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The Information Context of Moral Rights under the Copyright Regime

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The Information Context of Moral Rights under the Copyright Regime

Abstract: Moral rights have not been so uniformly or widely adopted as economic copyrights for authors, perhaps because the actual and potential value of moral rights in ensuring information needs are met has gone unrecognized. The authors demonstrate that moral rights protection can enhance authority control in the new information environment.

1. Introduction

The argument of this paper concerns the role of moral rights in an information society. The moral rights are a set of rights for authors that have emerged since the end of the nineteenth century and, where they are recognized, they run in parallel with the longer established economic copyright interests in works. Moral rights have not been uniformly adopted in all parts of the world, whereas the economic regime of copyright is now virtually universal.

In fact, there is a growing trend in foreign and international law to limit the recognition of moral rights. The United States, now a signatory to the *Berne Convention* and leading proponent of strong foreign and international intellectual property protection, does not have any moral rights provisions in its legislation¹ and is a leading opponent of the regime.² Indeed, the TRIPs (*Agreement on Trade Related Aspects of Intellectual Property Rights*) in 1995 incorporated the *Berne Convention* (see Article 9(1)) with the exception of the one section of the *Berne Convention* (Article 6bis) which provides for moral rights. Even in countries where moral rights provisions exist there is concern that these rights are being eroded. Canada, for example, in 1988 introduced a waiver clause into its moral rights legislation (*Copyright Act*, s.14.1(2)) which can be argued to weaken these rights because authors, given the disparity in bargaining power that exists between authors and publishers, can easily be required to waive their rights as a condition of publication (Vaver, 1987).

This paper will demonstrate the role that moral rights can play in enhancing authority control in information.³ Through a historical review of the origins of both copyright and moral rights in the context of the societies in which they emerged, it becomes understandable that moral rights protection has emerged at a later stage. Having emerged later, however, the potential value of the role of moral rights in the emerging information society continues to go unrecognized. This analysis will both argue for appropriate limits on moral rights protection and advocate for the universal adoption of moral rights.

2. The role and function of economic rights in copyright

The theoretical foundations of copyright have not been persuasively established (Howell et al, 1999, 17; Tawfik, 2003, Wilkinson, 2004), despite recent attempts (see, for example, Drassinower, 2003). Indeed, pragmatists have eschewed the need for theory in the area (Keyes and Brunet 1977). Justice Estey of the Supreme Court of Canada in 1979 asserted, in *Compo Co. v. Blue Crest Music Inc.* (372-373),⁴ that,

... copyright is neither tort law nor property in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls between rights and obligations heretofore existing in the common law. Copyright legislation simply creates rights and obligations upon the terms and in the conditions set out in the statute. This creature of statute has been known to the law of England since at least the days of Queen Anne when the first copyright statute was passed. ... The legislation speaks for itself ...

In general, however, the theoretical and explanatory descriptions, if not completely articulated from theoretical foundations, still display a common perspective on the role of the copyright regime. As Justice Binnie of the Supreme Court of Canada commented recently, speaking for the majority of the court (Chief Justice McLaughlin, Justice Iacobucci, Justice Major and himself) in *Theberge v. Galerie d'Art du Petit Champlain Inc.*(2002, para.30; hereinafter, *Theberge*):

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).

This notion of the balancing function of the copyright regime is focused on what are often termed the “economic rights” in copyright. In Canada, these economic rights are expressed in such terms as “...the sole right to produce or reproduce the work..., to perform the work...in public, to publish the work...” (*Copyright Act*, s.3).⁵

This notion of the balance in the economic scheme of copyright gives prominence to the creator or author. Indeed, both moral rights (for example, Aide, 1990) and copyrights (for example, Boyle, 1996) have been linked to the romantic conception of the author. However, Patterson (1968, 14) demonstrated that:

... [t]he irony is...that...copyright should have come to be known as an author's right.

