The Moral Rights of Authors in the Age of Digital Information

J. Carlos Fernández-Molina and Eduardo Peis

Departamento de Biblioteconomia y Documentacion, Universidad de Granada, Colegio Máximo de Cartuja, 18071 Granada, Spain

In addition to stipulating economic rights, the copyright laws of most nations grant authors a series of "moral rights." The development of digital information and the new possibilities for information processing and transmission have given added significance to moral rights. This article briefly explains the content and characteristics of moral rights, and assesses the most important aspects of legislation in this area. The basic problems of the digital environment with respect to moral rights are discussed, and some suggestions are made for the international harmonization of rules controlling these rights.

Introduction

Copyright laws grant economic rights (rights of reproduction, distribution, adaptation, public performance, broadcasting, rental) as well as a series of noneconomic privileges known as "moral rights." Although the copyright laws of different nations may vary significantly regarding this issue, most recognize two moral rights: paternity, which is the right of the author of a work to be identified as such, and integrity, the right to oppose any changes in the work that might distort it or alter it in detriment to the honor or reputation of the author.

The survival of these rights is seriously endangered by the endless possibilities for information production, processing, and transmission in the digital environment. We can find many examples of infringements on paternity and integrity made possible by the plasticity of digital works and the development of the Internet. For instance, author information may be lost when a work is downloaded from the information network, or the work may be sent over the Web under a false author name (perhaps the user's name). Even if the author information appears intact, there may have been changes in the contents of a work, such as unauthorized omissions or additions of material. In this way, an author's name may appear on a document that expresses ideas totally contrary to his or her convictions. A digital photograph can be manipulated to portray a falsification that might be accepted by persons as a true representation of reality. In the development of a multimedia product, bits of many different works may be fused together, leading to real difficulties in determining who is the author of each musical, visual, or textual piece, and where one ends and the next one begins. A link may be created to another document, and not necessarily to its first page (where the author's name would be given) but to a following page that is more directly related with the topic or objective at hand, leading to confusion as to the true authorship of the linked document. Similar confusion may result from the use of frames to diffuse information created by others.

This is the reason for the growing interest in moral rights observed over the last few years, with calls for their reinforcement on the part of some, and warnings of the negative effects of their strict application, or opposition to their existence, on the part of others. Although for different reasons, it is generally agreed that the new technological situation has caused moral rights to become one of the central issues in the international debate on intellectual property within the digital environment (Barlas, 1998; Fujita, 1996; Holderness, 1998; Langlois, 1996; Lemley, 1995; Negin, 1997; Oppenheim, 1996).

Over the last decade, international bodies and governments have been making a great effort to adapt most aspects of copyright legislation to the current technological context, and enhance international agreement. Issues related to moral rights, however, have been largely neglected. The two basic reasons for this are the increasing uncertainties about which legislative solution would be the most appropriate, in view of the diverse interests of the main parties involved (authors, users, and publishers), and the deep-rooted division on this issue between what we will call the European "continental" standpoint (the civil law perspective) and the "Anglo-Saxon" standpoint (based on common law).

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Our article touches on the origins, content, and features of moral rights, with a focus on the two most important ones: paternity and integrity. The legal framework in this area is discussed, starting with the principal international treaties and agreements, and on through the national legislations of certain countries, with a distinction between the European-continental and Anglo-Saxon conceptions to assess their differences in this field. We then enumerate the reasons why the development of the digital environment has drawn attention to the legislative divergences, and identify the main conflicts of interest that interfere with the harmonization of laws. Finally, we put forward some suggestions for achieving a better balance among the different positions of the sectors involved.

Origin, Content, and Characteristics of Moral Rights

The origin of moral rights can be found in French law, later extending to other continental lands, and beyond. The basic premise is that a work constitutes an integral part of the author's personality. A work is a spiritual creation, or the product of a person's thought, in such a way that the work and its author cannot be completely disassociated. Even if an author waives economic rights on his or her work, the creation is still dependent, to some extent, upon its creator. Intellectual work is protected because it is the emanation of the author's personality (Colombet, 1992).

