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Moral Rights: International Framework and Indian Approach

Nikhil Agarwal* and Vinayak Ojha[†]

Abstract

In the wake of increasing globalization and technical advancements in the digital field, the dissemination of creative work has become easier than ever. However, this development has come with its own set of challenges, particularly for Intellectual Property Law, as most of online transfer of information is unregulated. Digitalization has led to the imminent need for standardized and stringent protection of an author's work. While this protection is mainly conceived as commercial right of the author on his work, there is another fundamental element to it, which is equally important and cannot be neglected, i.e., moral rights. These rights include right of attribution and integrity and are so inextricably related, that they stay with the author, even after transfer of economic rights on the work. In order to ensure effective globalized protection, there is a requirement for minimum standards of protection in all domestic laws, as was provided in the TRIPS agreement. This paper analyzes the Moral Rights regime as envisaged by the TRIPS agreement, and the monoist and dualist approaches that have been adopted by different countries. It also analyzes the evolution of moral rights in India.

* Gujarat National Law University, Gujarat, India; nikhil.gnlu@gmail.com

[†] Gujarat National Law University, Gujarat, India;
vinayakojha94@gmail.com

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I. Introduction

Moral rights ought to protect an author's personality, as reflected in the creation of his or her mind.¹ When an author sets out to create a work of art, it involves honor, dignity and artistic spirit of the author in a fundamentally personal way and represents the author's intrinsic dimension of creativity. Copyright is a bundle of rights classifiable under two major heads- economic rights and moral rights. While economic or property rights are objects of commerce which can be transferred or assigned during its limited life span, moral rights are inalienably attached to the author, remaining unaffected by the assignment or termination of property rights.² Moral Rights, like integrity and attribution rights in Intellectual property law, have evolved in order to safeguard certain rights of the author over his work. France has been rightly dubbed the "mother country" of moral rights³ as these rights owe their origin to the French concept of *droit moral*,⁴ which has two underlying principles - (1) The Right of Repentance - which is the artist's authority to determine when his work is complete for the purpose of completion⁵ and (2) Independent of the copyright, the artist has an interest in his work so as to enable him to enjoin defamation or any contrary assertion of paternity.⁶

¹UNESCO, A. B. C. OF COPYRIGHT (France: United Nations Educational Scientific and Cultural, 1981).

http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/diversity/pdf/WAPO/ABC_Copyright_en.pdf.

²WILLIAM STRAUSS, THE MORAL RIGHT OF THE AUTHOR 115(1959).

³Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19COLUM. J.L. & ARTS201(1993).

⁴Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53(4)HARV. L. REV. 554 (1940).

⁵Columbia Law Review Association, Inc., *Moral Right of Artists*, 49COLUM. L. REV. 1, 132 (1949).

⁶*Id.*299-366.

Owing to various International treaties, most copyright regimes in the world have incorporated moral rights in their domestic laws.⁷ However, the nature and duration of protection, differs from jurisdiction to jurisdiction. Most countries recognize two kinds of moral rights - the right of attribution (or the right to claim authorship) and the right of integrity.⁸ Some countries give the author, the right to choose whether the work should be published under the right of disclosure. The duration of protection of these rights also differs. For example, under French law, moral rights are perpetual, under German law moral rights exist as long as copyright exists (70 years after he or she dies), while in other jurisdictions, moral rights terminate with the author's death.⁹

II. Different Standards of Protection: Monoist and Dualist Approaches

Different countries have set different standards of protection for moral rights.¹⁰ Germany and Austria follow a monoist approach, whereby moral rights of an author are not independently recognized, but are clubbed with the general protection that is given to a creator's economic rights under copyright law.¹¹ The monoist theory suggests that copyright is a single right which has both economic and moral elements, hence one kind of right gives protection to two different kinds of rights. This structure of protection is useful when both kinds of interests exist at the same

⁷Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 603(a), Dec. 1, 1990, 104 Stat. 5128; Art. L. 121-1 to L. 121-9 Code de la propriété intellectuelle; Section 57, Indian Copyright Act, 1957 (Act 14 of 1957).

⁸STRAUSS, *Supra* note 3.

⁹Stephanie C. Ardito, *Legal Issues - Moral Rights for Authors and Artists*, INFORMATION TODAY, 2002. [http:// www.infotoday.com/ it/jan02/ardito.htm](http://www.infotoday.com/it/jan02/ardito.htm) (Last Accessed Feb. 20, 2016).