The purpose of the Statute of Anne, then, was to provide a copyright that would function primarily as a trade regulation device – acting in the interests of society by preventing monopoly, and in the interest of the publisher by protecting published works from piracy, as did the stationer's copyright.

Similarly, in examining the history of *droit d'auteur* in France, Hesse (1990, 130) argues that the abolition of the privileges of the publishers which existed in the *ancien regime*, before the French Revolution, in favour of the limited property right created afterwards was actually done in the interest of the public, not out of respect for the personal rights of the author:

What the revolutionaries acknowledged and sought to ensure was not the individual dictation of meanings and truths but their maximum exchange, conflict, and social negotiation...[T]he revolutionaries explicitly intended to dethrone the absolute author, a creature of privilege, and recast him, not as a *private* individual (the absolute bourgeois), but rather as a *public* servant, as the model citizen.

Moreover, elimination of the royal “privilege” system actually resulted in a loss of power and control for the publishers and the beneficiary of this change from privilege to property right was the public.

Therefore, it appears from the evolution of the legal regimes of copyright⁶ and *droit d’auteur*⁷ that the role of the author was a pragmatic strategy rather than a normative concept in copyright. The concept of a unique “author” for every work was necessary in order to uniquely identify, and thus commodify, particular expressions of information so that those investing in the replication of those expressions could be rewarded for their investment. If copyright had been invested in the printer or publisher, without recourse back to the original author of a work, how could that printer or publisher have defeated the claim of a competitor to reproduction of that same work? The early history of attempts to license printing presses, prior to the eighteenth century, demonstrated that systems dependent upon centralized controls failed: the system dependent upon identifying a work uniquely with its author succeeded in the industrial age.

Publishing technology became widespread in society because there was an incentive created through copyright for investing in it. Since the way that copyright created an incentive for the industrial production of text, and then, somewhat later, also for production of musical scores and art reproductions, was to artificially create a scarcity in the underlying work which the copyright holder could then capitalize upon, once an artist or writer who held the original copyright chose to access the industrial tools of publication, the artist or writer was almost invariably required by the new industrial elite to give up control of the original work. Production of text, musical scores and artwork became industrialized just at the dawn of the period during which those who controlled industrial processes have become the elite – and copyright first ensured the transition of text production to an industrialized process and then has served to maintain the economic viability of that production.

Howsoever, it is not particularly necessary to establish why the identity of the author was important to the original legislators of economic rights in copyright, whether a romantic notion of rewarding the authors or a pragmatic notion of ensuring reward to those who invested in the industrialization of distribution:⁸ the distinguishing feature of the economic regime of copyright is that the rights are attached to the *copyright holder*, once the particular expression has been uniquely identified. The copyright holder can be – but is not necessarily – the author. Under the Canadian *Copyright Act*, for example, the works created by employees are all owned, from the time of their creation, by the employee’s employer, not by the employee author (see s.13(3)). Moreover, it is the essence of the economic rights in copyright that they are fully transferable: even if the author is the initial owner of the economic rights under the statute, the author is able to fully or partially divest her or himself of those rights, and the divested rights are thereafter held entirely by another (see the *Copyright Act*, s.13(4)).

The later concept of moral rights stands in contrast to the development of these transferable economic rights. As the Subcommittee on Moral Rights for the 1928 Conference,⁹ which recommended adoption of such rights into the *Berne Convention*, noted

...the principle is fully established, and that it is henceforth beyond doubt that the creator of a literary and artistic work retains rights in the product of his intellectual effort that are above and outside all agreements on disposal. Those rights, *which for want of a more adequate expression are called moral rights*, are

distinguished from economic rights, and assignment of the latter leaves the former intact [*italics added*].

The European revolutions of which the print revolution was a part (Eisenstein, 1979) ultimately ended up redefining the elites.¹⁰ Through the legal fiction of the copyright, the investment required for the industrialization of the dissemination of text was encouraged and protected. The new elites were based upon ownership and control of the engines of industrial production, rather than, as formerly, upon ownership and control of agricultural production and land (see, for example, Beattie and Finlayson, 1987, or Stone, 1972).