The specific ingredients of moral rights reflect some discrepancies between different national legislations, even within the continental group (Lipszyc, 1993), where the rights of publication, paternity or attribution, integrity, modification, withdrawal, and access to work may be left unacknowledged or interpreted in various manners. Of these, only paternity and integrity are generally recognized among national legislations, and they are the only two specified in the main international treaty in this field, the Berne Convention (WIPO, 1971). Because we believe they at a greater risk of being superseded by the development of the digital environment, we pay special attention to them below.

Stated in very general terms, the right of paternity ensures the author of a work the right to be identified and recognized as such. According to Desbois (1978), this right is absolutely incontestable from a moral standpoint. The right of paternity, however, embraces other related privileges. To illustrate the different expressions of paternity, we will refer to the Italian doctrine. Greco and Vercellone (1974) distinguish the rights of identification, disclosure, and assertion as competences within paternity.

Identification implies that the author is free to remain anonymous or else to be identified as the creator of the work, with the distinctive sign of one's choice: a name, pseudonym, or symbol. The right of disclosure comes into play when an author who once hid his identity decides to reveal it. Finally, the right of assertion is conceived to prevent the usurpation of paternity, that is, to prevent another person from posing as the author of a work. Assertion also implies the author's right to affirm his authorship to anyone ignoring or questioning it, even when it is not a case of usurped paternity.

The notion of integrity means the author's right to impede the distortion, mutilation, modification, or alteration of a work without express consent. This concept can be traced to the French doctrine of *droit de respect* (Michaélidès-Nouaros, 1935), which considers any work to be the expression of the author's personality, and aims to protect it from being changed by third parties. Any action—whether lucrative, malicious, negligent, or unconscious in nature—against the author's genuine creation is considered unlawful, and the author can legitimately demand protection of the integrity of his work from abusive maneuvers that would damage his persona as creator.

This personal conception of moral rights gives them two fundamental characteristics that differentiate them from economic rights. First, moral rights cannot be waived; that is, an author cannot legally renounce his paternity, bind himself to an usurpation of his authorship, or allow alterations of his work that would harm his own reputation. Second, moral rights are "inalienable," meaning they cannot be transferred by any *inter vivos* act, either as a gift or in exchange for something of value. Inalienability can be seen as the most important characteristic of moral rights, suggesting they are so closely linked to the author that they cannot be surrendered under any circumstances. They are inherent to the author and may not be included in commercial terms, i.e., they can only be exercised by the person possessing such rights (González, 1993). In the words of Desbois (1978), an author who renounces the defense of his personality is committing a "moral suicide."

Another important characteristic of moral rights that can only be applied to paternity and integrity is that of "perpetuity." After the author's death, these two rights are held by the person or legal entity designated by the author, or the heirs or institutions recognized by the law as the holders of such, with no time restrictions. The justification behind perpetuity is that keeping a nation's cultural patrimony intact is a matter of public interest.

In analyzing the content and characteristics of paternity and integrity as moral rights, we use the French model as the starting point, as their doctrine and law represent the purest view of *droit moral*. Other national legislations do not follow this approach. Even among the remainder of the European continental countries, significant differences are seen regarding the content and scope of moral rights.

The Legal Framework

The regulation of moral rights is far from homogeneous then, which makes it necessary to reconsider the main international treaties and agreements in this area, and the most relevant aspects of national legislation in some representative countries.

International Treaties and Agreements

The appearance and development of the information society has made copyright one of the legal fields with the greatest need for international harmonization. We can start with a look at the legal bodies with an international scope that regulate copyright and related matters. They are: the Berne Convention (WIPO, 1971), the Universal Copyright Convention (Unesco, 1971), the TRIPS Agreement (WTO, 1994), and the WIPO Treaties (1996a, 1996b).

Berne Convention for the Protection of Literary and Artistic Works. The first copyright laws were characterized by the defense of authors exclusively within their respective countries, leaving their works unprotected outside the national boundaries. In the 19th century, however, some European countries began to express concern for the international protection of copyright. Initially, bilateral agreements were made on the basis of reciprocity, but this soon became insufficient. A multilateral treaty was then signed: the Berne Convention of 1886, still the single-most important international legal instrument in the field.

