concept and are aimed at protecting the link between a creator and his work. Throughout common law jurisdictions they are treated with a certain amount of misapprehension. This is reflected in the way in which they have been implemented. The level of protection granted is considerably lower than in civil law countries. The common law response has been to implement moral rights to the extent that they reflect existing common law remedies. This may be due to a poor grasp of the rationale underlying moral rights. The rights that have been implemented in common law countries differ in several respects from the traditional civil law concept of moral rights.

This paper analyses the justifications for moral rights, and surveys approaches taken in other jurisdictions. This enables an assessment of the New Zealand Copyright Act. Deficiencies in the New Zealand approach are highlighted, and suggestions for reform made.

The length of this paper is approximately 14,210 words excluding footnotes and bibliography.

I Introduction

An artist created a statue for a village square. After several years the town decided to tear down the statue. Some time later the artist travelling through the area remarked to his companion on the uneven road surface. Closer inspection revealed that his statue had been dismantled and used for roading. Understandably aggrieved the artist sought enforcement of his moral rights.[1] At the opposite end of the scale is the example where an artist has erected a steel sculpture. It has corroded, and is regarded as an eyesore and a potential safety hazard. It is not possible to pull the structure down, to do so would violate the artist's right to have the integrity of his work respected.[2] This example represents the worst case scenario from a common law point of view. Few would deny that the artist in the first example should have a right to prevent or seek redress for what has happened. In the latter example, the artist's rights might be regarded as flying in the face of common sense.

Moral rights are either an established part of a country's legal system or are regarded as an unwelcome parvenu. Common law countries heralded the introduction of moral rights with suspicion. Civil law jurisdictions have a moral rights tradition and give a higher degree of protection. New Zealand included moral rights provisions for the first time, in the Copyright Act 1994 to fulfil obligations to the Berne Convention. The level of understanding of moral rights is poor. The term "droit moral" is a faux ami and causes confusion and misapprehension. Such an expansive system of personality rights was viewed with mistrust. The French system of moral rights is held out by commentators as the ultimate model of moral rights protection. However, even the French Intellectual Property Code does not require the level of protection that has been implemented by the French courts.[3] There is no reason why the French model of moral rights should be

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[1] Example based on *Sudre v Commune de Baixas* [1936] DP.III.57.

[2] Based on an anecdotal case in Grenoble, France.

[3] See W. Strauss "The Moral Right of the Author" (1955) 4 American Journal of Comparative Law 506, at 516 and 535.

preferred over any other. The German system has as long a lineage, but a slightly different jurisprudential basis.

The common law approach to moral rights varies. Common law countries have responded to the perceived threat by implementing limited rights. The United States has enacted sui generis moral rights legislation.[4] Another approach is to formulate sui generis exceptions.[5] Gerald Dworkin suggests that a key to reconciling difficulties may lie in allowing different levels of moral rights protection for certain works such as computer programs and databases.[6] Another alternative is to allow waiver of moral rights. The fundamental question is the extent to which this should be regulated. Dworkin voices concern at the possibility of authors being able to enforce moral rights in a way that benefits their economic interests by subterfuge. However, he concedes that authors' rights are in need of protection given the power imbalance frequently present in the author/publisher/commissioner menage à trois. [7]

This paper will evaluate the justifications for, and means of implementing the range of moral rights. The different rationalisations for moral rights protection and the ways in which moral rights have been incorporated in various common law systems will be explored. Common law approaches will be compared with more traditional moral rights systems to determine where the differences lie. The New Zealand Copyright Act 1994 purports to grant moral rights, but the legislation is deficient in several respects. The paper will analyse deficiencies in common law approaches to moral rights and suggest alternative ways to define moral rights and apportion the benefits, rights and duties between creators and utilisers.

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[4] As in the United States.

[5] As is frequently the case with regard to computer programs.

[6] G. Dworkin "Moral Rights and the Common Law Countries" (1994) 5 Australian Intellectual Property Journal 5, at 35.

[7] In this paper the words creator and author are lused interchangeably. Unless specified to the contrary, where abstract reference is made to a person, the male form shall be taken as including the female.

II What are moral rights?

There is no single definition of moral rights, each jurisdiction varies the rights to suit its legal, economic and social background. Moral rights evolved from the civil law system. They are a creature of judicial invention as opposed to being statutorily derived. There are two fundamentally divergent views of moral rights, the "dualist" theory favoured by the French, and the "monist" theory underlying German moral rights. The French dualist approach considers moral rights to be totally separate from economic rights. The German monist approach regards moral and economic rights as being interdependent, both rights expiring at the same time. The Berne Convention sets out basic rights that should be recognised in moral rights provisions. It does not require that moral rights be implemented by specific legislation. It is argued by common law countries that moral rights are recognised and already provided for by existing legal remedies, such as consumer protection legislation and common law remedies.[8] Other countries are keen to limit the scope of authors' rights, fearing that increased protection for creators will necessarily lead to increased costs of expression.[9] This paper outlines the approaches to moral rights in various jurisdictions.

The first text of the Berne Convention did not recognise the existence of moral rights. Mounting pressure from a number of countries, including France, Italy and Belgium culminated in the inclusion of limited moral rights provisions in the 1928 Convention. Article 6bis of the Berne Convention recognises the right to attribution and integrity rights in more limited scope than the French approach.[10] The rights of divulgation and withdrawal are not included in the Convention. Even in countries with a strong moral right tradition the right of withdrawal is more notional than real. The Berne Convention

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[8] See M. Wyburn "The Attorney-General's Department's Moral Rights Discussion Paper: Background and Proposals" (1995) 23 Australian Business Law Review 318 at 326.

[9] Common law countries.

[10] See Appendix 1.

does not require that the rights must be inalienable.[11] This is largely a result of pressure from the United States which was reluctant to recognise moral rights and especially reluctant to do so where such rights would be inalienable. The Berne Convention does not prohibit a waiver of moral rights, so long as the waiver is explicit, and is not purported to be effected by an assignment of the economic rights to the work.[12] The following categories are deemed in various jurisdictions to be components of moral rights.

- ***Right of Attribution***

The right of attribution gives the author the right to assert paternity with respect to the work. The reverse side is the "negative" right to non attribution.

- ***Right of Disclosure***

The right of divulgation allows the author to decide when the work is to be released for publication.[13] The decision should not be pre-empted by another person.[14] Non disclosure has been described as one of the most economically significant privileges involved in copyright.[15] After the initial disclosure the owner's privileges to decide not to use or license the work may be overridden by the Court as it seeks to facilitate the widest possible dissemination "in the public's interest". If this right is important in the broader intellectual property context, the same can be said of moral rights. Of all the moral rights, this is perhaps the best recognised in common law.

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[11] Unlike WIPO which states: "[m]ost of the copyright laws recognise moral rights as an inalienable part of the copyright, distinct from the so-called economic rights".WIPO Glossary of Terms of the Law of Copyright and Neighouring Rights 161, WIPO Publ. No. 827 (EFR)(Jan 1 1981).

[12] A. Latman, RA Gorman, JC Ginsburg *Copyright for the Nineties* 1992 Cumulative Supplement, 3 ed, The Michie Company, Charlottesville, Virginia, 1992, at 161.

[13] *Salinger v Random House* 811 F2d 90(2d Cir,1987) is an example of how this right has been applied.

[14] See R. Sarraute "Current Theory on the Moral Right of Authors and Artists Under French Law" (1968) 16 American Journal of Comparative Law 465, at 467.

[15] See W. J. Gordon "An Inquiry into the Merits of Copyright:The Challenges of Consistancy, Consent, and Encouragement Theory" (1989) 41 Stanford Law Review 1343, at 1390.

- ***Right of Integrity***

The right of integrity confirms the author's right to have their work respected. The right of integrity in France is perpetual, inalienable and imprescriptible. It can be made the subject of a testamentary disposition.

- ***Right of Withdrawal and Modification***

The right of withdrawal and modification allows the author has a right to retract the work after publication has taken place. This may be subject to the proviso that the author compensates the other contracting party who may suffer harm. The right of modification and withdrawal exists in various guises in France, Germany and Italy but not in common law jurisdictions.[16]

- ***Droit de Suite***[17]

In some countries droit de suite is considered to be a moral right.[18] It allows the author to follow the economic success of their work by giving the creator the right to a percentage of the resale profits if the work is sold at public auction or through a dealer. The droit de suite rewards creativity, and also redresses the power imbalance between publishers and creators. It is acknowledged to a significant extent in the German concept of *Nachfolgezwecksübertragung* (the right to follow the proceeds from the work).[19] The United Kingdom rejected the droit de suite as being too impractical to implement.[20] In the United States § 24 of the Copyright Act 1909 provided a right of renewal once the initial copyright term has expired, giving a second remunerative bite.[21] The terms of the Act still apply retrospectively to some older copyright works. The right of renewal did not vest until the end of the original term of copyright. If the author died before this and had purported to assign the right of renewal to someone else that part of the assignment would

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[16] Above n 14, at 476.

[17] Article 14 Berne Convention provides for droit de suite.

[18] For example France, Germany, Belgium, Italy, Norway.

[19] The so called "best seller paragraph". Art 26 URHG 1965.

[20] United Kingdom Green Paper 1981, at 55.

[21] *Stewart v Abend* 110 Sct 1750, L Ed 2d 184 (S Ct 1990).

be invalid and the right would vest with the executors.[22] The debate about retrospectivity and extension of the copyright term continues in the United States.

A Moral Rights and Property Rights

Hohfeldian theory defines property as a bundle of rights.[23] The rights express the relationship between the property and those who control it. This theory gives a person a "claim right" against others. This theory is equally applicable to intellectual property. Copyright describes the relationship between the creator and their right to exploit the potential of the creation. It also describes the subsequent relationship between the creator and the person to whom the economic rights of exploitation are transferred. Moral rights, focus on the intimate connection between the creator and their creation. The interrelationship between intellectual property rights and moral rights requires analysis. A reason why common law systems have such difficulty accepting and rationalising moral rights may be because our system of property rights differ conceptually from the European model. If this theory is true, a paradigm shift may be necessary to facilitate the introduction and acceptance of moral rights. Common law property rights traditionally focus on the physical, more concrete elements of property law. Intellectual property law is one of a number of exceptions to this. The basis for intellectual property law is hard to discern. Commentators generally focus attention on the economic aspects of copyright. Jeremy Waldron, favours adopting a rights based approach to property rights.[24] The question is whether there is an individual interest which is sufficiently important from a moral point of view to justify holding people to a duty to promote it. The same logic can be applied to moral rights.

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[22] Derivative works complicate the situation and are a legal issue in their own right. Derivative works created under a grant from the author will be valid and can be used during the extended term of copyright while other derivative works based on the grant made during the renewed term will not be valid.

[23] For a general discussion of property rights see Gordon above n 15.

[24] See generally J. Waldron *The Right to Private Property* Clarendon Press, Oxford, 1988.

In recent years in New Zealand there has been an effort to accommodate different concepts of property ownership. Most educated citizens would acknowledge the existence of communal ownership of resources. There is greater recognition of indigenous people's intellectual property rights. The concept of a spouse having rights over the other spouse's future earnings reflects a shift in our concept of property. It does not require a quantum leap to move towards incorporation of moral rights into the New Zealand legal system.