¹⁰Robert Sherman, *The Visual Artists Right Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373 (1995).

¹¹Jonathan Stuart Pink, *Moral Rights: A Copyright Conflict Between the United States and Canada*, 1 SW. J.L. & TRADE AMERICAS 192 (1994).

time and the express provision protects only one of these interests, because then the solution to the problem would be the Copyright system itself.¹² If moral rights are part of the author's copyright, then they have to be regulated by copyright law.

The application of the monist theory can be found in Article 11 of the German Copyright Act, as it recognizes the unitary character of copyright and gives protection to the author's interests in the personal relationship with his work and the economic exploitation of the work. The explanatory memorandum further clarifies the nature of these rights and terms them to 'form an inseparable unit'. Hence a collection of rights is granted to the author, comprising of both economic and moral rights.¹³

Other countries such as France, Belgium and Italy,¹⁴ follow the dualist approach which holds that an author's right comprises of two distinct elements, i.e., one economic or property rights and the other personal or moral rights.¹⁵ The dualist approach has been incorporated in major International Treaties related to copyright law, such as The Berne Convention¹⁶ and the World Intellectual Property Organization's Performances and Phonograms Treaty¹⁷ as well as the Universal Declaration of Human Rights.¹⁸ The French

¹²EUGEN ULMER AND GERHARD SCHRICKER, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW VOLUMES (2007).

¹³J. A. L. STERLING AND ADRIAN STERLING, WORLD COPYRIGHT LAW (3rd ed., 2008).

¹⁴Lionel Bentley, *Between a rock and a Hard place*, 2009 <http://www.creatorsrights.org.uk/index.php?user=1§ion=Between+a+rock+and+a+hard+place&subsect=D%3A+A+look+across+Europe>(Last Accessed Feb. 20, 2016).

¹⁵Ardito, *Supra* note 10.

¹⁶Berne Convention for the Protection of Literary and Artistic Works, Jan. 29, 1970, 1161 U.N.T.S. 30; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203; Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217 A (III) (1948).

¹⁷WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203.

¹⁸Universal Declaration of Human Rights art 27(2), Dec. 10, 1948, U.N.G.A. Res. 217 A (III) (1948).

system is based on a dualistic approach that separates moral and patrimonial prerogatives.¹⁹

Economic superpowers such as USA and UK have adopted the monoist approach to secure moral rights, which has in effect restricted the scope of protection given to an Author's personal rights. Moral Rights are essentially a feature of the (European) civil law and is not so well received as a foreign concept in common law countries. Common Law perceives copyright as an economic right, the same idea is complemented by the introductory section of the U.K. Copyright, Designs and Patents Act, 1988 which holds copyright to be a property right.²⁰ Only the author has the right to benefit commercially from his work and his link to his own work is severed once he makes it available to the public and the work itself becomes subject to market forces. The idea of an inalienable link of the author with his work, is not in consonance with the idea that views work as a tradable commercial property.

On the other end of the spectrum, are countries like France and Denmark that recognize the author's link to his work and render moral rights inalienable and perpetual.²¹ Although these rights can be waived, but such waiver is not absolute and the author cannot be held to his waiver. Jurisdictions such as United States, where the legal framework is rooted in contract law, will not support such stringent standards of protection.²² However, the judicial authorities in USA, have used trade practices, privacy laws etc. to adjudicate issues related to moral rights. In the case of *Archbold v. Sweet*,²³ the publisher made amendments to the author's work

¹⁹Jean-François Bretonnière and Thomas Defaux, *French Copyright Law: A Complex Coexistence of Moral and Patrimonial Prerogatives*, (Jan. 4, 2012), <http://www.iam-media.com/Intelligence/IP-Value/2012/Legal-perspectives-Europe-Middle-East-Africa/French-copyright-law-a-complex-coexistence-of-moral-and-patrimonial-prerogatives>(Last Accessed Feb. 20, 2016).

²⁰ Copyrights, Design and Patents Act 1988, c.48, s.1.

²¹KWALL, *Supra* note 2.

²² Morton Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV.L. REV. 917 (1974).