It is no accident of history that the emergence of the copyright and *droit d'auteur* regimes in Europe followed the print and industrial revolutions. The only way to fully exploit the creation of a work is to reach the largest possible market. The largest possible audience for texts and artworks after the printing press was invented was the audience that was available once the work was identically replicated through the printing press. With the demise of the old elites and consequent undermining of that patronage system, the best access to support for artists and writers was to access the new elites: the industrialists, who, in turn, recouped their investments in “their” artists and writers *and* in their publishing technology by accessing the new mass audiences available through publishing. This, of course, meant most artists and writers chose to indirectly profit from the newly enlarged audiences for their work by, also indirectly, accessing the technology of publishing.

Copyright has almost certainly survived precisely because it favours those who have become the dominant elite: the industrialists. Samuelson (2001) points out that “copyright industry groups have cultivated relationships with policymakers in the executive and legislative branches over a long period of time. They have built up a trust with policymakers, and they know how to get their message across to this audience very effectively.”

However, from the perspective of an analysis of information flow in society, it must equally be noted that copyright does not secure to the copyright holder the exclusive right to communicate particular information. An essential feature of the copyright scheme is that the rights given to copyright holders only attach to given, particular, expressions of information: copyright holders do not control ideas. Thus, although a particular expression of an idea can, at any given time, be the subject of the limited term monopoly control that copyright creates in rightsholders, other competing expressions of that same information are not so controlled by that monopoly interest. Indeed, alternative expressions of those same ideas are as equally encouraged through the incentive of copyright as was the expression already copyrighted. This characteristic of copyright contributes to the part of the copyright equation “that promotes the public interest in the encouragement and dissemination of works,” to quote again Justice Binnie.

In the late nineteenth century, the dominance of copyright as an effective vehicle for advancing national economic agendas was signaled by the creation in 1886 of the international *Berne Convention*. As Ricketson (1987, 79-80), points out,

[d]espite[its] relatively limited membership, the geographical sweep of the new Union was considerable when account is taken of the colonial possessions of France, Germany, Italy, Belgium, Spain and the U.K. ...

Significantly, the United States, which was then still an information-importing nation, did not join the *Berne Convention*. The United States indeed created a form of copyright

very early in its history, in 1790, but did not extend that protection to works produced outside the United States until 1954 (and even works created or written by foreigners but manufactured or published inside the United States did not enjoy protection of American copyright until 1891). Indeed, the United States did not join the “Berne” community until it realized in the last quarter of the twentieth century, that it had become a net exporter of information (Samuels, 2000).

3. The emergence of moral rights

In contrast to the eighteenth century emergence of copyright, moral rights for authors have only comparatively recently come to be recognized. These rights can be traced back to French judicial decisions (Sarraute, 1968) and German jurisprudence (Sterling, 1998, s. 8.01) in the mid-nineteenth century. Internationally, moral rights only came to be recognized in the *Berne Convention* about four decades after the *Convention* was first established, when it was revised at the Rome Copyright Convention in 1928.¹¹ Since that year, Article 6*bis* of the *Berne Convention* has required two moral rights of the author: the right of paternity (“the rights to claim authorship of the work”) and the right to integrity (“the right...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 [the author’s] honor reputation”). Article 6*bis* goes on to state in section (3): “[t]he means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.”

Despite the inclusion of these two moral rights in the *Berne Convention* at the end of the first quarter of the twentieth century, even member states of the Convention have been slow to explicitly adopt moral rights in their national legislation in the more than seventy-five years since.