The original text of the treaty lacked a specific provision for the protection of moral rights. In fact, these rights were not internationally established until the treaty was revised in the 1928 Rome Conference. After prolonged controversy between the Italian and the Australian delegations, the latter representing the Anglo-Saxon perspective, an intermediate proposal was approved, resulting in article 6bis of the Convention. Copyright was thereby recognized internationally for the first time as an economic and moral right, the latter belonging to the author even after transfer of the economic privileges (Ricketson, 1987). After several modifications introduced in the subsequent revisions in Brussels (1948), Stockholm (1967), and Paris (1971), the article reads as follows:

> 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 honor or reputation.
>
> The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
>
> The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

In essence, the first paragraph recognizes the two most important moral rights: paternity and integrity. The second and third paragraphs respectively regulate their duration and application.

The duration of these rights has been one of the most controversial issues in the Convention's successive versions. In the Brussels Conference (1948), several proposals for the protection of the author's *post mortem* moral rights were put forth, but all were rejected on the grounds that such an act was not related to Private but rather to Public Law. Finally, the 1971 Paris Revision gathered a consensus formula admitting the possibility of maintaining the author's paternity and integrity rights after his death, at least until the economic rights expired (Desbois, Françon, & Kerever, 1976). For those countries whose legislation did not safeguard the *post mortem* protection of economic rights, an exception was made. They were allowed to lay down a provision specifying that some moral rights would no longer be protected after the death of the author. This consensual solution was designed to accommodate the Anglo-Saxon legal conceptions, according to which protection of these rights was tied to libel laws, whose applicability ceased upon the death of the slandered subject.

As far as applicable law is concerned, the third paragraph is clear: the legislation to be applied is that of the country where protection is demanded. Article 5, Section 2 also establishes that these rights may be exercised without any formal requirement, and that their use is "independent of the existence of protection in the country of origin of the work." This means that although the moral rights of authors and publishers are not clearly recognized in the United States, for example, they should be taken into consideration when international dealings are concerned.

Given that the Berne Convention has been signed by some 140 countries to date, including all those with substantial volumes of intellectual productions, we might assume that at least the two most relevant moral rights, paternity and integrity, are recognized and protected by most national legal frameworks. However, as we shall discuss below, there is still a lack of agreement across national borders. Furthermore, some Anglo-Saxon countries do not satisfactorily comply with the provisions of this Convention.

Universal Copyright Convention. Another relevant international instrument regulating copyright is the Universal Convention held in Geneva (Unesco, 1971). The objective of this Convention was to provide less rigorous author protection, so as to attract those countries that had rejected the Berne agreement.

Unlike the Berne Convention, the Universal Copyright Convention does not include provisions explicitly recognizing moral rights. The rights of paternity and integrity may be indirectly presumed, however, from some of its regulations (Dietz, 1987). This omission should not be seen as an oversight, but rather as a deliberate attempt to accommodate countries that did not sign the Berne Convention on the basis of such grounds.

The TRIPS Agreement. Because intellectual creations are objects of commerce, they are also affected by international trade agreements. The Uruguay Round of GATT has proved particularly important in this respect: its final agreement led to the World Trade Organization (WTO), and included a section on intellectual creations known as the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) (WTO, 1994).

The TRIPS Agreement includes a declaration of intention for the development of mutual support between the WTO and the World Intellectual Property Organization (WIPO), on which the Berne Convention is dependent. Moreover, its ninth Article states that WTO members must comply with the Berne Convention rules, with the exception of Article 6bis. Thus, the TRIPS Agreement is intended to regulate international trade without taking authors' moral rights into account, an exclusion no doubt due to the pressure of the United States delegation (Maier, 1994).

WIPO Treaties. The WIPO established two committees of experts for the in-depth analysis of the new situation brought on by digital information and networks, and the need to adapt legislation worldwide. The committee on a Possible Protocol to the Berne Convention, in 1991, was followed by the committee on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, in 1992. Rather than revising the two international treaties regulating copyright and neighboring rights—the Berne Convention and the Rome Convention (WIPO, 1961)—their objective was to elaborate two supplementary, up-to-date treaties that would take the new digital environment into account. After several years of work, the WIPO convoked the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions (Geneva, Dec. 2–20, 1996), at which time the two new treaties were finally approved.