²³ 174 Eng. Rep. 55 (N.P. 1832).

and published the new edition without permission. The Court held that such amendments had affected the author's reputation and violated his moral rights. Similarly in *Zim v. West Pubin Co.*²⁴ the court used the invasion of privacy to give the plaintiff the right to control his name for commercial purposes. In USA, Section 43(a) of the Lanham Act, 1994²⁵ recognizes unfair competition in cases of false designation of origin, but the application is limited to commercial actions only, which limits its applicability to moral rights. However this provision has been used to protect the right of attribution and integrity in the case of *Gilliam v. American Broadcasting Companies, Inc.*²⁶

Even though principles of common law can be used to protect moral rights, in no way does it reduce the importance of independent protection of moral rights under statutory law.²⁷ The USA enacted Visual Artists Rights Act (VARA) in 1990, which only protects the moral rights of visual artists. The provisions of VARA are inconsistent with the Berne standards for moral rights protection. It gives visual artists the right of attribution and integrity.²⁸ The provisions of VARA are irrelevant in all TRIPs disputes.²⁹

III. Moral Rights under the Berne Convention

The revision of the Berne Convention in 1928, was the first concrete step to incorporate and recognize moral rights, as it obligated the contracting states to provide protection to the right of attribution and integrity of the author. Article 6bis mandated all contracting parties to provide protection to moral right, under their respective

²⁴ 573 F.2d. 1318, 1326 (5th Cir. 1978).

²⁵ 15 U.S.C. § 1125(a) (1994).

²⁶ 538 F.2d 14 (1976) (applying the Lanham Act § 43(a) to resolve a copyright infringement suit).

²⁷ Michael Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601 (2001).

²⁸ 17 U.S.C. § 106(A) (1991).

²⁹ Monica Kilian, *A Hollow Victory for the Common Law? TRIPs and the Moral Rights Exclusion*, 2 MARSHALL REV. INTELL. PROP. L. 321 (2003).

domestic legal frameworks, and the question of determination of method of complying with their obligations, was left to the discretion of the state. As a result, some states afford these rights to owners not under copyright law, but under tort or contract law.

IV. Exclusion of Moral Rights from TRIPS

When the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) came into effect, moral rights legislation was part of at least two economically important common law countries- United Kingdom³⁰ (U.K.) and United States³¹ and it could have been argued that harmonization of copyright was well underway. Although the TRIPS agreement required the WTO state parties to the Berne Convention, for the Protection of Literary and Artistic Works, to comply with its substantive provisions,³² it was amended to exclude Article 6bis from its ambit.³³

Now, Article 9.1 states that members have no rights and obligation under Article 6bis, due to which members cannot pursue the enforcement of Moral Rights under the WTO dispute settlement mechanism. Despite the fact that both USA and UK have given protection to moral rights in their domestic legal systems, the exclusion of Article 6bis is surprising as TRIPS is a much more persuasive instrument than the Berne Convention, due to the express dispute settlement mechanism it provides under WTO.³⁴ The Exclusion of 6bis from the TRIPs agreement was largely a USA initiative³⁵ and it argued that since moral rights are non-economic and are not related to trade activities in Intellectual property law,

³⁰ Copyrights, Design and Patents Act 1988, c.48 (Eng.).

³¹ Copyright Act of 1976, Pub. L. No. 94553 (codified at 17 U.S.C. §§ 101-810 (1994)); Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 603(a), Dec. 1, 1990, 104 Stat. 5128.

³²Berne Convention for the Protection of Literary and Artistic Works, Jan. 29 1970, 1161 U.N.T.S. 30.

³³ Agreement Establishing the World Trade Organization, April 15, 1994, 1869 U.N.T.S. 299.

³⁴*Supra* note 33.

³⁵Gunlicks, *supra* note 28.

which is the sole topic of TRIPS,³⁶ it must be excluded. Moreover, the stand taken by USA was heavily influenced by powerful interests groups such as Hollywood film industry, which apprehended that if moral rights were recognized within the WTO framework, it would be an impediment to the use of licenses that had already been acquired.³⁷

IV.1 Scope and Limit of Exclusion

Only those aspects that are derived from Article 6bis are excluded from TRIPs, including the right of integrity and attribution. If the right is not derived from 6bis, it is not covered by Art. 9.1 and thus is not excluded. Moreover as is evident from the phrase “Under this agreement”, the restrictions on those rights and obligation arise from the agreement itself and states that have ratified the Berne Convention, have to observe Article 6bis in whichever version valid for them.³⁸ However, the continuation of the obligations under the Berne convention does not imply that Art.9.1 is only relevant for countries that haven’t ratified the Berne Convention.³⁹

The conflict between common and civil law countries regarding the standard of moral rights protection, is an impediment to the harmonization of intellectual property law. The TRIPS agreement was drafted in accordance with the U.S. Proposal, as opposed to the European community,⁴⁰ where countries like France, provides a very high standard for protection of moral rights in their domestic legal framework.