Copyright legislation governing Canada prior to Canada’s signing of *Berne* had no moral rights aspects,¹² although, beginning in 1924, the year Canada’s first sovereign *Copyright Act* came into force,¹³ there were repeated attempts made to add moral rights protections to the Act—in 1924 (Bill 28 of 1924, 3rd session, 14th Parliament), 1925 (Bill 2 of 1925, 4th session, 14th Parliament), 1926 (Bill 3 of 1926, 1st session, 15th Parliament), and 1927 (Bill 45 of 1927, 2nd session, 16th Parliament). Even after moral rights had been included in the *Berne Convention* and Canada had become signatory to the *Convention*, two further attempts to introduce moral rights into the Canadian legislative scheme, in 1930, were unsuccessful (Bills 16 and 37 of 1930, 4th session, 16th Parliament). However, three years after moral rights were added to the *Berne Convention*, Canada took a leadership position amongst signatories (Adeney, 2001; Gendreau, 1994) and amended its *Copyright Act* with the following wording (*Act to Amend the Copyright Act*, S.C. 1931)¹⁴:

Section twelve of the said Act is hereby amended by adding thereto the following subsection:

(5) Independently of the author’s copyright, and even *after the assignment, either wholly or partially*, of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation. [italics added]

Slowly other countries have added moral rights provisions to their copyright legislation. Even France (as mentioned, one of the European jurisdictions whose courts had originally produced the concept of moral rights) did not add explicit statutory

recognition of moral rights to its copyright regime until 1957 (Loi du 11mars, 1957, No. 296). England only followed suit by amending its legislation to include moral rights in 1988 (*Copyright, Designs and Patents Act 1988*).

4. The Scope of Moral Rights

At the 1928 Berne Conference in Rome, the Italian delegation drafted the most comprehensive proposal¹⁵ for inclusion of moral rights in the *Berne Convention* and described these rights as follows (Memorandum by the Italian Delegation):

...regardless of whether this right is assimilated to the right of physical ownership, or conceived as a new economic right in immaterial or intellectual property, or if the opposite view is held to the effect that the right represents no more than a branch of the group of rights of the private person, or, finally, if the right is conceived as being a *sui generis* right which, in the course of its development and according to various prerogatives that make up its content, operates as a personal right and as an economic right by turns, it is agreed today that, independently of the exclusive rights of economic character, which are essentially temporary and transferable, the author does own one right, or a set of rights strictly inherent in his person, that are intransferable and without limitation in time, and which mainly concern the absolute right to publish or not to publish the work, to recognition of authorship and finally to the protection of the integrity in the work....

As described earlier, only two of these three proposed rights became enshrined in the *Berne Convention*. There was not international consensus on the appropriateness of the “right to publish or not to publish,” known as the right of divulgation.¹⁶

Some countries also recognize a right of withdrawal: the author’s right to insist that a work be withdrawn from the public. This right has also not been adopted internationally and is not part of the Canadian statute. On the other hand, when Canada revised its moral rights provisions in 1988, and completely reworded them, it included three types of moral rights: in addition to the rights of paternity (sometimes termed the attribution right) and integrity, which, as discussed above, had already been protected, albeit in another form, since 1924 in Canada, the 1988 amendments added the right of association.¹⁷ This latter right is not usually enumerated as an element of moral rights (see McKeown, 2000; Sterling, 1999).

It is difficult to argue over the appropriate scope of moral rights protection without a clear consensus on the role or function of these rights.

5. The role and function of moral rights

Many authors accept the account of moral rights as an extension of the authors’ personalities through their works.¹⁸ On the other hand, Vaver resists this justification and dismisses out of hand “metaphysical reasoning” that attempts to ground moral rights in labour theory or natural rights arguments. Instead, he proposes a utilitarian justification: “The public interest in a continuous record of its culture justifies giving authors some control over their works as a private right to be exercised for the public good” (Vaver, 2000, 167). Gibbens (1989), interested in the private-public interest divide, sounds in a

similar vein: “the central question in analysing moral rights regimes is: ...is it [moral rights legislation] premised on the protection of some private interest like the reputation of personality of the creator, or is it premised on the protection of the public interest in preserving the integrity of cultural property?”