B Civil Law Systems

Civil law systems have a longer tradition of moral rights. There are two main approaches to moral rights, the German monist system and the French dualist system. Cornish stresses, however, that both countries have placed moral rights in a high position, the moral rights being essential and the economic rights consequential. Moral rights comprise as a bundle of rights including attribution rights, integrity rights and the right of disclosure and withdrawal/repentance, depending on the jurisdiction. Moral rights as a rule cannot be waived. The concept of waivability makes moral rights more acceptable to common law countries, but potentially poses the greatest threat to the more traditional European concepts of moral rights.

1 France

France describes its system of moral rights as being dualist.[25] The philosophy centers around two parallel strands of moral rights. One is the economic right, "le droit patrimonial", the other "le droit moral". The moral right is a personality right which attaches to the author and ranks above the economic rights.[26] It is perpetual, inalienable and indefeasible.[27] Economic rights are treated as an extension of the moral rights of the author rather than as an independent right. The moral right comprises the right to

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[25] For a general discussion of French moral rights see Y.L. Sage "The French Intellectual Property Code 1992- The Author's Rights of Disclosure and of Reconsideration" (1995) mimeo.

[26] Article L.121-1 Intellectual Property Code.

[27] Art 6 French Intellectual Property Code.

attribution[28], the right to have the integrity of the work respected[29], the right of disclosure[30] and the right to reconsideration.[31]

The author has positive and negative rights of attribution. The author has absolute discretion to decide if and when the work should be released to the public.[32] In some cases the Court may be asked to ascertain whether there were conduct or circumstances indicating an intention to disclose the work. The *Camoin* case illustrates the approach to the right of disclosure.[33] The artist, Camoin had thrown away paintings which he regarded as unsatisfactory. These were subsequently found and sold at auction. When he became aware of this, he ordered that the paintings be destroyed. The Cour de cassation held that the author alone has the right to determine disclosure of the work.[34] Delivery up and destruction of the works was ordered by the Court. If the Camoin case were tried in a common law jurisdiction the same result would probably be reached. The right of disclosure is fairly well established in our system, as copyright is awarded to the first creator.

Where an author enters into a commission, the author assumes the responsibility of creating the work and disclosing it. If the author genuinely feels that he is unable to create the work he intended to create he may still choose not to disclose the work. The author would, however have to compensate the owner or commissioner of the work. The Court may require evidence as to the genuineness of the author's belief that the work could not be created. *Salon d'Eté* is a variation on the usual case scenario where the author wishes to exercise his right of non-disclosure.[35] The artist Dubuffet was commissioned by Renault

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[28] Art Art 6.

[29] Art 6.

[30] Art 19.

[31] Art 32.

[32] This is similar in common law countries.

[33] *Camoin v Carco* D.P 1928.2.89, Gaz.Pal. 1931.1.678.

[34] For a further discussion see A. Francon; J. Ginsburg "Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work" (1985) 9 Columbia VLA Journal of Art and the Law 381, at 387 ff.

[35] *Dubuffet* Trib.gr.inst. Paris 23 mar, 1972.

to create a sculpture for the entrance to their main buildings. Work commenced but an unforeseen cost blowout and anticipated high maintenance costs led Renault to decide not to continue with the project. Dubuffet offered to pay the difference between the price increase and the cost blowout, in order to complete the work but Renault remained unconvinced. Dubuffet petitioned the court of first instance to enforce the contract but his application was denied. On appeal the Court held that the artist is guaranteed the right of disclosure, by cancelling the contract Renault had denied the artist this right. This approach is significant in that the author was seeking to enforce a positive right of disclosure.

An author who has transferred his exploitation rights retains a right to reconsider or retract the work as he sees fit.[36] The extent of reconsideration permissible is determined by reference to the contract. The author cannot require a complete retransfer of the work. Reconsideration can take place prior to the publication of the work, or during the course of exploitation of the work. The author who elects to exercise the right of reconsideration must compensate the copyright holder for any prejudice that the retraction or alteration may cause. If the author who retracted the work wishes to publish again the previous publisher must be offered the opportunity to publish the work on the same terms as previously. There is a right of integrity that extends to protect the author from excessive criticism. This approach was rejected in Germany, where the usual rules of libel and slander apply to such circumstances.

French moral rights allow authors of collaborative works to retain the rights of an individual in respect of the work. Audiovisual works constitute an exception to this rule and are regarded as purely collaborative works, the parties involved are treated as co-authors. If a co-author refuses to complete his portion of the work he cannot demand that the other authors do not use the work that he has already completed. For an audiovisual work to be complete a master copy must be approved by all the parties involved. Any changes or alterations to the final work require the approval of all the collaborators.

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[36] See *Whistler v Eden* DH 1898.2.465, S 1900.2.201 where the work was neither published nor released.

The French Intellectual Property Code establishes a hierarchy of successors to the author's moral rights. The executors are first in the line followed by the surviving spouse and other heirs. The executors are curators of the author's memory and are responsible for maintaining the integrity of the author's work. Should a problem arise the Code permits a judge to intervene, to ascertain the intention of the author, and if necessary make modifications to the agreement to facilitate the "correct usage" of the author's work.

Theoretically the moral right in France is not waivable. The right is considered to be such an integral part of the author's personality that it is impossible for her to divest herself of that right. In France the moral right has a higher level of protection than the economic rights. However, it has been subdivided to enable the exercise of the rights by successors and can be assigned into trusteeship. French courts do not accept that there can be an implied waiver of the moral right, but in the case of collective works the author may not unreasonably refuse to consent to a change in the work. Common law looks askance at the scope and extent of French moral rights, fearing that they are untenable in practise.

2 Germany

Germany asserts the interdependence of moral and economic rights. The two strands are in a sense complimentary. While the economic rights focus more on the end result of creative endeavour, moral rights focus on the creative process. Eugen Ulmer describes the interrelationship in the following way: [37]

> Copyright/authors' rights derive from the great idea of intellectual property which is common to all Europe. Today this idea has its importance as, being founded on natural law, it draws attention to the element of equity which is inherent in copyright. No doubt, unlike a material good, a work is not only attributed to the author for the purpose of its economic exploitation, but is also attached to him as a child of his spirit...I believe, in particular, that the constitutional guarantee of property applies to copyright. The Basic Law of Bonn guarantees property. In constitutional language, that means that intellectual property is also guaranteed-copyright in its component parts consisting both of patrimonial and moral rights.

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[37] E. Ulmer "Lettre d'Allemagne", 1957 "*Le Droit d'Auteur*" 16.

The Basic Law is Germany's founding constitutional document. All other legislation is subordinate to the overriding principles in the Basic Law. In 1954 the Federal Supreme Court affirmed that the Basic Law provided everyone with the right to free development of his or her personality. This applies to intellectual property law and to the moral rights especially. The German approach attempts to balance the public interest in the dissemination of culture and information with the stimulation of creativity. This approach centres around the auctorial myth and the creative process rather than the creative result. This philosophy was expressed succinctly by De Boor: [38]

> [I]f we wish to protect the creative personality, it is not sufficient to provide him with a financial reward for his work. Rather personal and cultural interests should be put first.

Moral rights are viewed as part of the author's exploitative right.[39] These rights are strengthened by the Basic Law protection of personality. The author has the right of disclosure,[40] the right of attribution and the right to prevent distortion or misrepresentation which would endanger the artist's intellectual and personal interests in the work.[41] There is no requirement that there be harm to reputation. It is the work and the artist's connection to it which is the important factor. The moral right is not transferable but changes may be authorised by contract.[42] The author can authorise others to exercise the right on his behalf. [43] The author does not lose his rights by doing this, he merely devolves them for certain purposes. The copyright transferee may not modify the work without the permission of the author, but the author may only prevent modification in good faith.

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[38] G. Davies *Copyright and the Public Interest* VCH, Weinheim, 1994, at 115.

[39] Alfred Gierke was the main proponent of this position.

[40] The right of disclosure has been recognised for some time under contract law provisions in the Civil Code rather than as a moral right principle. 79 RGZ 156, 110 RGZ 275, 112 RGZ 173.

[41] See Appendix 2.

[42] LUG § 9(1); KUG § 12(1).

[43] Eugen Ulmer gives the example of an author granting the publisher the right to prevent other theatre companies from staging work of his that has been mutilated or distorted in some way. Chapter E. Ulmer "Germany-(Federal Republic)"in S.M. Stewart *International Copyright and Neighbouring Rights* Butterworths, London, 1983.

Of the French and German systems of moral rights, the French system is the more extensive and radical. The German system is tied to notions of personality but can equally be expressed as a form of property right, since the two rights are intertwined. The monist explanation for the basis of moral rights is less well known in other jurisdictions, but may be more acceptable to common law countries. The system is more flexible and allows rationalisation either from a property or a personality rights based approach

III Rationale and Justifications for Moral Rights

A question raised in this paper is the extent to which moral rights exist within the existing body of law and how moral rights can be strengthened in our legal system. One of the traditional justifications for granting intellectual property rights is that it encourages incremental development. This is beneficial to society. There is however a difference between human creativity which is boundless, and limitations imposed by the physical science. Creators who seek patent rights must deal with the latter limitations. As a result of this they are rewarded a monopoly greater than that which is conferred by copyright.

Although no direct economic interest is conferred by moral rights economics can influence moral rights. The economic aspects of intellectual property protection are a "structural variant" on the rules that comprise the system of intellectual property rights, while moral rights are a "positional variant" on these rules. [44] The economic aspects are results driven, whereas the moral rights aspects are process driven. Moral rights exclude economic rights and could be regarded as a lesser species of right from a commercial point of view. Cost is frequently cited as a reason why moral rights should not be granted or should be waived. This is a specious argument, similar to justifying failure to obtain an easement by claiming that you could have bought one, but you thought that the other party was charging too much.[45] It is revealing that in the intellectual property realm we are

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[44] For a discussion on the concepts of positional and structural variants of rules shaping intellectual property see H. M. Spector "An Outline of a Theory Justifying Intellectual and Industrial Property Rights" (1989) 8 EIPR 270.

[45] S.L Carter "Does it Matter whether Intellectual Property is Property?" (1993) 68 Chicago Kent Law Review 715 at 718.

reluctant to allow market forces to decide what the value of the property is. We expect creators to be more altruistic than doctors or manufacturers.

A The Authorial Myth

The theory of the author is central to an analysis of copyright and moral rights.[46] The advent of moral rights coincides with the growth of theories about the role of the author in relation to their work. Some commentators are sceptical about the way in which the authorial concept has been mythologised in copyright law.[47] Moral rights are largely a Romantic construct which regards a work as being intrinsically connected to the author and deserving of protection as an extension of their personality. [48] It was conceived of as a measure of the creative genius of the author and was valued according to its degree of creativity. This highly authocentric approach lasted until the advent of modernism in the first half of the twentieth century.[49] A popular theory is that copyright evolved to protect authors and to encourage creativity.[50] A more likely hypothesis is that copyright protection evolved to safeguard the interests of publishers.