³⁶THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 249 (Arthur E. Appleton, Patrick F. J. Macrory& Michael G. Plummer eds., 2005).

³⁷ WTO - TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (Peter-Tobias Stoll, Jan Busche&KatrinArendeds., 2014).

³⁸PROF. MICHAEL BLAKENEY, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: A CONCISE GUIDE TO THE TRIPS AGREEMENT (1996).

³⁹FROM GATT TO TRIPS: THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (Beier, Friedrich-Karl and G. Schricker, eds. 1996).

⁴⁰Alexander Caviedes, *International Copyright Law: Should The European Union Dictate Its Development?*, 16 B.U. INT’L L.J. 165, 200(1998).

V. Moral Right Protection in India

Developing countries, like India, instead of emphasizing on commercial value of copyright, emphasize on the cultural and artistic prestige and provide strong protection to moral rights under their domestic legal copyright framework.⁴¹ Brilliance in art and literature is the trademark of any culture and the maturity and vitality of any culture is determined by the quality of creative genius of artists and authors.⁴² Section 57 of the Copyright Act, 1957 preserves this creative genius, by giving them a special protection and lifts author's status beyond the material gains of copyright.⁴³ Interestingly, Section 57 does not use the word 'moral rights' but uses the words 'Author's Special Rights'. In India, statutory recognition has been provided only to right of attribution and integrity. The right of retraction has been held to be not in consonance with the legislative intent.⁴⁴ The provision encompasses both "positive" and "negative" aspects of right of attribution. When words which are not there in the author's work are added to his work and the whole passage is attributed to the author, there is an infringement of the author's special rights under Section 57.⁴⁵

V.1 Statutory Recognition under Section 57 of the Copyright Act, 1957

*Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd. and Ors*⁴⁶ is considered to be the earliest case on record, where the scope of Section 57 was called into question. The court ruled that the scope of the section is not limited to literary works, but extends to visual

⁴¹EDWARD W. PLOMAN, L. CLARK HAMILTON AND CLARK L. HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 22-25 (1980).

⁴²*Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd. and Ors*, AIR 1987 Delhi 13.

⁴³ *Id.*

⁴⁴ *Pee Pee Publisher and Distributors (P) Ltd. v. Neena Khanna and Anr*, 2009 (40) PTC 515 (Del).

⁴⁵*Noah v. Shuba*, (1991) FSR 14.

⁴⁶*Supra* note 43.

and audio manifestations.⁴⁷ The provision puts the intellectual property on a higher footing than the normal objects of copyright and thereby it provides for inalienability of the moral rights.⁴⁸ To put it differently, the contract of assignment of copyright has to be read, subject to the provisions of Section 57, and the terms of contract cannot negate the special rights and remedies granted by Section 57.⁴⁹ Even if the author assents to a little modification in his work in the contractual agreement, this does not mean that the contract agreement will override the statutory provisions of the act.⁵⁰ Section 57 presupposes authorship, which implies that only the author can claim protection of moral rights and not any other person.⁵¹ For instance, a Director of a cinematograph film may not be able to assert moral rights, if he fails to establish that his directorial effort in the film is a work of artistic craftsmanship.⁵²

V.2 1994 Amendment to Section 57

In 1994, the scope of Section 57 was narrowed down by an amendment. The original provisions, whereby even distortion, mutilation and modification of the work which are not prejudicial to the author's honor or reputation would violate the author's special rights were incidentally, in excess of the requirement of Berne Convention⁵³ and thus, these words were qualified with the words "prejudicial to his honor or reputation". Since the Act is silent, judiciary has evolved two ways to determine if an act prejudices the integrity of an artistic work - "objective" criteria, wherein, the judge determines the efforts of alteration on the

⁴⁷Garapati Prasad Rao v. ParmandiSaroja, 1992 AIR AP 230.