The views of both Vaver and Gibbens, each searching for a public aspect to moral rights, as well as a private aspect focused on the author’s rights, create an echo of the type of balancing principle favoured in discussions of copyright – yet the lack of assignability in moral rights, a defining characteristic, means that the social bargain for granting moral rights to authors cannot be the same as that argued for copyrights. Indeed, when the holder of the copyright is different from the author, who continues to control the moral rights,¹⁹ the moral rights can be a limitation on the power of the copyright holder (Jendzjowsky, 1998). Since moral rights cannot create the same incentives as copyright does, the existence of moral rights cannot be serving the same social and economic interest in encouraging dissemination. Society does not receive any enhanced access to information from the existence of moral rights.

In the alternative, Vaver (supra) and Gibbens (supra) are both pointing to a public interest in culture which may be served by the existence of moral rights. However, this claim for the social utility of moral rights would not appear to explain adequately why development of the moral rights regime has lagged so significantly behind copyright.

What then is the social bargain that has permitted the moral rights regime to endure and spread? Moral rights serve society’s interest in authority control: the right to integrity preserves the author’s right to control the content of the work and thus the public’s right to be assured that a work represented to emanate from that author is in fact as the author constructed it; the right to paternity or attribution allows an author to insist that her or his identity is attached to the work and thus functions in much the same way as trademark is intended to function (as a reliable indication of source for the public); and, finally, the right of association, recognized in Canada but not necessary to the fulfillment of our Berne Convention obligations, permits the author to protect the integrity of the whole of her or his oeuvre by ensuring that no element of contextual placement is able to obscure the author’s intended context and thus ensures that the public reputation of the artist’s work is reliably as the author intended.

Research establishes that individuals need more than access to various sources of information in order to have their information needs satisfied, they also need to be able to select between competing sources of information (Wilkinson, 2001; Leckie et al, 1996; Lynch, 2001). This distinction has also been recognized as the distinction between the public’s need for information and the public’s need for stability in the meaning of a work (Hughes, 1999; see also MacNeil, 2000).

In a rigidly hierarchical society, where elites control the channels of information, the sources of information may not need to be identified individually by users in order to confirm their authority and be accepted as satisfying information needs. The Church in the Middle Ages, for example, controlled many of the distribution channels in Europe. Users of information who questioned the veracity of the sources being distributed by the Church were charged with being unorthodox (see further, on the question of creating authority in texts, Randall, 2001, 33ff). Secular information was also controlled by elites: for example, demonstration of the authority of sources of information was the origin of

documents “under seal.” MacNeil (2000,2) notes that archiving itself was also controlled by those in authority.

In the rapidly evolving society after the industrial and print revolutions, other indications of the authority of information had to be established to minimize reliance upon misinformation, thus ensuring that the new wide information dissemination pushed forward the progress of societies. The lag in development of the moral rights regime behind copyright can be explained by the fact that, until the end of the nineteenth century, there were various other mechanisms in existence in society which served to largely fulfill the need for authority in information selection: a combination of the effects of the emergence of copyrights in combination with authority controls exercised by the new industrial elites. The traditional print publishing industries had, in most jurisdictions, created an imprimatur of quality through the identities of the major publishing houses.

By the mid-nineteenth century, however, it was clear that a distinction was being recognized between authenticity and reliability but establishing a source’s authenticity could assist an information-seeker with evaluating that source’s reliability (MacNeil, 2000, 28). Legally enshrining moral rights mechanisms helped anchor the ability of the public in a number of European countries to judge reliability.