During the Renaissance authors were supported by wealthy patrons and the Church. The author was thought of as being a craftsperson, and if he was particularly gifted, as being inspired by a muse. This is illustrated by the claims of Martha Woodmansee who notes that creativity was conceived of as deriving from outside of the author.[51] The writer is a channel for creativity. This is illustrated by the teachings of Martin Luther who preached that all knowledge is God given and therefore should be disseminated freely. The

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[46] For a comprehensive discussion on the roles of printers and authors see B. Sherman and S. Strowel ed *Of Authors and Origins* Clarendon Press, Oxford, 1994.

[47] P. Jaszi "Toward a Theory of Copyright:The Metamorphoses of Authorship" (1991) 40 Duke Law Journal 455, at 459.

[48] See C Aide "A More Comprehensive Soul:Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right" (1990)48 University of Toronto Faculty of Law Review 211, at 214 ff.

[49] R.H Rotstein "Beyond Metaphor: Copyright Infringment and the Fiction of the Work" (1993) 68 Chicago-Kent Law Review 725, at 733.

[50] Ie a protection-incentive model of intellectual property.

[51] M.Woodmansee *"The Genius and the Copyright"* (1989) 10 Eighteenth Century Studies 425, at 427.

eighteenth century wrought a change in this perspective. Inspiration was regarded as a talent which had its basis in and derived from the author. Rather than being the recipient of universal or theistic wisdom; the creator impressed his imprint on the work. This shift in emphasis was discussed by Edward Young who wrote in 1759 that originality was the main feature of a writer's genius.[52] Young's essay received relatively scant attention in Britain but was published and widely distributed in Germany. Goethe, Herder, Kant and Fichte built upon this rudimentary philosophy. It was uncommon for writers to make a living out of the proceeds of sales of their works. This prompted Beaumarchais to comment that: [53]

> In theatre foyers, people say that it is not noble for authors who seek fame to fight for their everyday needs. It is true that fame has its appeal, but people forget that nature has condemned us to have lunch 365 times so that we can enjoy the fame for a year.

At the end of the seventeenth century as patronage declined writers began to receive honoraria form publishers. Honoraria were not regarded as wages but were more a recognition of the authors' achievements, the sums involved were modest. There was a flat rate which took no account of an author's subsequent success. There was little economic incentive to create. Publishers rewarded authors of scientific texts with honoraria, but it was uncommon for poets to receive or accept such payment.

Tension between authors and publishers arose when authors began to perceive that publishers were benefiting disproportionately at the expense of authors, a theme that continues to this day. The sea was not all plainsailing for publishers of the era either. There was no statutory copyright protection and publishers were having their markets undercut by pirates. The book privilege was a solution designed to assist publishers. States developed copyright protection largely at the insistence of the mercantile class which demanded a more certain return on their investment. It would be misleading to say that the publishers had a high initial outlay. The benefits that authors obtained were more

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[52] E. Young *Conjectures on Original Composition.*E Morely ed; Manchester 1918.

[53] Quoted in *Copyright-Documents in Politics and Society in the Federal Republic of Germany* Inter Nationes e.V., Bonn, 1990, at 5.

esoteric than commercial in nature. Publishers claimed that the value in books lay in the copies of the books themselves. Authors countered that the value and integrity in books lay in the inherent qualities and ideas underlying the work and in the creation of the author. Protection for authors evolved from a back door approach to moral rights. A groundswell of moral support for the plight of the Romantic author emerged.

The authorial concept remains and has formed central part of the moral rights philosophy. Authors rarely retain control over their economic rights. What remains are moral rights. Beaumarchais' comment about the plight of authors may still hold a grain of truth. Now that authors may eat, attention turns to Beaumarchais' "fame" element; the more esoteric areas of endeavour requiring attention.[54]

B Locke's Property Theory

Moral rights can be justified both as a personality and a property right. A justification for intellectual property protection is that it simultaneously provides a reward for creativity and a stimulus for further creativity. John Locke formulated a theory justifying why property rights should be protected.[55] This theory of property rights parallels Luke 10:7 which justifies reward.[56] Locke formulates this in the following way:

> [E]very man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.

Locke's theory provides an interesting justification for intellectual property rights. Locke's *Second Treatise on Government* focuses on the property right of an individual in the labour of their own body. The appropriation of an unowned object by the application of human labour is acceptable where it does not impair the position of another. The requirement that there be a symmetry of interests presupposes that protection will only be

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[54] Post structural literary prompted Michel Foucault to proclaim the death of the author.This is yet to affect copyright.

[55] See S. Strömholm *A Short History of Legal Thinking in the West* Norstedts Förlag AB, Stockholm, 1985.

[56] "[F]or the labourer is worthy of his hire".

granted to those things that are socially beneficial. On what basis therefore does a person deserve to have powers or rights above others? There are three basic explanations.[57]

1. Public response to excellence deserving of merit.
2. Reciprocal exchange.
3. Response to specifically human needs.

Western society values excellence of creativity. Influenced by Lockean theory it is thought that labourers are deserving of reward. Kase claims that the Berne Convention has its ideological basis in a Lockean justification for property ownership.[58] The extent to which we still rely on Lockean philosophy can be inferred from Justice O'Connor's remarks in *Feist v Rural Telegraph Co* where she stated that copyright should only protect works which:[59]

> are original and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labour.

In expressing this formulation the judge favours individuated authorship. It is simplistic to say that the sole motivation for creativity is financial reward. Altruistic principles are involved.[60]

> [A]uthors and inventors deserve a reward for their labour and should be given it regardless of whether they would continue their work in the absence of compensation.

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[57] See L. Becker "Deserving to Own One's Intellectual Property" (1993) 68 Chicago-Kent Law Review 609.

[58] F.J. Kase *Copyright Thought in Continental Europe* F.B Rothman & Co, South Hackensack NJ, 1967, at 9.

[59] 111 Sct 1282 (10 Cir 1991).

[60] Above n 15, at 1448.

C Hegelian Theory of Personality

Hegelian philosophy centres around the connection between the full development of the human personality with acts of appropriation.[61] This philosophy questions the Lockean approach which rewards creativity with protection. Utilitarian arguments focus on the consequences of creativity, not on that which stimulates it. [62] Lockean theory rationalises that if no one suffers harm by rewarding creators with rights, there can be no reason to object to rewarding creators with such rights. At first glance the Hegelian approach appears to be better aligned with the dualist concept of moral rights. Hegelian philosophy says that labourers are dependant on their products. The products we produce are connected to our identity as individuals. The welfare of the product is therefore connected to our welfare as persons. There is an identity interdependence between the work and the individual. This concept is developed and expanded on by Becker.[63]

> Identity-dependence on the products of one's intellectual labour is generated and sustained by the social norms that identify human excellence with authorship, originality, and singularity, and which encourage the author-identification of products.

This further creates a risk for the creator as:[64]

> [S]ocial norms that create incentive for productive intellectual labour also imperil the labourers who may become identity-dependant on the products of their labour.

Wendy Gordon justifies this by saying that dominion over property can be justified as an outgrowth of rights over one's self.[65] Gordon's formulation blends of Lockean and Hegelian justifications for property rights. This could be regarded as a valid explanation

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[61] It is also a form of natural law. For a general discussion of natural law see L.L. Weinreb "Natural Law and Rights" in R.P.George ed *Natural Law Theory*, Clarendon Press, Oxford, 1992.

[62] Utilitarianism is set out in R. Dworkin *Law's Empire* Fontana, London, 1986.

[63] Above n 57 , at 627.

[64] Above n 57, at 627.

[65] Above n 15, at 1388.

of the status of moral rights. Lockean theory focuses on the investment of labour as being the justification for property rights.

The French system classifies moral rights as a personality right. The connection between the author and the work is paramount. Common law countries are more hesitant and place emphasis on the economic rights. Keith Aoki and Gerald Dworkin both regard moral rights as potentially a double reward for creativity.[66] Moral rights can be classified and justified either as a form of incorporeal property or as a personality right with limits. There is precedent in the common law system for this and it may facilitate understanding of how moral rights can operate. Better understanding of other schemes of moral rights can help to clear up misapprehension.

D Who should bear the Cost of Moral Rights?

A common complaint is that allowing moral rights protection will impose an additional cost, above that of copyright. An analysis of who is best able to bear the risk and who should do so on policy grounds should be carried out. In a situation where no moral rights are recognised, the author bears the risk. Where there is only partial or sui generis moral rights legislation and an expectation that rights will be waived, only the most successful artists will have a chance of enforcing their moral rights. In Stephen King's world there may well be equality of bargaining power. He is free to assess the value of his moral rights. It would be reasonable to assume that few creators are fortunate enough to possess such bargaining status.

The only way that the majority of authors benefit from moral rights protection is by having unwaivable provisions.[67] Jeffrey Dine points out that tort law attempts to place the cost on

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[66] K. Aoki "Adrift in the Intertext:Authorship and Audience "Recoding Rights" (1993) 68 Chicago-Kent Law Review 805 and above n 7.

[67] See J.M. Dine "Authors Moral Rights in Non-European Nations:International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls" (1995) 16 Michigan Journal of International Law 545, at 580. Note pagination from Westlaw database. Original page numbers may vary.

the least cost risk avoider, and that this approach should also apply to moral rights.[68] This proposition is problematic. As can be imagined there may be cases where it is desirable to allow waiver. A rusting sculpture that poses a safety risk should be able to be removed. And yet it is also true to say that the author should not be the one to bear the cost and risk of the copyright transaction.

IV Implementation

A Moral Rights in the International Setting

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) forms part of the Uruguay round of GATT negotiations. GATT members must extend to other member states protection that is at least equivalent to that provided in the Berne Convention, the Paris Convention[69], the Rome Convention[70] and the Treaty on Intellectual Property in Respect of Integrated Circuits.[71] It is also required that intellectual property is given most favoured nation treatment. However a specific exception was made in the case of the Berne Convention. Member states do not have to comply with the provisions of Article 6 bis. This was the result of a specific demand from the United States. The Berne Convention is excluded from the TRIPS dispute resolution process. Moral rights have a tenuous position in international law.

B How is the Berne Convention applied in Common Law Countries?

The Berne Convention has a wide scope and purports to apply to almost any field of creative endeavour. The way in which it is implemented varies greatly. The Convention does not require that a separate statute be introduced to implement moral rights. For

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[68] Above n 67, at 578 ff.

[69] The Paris Convention for the Protection of Industrial Property, 21 UST 1583, 828 UNTS 305.

[70] The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 496, UNTS 43.

[71] 28 ILM 1477 (1989).

years common law countries claimed that consumer protection statutes and common law doctrines such as passing off and defamation provide sufficient protection. After a reluctant start, common law jurisdictions now accept that there is a need for moral rights protection beyond the scope of the common law protections. The question remaining is just how far this protection should extend. There is a degree of latent protection in legislation and common law. Contract law provides another source of protection, but it primarily protects the author's economic interests. In common law jurisdictions when copyright is assigned the contract will often express the extent to which the integrity right is within the influence of the creator of the work. Prior to the Rome Revision of the Berne Convention there was virtually no moral rights protection for artists in common law countries. Some protection was afforded artists in the form of the common law actions in the tort of passing off and defamation. There are criticisms of relying on tort for protection as it provides no protection after the death of the author.[72]

1 What is wrong with the use of tort?

The tort of passing off has been described as an example of common law evolving to indirectly protect the integrity rights of the creator.[73] Such protection is arguably more likely to be used by the copyright transferee than the author, and is focussed on the ultimate market effect rather than on the integral rights of the creator. To this extent the common law assumption that existing protection is sufficient is inherently flawed. The problem is approached in an indirect way and shirks a more comprehensive process of reform. Avoiding cost and delay may be a laudable aim, but should not be used as an all embracing justification for ignoring issues that need to be dealt with.