⁴⁸ Mira T. SunadaraRajan, *Moral Rights in Developing Countries: The Example of India-Part I*, 8 J. Intell. Prop. L. Review 5, 357 (2003); Mira T. SunadaraRajan, *Moral Rights in Developing Countries: The Example of India-Part II*, 8 J. Intell. Prop. L. Review 6, 449 (2003).

⁴⁹PAUL EDWARD GELLER, *International Copyright: The Introduction*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* (Lionel Bently ed., 1997).

⁵⁰*Supra* note 43.

⁵¹Satraj Singh Pannuv. Gurbani Media Pvt. Ltd. and Ors, 2015(4) ARBLR 176 (Delhi).

⁵²*Id.*

⁵³Amar NathSehgalv. Union of India, 2005 (30) PTC 253 (Del).

reputation of the author and “subjective” criteria where, the author’s own perception of the alteration and impact on his reputation is taken into consideration.⁵⁴ Having said that, in cases of *Mannu Bhandari*⁵⁵ and *Amar Nath Sehgal*⁵⁶ the judiciary applied the subjective test.

Post-amendment, the author can only claim damages or seek an order of restraint and not any other action. Moral rights after amendment subsists only as long as copyright subsist. An explanation clause was added providing that failure to display a work in accordance with author’s wishes would not constitute violation of author’s moral rights. The natural consequence of this insertion of explanation is that the artist would be unable to prevent his work from being displayed in an environment alien to the one for which it was created. This change has been criticized for being insensitive to the rights of artists by various artists’ forums in India.⁵⁷ Consider for example - the use of a popular character from a children's book in a pornographic film. Though the use of the character is entirely alien for the purpose for which it was created, yet the author cannot object to it, due to the addition of the explanation in section 57.

V.3 Judicial Interpretation of Section 57 post 1994 Amendment

*Amar Nath Sehgal v. Union of India*⁵⁸ is considered to be the landmark case for moral rights. Mr. Sehgal created a bronze sculpture which was displayed in the International Convention hall in Delhi, for two decades, but then was pulled down and dumped in a storeroom. Mr. Sehgal brought an action against the government of India under Section 57. The court ruled that Section 57 should be interpreted in its widest sense to include destruction of a work of art, being the extreme form of mutilation. Destruction of work reduces the volume of the author’s creative corpus, thereby

⁵⁴Rajan, *Supra* note 49.

⁵⁵ AIR 1987 Delhi 13.

⁵⁶*Supra* note 54.

⁵⁷P. NARAYANAN, LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS 36 (2nded, 1995).

⁵⁸ 2005 (30) PTC 253 (Del).

affecting his reputation prejudicially. Mutilation is nothing but destruction to render the work imperfect.⁵⁹

The Court reiterated that contents of International Conventions and norms are significant for the purpose of interpretation of the domestic laws⁶⁰ and held that if a work of Art acquires the status of the cultural heritage of the nation, India has to honor its declarations in the International Community. The declarations in International Community imposes various obligations on the States such as to respect, protect and to preserve cultural rights. Declarations such as Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of ownership of cultural property,⁶¹ Convention Concerning the Protection of the World Cultural and National Heritage,⁶² International Covenant on Economic, Social and Cultural Rights⁶³ etc. are examples of the same.

V.4 2012 Amendment to Section 57

In 2012, a new section 38B, was incorporated which recognizes moral rights of the performers, in sequence with Article 5 of WIPO Performances and Phonograms Treaty (WPPT), 1996. This gives right of authorship and integrity to the performers after taking into consideration the possibility of digital alteration of performances, in a digital environment. The 'explanation' to the section clarifies that editors are free to perform their tasks without the fear of legal consequences.⁶⁴ This clarification has been added probably to

⁵⁹T. R. SRINIVASAIYENGAR, COMMENTARY ON THE COPYRIGHT ACT 477-478 (8thed, 2013).

⁶⁰Vishakav. State of Rajasthan and Ors, AIR 1997 SC3011.

⁶¹Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of ownership of cultural property art 1-4, Nov. 14 1970, 823 U.N.T.S. 231.

⁶²Convention concerning the Protection of the World Cultural and Natural Heritage art. 1 and 5(d), Nov. 16, 1972, 1037 U.N.T.S. 151.