The social “bargain” that is implicit in the moral rights regime encourages its adoption as other forms of authority control in information weaken: the public is assisted by providing mechanisms to permit works to continue to be those works identified with particular sources, their authors; in return, the authors of works are given particular unassignable elements of control over their creativity despite the separate existence of the copyright interests, which either are not ever vested in the authors or, being designed to be transferable, do not remain with the authors. This perspective is thus completely consistent with the fact that a single physical action can bring about an infringement of the copyright in a work as well as the infringement of moral rights in a work.²⁰

Since the late nineteenth century, revolutions in communications technology continue to cause shifts in our social and economic fabric. Technology is again the engine driving a “new economy” – but specifically now communications and information technology, rather than an industrial economy. In the twentieth century, sources of information multiplied and the channels of information distribution were augmented, and, as before, one important result has been a decline in the ability of elites to provide the imprimatur of authority on the dissemination of information. In this environment, issues concerning the authority of information, its reliability and currency, become key. It would appear, as a result, that the need for the social and economic role played by moral rights has been increasing: the moral rights regime is one way a society can ensure that information can be associated with its source.

This argument for the value of moral rights dovetails with the critique made by Hughes (1999) of those who oppose strong copyright regimes. The critics of strong copyright regimes, he points out, defend users’ needs as centred upon the need to access works in order to transform, adapt or use copyrighted works in order to produce new works or new meaning. While not disputing the need for such activity, he fears that in focusing upon the production of new works, another user interest is ignored. Users, he argues, are also interested in the stability of meaning or value or cultural products. In other words, the user is also interested in preserving the integrity of the work – a preservation which is possibly exercised by the owner of copyright, where Hughes focuses, but, we would

argue, is even more the role of moral rights (which cannot be assigned away from the author).

Our view of the role and function of moral rights is also consonant with the lack of enthusiasm which the United States has shown for this regime. The United States, now the major exporter of information in a global information economy, places great emphasis upon the commercial exploitation of information. As media empires have grown, it may be suggested that that same function proposed here as the proper role of moral rights has been overtaken, particularly in the United States, by the trademarks of the major entertainment conglomerates. Trademark, in the commercial sphere, of course, functions as the quintessential indicator of the public's sense of source. In a society which reveres trademark and where important information sources are identified in the minds of the public with particular trademarks, there may be less impulse for a strong system of moral rights to be developed to respond to information needs. Of course, assigning this function of authority control to the trademark system would require that commercial conglomerates maintain control over very significant proportions of the information transfers in society. This possibility may have motivated Moore's (2003, 204) pessimistic comment that

Arguably the creator's rights tradition has played [a] minor role in the formulation and application of Anglo-American systems of intellectual property. Even in those countries where these rights are codified in the law, they are apt to be overshadowed by the aforementioned economic rights and incentive based social progress arguments. ... The globalization of intellectual property, rapid growth of digital networks, and expanding power of multinational corporations, have pushed systems of intellectual property away from theoretical foundations and back toward privilege.

We argue that it may be in the pragmatic, economic interests of societies now to limit the privilege of elites created by the technology of the industrial revolution in order to foster the social and economic conditions necessary to efficient and effective information transfer, which appears to be prerequisite to success in the new age of communications. In a distributed information environment, such as the internet is providing, and as trademarks come to represent increasingly diverse portfolios of goods and services, trademark may not adequately serve this information need in society to evaluate the authoritativeness of information sources. It is precisely through the strengthening of the moral rights regime in order to assist the public in identifying reliable and relevant information for their needs that progress in the sciences and useful arts can be assured.

This perspective on moral rights is as different from the argument that moral rights are purely personal rights of the author as is the argument that the copyright is purely a property right of the copyright holder. While moral rights are traditionally couched in terms of the rights given to authors, just as the rhetoric of copyright also revolves around authors, moral rights serve society's interest in authority control just as copyright serves society's interest in information dissemination. Both moral rights and copyrights are best understood as the implementation of information policy designed to further the interests of society in an expanding supply of reliable, available information: copyright designed to address the question of the supply of available information and moral rights designed to address the question of making the reliability of that supply ascertainable.

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Notes:

¹ Both Damich (1988) and Grant (1992), for example, provide arguments that American law does not provide moral rights protection sufficient to satisfy the United States' *Berne Convention* obligations. However, the U.S. government has passed a statute providing integrity rights to defined visual artists: the *Visual Artists' Rights Act, 1990*.