Tort fails to safeguard the potential reputation of a developing artist who has yet to achieve fame. It is possible for an author to suffer detriment without damage to their reputation. The expression of the author's work or their integrity as a creator may be

[72] This is a result of a compromise reached at the Stockholm Convention 1967.

[73] Above n 7. Passing off protects the goodwill in a business.

damaged. This situation is not caught by the requirement that the treatment must be prejudicial to their honour or reputation. For example, if a gallery owner purchased an artist's works and proceeded to air brush the paintings the artist may well have the sympathy of a public outraged at such a thoroughly tasteless mutilation. The artist's reputation may not be prejudiced, but there is damage to the integrity of the work itself, and by extension to the artist.

The right of integrity protects the author's economic interests to the extent that a distorted work may damage the author's reputation.[74] The right to integrity also protects the link between the author and the work in question. Any action that affects the work, by implication also affects the author. There is a social benefit in protecting the author's integrity in works. By doing so we also protect the value of our cultural heritage.[75]
Moral rights extend beyond the realm of author protection, to serve as a form of "truth in marketing legislation".[76] This enables the public to receive the work in the form that it was intended to be received by the public.[77] The precondition that there be damage prejudicial to the honour or reputation of the artist is justified as a floodgate against the potential flood of moral rights claims from aggrieved creators. France, Germany and Canada have had moral rights regimes for some time and there has been no evidence to suggest that a flood of litigation has resulted from the implementation of moral rights. This formulation confuses common law defamation with moral rights. This is not optimal as an action in defamation usually seeks damages as recompense for infringement. This does nothing proactive to prevent damage to the author's reputation. Given that moral rights differ in many ways from the tort of defamation, it is not valid to import the same considerations directly across. It seems that this is just another example of common law countries attempting to fit moral rights into existing jurisprudential holes, rather than developing a fresh body of jurisprudence.

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[74] D Tan "Seeing Red over Stravinsky's Firebird" (1996) 7 Intellectual Property Journal 63, at 65.

[75] Merryman states that: "To revise, censor or to improve the work of art is to falsify a piece of culture" J.H Merryman "The Refrigerator of Bernard Buffet" (1976) 27 Hastings Law Journal 1023, at 1041.

[76] Above n 8, at 319.

[77] D.Vaver "Authors' Moral Rights and the Copyright Law Review Committee's Report: W(h)ither such Rights Now?" (1988) 14 Monash Law Review 284 at 287.

V Moral Rights and Common Law

A Infancy and Evolution

The common law system does not provide us with an impressive body of law relating to moral rights. Initially it was denied that such a right existed at law. In *Shostakovic v Twentieth Century Fox Film Corp* Ltd the plaintiffs' music was used in such a way as to cast the Soviet Union in a bad light.[78] The musicians argued that the use of their music implied that they approved of the content of the film. This violated their right of non attribution. The case failed in the United States where the Court refused to hold that such a right existed, but succeeded in France where moral rights were more established.[79]

John Lennon in *Big Seven Music v Lennon* claimed that the packaging of his record amounted to a mutilation of his work and thus violated his moral rights.[80] Former Beatle George Harrison brought an action against a record company that planned to create a tape compiled from interviews recorded fifteen years previously, interspersed with Beatles music.[81] Polydor had the copyright in the interviews and was licensed to use the recordings of the Beatles music. The Beatles attempted to stop the recordings from being released on the grounds that it would be prejudicial to their reputation as their views had changed substantially since that time. The United States court refused to uphold the Beatle's action.

The law has evolved to the point where moral rights are being recognised in various guises and aliases, within the existing system. In more recent times there has been a swing in favour of upholding moral rights. George Michael and his record company took action

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[78] 80 NYS 2d 575 (1948).

[79] *Soc le Chant de Monde v Twentieth Century Fox* [1953] DA 1954, 16.

[80] 554 F2d 504 (2d Cir 1977).

[81] *Harrison and Starkey v Polydor* [1977] FSR 1.

against BMG Records who were attempting to release a compilation using samples from George Michael's work "Bad Boys".[82] The copyright owner Morrison Leahy Music Ltd took action on the grounds of infringement of copyright by an unauthorised adaptation of its copyright work. George Michael alleged breach of the right of integrity, claiming that BMG's recording was a derogatory treatment of his work. The Court was prepared to grant an injunction preventing the release of the work, saying that the plaintiffs had an arguable case on the grounds.

In the space of forty years there has been a gradual move towards the acceptance of moral rights. At the time that John Lennon and George Harrison attempted to use moral rights arguments, these rights were not legally recognised. The demand for moral rights has been the horse drawing the legislative cart. The approaches vary through the various jurisdictions. The United States chose to adopt limited sui generis legislation, Canada has strengthened pre existing moral rights, and Australia is in the process of reform. The New Zealand Copyright Act 1994 closely mirrors the United Kingdom Copyright, Design and Patents Act and its concomitant deficiencies.

B United States

The United States was late acceding to the Berne Convention.[83] In implementing the Convention the United States favoured a minimalist approach and spurned a major rehaul of their copyright law. American inaction with regard to the implementation of the principles of Art 6bis was defended by a comparison with other Berne Convention countries whose legislation did not comply with Art 6bis. Legislation was enacted to the effect that the United States legislation existing on the date of implementation of the Berne Convention was sufficient to satisfy the United States obligation under Art 6bis.

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[82] *Morrison Leahy Music Ltd v Lightbond Ltd* Unreported, High Court of Justice, UK, March 1991.

[83] The United States acceded to the Berne Convention in 1988.

Unlike the United Kingdom, the United States Copyright Act does not purport to extinguish common law copyright.[84] There could be scope to argue on the basis of common law copyright, which would include moral rights.[85] Arguments may be made on the right to claim attribution and to object to distortion, mutilation, modification or any other derogatory treatment.[86]

1 Pre accession to the Berne Convention

Courts in the United States have long been reluctant to recognise the existence of moral rights. In *Crimi v Rutgers Presbyterian Church* the Court refused to uphold an artist's claim that his mural (which had been painted over) should be restored or removed at the expense of the Church who had not commissioned it in the first instance.[87] The Court held that moral rights did not exist at law. However, some arguments similar to moral rights were made before courts throughout the first half of the twentieth century. Protection was granted in *Neyland v Home Pattern Co* where an embroidery pattern of the plaintiff's work was published and attributed to him.[88] Neyland complained that this was a misuse of his work and name. The action was held to be a violation of his personal rights under section 51 of the New York Civil Rights Law. Protection analogous to moral rights protection was granted by means of tort, contract and unfair competition law.[89]

Moral rights have resurfaced. The Monty Python team has left its mark on American copyright law. Monty Python successfully brought an action against ABC claiming that their moral right had been infringed by advertisements interrupting their show. The action succeeded under the guise of the Lanham Act.[90] Terry Gilliam has kept up the tradition.

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[84] *Donaldson v Beckett* 4 Burr. 2408 settled in the UK that the Statute of Anne extinguishes and replaces the common law of copyright.

[85] See § 101 Berne Convention (2)(b)(i) and (ii).

[86] See Appendix 3. The right of disclosure as in other common law countries, is fairly well recognised. *Salinger v Random House* above n 13, is an example of how this right has been applied.

[87] 89 NYS 2d 813 (Supreme Court 1949).

[88] 65 F 2d 363 (2nd Cir. 1933).

[89] *Granz v Harris* 198 F 2d 585 (2nd Circuit, 1952).

[90] The Lanham Act is similar to the New Zealand Fair Trading Act 1986.

The "Brazil" case represents the development of a body of law relating to moral rights in the United States. Terry Gilliam produced the film Brazil with the financial support of Sidney Sheinberg, president and executive officer of MGM. The film was completed within budget and in time but Sheinberg wanted to cut the running time and alter the ending. Gilliam argued that impacted on his moral rights as director and author of the film. During the course of filming Universal compelled Gilliam to sign a contractual variation which rescinded previous oral assurances and allowed the film to be cut. To encourage compliance half the film's budget was withheld. The variation reluctantly agreed to was that Gilliam would lose the right to the director's final cut if the film exceeded the 125 minute maximum. Gilliam steadfastly maintained that the film's integrity and ending were non negotiable. By signing the variation Gilliam lost the contractual right to the final cut and was made subject to the terms of a gagging order. A public and acrimonious dispute ensued and Gilliam's plight struck the chords of the public's heart. Universal came under considerable criticism and the resulting adverse publicity ensured that Gilliam's rights were respected.

This example highlights the problems inherent in the United States copyright law. Contract and property rights are favoured above moral rights, which are conceived of as more of a personality right. Recognition is focussed on the author's right of economic exploitation, ignoring the personal and creative link of the artist with his work.

2 Federal approach

In the United States debate raged as to how moral rights could be incorporated into law whilst requiring as little change as possible. Moral rights were opposed on a number of grounds. Moral rights appear to be disconsonent with the principles underlying American copyright and trademark legislation.[91] The United States regime favours the dissemination of knowledge for the public benefit. It was thought that increased protection for creators would deter economic investment in the arts, and lead to cultural

[91] The United States Copyright Act purports to favour the progress of science and the useful arts. Jeremy Waldron enlarges on the meaning of this in "From Authors to Copiers" (1993) 68 Chicago-Kent Law Review 841.

conservatism.[92] The latter charge would only be applicable in situations where there is a requirement that the work be "of recognised stature"[93] Such a precondition necessarily calls for the court to make a value judgment about the creative merits of the work. This is paradoxical, given that in the more established realms of copyright law, judges are loath to make an assessment of the artistic merit of the work.

3 Lanham Act and torts

The United States has used elements of the Copyright Act and the Lanham Act to protect aspects of intellectual property. The acts are designed to operate in a socially beneficial way, favouring societal interests to a greater extent than the rights of the creator. The Lanham Act operates as a form of consumer truth protection. The Lanham Act has been used by courts to protect the right of attribution and the right of integrity.[94] Protection only applies if the creator has contracted to retain the right to assert their integrity rights against the copyright transferee. The tort of defamation has been used to prevent false attribution.[95] Dane Ciolino expresses concern about the adequacy of relying on tort for moral rights protection.[96]

4 Visual Artists' Rights Act (VARA)

The United States introduced the Visual Artists Rights Act in 1990 to atone for the failure to enact legislation in accordance with Art 6bis.[97] The Act bestows the rights of

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[92] D.Ciolino "Moral Rights and Real Obligations: A Property Law Framework for the Protection of Author's Moral Rights" (1995) 69 Tulane Law Review 935, at 957.

[93] Section 106A Visual Artists Rights Act 1990 (VARA). The State legislation of California, Louisiana, Massachusetts and Pennsylvania also have such a requirement. This operates so as to protect only established artists.