⁶³International Covenant on Economic, Social and Cultural Rights art 15(1), Dec. 16 1966, 993 U.N.T.S. 3.

⁶⁴Zakir Thomas, *Overview of Changes to the Indian Copyright Law*, 17 J. INTELL. PROP. L. REVIEW 324-34 (2012).

balance the rights of the producer of a program and the performers. The legal representatives of the performer cannot exercise his moral rights, unlike the legal representatives of the owners of copyright. It is not clear why the legislature has come up with such a discriminatory provision.⁶⁵

Apart from these, two alterations were made in section 57. The words in sub-section 1 'which is done before the expiration of the term of copyright' were omitted, thereby restoring the original section 57 in this aspect. This means that the author's legal representatives can claim injunction or damages, in case of distortion, mutilation, modification or other act in relation to the work, even if it occurs after the expiry of the term of copyright.

In sub-section 2 the words 'other than the right to claim authorship of the work' were omitted. This implies that the legal representatives of the author may exercise the rights provided to the author in the first clause of section 57 of the Act. The previous provision which drew a distinction between the assertion of the author's moral rights by his descendants or legal representatives on his behalf, and the capacity of these agents to claim authorship of his work,⁶⁶ has been done away with.

V.5 Inconsistent Approach of the Legislature and Judiciary

In India, the stand taken by the judiciary and the legislature on the compass of moral right has been paradoxical. While the former endorses an expansive approach, the latter strives for a more restrictive one. However, the legislature in 2012 upset the applecart by widening the ambit of Section 57.

Indian Legislature was initially reluctant in broadening the scope of Section 57. There were various reasons cited by the legislature, for its cautious approach. Firstly, since government owns copyright in the works of important authors,⁶⁷ extensive protection may result in hefty sum of liability in the form of financial damages by the

⁶⁵ALKA CHAWLA, LAW OF COPYRIGHT COMPARATIVE PERSPECTIVES (1sted., 2013).

⁶⁶ *Id.*

⁶⁷MIRA SUNDARA T. RAJAN, MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY (2011).

courts, accompanied with the intimidating costs of legal defense. Secondly, the Berne Convention, to which India is a signatory, lays down that when supplementary rights are given to the domestic authors, equivalent rights have to be given to the foreign authors.⁶⁸ It will make India a less attractive destination for foreign investment in creative enterprises, such as films, by increasing both the costs of doing business and the prospective liability and would affect India's ability to compete for investment with countries where moral rights are less important.⁶⁹ Thirdly, India is culturally and traditionally a diverse nation. A work created in one part is available in all parts of the country and is often translated into various languages. If the ambit of special rights is broadened, it may augment litigation in the country and would saddle the already burdened judiciary. At the same time, it would be very difficult for small creators to know the intricacies of law and they may be held liable for minor breaches of Moral Rights. Though the concerns are real and significant, it is doubtful if they are logical and practical.

On the other hand, Indian courts have navigated India's move from a traditional, to an industrial society, by weighing the preservation of cultural heritage and maintenance of cultural standards against the economic drive to commercialize and commodify Indian culture, whether for domestic or international audiences.⁷⁰ In tendering moral rights issues, Indian judges have routinely endeavored as champions of culture and have proven that the cultural heritage is their utmost priority. Through moral rights, their focus on the relationship between authors and their works, has allowed them to avoid pitfalls while attempting to assess artistic quality in the courtroom.⁷¹ Section 57 is thus viewed as a telescope, for legally safeguarding the cultural heritage of India.

⁶⁸Berne Convention for the Protection of Literary and Artistic Works art 5(3), Jan. 29 1970, 1161 U.N.T.S. 30.

⁶⁹Rajan, *Supra* note 68.

⁷⁰Rajan, *Supra* note 49.

⁷¹Rajan, *Supra* note 68.