² The inclusion of moral rights protection in the *Berne Convention* was one of the stumbling blocks for many years to the accession of the United States to the Convention (see, among many others, Sterling, 1999, 280). Koeberle (1989) describes how eventually, just prior to 1989, the American Congress was persuaded that American law generally already provided sufficient protection for moral rights such that the United States need make no explicit changes to its copyright legislation in order to comply with the moral rights provisions of the *Berne Convention* once the United States became signatory to the Convention in 1989.

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⁴ See also *Jeffreys v. Boosey* (1852), 4 House of Lords Cases 815, where Pollock B. made observations to the same effect.

⁵ It is interesting to note, in the context of the history of libraries, that the right to lend was never traditionally a right given to the copyright holder by legislatures. Originally probably, during the eighteenth century development of the economic rights in copyright, a right to control lending was thought to be unnecessary given the contemporary understanding of the distribution of text in an environment where literacy was still limited to elites and the notion of libraries being publicly accessible was still centuries away. See Harris (1995). However, in the new communications environment, a right to lend in certain circumstances has now been added to the taxonomy of copyright holders' economic rights: see the rights to rent out computer programs and sound recordings which were added to the Canadian *Copyright Act* in 1997, by S.C.1997, c.24, and now appear in s.3(1) (h) and (i), respectively, where "rental" is defined in s.2.5.

⁶ British statutes previous to the Statute of Anne in 1709 had created licensing regimes for printers and publishers which the *Statute of Anne* replaced. The common law prior to 1710 had not dealt with the problem but when it eventually did, although a common law right of authors was recognized by the English Court of Appeal in *Millar v. Taylor* (1769), the British House of Lords, in a close six to five decision, later recognized that the statutory right created by the *Statute of Anne* overrode any common law right which had existed, see *Donaldson v. Beckett* (1774).

⁷ As Tawfik (2003) has documented, there is ambivalence in Canada about whether and to what extent the principles of *droit d'auteur* are embedded in Canadian law. See also, in Gaudreault-desBiens (2004), discussing blending civil and common law traditions, footnote 49 wherein he is critical of the majority judgment in the *Theberge* case, arguing that it too readily adopted a common law perspective on the *Copyright Act*.

⁸ McKeown (2000, 21), in commenting on an early precursor to the Statute of Anne (an order of the British House of Commons in 1642 that printers should neither print nor reprint anything without the name and consent of the author (Jo.H.C. II, 402)), both comments that "in forbidding printing 'without the name and consent of the author' there was an implicit recognition of author's rights." and, in the preceding sentence, also makes the point that "it seems clear [the order] was designed as a purely regulatory measure and **not** to protect the rights of authors." [emphasis added]).

⁹ Conference in Rome, 1928 – II. Reports of the Sub-Committees 1. Sub-Committee on Moral Rights (Jules Destree [of the Belgian delegation], Reporting Chairman).

¹⁰ McKeown (2000, 15-16) point out that

...in response to the divergence of religious belief during the Reformation, the clerics came to rely on printing as a means to control doctrine and prohibitions. In 1401 a statute was passed for the suppression and punishment of heretical writings and in 1529, Henry VIII published a list of prohibited books, followed by a proclamation relating to religious books the next year. ...

Meanwhile, as is commonly credited, William Caxton introduced the printing press into England in 1476. At first, foreign owned presses were encouraged in England. For example, between 1484 and 1533, a statute regulating and restricting foreign businesses in England had an exemption for printing and bookselling (see 1 Rich.III, c.9). However, this early encouragement of foreigners was shortly replaced by attempts to encourage and protect the indigenous press industry by licensing beginning on November 16, 1538 under Henry VIII (see Steele, Procl.No.176). In May 1557, the Stationers' Guild was given a royal charter and charged with maintaining the monopoly over printing and publishing in England. Almost simultaneously, Elizabeth I, at the outset of her reign, issued a proclamation in 1558 that all heretical books be burned. The system of centralized control of the press culminated in the *Licensing Act of 1662* (13 & 14 Car.II, c.33). In turn, these attempts at this type of control gave way to the Statute of Anne of 1709.