The first of the two, the WIPO Copyright Treaty, makes no reference to authors' moral rights, leaving the provisions of the Berne Convention in force. Yet its Articles 11 and 12 introduce a new means of legal protection, meant to complement the technological measures developed to safeguard copyright, and useful as well in the protection of paternity and integrity. Article 11 sets down the obligation of the signing countries to provide legal protection and effective legal remedies against the circumvention of technological measures designed to protect works in digital formats; whereas Article 12 protects against the unauthorized removal or alteration of electronic rights management information and the distribution or communication of works where this information has been removed or altered without authorization.

Although the second of the new treaties, the WIPO Performances and Phonograms Treaty, does not focus on copyright but rather on neighboring rights, it deserves some attention here. Its Article 5 establishes the protection of the moral rights of performers. During the conference, most of the delegations were in favor of including these rights in the treaty, as inalienable but waivable rights. However, it was finally agreed that article 6bis of the Berne Convention be used as the model for writing up the new article, and as a result, the language used is nearly identical (Liedes, 1996): it recognizes paternity and integrity, it considers them rights that are independent of the economic rights, and establishes their validity after the death of the performer, at least until the extinction of his economic rights, with the same exception. This treaty also includes Articles 18 and 19 on the protection of technological measures and electronic rights management information, expressed as almost exact reproductions of their equivalents in the WIPO Copyright Treaty.

Continental Countries

To the contrary of Anglo-Saxon countries, most countries are in favor of specifications for the protection of moral rights within copyright laws. Yet even European continental laws are not totally in agreement either. The divergence lies in two basic conceptions, referred to as the French and German approaches (Strömholm, 1967).

The dichotomy is a consequence of the two theories that govern the concept of copyright: monism and dualism. The dualist doctrine, exemplified by French law, affirms that two different types of rights concur in author protection: economic and personal rights. The economic rights comprise several pecuniary privileges which, despite their *sui generis* nature, come under the heading of real property rights; whereas the personal rights embrace a set of moral privileges pertaining to the category of personality rights (Bertrand, 1991; Gautier, 1991; Lucas & Lucas, 1994).

The monist doctrine, represented by German legislation, assumes that copyright is a single right, under which the author's material and moral interests are intertwined (Poll, 1995; Ulmer, 1980).

Monism and dualism are much more than simple theoretical divisions. These two dogmatic approaches have important practical consequences, because they establish a oneness—or else duality—of the legal regime to which copyright is subjected. The dualist point of view justifies the unequal treatment of moral and economic privileges on the grounds that they correspond to two different legal objectives: (a) the protection of the author as an individual by means of his work, and (b) the provision of economic profit for the author. Monist systems, in contrast, give similar priority to both rights on account of the inseparable character of the elements coinciding in copyright.

As a result, dualist countries (which include France, Belgium, Brazil, Greece, Italy, Mexico, Portugal, and Spain) hold that moral rights are inalienable, cannot be waived, and may even be considered perpetual; yet the economic privileges are limited in time, and can be transferred by the author. The monist countries (Germany, Argentina, Austria, Finland, The Netherlands, Norway, Sweden, and Switzerland, among others) consider moral rights

to be just as long-lived as the economic ones and, under certain circumstances, they, too, can be waived.

Anglo-Saxon Countries

Because of their common law tradition, Anglo-Saxon countries perceive moral rights as something beyond legislation. Yet some recent developments suggest that this conception is changing, at least in some Anglo-Saxon lands. Let us take a look at the United Kingdom, Canada, the United States and Australia.

In 1988, British law introduced the legal concept of the moral rights of an author, most importantly, paternity and integrity. These rights could not be transferred to another person or institution, although authors would have the right to waive them if they so wished. In the United Kingdom, moral rights are not perpetual; they can be exercised only as long as the economic rights (Wall, 1998). A surprising aspect of British Law, reflecting a lack of generosity, is the requirement of an act of assertion by the author to allow paternity to come into force; the right applies only where it has been asserted in writing, in the work or in an assignment or license covering the work. This stands in apparent contradiction with the fact that no formal requirement is needed to copyright a work.