VI. Waiver of Moral Rights

There is no settled jurisprudence in India as yet, on whether moral rights can be waived. The position around the globe does suggest that moral rights can be waived. While USA,⁷² UK⁷³ and New Zealand⁷⁴ explicitly permit waiver, Chinese copyright law⁷⁵ does not expressly permit waiver, but considers it to be permissible, provided it isn't against public policy.⁷⁶ The Delhi High Court in *Sartaj Singh Pannuv. Gurbani Media Pvt. Ltd. & Anr.*⁷⁷ ruled that a voluntary waiver is not against public policy and voluntariness has to be ascertained based on the evidence available on record. Sonia Baldia⁷⁸ and Mira Rajan⁷⁹ suggest that Indian law permits waiver of moral rights if it is in writing, meets the "reasonableness" standard and is not against public policy.⁸⁰ They place reliance on Section 21 of the Copyright Act, 1957 which says that the author of a work may relinquish all or any of the rights comprised in the copyright of a work, by giving a notice to the Registrar of the Copyrights.⁸¹ The proponents of the other view argue that the moral rights are so inherent and fundamental to the author, that they cannot be waived. Some scholars compare moral rights to the fundamental

⁷² VARA § 603, 17 U.S.C. § 106A (e) (1).

⁷³Section 87, Copyright Design and Patent Act, 1988.

⁷⁴ Section 107, New Zealand Copyright Act, 1994.

⁷⁵ Copyright Law of the People's Republic of China, 1990.

⁷⁶ Yong Wan, *Moral Rights of Authors in China*, 58 J. COPYRIGHT SOC'Y U.S.A. 455 (2011).

⁷⁷ 220 (2015) DLT 527.

⁷⁸ Sonia Baldia, *Intellectual Property in Global Sourcing: The Art of Transfer*, 38 GEO. J. INT'L. L. 499 (2007).

⁷⁹ Mira T SundaraRajan, *Moral Rights in the Public Domain: Copyright Matters in the Works of Indian National Poet C SubramaniaBharati*, SING. J.L.S.161, 175 (2001).

⁸⁰Centrotrade Minerals and Metal. Inc. v. Hindustan Copper Limited,2006 11 SCC 245.

⁸¹ Section 21, The Copyright Act, 1957.

rights enshrined in the Constitution which cannot be waived.⁸² There is a possible argument that moral rights are analogous to Fundamental Rights, as the Universal Declaration of Human Rights provides for the protection of both material and moral interests,⁸³ and the Supreme Court of India has very often read the provisions of International Conventions into Indian Law, in case there is a lacuna.⁸⁴ Waiver is considered to be against public policy, as public has a right to know the author of a certain piece of work.

Waiver may lead to some unwanted consequences. Most often, the purchaser is the dominant party in copyright contracts and therefore, the bargaining power of the author is very low and the purchaser may force the author to agree on waiver clause. Though this is not a voluntary waiver and is prohibited under the law, proving coercion and involuntariness of the author before the court of law, is always a difficult task. If waiver is out rightly prohibited, it will better preserve the legislative intent. If author does not want to enforce his moral rights, he may not bring a suit against the alleged infringer, thereby resulting in implied waiver.

VII. Moral Rights Protection in the Digital Age: Indian Framework

The 1994 amendment provided that the copying or adaptation of computer programs will not lead to a violation of the author's moral rights. The provision seeks to make "debugging" possible without potential infringements of copyright and moral rights, whereby it acts in conjunction with an addition to s 52 of the Copyright Act allowing the copying and adaptation of computer programs as "fair dealing" with computer programs under the

⁸²Mrinalini Kochupillai, *Moral Rights under Copyright Laws: A Peep into Policy*, Part I, SPICYIP.COM, <https://spicyip.com/2007/12/moral-rights-under-copyright-laws-peep.html>(Last Accessed Feb. 20, 2016).

⁸³Universal Declaration of Human Rights art 27(2), Dec. 10, 1948, U.N.G.A. Res. 217 A (III) (1948).

⁸⁴Gramophone Company of India Ltd v. BirendraBahadur Pandey &Ors., 1984 AIR 667.

Act.⁸⁵ The exception applies generally in two kinds of circumstances – first, if the copying or adaptation is done “in order to utilize the computer program for the purpose for which it was supplied” and second, if “back-up copies for temporary protection in order only to utilize the computer program for the purpose for which it was supplied have to be made.”⁸⁶ In *Statart Software Pvt. Ltd. v. Karan Khanna*,⁸⁷ there was a question as to whether a company’s modification of a computer program, developed by two former employees, to personalize template of letters, amounted to an infringement of their moral rights of integrity.

Though the case was settled out of court, this amendment seeks to address such type of situations wherein such acts would not amount to infringements of author’s moral rights.