[94] See *Gilliam v American Broadcasting Co* 538 F 2d 14 (2d Cir 1976) where the Court was prepared to recognise the right of integrity as falling within the scope of the Lanham Act. At the same time the Court acknowledged that American copyright law does not protect artist's moral rights. See also L.L. Van Velzen "Injecting Duty Into Droit Moral" (1988-89) 74 Iowa Law Review 629, at 643.

[95] *Edison v Viva International Ltd* 421 NYS 2d 203, (S Ct 1979).

[96] See above n 92, at 952 and discussion entitled "What is Wrong With the Use of Tort?".

[97] For a discussion of the VARA see M. Weir "The Story of Moral Rights or the Moral to the Story" (1992) 3 Australian Intellectual Property Journal 232, at 246.

correct attribution and integrity upon the creators of visual arts. The right of integrity generally only applies where there has been a derogatory treatment of the work, which is prejudicial to the artist's honour or reputation. The right to integrity prevents the mutilation, destruction or distortion of works as well as protecting against wilful or negligent destruction by neglect of a work of recognised stature. The inclusion of detrimental treatment by neglect is a noteworthy development. This allows inaction on the part of the owner of the work to be prosecuted. In other jurisdictions there is no duty to maintain the work.[98]

Perhaps the biggest deficiency in the federal approach to moral rights protection is the limited scope of its application.[99] Authors of literary, dramatic and musical works do not fall within the ambit of the Act. Works of art in commerce and works made for hire are excluded from the category of visual works for the purposes of the Act.[100] The exclusion of works made for commerce denies a financially lucrative and easily exploited category of works, the protection of the Act. It is not logical to assume that any the less creative input goes into a work created on commission. A mitigating factor is that blanket waivers of authors' rights are not permitted. An author can negotiate and agree to a waiver. VARA is effectively a form of legislative contractual regulation, and focuses less on author's rights than it does on safeguarding the purchaser's investment in the work. It ignores the lucrative literary and film markets. The reaction to overall efficacy of VARA is mixed. Jane Ginsburg takes a cautiously optimistic approach to the Act. Her expressed hope is that: [101]

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[98] In the United Kingdom there is no such duty to maintain.

[99] For an outline of state and federal arts legislation see J.A. Frazier "On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds:Notes to Building a Sociology of Copyright Law" (1994) 70 Tulane Law Review 313.

[100] For a full discussion of the "works made for hire" argument see "Works-Made-For-Hire' A Round Table Discussion" (1990) 14 Columbia VLA Journal of Law & the Arts, 507.

[101] 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 Columbia VLA Journal of Law & the Arts 477, at 497.

> [...] one may hope that the Visual Artists Rights Act affords a first, rather than a last, step towards evolving more generalised guarantees of the rights of attribution and integrity of creators of original works of authorship.

5 State solutions to the moral rights dilemma

While the United States debated the moral rights issue, several states proceeded with sui generis moral rights legislation for fine art. These statutes grant the rights of integrity and attribution. Some provide specifically for protection against destruction, but it is uncertain in many jurisdictions whether there is protection against total destruction as opposed to mutilation. In deciding only to protect a limited category of work, states have made an assessment about the types of works that they think society does or should value.[102] For a work to be protected there is usually a requirement that the work be of recognised quality.[103] Damich points out that whereas most copyright protection proceeds on the basis that everything is protected and then limits the scope, these statutes start from a narrow point, assuming that only certain types of work will be protected. States are more likely to provide protection where the work has been publicly displayed. It is questionable whether there is a logical rationale for curtailing the right of attribution with respect to art held in private collections. Although privacy issues are involved, this is to be weighed against the fact that it is relatively cheap and easy to attribute a work.[104]

Most states have created a sensible requirement with respect to the negative right of attribution. If an author wants to disassociate themselves from a work, they must have a valid reason for doing so. This is intended to prevent the situation where an artist refutes attribution unless a substantial sum is paid.[105] In New York the artist has a positive right of attribution and can prevent a work from being attributed to them if it has been

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[102] See generally E.J. Damich "State Moral Rights Statutes: An Analysis and Critique" (1989) 13 Columbia VLA Journal of Law & the Arts 291, at 297.

[103] Damich above n 102 cites Cal s 987(b)(2); La ss 2152(4) and (7) and NM s 13-4B-2, as examples of this requirement.

[104] Above n 102 at 309.

[105] Although from the artist's point of view this would create a very effective de facto droit de suite regime.

damaged, altered or defaced. However, if false attribution is alleged, the artist must prove that this results in a reasonable likelihood of damage to their reputation

Moral rights exist to protect and preserve the link between the artist and their work. Whether or not the public's perception of the artist is altered as a result of the mutilation is of no direct import, and confuses the distinction between moral rights and tort. It can also be argued that destruction of a work of art amounts to damage to the reputation of the artist, but most regimes do not deal with this issue. Removal of art from a site is not a breach of the right of integrity. However, several states provide that if a work is to be removed from a building the creator should be notified of the fact and given the opportunity to remove the work themselves.[106] In New York there is a positive duty to maintain works of art. In California there is no duty to maintain the art work, but person may not intentionally destroy, deface, mutilate or alter a work. Conservation measures taken in good faith will not attract liability. Acts of gross negligence are deemed by some legislatures to be worthy of punishment. Liability for violation of an integrity right only attaches where there is knowledge or intent.[107] The Berne Convention does not require knowledge or intention. This requirement is problematic as it erodes the scant protection granted to the artist.[108] By focussing on the wrongdoers intent it ignores both the damage to the work and the artist, which is the proper focus of moral rights. A system which focuses on the requisite standard of care would be more equitable

The fact that states felt the need to enact moral rights legislation prior to federal legislation indicates a perceived need. However, neither state nor federal legislatures were prepared to expand the scope of moral rights any further than was necessary. The legislation is limited in application and in scope, and is tied to concepts of tort, rather than seeking to evolve a body of moral rights jurisprudence.

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[106] Pennsylvania, California, Connecticut, Louisiana and New Mexico all have provisions relating to the removal of art from buildings.

[107] New York and California prescribe liability in such cases.

[108] California, Massachusetts and New Mexico hold that gross negligence in restoration or conservation attracts liability.

C Canada

Canada was the first common law signatory to enact specific legislation dealing with moral rights provisions.[109] Its copyright regime is an amalgam of common law and civil law principles Provisions have purportedly been strengthened to make integrity rights more readily enforceable in cases of distortion, mutilation or damage to reputation. Prejudice to honour and reputation is presumed where there is an unauthorised modification to works of fine art.[110] Steps taken to preserve the work are not regarded as modifications or damage to the integrity rights. Changes in location or negative space, in the absence of any other factors are not regarded as a distortion or mutilation of the work according to the provisions Canadian Copyright Act. This is arguably unsatisfactory.[111] Canadian commentator, Mark Rudoff points out that moral rights should go beyond merely protecting the economic value of the work.[112]

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

Rudoff's thesis is that moral rights, particularly integrity rights, serve to protect society's interest in the preservation of art in the form that the creator intended it to be seen. He argues that the best, albeit rather indirect way to protect an artist's economic interest in a work is to grant the fullest protection possible to the artist's connection to the work.[113] It must however, be acknowledged that an overly broad interpretation of the right to integrity could lead to a result that is unworkable in practice.

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[109] Moral rights were first enacted in 1931.

[110] For example paintings, sculpture or engravings.

[111] Where the work of art is a sculpture, to change the location of the work could be to change the work itself. Art does not exist in a vacuum, but rather in a context.

[112] M.L. Rudoff "The Dancer and the Dance" (1991) 29 Alberta Law Review 884, at 886.

[113] Above n 112 at 887.

The Canadian legislation allows waivers, a move criticised by Professor Vaver.[114] A concern expressed was that the right of paternity would have to be able to be waived to enable ghostwriters to fall within the scheme of the Act.[115] The right of paternity is waivable if it is reasonable to do so in the circumstances.[116] This is arguably contrary to the Berne Convention.[117] A question remaining is whether the public interest recognised in the legislation should be vulnerable to private contractual provisions. The effectiveness of the Canadian provisions is called into question by existence of the waiver provisions. As one commentator has remarked,[118]

> In the end, all that the new moral rights provisions may have accomplished is the insertion of an extra paragraph in the transfer and sale agreement between the purchaser and the artist.

D United Kingdom

The Whitford Committee convened to reform the Copyright Act, concluded that the law was not meeting the obligations imposed by Art 6bis of the Berne Convention. Moral rights provisions were recommended. The Copyright, Designs and Patents Act 1988 (CDPA) includes provisions aimed at conforming with Art 6bis.

The right of disclosure is protected by Act and by the doctrine of breach of confidence.[119] The author has the right to be the first person to put the work into circulation.[120] Copyright is infringed if the defendant puts copies of the work into

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[114] D. Vaver "Authors' Moral Rights in Canada: Charter or Barter of Rights for Creators?" (1987) 25 Osgoode Hall Law Journal 749, at 771 ff.

[115] See R.D. Gibbens "The Moral Right of Artists and the Copyright Act Amendments" (1989) 15 Canadian Business Law Journal 441, at 467.

[116] S 12(1) Canadian Copyright Act 1985.

[117] A similar proposal was mooted in the United Kingdom but was rejected as the Committee felt that it was a deviation from the principles underlying the Berne Convention. For a general discussion of the UK Act see R. Merkin *Richards Butler on Copyright, Designs and Patents* Butterworths, London, 1989, at 234 ff.

[118] Above n 115.

[119] *Prince Albert v Strange* (1849) 1 M & G 25 dealt with a situation where private etchings by Prince Albert were obtained by an unlawful act, and published. Breach of confidence was used to restrain the publication of the etchings.

[120] S 18(1) CDPA.

circulation without the permission of the copyright owner. The Committee originally concluded that a positive right of attribution would not be desirable, as this could create difficulties in the case of authors of composite works. The resulting legislation purports to accord the author full rights of attribution.[121] The author has the right to be identified as the author of the work. Authors are protected against false attribution and have the right to decide when to release the work to the public.[122] Artists have protection against the unauthorised alteration of artists' work and the fraudulent affixation of signatures.[123] Rights are not infringed unless they have been asserted in accordance with section 78 of the Act. The requirement of assertion indicates that some of the initial hesitancy to grant attribution rights remains. Furthermore, as in New Zealand, the court can take into account the delay in asserting the right when assessing damages.[124] Personal assertion is required, if the assertion is made in an assignment of copyright there must be a statement to that effect. An assertion can be made by a written instrument signed by the person asserting the right.[125] The right of attribution only applies where the work is published commercially, broadcast or performed in public, included in a cable programme or if the work is a film or sound recording and is issued to the public.[126]

Integrity rights do not extend to prevent the relocation of a work or protect the physical manner in which the work is displayed.[127] The right to object to derogatory treatment does not protect against complete destruction.[128] There is no obligation to keep the work in a fit state of repair. The copyright owner can treat the work with impunity as long as the conduct falls outside the definition of derogatory treatment. The rights of integrity

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[121] For a discussion of the reform process seeMerkin above n 117, at 234.

[122] See *Doyle v Wright* (1928-35) MCC 243 and *Gilbert v Star Newspaper Co* (1894) 11 TLR 4.

[123] S 84 Copyright, Designs and Patents Act (CDPA) 1988.