¹¹ Parenthetically, this was also the same convention at which Canada became, for the first time in its own right, signatory to the *Berne Convention*.

¹² The Legislature of Lower Canada in 1832 enacted copyright legislation (2 Will.IV, c.53), which was repealed in 1841 and replaced, in the new Province of Canada, by the *Act of 1847* (4&5 Vic., c.61). However, the Privy Council in Britain later held that the British Literary Copyright Act of 1842 (5-6 Vic., c.45) covered all the Dominions despite various colonies having passed their own legislation: *Routledge v. Low* (1868) L.R.3 H.L.100. Canadian decisions later also accepted this position: *Smiles v. Bedford* (1877) 1 O.A.R. 436 at 447 (Ont.C.A.) and *Durand et Cie v. La Patrie Publishing Co.* (1960) 20 Fox Pat.C. 84 at 92 (S.C.C.) After Confederation in 1867, the first federal *Copyright Act* was passed in 1868 (31 Vict., c.54). The *Copyright Act of 1875* (38 Vict., c.88 which was passed and ratified by the British Parliament for effect in Canada after discussions between British and Canadian officials) was continued (see R.S.C. 1886, c.62), with revisions (see R.S.C.1906, c.70), in force until 1924. The British *Literary Copyright Act of 1842* was still also effective in Canada until 1924, as was the British *Copyright (Musical Compositions) Act of 1882* (45-46 Vic., c.40). The 1924 statute did not have retrospective effect.

¹³ S.C. 1921, c.24. This Act, with revisions through the *Copyright Act Amendment, 1923* (13-14 Geo.V., c.10) came into force on January 1, 1924.

¹⁴ This wording continued unchanged until 1988. See R.S.C. 1952, c.32, s.12(7) and R.S.C. 1970, c.C-28, s.12(7) and R.S.C. 1985, c.C-42 where the section was moved to s.14(4).

¹⁵ A number of other delegations made initial proposals of this sort: see Ricketson, 1986, 102 and 460.

¹⁶ Ricketson, 1986, 476, argues that this right may be implicit in the *Berne Convention*. However, we take the position that this right is not necessary to the social function we ascribe to moral rights. As further discussed, the rights of paternity and integrity, which the *Berne Convention* countries did explicitly adopt, do perform this function.

¹⁷ The terminology and arrangement in the current Canadian legislation are somewhat confusing, however, in terms of identifying the three rights in language that parallels the terminology used by other authorities. The right to attribution or paternity appears in the Canadian statute as:

s.14.1(1) The author of a work, has ... in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym ...

The right to integrity appears as:

s.14.1(1) The author of a work, has, subject to section 28.1(1) the right to the integrity of the work ...

and

s.28.1(1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,
(a) distorted, mutilated or otherwise modified.

And, finally, the newer right to association,¹⁷ still using the language of "integrity," appears as:

s.28.1(1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, ...
(b) used in association with a product, service, cause or institution.

¹⁸ Including, for example, Reeves, 1984, who says (at 7) "French case law and statutes are permeated with the humanistic, even metaphysical notion that a creative work is, much more than an item of property, an extension of the very personality of the creative artist."

¹⁹ See *Copyright Act*, s.14.1(3): An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.

²⁰ This approach would seem to put to rest any problem in Canada with the constitutionality of moral rights as a federal exercise of power. As personal rights distinct from copyright, they might be problematic for the federal government to legislate (see Toupin, 1993 and Gendreau, 1994). However, under our thesis, moral rights are, if not clearly federal under s.91(23) of the Constitution Act conferring federal jurisdiction over "copyrights," (see Vaver, 1983, 161) at least very arguably part of interprovincial trade and commerce (at least as much as is personal data protection), which is federal.