Recent technological advancements have threatened the very existence of the copyrights law, in the information oriented society.⁸⁸ However, copyright law has adapted to the technical innovation, by extending copyright principles to protection of computer software and other similar technologies,⁸⁹ allowing copyright principles to enjoy a resurrected prestige in the world of information technology.⁹⁰ In contradiction, moral rights have fallen behind, mainly because of its failure to effectively confront challenges emerging due to the digital revolution. Firstly, the dissemination of works of art has become easier, speedier and wider than ever before. It has become very difficult for the author to contain the manner in which it is treated and to restrict its

⁸⁵S Ahuja, *Latest Amendment to the Indian Copyright Act*, 44 COPYRIGHT WORLD 38(1994).

⁸⁶Rajan, *Supra* note 68.

⁸⁷PRAVINANAND, THE CONCEPT OF MORAL RIGHTS UNDER INDIAN COPYRIGHT LAW 27, 35-36 (1993).

⁸⁸A Christie, *Reconceptualising Copyright in the Digital Era*, EUR. INTELL. PROP. REV. 527-530 (1995).

⁸⁹Mira T. SundaraRajan, *Moral Rights in the Digital Age: New Possibilities for the Democratization of Culture*, 16 INT’L. REV. L. COMP. & TECH 2 (2002).

⁹⁰Jane C. Ginsburg, *Four Reasons and a Paradox: The Manifest Superiority of Copyright over Sui Generis Protection of Computer Software*, 94 COLUM. L. REV. 8, 2565 (1994).

redistribution.⁹¹ Secondly, when works are transmitted through digital medium, the user of the work can easily modify it in such a way that future users are unable to notice the alterations and the scale at which these changes occur is so immense, that an author is unlikely to be aware of most of the modifications to his work.⁹² The third challenge which has surfaced, is the implementation and enforcement of the author's rights, because of the technological and regulatory obstacles. The technical difficulties were discussed by the French Court in the famous Yahoo ruling.⁹³ Moreover, the attempt to regulate flow of information through digital means goes against the idea of global information society. Further, since moral rights are not a part of the TRIPS agreement, they lack the international baseline uniform standard, as each country has its own legislation providing moral right protection.

Despite the challenges, moral rights continue to be a guardian of the social values and cultural community. Moral rights are in a transitional phase, as they have deviated from the traditional, theoretical basis on fixed notions of authorship, the creative work and creativity.⁹⁴ Moral interests have become dependent on understanding public awareness and the goodwill of the public, who enjoy and appreciate art.⁹⁵

VIII. Conclusion

Moral Rights have undergone a process of Internationalization. Its protection under domestic copyright regimes has been affected by the exclusion of Article 6bis as a compulsory requirement under the TRIPS agreement, which had previously mandated a uniform standard of protection to be granted by all members to the agreement.

⁹¹*Id.*

⁹² T Dreier, *Adjustment of Copyright Law to the Requirements of the Information Society*, 29 INT'L. REV. IND. PROP. & COPYRIGHT L. 627-630 (1998).

⁹³Yahoo!, Inc. v. La LigueContre Le RacismeetL'Antisemitisme, 145 F.Supp. 2d 1168, 1171 (N.D. Cal. 2001).

⁹⁴Rajan, *Supranote* 80.

⁹⁵ *Id.*

Owing to the lack of an international standard for Moral Rights protection, these rights have been and will be incorporated differently by different jurisdictions, with India being no exception, which has made harmonization of Moral Rights very difficult. Uniformity in the standard of moral rights protection is the need of the hour, to end the disparity that exists in the protection offered in different jurisdictions. The inconsistent municipal laws of different countries will cause problems like problem of jurisdiction in case of inter-country breach of author's moral right. A breach in one country may not be a breach in other, a waiver in one country may not be applicable on the works of the same person in another country, and one country may provide perpetual protection while other may not offer the same protection. These are just some of the complexities which have unfolded in recent years and with growing globalization and technological advancements, these issues are likely to become multifarious. It would be beneficial to have harmonization of international law on the subject of author's moral rights.

Developing countries like India, have the opportunity to protect moral rights, in the absence of mandatory International standards for the protection of moral rights that have been excluded from the TRIPS agreement. This will ensure the preservation of its culture in the face of globalization and advancement in information technology. Moreover, it will also set an example for other developing countries to give the same level of protection to authors and help contribute to the harmonization of moral rights.