Canadian legislation is very similar to that of the United Kingdom. Revised in 1988 and 1997, it recognizes paternity and integrity for the same duration as the economic rights. Although they cannot be transferred by means of *inter vivos* acts, the holder may waive them. The important difference in the Canadian legal framework is that no formal requirement is needed for securing moral rights (Canada, 1999).

The case of the United States is, without a doubt, the most complex. Its laws do not expressly recognize the moral rights of the author, although related or component privileges are protected, to some degree, under other rules: unfair competition, privacy, defamation and misrepresentation, derivative works, or the Lanham Act. And the belated undersigning of the Berne Convention in 1988 has not meant any real change in the U.S. stance on authors' moral rights. During the passage of the Berne Convention Implementation Act, the U.S. Congress stated specifically (Senate Report 100-352, 1988) that rights equivalent to authors' moral rights were already recognized in the United States under: (1) the common law of misrepresentation and unfair competition; (2) Section 43(a) of the Lanham Act, which prohibits "false designation of origin, [or] false or misleading description of fact" that is "likely to cause confusion, . . . mistake," or deception about "the affiliation, connection, or association" of a person with any product or service; and (3) defamation (libel) law. In short, Congress insists that U.S. Law is already in compliance with the provisions of Article 6bis of the Berne Convention and, consequently, no amendments or modifications are to be made in its copyright legislation.

Soon afterwards, however, the 1990 Visual Artists Rights Act (VARA) was ratified, containing an explicit recognition of these moral rights of paternity and integrity for a narrow group of authors: the creators of works of visual arts. Under VARA, moral rights automatically vest in the author of a "work of visual art," which includes paintings, drawings, prints, sculptures, and photographs, existing in a single copy or a limited edition of up to 200 signed and numbered copies. To be protected, a photograph must have been taken solely for exhibition purposes. VARA protects only those works of "recognized stature." Posters, maps, globes, motion pictures, electronic publications, and applied art are some of the categories of visual works expressly excluded from VARA protection (Ginsburg, 1992).

This leads us to ask: if U.S. law already gave adequate protection of authors' moral rights, why was it necessary to introduce VARA? And why are "authors" restricted to the field of visual arts? The answer is clear: serious doubts still surround the recognition and protection of authors' moral rights in the United States (Standler, 1998).

A study recently carried out by the U.S. Copyright Office (1996) comes to support this conclusion. Their survey of artists found that a great percentage ignored the very existence of moral rights. This reflects the limited diffusion of the concept of moral rights in the United States.

Finally, the long-standing debate in Australia deserves mention. It began with a report by the Copyright Law Review Committee (CLRC, 1988) on the need to add guidelines for the protection of authors' moral rights to their 1968 Copyright Act, and what to include under such rules. As a result, Australia's 1997 Copyright Amendment Bill included provisions for moral rights to fully comply with the provisions of article 6bis of the Berne Convention.

The Australian bill granted authors the two basic moral rights of paternity and integrity, applicable to all the kinds of creative works covered by the Berne Convention: literary, artistic, dramatic and musical works, and films. These rights could not be attributed or transferred to others, but could be waived with the author's written authorization, either for the benefit of everyone, or for the benefit of a particular person or class of persons. The waiver applied only to works already existing at that time, with an exception for works made in the course of employment, in which case the waiver would affect future works (Brudenall, 1997).

The Australian proposal did not introduce the British requirement of an assertion act, and so these rights were to exist from the time a work is created to the time the copyright expired (Lee, 1997).

Although these provisions were on the verge of ratification and the Copyright Act was to have a new Part IX, in which paternity and integrity would be protected, the Australian Government finally decided to leave the provisions regarding moral rights out of the 1997 Copyright Amendment Bill, on the grounds that the terms for waiving these rights had not been settled. Notwithstanding, the Government has expressed its will to reach a consensus regarding this problem, so a new law establishing authors' moral

rights is likely to be introduced in the near future (Commonwealth of Australia, 1998).

Implications of the Digital Environment

The absence of international harmonization did not present serious problems up until a few years ago. The progressive appearance and development of the digital environment, however, has altered the situation considerably. The action of the European Union can be cited as evidence. In November of 1992, a hearing of interested parties made it clear that, at least at that time, moral rights could not be seen as a serious problem for the common market. Soon afterwards, however, documents from the Commission of the European Communities (1995, 1996) mention that the absence of international legal harmonization was bound to present problems for the use of all kinds of intellectual creations.