[124]s 78(5) CDPA 1988.

[125] S 78(2)(b).

[126] This provision is paralleled in the New Zealand Copyright Act 1994.

[127] See further discussion on the concept of relocation and negative space.

[128]This is a common feature in common law jurisdictions..

and paternity do not apply to computer programs and news reporting.[129] The Act allows for the editing of works in the interests of good taste and public welfare.

The rights in the United Kingdom Act last for life plus fifty years in the case of works, and for fifty years for film. Moral rights are not assignable *inter vivos* but can be made the subject of testamentary disposition.[130] The rights of paternity, integrity and privacy with regard to photos and films can accompany testamentary disposition.[131] In such absence the right can be exercised by the personal representative of the author. Contractual rights and integrity rights often operate in parallel enabling the author to seek redress either by relying on the specific terms of the contract or on the more general integrity rights. An author can consent to acts which would otherwise be an infringement of moral rights and can waive the rights. Waiver may be formal or informal. The existence broad waiver clauses could effectively means that authors' moral rights will seldom be enforced.

Criticisms of the United Kingdom Act mirror those of the New Zealand Copyright Act. The requirement that the right of attribution be asserted, the uncertainty relating to the scope of the integrity right, and the broad approach to waiver provisions are diminish the scope of moral rights.

E Australia:Process of Reform

Australia's approach to moral rights has been cautious. In reviewing the Copyright Act the Copyright Review Committee, unlike the Whitford Committee, concluded that there was insufficient abuse of moral rights to warrant statutory intervention.[132] The Committee voted 5 to 4 against the incorporation of moral rights in Australia's

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[129] S 79 CDPA 1988.

[130] S 94, 95 CDPA 1988.

[131] S 95 CDPA 1988.

[132] See Vaver above n 77, at 286. See also Copyright Law Review Committee (CLRC) Discussion Paper *Moral Rights* 1984 and Report *Moral Rights*.

Copyright Act 1988. The existing protection provided by the law of passing off and unfair competition may protect the economic aspect of the author's rights. However, there is little protection against modification or derogatory treatment of the work. The Trade Practises Act and the Copyright Act protect integrity rights only to a limited extent.[133] In 1994 the Australian Attorney-General's department revived the debate by releasing a discussion paper on moral rights. The paper is not intended to reopen the debate on whether moral rights should be included in legislation, but aims to determine how they can best be incorporated. The stated aim is to develop a regime that: [134]

> strikes a workable balance between the rights of copyright creators, the rights of users and producers of copyright material and the community generally.

Australia's move towards recognition of moral rights was occasioned by a variety of considerations. Moral rights were a way of making Australia appear more responsive to international obligations under the GATT. They were also heavily promoted by pressure groups such as the Australian Society of Authors, the Australasian Performing Rights Association (APRA) and surprisingly enough the Australian Book Publishers' Association. Mr Justice Sheppard correctly commented that moral rights will act as a complement to economic rights to allow full protection for authors.[135]

Australia plans to implement the rights of attribution and integrity. The right of attribution will only extend to the positive right of attribution. The draft paper suggests granting authors a positive right of integrity against any "material distortion, mutilation or alteration" that is prejudicial to the author's reputation or honour. Australia may have hoped that this formulation would enable moral rights to be grafted onto existing common law. [136] The prejudicial treatment requirement parallels other common law countries. In assessing the degree of infringement (the degree of prejudicial alteration,

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[133] See S. Ricketson *The Law of Intellectual Property* Law Book Company, Melbourne, 1984, at 431.

[134] Attorney-General's Department Discussion Paper, "Proposed Moral Rights Legislation for Copyright Creators" June 1994, at 3.

[135] Justice Sheppard "Moral Rights" [1994] Arts and Entertainment Law 11 at 21.

[136] For criticism of this point see comments in heading "What is Wrong With the Use of Tort?"

mutilation or destruction) the court is called upon to make an assessment of the artistic worth of the plaintiff's work. The right of integrity may cause the most radical change to the law in Australia, as these rights have been relatively unprotected in law thus far. Issues relating to the rights of performing artists remain largely unresolved. In addition to protection for literary, artistic, musical and dramatic works, Australia will grant protection to films, sound recordings and broadcasts. The Berne Convention does not require protection for the latter three categories. It is assumed that in the case of film moral rights will rest with the producer of the film.

The duration of moral rights causes concern.[137] Such difficulties can be set aside if the right to exercise moral rights is perceived as distinct from actually possessing the rights. Australia intends to limit the duration of moral rights to the same duration as economic rights. This is similar to the monist concept of moral rights.[138] If the rights are not specified to last beyond the death of the creator then they cease upon the creator's death.

Formal waiver provisions are proposed to prevent moral rights being too onerous. This creates the risk that moral rights may exist on paper more than in reality.[139] Balanced against this is the concern that strict adherence to moral rights may create a system that is inflexible and unmanageable. Further it is also argued that an absence of formal waiver provisions could lead to a proliferation of unregulated under the counter waiver deals.

Moral rights will be alienable. This contrasts with the French system where moral rights are perpetual and inalienable. The scope of the proposed rights is still uncertain. One approach would be to have a list of exceptions to the rights. The drawback is that this is inflexible. The other alternative is to allow the application of the rights to be subject to a test for reasonableness, as in Canada. The Australian Discussion Paper draws an analogy between the latter scheme and the present system for fair use, where reasonableness is judged in light of all the circumstances.

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[137] Above n 8, at p 338.

[138] Where the economic and moral rights are interdependant and expire together.

[139] Above n 115.

Australia has taken longer to decide to implement moral rights, but there has been more debate on the merits of various levels of protection. In spite of this the Australian proposals are lacking in several respects. By only allowing a positive right of attribution, the author is denied the means of defending unauthorised attribution, unless he can rely on consumer protection legislation.[140] This abrogates a fundamental right of authorship. The requirement of prejudicial treatment limits the right of integrity to existing common law remedies. Concern about the waiver scheme is valid. This is intensified by the proposal that the rights be alienable. The deficiencies in the proposals are problems consistently found in the common law world.

F New Zealand

The Copyright Act introduced moral rights to New Zealand in 1994. The Act should have been well reasoned and coherent piece of legislation. Instead the legislation is to a large extent reliant on the United Kingdom's Copyright, Designs and Patents Act. There has been no litigation on the provisions, so most of the problems highlighted are speculative. It is difficult to tell the extent to which the problems are due to fundamental misconceptions about moral rights, and the extent to which poor drafting is at fault.[141]

The Act purports to grant the rights to attribution and integrity. An author must assert their moral rights, since the right to identification is not infringed:[142]

> unless the right has been asserted under this section in such a way as to require that person to so identify the author or director.

In an action for copyright infringement the court will take into account any delay in asserting the right of attribution.[143] The requirement that an author must specifically

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[140] If someone attributed a work to an author,which was not his, he would be unable to disassociate himself from the work within the realms of the moral rights provisions.

[141] Cf s 11 Copyright Act. See Appendix 4.

[142] S 96.

[143] S 96(5).

assert their moral rights is incongruous, given that the economic aspects of copyright have no such corresponding onus. An unnamed author does not have to assert their rights to gain the benefit of fifty years copyright protection. Copyright comes into existence upon creation of the work.[144] The Departmental Report to the Select Committee on the Copyright Bill suggested that the requirement of assertion was inconsistent with the "spirit of informality" inherent in the Copyright Act.[145] It could also be said to be inconsistent with Article 5(2) of the Berne Convention which states that the enjoyment and exercise of authors' rights should not be subject to any formality. This raises the question as to why moral rights must be asserted. Copyright grants rights and an ability to exploit the work's commercial value. Moral rights, in principle are not tied to economic rights. There is less cost associated with giving effect to moral rights than there is in economic rights and yet there is a requirement of assertion. The requirement of assertion and commercial use of the work provides a loophole by which moral rights can be rendered less effective.

The author of a literary or dramatic work has the right to be identified as the author when the work is first performed, broadcast or published commercially.[146] Composers of musical works are only accorded copyright protection when the work is commercially published or when copies are distributed to the public. The right of attribution follows publication in the case of artistic works. If copyright in a work first vested with the employer or with the director's employer, the right of attribution (with a few provisos) is not applicable.[147] The right does not apply in the case of collaborative literary, artistic or dramatic works where the authors were not previously identified in or on published copies of the work. Reflecting the Whitford Committee debate, the New Zealand Act demonstrates a reluctance to embrace the rights of authors in a collaborative work.

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[144] S 22(3).

[145] Department of Justice "Copyright Bill:Departmental Report" 3 November 1994, at 110.

[146] S 94 (2).

[147] S 21(2), s 5(2)(b).

There is a slight advantage over the Australian proposals which do not recognise the right to non attribution. The New Zealand legislature has given the widest protection to the right to object to incorrect attribution. The right to object to false attribution is not dissimilar to elements of the tort of passing off, or the protection granted by the Fair Trading Act. This may account for the broad protection granted in section 102. The right to object to false attribution does not require that there be commercial motivation. The right is infringed by a person who merely issues to the public copies of literary, dramatic, musical or artistic work or a film in which there is a false attribution.

Treatment is derogatory if by distortion, mutilation or otherwise, it is prejudicial to the honour or reputation of the author or director.[148] The right is formulated in a positive sense.[149] This provision does not apply to performing artists, to architectural designs for buildings or to where an alteration is carried out to maintain standards of decency or good taste. Derogatory treatment is only actionable if the work is made public.[150] The French approach has no precondition that the derogatory treatment be made public. In France the work is regarded as an extension of the author and derogatory treatment is prohibited even if it is not available to the public. An analysis of the New Zealand provision indicates that if a literary work were subjected to derogatory treatment, but was not published commercially, and was distributed to the public or made available, it would not fall within the rubric of the Act.[151] The definition of commercial publication contained in section 11 is problematic.[152] The section focuses on the timing of the publication and may relate more to a copyright owner's right of disclosure.[153] It does not aid interpretation of section 99. Secondary infringement likewise requires that the infringement be carried out in the course of business.[154] The rationale behind the New

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[148] S 98.

[149] S 98(2).

[150] S 99 Copyright Act 1994, Appendix 4.

[151] See Appendix 4.

[152] See Appendix 4.

[153] Compare with s 18(1) CPDA.

[154] S 99(6) (knowledge of derogatory treatment)

Zealand moral rights provisions appears to be linked to the exploitative value of the work. Making moral rights dependant on the author's exploitative use of the work derogates from the fundamental precepts of moral rights whether defined as a personality right or a property right. It disproportionately impacts on the rights of the author, and too closely links the economic rights with moral rights. No discernible public purpose is served by such an approach.

There is an underlying theme that a commercial element is required before the rights to positive attribution and integrity rights are triggered. There is a fundamental confusion between moral rights and economic rights, an analysis of approaches in other common law jurisdictions lends credence to this theory. This introduces a requirement which is not present in the European approach to moral rights. The basis for moral rights lies in the imputed connection between the creator and her work. The right is personal to the author and protects the integrity of the creator and his work. Even if we accept that the rights interdependent, this does not mean that they are one in the same, or that one deserves to be abrogated in favour of the other.