The key to the problem of moral rights in this new environment lies in the great plasticity of digital works. Harm to moral rights within a private sphere was not considered relevant in the past, as no means of publication existed for such material. But today, the situation is quite different. The potential of digital technology includes the potential manipulation and transmission of works in a strictly private sphere, and their subsequent diffusion over digital networks to third parties. Thus, a user may be unaware of the exact content of the original work, or ignore the real identity of the author.

The new technological situation clearly points to a need for protecting authors' moral rights in the international sphere, which implies a harmonization of legislation at the international level. Unfortunately, enormous discrepancies exist on how to proceed in this direction. In the case of the European Commission, copyright documents acknowledge the need for this harmonization, yet consider it a subject requiring further review before specific measures are taken (Commission of the European Communities, 1995, 1996, 1997).

Towards International Harmonization

When discussion centers on economic rights, authors' interests generally side with those of publishers, as opposed to users. Moral rights, by contrast, divide these two groups into three different kinds of interests. Harmonization does not only face the obstacle of integrating different legal traditions; it also has to conciliate the points of view of these different sectors.

Agreement on appropriate legislation for the protection of authors' moral rights in the context of the current international scenario, then, means resolving three separate conflicts: (1) authors versus publishers, (2) authors versus. users, and (3) *droit d'auteur* versus copyright.

Authors versus Publishers

This is without a doubt the fiercest conflict impeding international harmonization of moral rights rules. Both authors and publishers have been lobbying intensely in their respective realms. The author sector (authors and their representatives) push for international harmonization with reinforced moral rights; whereas the publishing sector (including publishers, producers, broadcasting companies, and the press) calls for a flexible regulation of moral rights so that authors may waive their rights to the publishers, thus facilitating the diffusion of digital intellectual creations.

In this respect, the companies representing American, British, and Australian authors complain that their authors' moral rights are largely unprotected, and that publishers and producers threaten to break commercial agreements unless they obtain the authors' full renouncement of moral rights. That is, the publishing sector tends to take advantage of the weaker position of the authors, preventing them from making use of their legitimate rights. According to Norwick (1995), more and more American publishers require authors to fully waive their moral rights; yet paradoxically, they continue to assert that such rights do not exist in the United States. This contradictory attitude suggests that what the publishing sector really wants is to make certain they will have no problems with moral rights in the future.

In short, it is not in the interests of publishers to recognize the moral rights of authors. If they must exist, in their opinion, they should be so limited as to make waiving them a commonplace thing. In full contrast, the author sector insists on greater protection of moral rights and on increased possibilities for negotiating the terms of waiver (e.g., full waiver, under specific circumstances only, and what is received in turn).

The waiver of moral rights is especially significant in the case of multimedia works (Leonard, 1995). Their elaboration involves using the whole or some parts of many different pieces of work, making it particularly difficult to respect the paternity of each author, on the one hand, and the integrity of the component works, on the other. This is the reason why producers of multimedia works need to ensure the authors' waiver of moral rights on the work, in addition to ensuring that the new creation does not violate the moral rights on the pre-existing material used.

Authors, meanwhile, argue that the use of a work implies its authenticity and the recognition of its origins, as guaranteed by moral rights (Holderness, 1995). They also claim that if these rights are not upheld, censorship will become a danger: the publisher acquiring the rights of a work may choose to omit or erase any parts of it that they consider inappropriate (Duffy, 1998). Along these lines, Goldgrab (1995) affirms that authors' moral rights should be seen as the corollary of freedom of speech, and that they are rendered useless if the work might be later cut, mutilated, or misused without any legal control.

Authors versus Users

The habitual dispute between authors and users is that of paid versus free access. Moral rights give this conflict a new front: the authors want to preserve the work exactly as it was created, without alterations; whereas users might wish to modify it to suit special needs or interests, deleting parts of a work or mixing one work with another. It is important to point out that in this respect, moral rights also benefit the users, as they ensure the work acquired is authentic and genuine.