The New Zealand Copyright Act focuses less on creators' moral rights than it does on publishers' rights.[155] Moral rights may be waived, and there is almost an expectation that rights will be waived.[156] This raises the question of which type of waiver system should be operated. The approach taken by the legislature has been to specify exceptions to the Act. It may be consistent if there were to be defined situations in which waiver is permissible. This would provide a degree of clarity. However it is conceivable that a less regulated waiver scheme could succeed and protect creators rights. This would however require the moderating influence of an organisation set up to mediate/negotiate waivers. This would

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[155] In this respect the New Zealand Act is doctrinally similar to Wächter's theory of the publisher's right. This theory states that the essence of copyright lies in the rights that the author assigns to a publisher for commercial exploitation of the work. The main aim is for the author to be able to prevent others from unauthorised use of his/her work. O. Wächter *Das Verlagsrecht mit Eischluss der Lehren vom Verlagsvertrag und Nachdruck nach den geltenden deutschen und internationalen Rechten* Stuttgart 1857/58 as cited in F. J Kase above n 58.

[156] A discussion at the Ministry of Commerce about neighbouring rights and moral rights highlighted this attitude. Exeptions have been created for authors of computer programs, articles for newspapers, magazines, periodicals or works for current events, or authors of works whose copyright subsists in the employer.

help to provide objectivity and would safeguard creators' interests. The organisation would act as a fiduciary for the creator. This could be combined with a *domaine public payant* system for maximum efficiency.[157]

VI Alternatives

A Developments in other Jurisdictions

India and Israel copyright legislation based on the United Kingdom model. From this starting point the models diverge. Each country has modified the protection in such a way as to give increased rights to authors.

In *Mannu Bhandari v Kala Vikas Pictures* the plaintiff, a writer agreed to allow the film director to adapt it for film.[158] The film differed substantially from the novel and the author claimed that her right to integrity was violated and the novel mutilated and distorted by the film's interpretation. The trial judge dismissed the case on the basis that a poor film reflects badly only on the filmmaker and not the author. On appeal the Court found that there was distortion and mutilation of the plaintiff's work. The contractual provisions were read in light of Indian moral rights provisions. The only modifications permissible were those necessary due to the constraints of a medium.[159] The High Court held that the film could be released on certain conditions. The author's name could not be associated with the film or publicity and copyright in the work would be returned to her. The plaintiff agreed not to claim any interest or right in the film and not to contest the release of the film.

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[157] See heading below "Domain public payant".

[158] [1987] AIR (Del) 13.

[159] Above n 158, at 19.

The Israeli decision in *Qimron v Shanks* caused dismay in the United States.[160] The director of the Biblical Society published a forward to volume of photographs about the Dead Sea Scrolls. Professor John Strugnell, Professor Elisha Qimron and a team of researchers were responsible for translating and reconstructing the scrolls. A critical article in the Biblical Society publication attributed the research on the scrolls to Professor Strugnell and an unnamed "colleague". Professor Qimron sued for damages and an injunction, alleging that his copyright in the research on the Scrolls was wilfully infringed, and that publication without attribution violated his moral right. Israeli law takes a proactive approach to moral rights. The right to paternity provides that an author is entitled to be credited in the usual extent and manner for his creation. Unlike the United Kingdom and New Zealand there is no requirement that the right of attribution be asserted. The Israeli approach is laudable in this respect. The Israeli court found for the plaintiff on both charges and issued an injunction and awarded substantial damages.[161]

These cases both show that a British based system of copyright can be adapted to reflect changing values. Both countries have placed value on the right of attribution, India in particular upholding the right not to have work attributed when it has been distorted and not allowing modification beyond that required by the constraints of a medium. These systems have made an effort to comprehend the values underlying moral rights and to give effect to them.

B Domaine Public Payant

The domaine public payant scheme could be considered for implementation in New Zealand.[162] It would complement moral rights legislation. In Western copyright law the rights and monopolies granted by copyright are limited in duration. After this the work

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[160] 3 [5753-1993] P.M.10 (D Jerusalem 1993).

[161] Statutory damages of US $7,407, US $29,600 for mental distress and US $18,519 for solicitor's costs.

[162] See generally Dr C. Mouchet "Problems of the "Domaine Public Payant" (1983) 8 Columbia VLA Journal of Art and the Law 137.

passes into the public domain and can be used for free. This makes it attractive to publishers and rental outlets. The concept of *domaine public payant* has existed for a long time. It is not common in common law countries, but has found root in Italy, Chile, Argentina, Mexico and the former USSR. *Domaine public payant* seeks a resource rental for the use of material in the public domain. The system is designed to prevent the use of public domain works in such a way that would prejudice their authenticity or identity. The fees collected are poured back into supporting the arts. Those who oppose this system argue that it extends the monopoly granted by copyright, acts as a disincentive to creativity and has the potential to act against "cultural freedom".[163] However, if the body administering the scheme included representatives elected by creators, fears of government capture could be allayed.[164] Proponents praise the support conferred on the arts by this system.

Moral rights involve similar issues to cultural property protection. States recognise the value of protecting cultural items from mutilation or destruction. The system can help to preserve cultural property for future generations.[165] Merryman highlights the importance of the protection of cultural property not in the interests of cultural nationalism, but cultural internationalism.[166] Legislation and international conventions provide a framework for protection.[167] Moral rights help to preserve the integrity in the creator's works and to safeguard their contribution to cultural heritage.

Works which are in the public domain are cheaper and are favoured by publishers. Such books, plays and artworks are not cheaper by virtue of being in the public domain. The exploiters can capitalise on these works. In real terms, the public receives little value from

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[163] See above n 162, at 138.

[164] Such a scheme was proposed in Norway.

[165] For a comprehensive debate on the protection of cultural property via intellectual property regimes see J.H. Merryman "Two Ways of Thinking about Cultural Property" (1986) 80 American Journal of International Law 831.

[166] Above n 165, at 846. See also J.H Merryman "The Public Interest in Cultural Property" (1989) 77 Calfornia Law Review 339.

[167] The Convention for the Protection of Cultural Property in the Event of Armed Conflict recognises that even in testing times, the protection of cultural property is still of importance. It is important not just to protect one's own cultural heritage, but also to protect the cultural heritage of others. May 14 1954, The Hague.

the works being in the public domain. By creating a fee for the use of these works it balance is redressed, assisting current creators. Dr Carlos Mouchet puts the case for *domaine public payant* convincingly.[168] Mouchet argues that the real beneficiaries of the public domain are not the public but publishers and producers. These people he argues, do not on the whole complain when the cost of raw materials such as paper, machinery or to a point labour, goes up. Yet when it is suggested that they should pay for the resource in which the actual value lies, there is more concern. [169] The public domain thus benefits the major user more than the individual user.

An effective system would be retroactive and would include works already in the public domain. Any other system would require an arbitrary timeline to be drawn to decide which works should be included or excluded. The question of who is to benefit remains open for debate. Proposals centre around a similar range of options. Potential beneficiaries are the relatives of creators, creators societies and the State, the proportions in which they would benefit vary. The aim is to provide stimulus and reward for creativity, and to enable the state to encourage the arts. Mouchet suggests that the amount charged for the use of works in the public domain should not be high, and should reflect the charges levied by existing copyright/ performing artists' collection agencies.

The *domain public payant* structure is well suited to safeguarding the moral rights interests of creators and cultural property. It could be a means of providing support and protection of cultural heritage and could provide the state with revenue for the arts, which would further the interests of all creators. Publishers would not be seriously affected by the charges levied. They can be absorbed and factored into production costs. For years the real costs has been hidden. Publishers have made free use of works in the public domain whilst at the same time not passing on the lower production costs to the consumer.

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[168] Above n 162.

[169] "[I]t is surprising that there are people who are unwilling to pay for the use of the real and irreplaceable raw material, which is what intellectual creation really is - without which books would be piles of blank sheets, the stage would be empty, a gramophone record would be inert matter, and radio and television would merely serve to transmit news and advertising." Above n 162, at 139-140.

VII Conclusion

Common Law countries clearly have difficulties with the concept of moral rights. This is reflected by the limited application accorded in some countries. In the United States they have been introduced in sui generis form. Canada gives broader scope and a good level of protection for integrity rights but allows broad waiver provisions. In the United Kingdom and New Zealand the scope purports to be wide, but the actual application is narrow. French law defines moral rights as a personality right. The German system allows them to also be defined as a property right, by virtue of the interrelationship between moral and economic rights. Common law is familiar with personality rights as expressed in tort and with property rights. Any of the justifications for either system of rights can be used to rationalise moral rights.

New Zealand has created a hierarchy of rights which attempts to replicate existing common law remedies. Instead of recognising that a paradigm shift is necessary the legislature is only prepared to recognise rights to the extent that they parallel existing tort law concepts. New Zealand should draw on existing legal concepts to ease the implementation of moral rights, but should not attempt to crudely graft them onto existing structures, mindless of the concepts and justifications underlying moral rights.

The rights of integrity in New Zealand are limited and are defined according to existing tort concepts. Requiring damage that is prejudicial to the honour or reputation of the author loses sight of the fact that it is the artist's link to the work rather than his reputation that is being protected. Again the public display requirement does little to protect the author's moral rights and focuses on reputational damage. The provisions mentioned should be amended so as to focus on the rights of the creator.

There will be circumstances in which it is necessary to curtail moral rights. This returns us to the question of who should bear the cost of moral rights. Waiver provisions redistribute the onus. The balance of the load should be distributed between the parties. In the current New Zealand climate, waiver provisions appear to be the solution most likely to find

acceptance. Waiver provisions should be tightened. There should be a change of emphasis. Rather than starting from the assumption that there will be a blanket, we should start from the assumption that there is no automatic waiver. The parties should be able to bargain in a regulated fashion. Waivers should be negotiated when there is a proposed transfer of the economic rights. The bargain should not be conditional on the waiver of the moral rights. The contract should stipulate with due particularity the types of rights that are being waived ***and*** the purpose(s) for which this is done (a purpose-for-grant approach). This would help to prevent an overly general and extensive disposition of the author's rights. There is scope for creators' organisations to become involved in negotiating contracts and monitoring the use of waiver provisions. The German system of copyright protection makes extensive use of collecting societies. Already APRA is beginning to make its presence felt. Droit de suite could help achieve better parity of bargaining power between authors and exploiters.

A *domaine public payant* system should be considered. The main reason why it was not implemented earlier was fear of a scheme with the potential for cultural capture.[170] New Zealand does not have this historical baggage. We are seeking ways to protect cultural property. This could create revenue and protect moral rights and the use of cultural property.

Moral rights and economic rights are frequently viewed as irreconcilable. Moral rights are perceived as being an obstacle in the headlong rush towards progress. Bolstering the author's position by recognising broad rights is an alien concept to the captain at the helm of a publishing firm. However moral and economic rights can co-exist in a productive and economically viable environment.[171] The main stumbling block is the negative preconceptions about a predominantly French conception of moral rights, and the common law reaction: broad waiver provisions. To remedy this requires a shift away from the French notion of moral rights. By redefining and justifying moral rights a more equitable situation for all can be reached.

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[170] This must be understood against the background and aftermath of World War Two.

[171] France, Germany, The Netherlands.

Appendix 1

Article 6bis Berne Convention

1. Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.