A strict application of moral rights would prevent users from making optimal use of the vast possibilities of handling digital information, and prove counterproductive for the information society as a whole: a certain amount of flexibility is needed to allow existing works to be used in the creation of new ones. Nonetheless, we must not forget that an author's reputation can be easily damaged by subjecting his work to serious deformations, mistakenly linking his name to the work of others, or transmitting false information about him or his work, which would lead to severe liability problems. Clearly, there is a need to ensure both the user's freedom and the author's dignity.

Droit d'auteur versus *Copyright*

International harmonization of moral rights does not only face the emerging problems of digital information development; it must also achieve a balance between the two most traditional legal approaches.

The Anglo-Saxon countries, in general, continue to look upon moral rights as something foreign. As a consequence, they either neglect to protect them, or include them in their copyright laws in a very restrictive manner. One good example can be seen in the United States White Paper (Information Infrastructure Task Force, 1995): scarcely two of its 238 pages address moral rights. The article mentions the need for careful consideration of moral rights in the digital environment, though no specific recommendations are put forward. It does, however, urge European countries to harmonize the regulations by which authors could waive their moral rights by contract.

Thus, it seems that the issue at the very heart of the controversy is the fact that moral rights cannot be waived in most continental European countries. Over the last few years, a slight approximation of positions can be detected in France, for instance, where a more pragmatic approach in both legislation and jurisprudence is adopted when dealing with works produced by the new technologies (including computer programs and multimedia works), yet without sacrificing the spirit itself of the moral right. Gautier (1995) refers to this hybrid understanding as *Copyright à la Française*.

Conclusions

The digital environment requires seeking a balance between two opposing forces: the strict enforcement of authors' moral rights, and the flexibility or irrelevance of these rights. We should underline that the characteristics of inalienability and nonwaiver sometimes harm the authors, who may be paid less for their works if publishers do not acquire moral rights (Lemley, 1995). This is the reason why more and more European experts believe it may be in the best interests of the author to yield certain moral attributes to the publisher—without completely abandoning his moral privileges: the publishing sector may be in a better position to control or defend moral rights in today's market. Both authors and publishers would benefit from fixing a convergent objective in this sense (Doutrelepont, 1997; Esteve, 1997).

In turn, the conflict between authors and users might be alleviated through norms prohibiting the circumvention of technological measures (encryptation, watermarks, variable line space encoding) and of rights management information. Specifications of this type have recently been included in the Digital Millennium Copyright Act (United States, 1998) and in the European directive draft (Commission of the European Communities, 1997). The rights management information is particularly helpful for defending paternity, as the name of the author is given therein.

The effectiveness of these new guidelines is not as clear with respect to integrity: given the limited success seen with the technological attempts to guarantee integrity itself, the corresponding norms are almost useless. For this reason, we also need to regulate the alteration and subsequent diffusion of the contents of an author's work, without interfering with his or her creativity and freedom of expression. One way to ensure a minimum of protection would be requiring a note on the work indicating that it has been altered, and showing the way to access the original. This would help avoid the transmission of false information while protecting the author's honor and reputation (Fujita, 1996). In any case, the technological measures and the provisions that control them must be considered as supplements (not alternatives) to the rights, whether moral or economic, established by legislation.

We should also bear in mind the importance of self-regulation in the digital context. A code of ethics and a sense of good conduct or "netiquette" might have long-reaching effects, especially in the world of academics and research (Langlois, 1996; Lemley, 1995).Finally, we believe the conflict between the two different legislative traditions cannot be sustained at such extremes for very long. A more appropriate focus would require a degree of flexibility and moderation on the part of authors, publishers, and users alike, so that all their interests be respected. Granted, intellectual creations have a commercial aspect that cannot be ignored; yet the rights of paternity and integrity are not only important to the authors or institutions that diffuse their works, but to any user who wishes to know the identity of a work's creator or the exact content of the original. The notion of paternity is a vital force in the spheres where knowledge is

shared, exchanged, and commercialized, as it affords authenticity and serves as the basis of author reputation and credibility. The right of integrity helps preserve our intellectual history—a history of ideas, of how they took shape, and what was discarded along the way—which could be modified or partially erased if copies of original versions are not safeguarded. More than ever, authors' moral rights must be conceived and agreed upon in terms that will favor the preservation of our cultural heritage and prevent its harmful manipulation.

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