Appendix 2

German Copyright Act 1965

1. General

§ 11

Copyright shall protect the author with respect to his intellectual and personal relations to the work, and also with respect to the utilisation of the work.

2. Moral Rights of the Author

§ 12. The Right of Dissemination

(1) The author shall have the right to determine whether and how his work is to be disseminated.

(2) The right of publicly communicating the contents of his work or a description thereof is reserved to the author, provided that neither the work, nor its essence, nor a description thereof has previously been disseminated with his consent.

§ 13 *Recognition of Authorship*

The author shall have the right of recognition of his authorship of the work. He can determine whether the work is to bear an author's designation and what designation is to be used.

§ 14 *Distortion of the Work*

The author shall have the right to prohibit any distortion or other mutilation of his work which would prejudice his lawful intellectual or personal interest in the work.

Appendix 3

§ 101 United States Code Annotated Title 17 Copyrights (Copyright Act 1976)

(b) Certain Rights Not Affected

The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law -

"**(1)** to claim authorship of the work;

or

"**(2)** to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honour or reputation."

Appendix 4

New Zealand Copyright Act 1994

Section 11 provides:

In this Act the term "commercial publication", in relation to a literary , dramatic, musical, or artistic work, means the publication of the work consisting of-

(a) Issuing copies of the work to the public at a time when copies made in advance of the receipt of orders are generally available to the public; or

(b) Making the work available to the public by means of an electronic retrieval system:-

and related expressions shall be construed accordingly.

Section 94 (1) of the Copyright Act provides:

Subject to section 97 of this Act,-

(a) The author of a literary, dramatic, musical or artistic work that is a copyright work has the right to be identified as the author of the work; and

(b) The director of a film that is a copyright work has the right to be identified as the director of the work,-

in the circumstances described in this section, but the right is not infringed unless it has been asserted in accordance with section 96 of this Act.

Section 99(1) provides

s 99(1) [Literary, dramatic, musical work] In the case of a literary, dramatic or musical work, the right conferred by s 98(2) of this Act is infringed by a person who-

(a) Publishes commercially, performs in public, broadcasts, or includes in a cable programme a derogatory treatment of the work; or

(b) Issues to the public copies of -

(i) A film or sound recording of; or

(ii) A film or sound recording that includes -

a derogatory treatment of the work.

Bibliography

Texts

G. Davies *Copyright and the Public Interest* VCH, Weinheim, 1994.

R. Dworkin *Law's Empire* Fontana, London, 1986

R.P. George ed, *Natural Law Theory*, Clarendon Press, Oxford, 1992.

Inter Nationes e.V *Copyright- Documents in Politics and Society in the Federal Republic of Germany*, Bonn, 1990.

F.J. Kase *Copyright Thought in Continental Europe* F.B Rothman & Co, South Hackensack, NJ, 1967.

A. Latman, R.A. Gorman, J. Ginsburg *Copyright for the Nineties* 1992 Cumulative Supplement, 3 ed, The Michie Company, Charlottesville, Virginia, 1992.

R. Merkin *Richards Butler on Copyright, Designs and Patents* Longman Group, London, 1989.

M. Nimmer, D. Nimmer *Nimmer on Copyright* Matthew Bender & Co, New York, 1996.

S. Ricketson *The Law of Intellectual Property* Law Book Company, Melbourne, 1984.

B Sherman; A. Strowel ed, *Of Authors and Origins*, Clarendon Press, Oxford, 1994.

S.M. Stewart *International Copyright and Neighbouring Rights*, Butterworths, London, 1983.

S. Strömholm *A Short History of Legal Thinking in the West* Norstedts Förlag AB, Stockholm, 1985.

J. Waldron *The Right to Private Property* Clarendon Press, Oxford, 1988.

E. Young *Conjectures on Original Composition.*E Morely ed; Manchester 1918

Journal Articles

C. Aide "A More Comprehensive Soul:Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right" (1990) 48 University of Toronto Faculty of Law Review 211.

K. Aoki "Adrift in the Intertext:Authorship and Audience "Recoding Rights" (1993) 68 Chicago-Kent Law Review 805.

L. Becker "Deserving to Own One's Intellectual Property" (1993) 68 Chicago Law Review 609.

S.L Carter "Does it Matter whether Intellectual Property is Property?" (1993) 68 Chicago Kent Law Review 715.

D.Ciolino "Moral Rights and Real Obligations: A Property Law Framework for the Protection of Author's Moral Rights" (1995) 69 Tulane Law Review 935.

W.R. Cornish "Authors in Law" (1995) 58 Modern Law Review 1.

E.J. Damich "State 'Moral Rights Statutes': An Analysis and Critique" (1989) 13 Columbia VLA Journal of Law & the Arts 291.

J.M. Dine "Authors Moral Rights in Non-European Nations:International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls" (1995) 16 Michigan Journal of International Law 545.

G. Dworkin "Moral Rights and the Common Law Countries" (1994) 5 Australian Intellectual Property Journal 5.

A. Francon; J. Ginsburg "Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work" (1985) 9 Columbia VLA Journal of Art and the Law 381

J.A. Frazier "On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds:Notes to Building a Sociology of Copyright Law" (1994) 70 Tulane Law Review 313.

R.D. Gibbens "The Moral Right of Artists and the Copyright Act Amendments" (1989) 15 Canadian Business Law Journal 441.

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 Columbia VLA Journal of Law & the Arts 477.

W.J. Gordon "An Inquiry into the Merits of Copyright:The Challenges of Consistancy, Consent, and Encouragement Theory" (1989) 41 Stanford Law Review 1343.

P. Jaszi "Toward a Theory of Copyright:The Metamorphoses of Authorship" (1991) 40 Duke Law Journal 455

A. Kronman "Contract Law and Distributive Justice" (1979-80) 89 Yale Law Journal 471.

J.H. Merryman "The Refrigerator of Bernard Buffet" (1976) 27 Hastings Law Journal 1023.

J.H. Merryman "The Public Interest in Cultural Property" (1989) 77 Calfornia Law Review 339.

J.H. Merryman "Two Ways of Thinking about Cultural Property" (1986) 80 American Journal of International Law 831.

C. Mouchet "Problems of the "Domaine Public Payant" (1983) 8 Columbia VLA Journal of Art and the Law 137.

R.H. Rotstein "Beyond Metaphor: Copyright Infringment and the Fiction of the Work" (1993) 68 Chicago-Kent Law Review 725.

M.L. Rudoff "The Dancer and the Dance" (1991) 29 Alberta Law Review 884.

Y.L. Sage "The French Intellectual Property Code 1992- The Author's Rights of Disclosure and of Reconsideration" mimeo, 1995.

R. Sarraute "Current Theory on the Moral Right of Authors and Artists Under French Law" (1968) 16 American Journal of Comparative Law 465.

Justice Sheppard "Moral Rights" [1994] Arts and Entertainment Law 11.

H.M. Spector "An Outline of a Theory Justifying Intellectual and Industrial Property Rights" (1989) 8 EIPR 270.

W. Strauss "The Moral Right of the Author" (1955) 4 American Journal of Comparative Law 506.

D. Tan "Seeing Red over Stravinsky's Firebird" (1996) 7 Intellectual Property Journal 63.

L. L. Van Velzen "Injecting Duty Into Droit Moral" (1988-89) 74 Iowa Law Review 629.

D. Vaver "Authors' Moral Rights in Canada: Charter or Barter of Rights for Creators?" (1987) 25 Osgoode Hall Law Journal 749.

D. Vaver "Author's Moral Rights and the Copyright Law Review Committee's Report: W(h)ither Such Rights Now?" (1988) 14 Monash University Law Review 285.

J. Waldron "From Authors to Copiers" (1993) 68 Chicago-Kent Law Review 841.

M. Weir "The Story of Moral Rights or the Moral to the Story" (1992) 3 Australian Intellectual Property Journal, 232.

M. Woodmansee "The Genius and the Copyright" (1989) 10 Eighteenth Century Studies 425.

"'Works-Made-For-Hire' A Round Table Discussion" (1993) 14 Columbia VLA Journal of Law & the Arts.

M.Wyburn "The Attorney-General's Department's Moral Rights Discussion Paper: Background and Proposals" (1995) 23 Australian Business Law Review 318.

Papers

Attorney-General's Department Discussion Paper, *Proposed Moral Rights Legislation for Copyright Creators* June 1994

E. Ulmer "Lettres d'Allemagne", 1957 *Le Droit d'Auteur* 16

Copyright Law Review Committee (CLRC) Discussion Paper *Moral Rights* 1984 and Report *Moral Rights.*

Department of Justice *Copyright Bill:Departmental Report* 3 November 1994.

WIPO *Glossary of Terms of the Law of Copyright and Neighouring Rights* 161, WIPO Publ. No. 827 (EFR)(Jan 1 1981).

Legislation

Convention for the Protection of Cultural Property in the Event of Armed Conflict. May 14 1954, The Hague.

Copyright Act 1994 (NZ)

Copyright Act 1985 (Canada).

Copyright, Designs and Patents Act 1988 (UK)

Copyright Act 1976 (US)

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 496, UNTS 43

Lanham Act (US)

Paris Convention for the Protection of Industrial Property, 21 UST 1583, 828 UNTS 305.

Treaty on Intellectual Property in Respect of Integrated Circuits 28 ILM 1477 (1989).

Visual Artists Rights Act 1990 (US)

Cases

Big Seven Music v Lennon 554 F2d 504 (2d Cir, 1977).

Crimi v Rutgers Presbytarian Church 89 NYS 2d 813 (SCt 1949).

Camoin v Carco D.P 1928.2.89, Gaz.Pal. 1931.1.678.

Donaldson v Beckett 4 Burr. 2408

Doyle v Wright [1928-35] MCC 243.

Dubuffet Trib.gr.inst. Paris 23 mar 1972.

Edison v Viva International Ltd 421 NYS 2d 203, 1979.

Feist v Rural Telegraph Co 111 Sct 1282 (10 Cir1991).

Gilbert v Star Newspaper Co (1894) 11 TLR 4.

Gilliam v American Broadcasting Co 538 F2d 14 (1976).

Granz v Harris 198 F 2d 585 (2nd Circuit, 1952).

Harrison and Starkey v Polydor [1977] FSR 1.

Mannu Bhandari v Kala Vikas Pictures [1987] AIR (Del) 13.

Morrison Leahy Music Ltd v Lightbond Ltd Unreported, High Court of Justice, UK, March 1991.

Neyland v Home Pattern Co 65 F 2d 363 (2nd Cir. 1933).

Prince Albert v Strange (1849) 1 M & G 25 94.

Qimron v Shanks 3 [5753-1993] P.M.10 (D. Jerusalem 1993).

Salinger v Random House 811 F2d 90 (2d Cir 1987).

Shostakovic v Twentieth Century Fox Film Corp 80 NYS 2d 575 (Sct 1948).

Soc le Chant de Monde v Twentieth Century Fox [1953] DA 1954, 16.

Stewart v Abend 110 Sct 1750, L Ed 2d 184 (S Ct 1990).

Sudre v Commune de Baixas [1936] DP.III.57.

Whistler v Eden DH 1898.2.465, S 1900.2.201

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Co Moral rights in
a common law
context