

Moral Rights of Authors: An Unwarranted Claim or an Imperative Need

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One of the core challenges in the realm of IP is the preservation of the moral rights of authors also known as author's special rights. Moral rights are non-economic, rights of an author which are vested in him in addition to a copyright. It is the rampant abuse of these rights, especially right of attribution and right of integrity which has become a cause of great concern for authors. Also the internet has greatly increased the capacity to manipulate works and therefore the protection of artistic integrity and safeguarding the cultural heritage becomes a most pressing issue today. Respect for moral rights of authors show the society's appreciation of individual creativity and helps a nation in its cultural and artistic development. However countries such as the U.S continue to ignore these rights in spite of the fact that they are signatories to the Berne Convention. In a globalized world where the works of an author maybe sold world-wide, it becomes necessary for us to have a uniform set of laws. The present paper revisits the philosophies behind moral rights and its historical development and attempts to bring forth a comparative analysis of moral rights in U.S.A, U.K, France and India.

Keywords: Moral Rights of Authors, Copyright, Intellectual Property Law, Paternity Right

The rights of an author can broadly be classified into Copyrights and Moral rights. Copyright right has an economic reasoning. It allows the author, or subsequent owner of the copyright of a literary or artistic work to make his creation available to the public and in return reap the benefits of his work, by protecting him against unlawful exploitation or infringement of his work by others. Copyright is essentially used as a mechanism to economically incentivise the author for his creation. A copyright unlike most other I.P. rights need not be registered and the right subsists in the author from the moment the work is created. The person creating the work is the author of the work and generally he is considered to be the first owner of the copyright, unless through a prior agreement the author consents that all his work will be the property of his employer. A copyright can be transferred or assigned further, and it is also a time bound right.

Unlike Copyrights, Moral Rights are a set of rights which are vested exclusively in the author of a creation or in his legal representative's after his death, and it is independent of a copyright, this means that even if a copyright is transferred by the author the moral right will continue to subsist in him.¹ They are

also known as non-pecuniary or personal rights. These rights are perpetual in nature and continue to exist in the legal representatives even after the death of the author. Some countries allow for this right to be waived off while others see it as an inalienable right, and yet there are countries which do not even recognise these rights. Moral rights give the author the Right to Attribution, Right to Integrity, Right to Divulcation, and right to Withdrawal.

Right to Attribution, also known as the right to paternity, allows the author to be identified as the true creator of that work and it gives him the right to exclude others from claiming authorship of his work. Attribution shows the natural link between the work and its author.² Right to Integrity allows the author to object to any alterations, modifications, improvements or degradation of his work by any person. So even if one was to purchase a painting of an artist he despite of the fact that he is the owner, does not have the right to make any changes to the painting without the author's permission. Right of Divulcation, also known as the right to disclosure, means that the author has the right to decide when and in which manner is his work to be brought before the public.³ The author has a right to decide when his work is complete, and how and in which form he would like to put it in the public domain. It is important to note

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here that not even the owner (in case of a commissioned work) has the right to force the author to show his work against his will. Lastly, Right to Withdrawal caters to situation when sometimes authors feel that they no longer want their work to be circulated in the society in the form that it earlier was made available. They may wish to make certain alterations and modifications in their work and therefore an author has a right to call back his work. This right is rather difficult to enforce even in countries with high moral rights protection as it will adversely affect the ownership and economic interests of a transferee. One of the ways to enforce the right to withdrawal is by indemnifying the transferee.

The Philosophy and Historical Development of Moral Rights in Europe in Contrast with USA

Although many jurists have put forward various propositions regarding property rights, however the realm of intellectual property mostly revolves around the theories given by John Locke, Hegel, and Condorcet.

Locke propounded the labour theory in his book *Two treatise of Government* wherein he states that a “man has property in his own person....whatsoever that he removes out of the state of nature that nature has provided, and left it in , he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property”.⁴

Hegel gave his personality theory according to which a person when combines his labour to any property he actually shares his personality with it and therefore his own personality is reflected in his work. Thus according to Hegel a book is nothing but an extension of the personality of the author.⁵

While Locke and Hegel advocated the privatisation of property and consequently their theories were advanced to monopolise intellectual property; there was one jurist who was against the very notion of privatising intellectual works, his name was Condorcet and he was a French Mathematician and philosopher. He argued that ideas were not a gift given by god, they did not naturally occur and hence could not be appropriated by any single person. Ideas were born out of the collective experience of society and therefore “if ideas as social creation were to be recognized as a form of property, it must not be on the basis of individual natural right but rather on the basis of social utility of a property based regime”.⁶ Thus Condorcet had given rise to a different view of intellectual property: Social utilitarianism.

The two thoughts battled each other in the 18th century wherein the thinkers who sided with Locke, Hegel and Fichte argued that the works of the intellect is a personal right derived from natural law, while those who sided with Condorcet said that the essence of law was to safeguard public interest. Eventually these arguments and the lapse of the monopoly right given to the Stationers Company led to the enactment of what is widely known as the 1st statute on copyrights: The Statute of Anne, 1710.⁷ This Act had taken both the natural right view and the theory of social utilitarianism into consideration. On one hand it gave the authors a monopoly right to exploit their creations but on the other hand it limited this monopoly to 14 years with an additional 14 years if the author was alive after the initial period after which the work passed into public domain and anyone could publish the work. Thus the propositions put forward by both factions were equally catered to.

So the above reasons was what led to the enactment of the first statute of copyright in 1710 but to understand the evolution of moral rights we need to go back further into the 15th century where the rise of artists such as Leonardo da vinci and Michelangelo was giving birth to the concept of moral rights. After going through the philosophy behind intellectual property rights one may question that why artists should be given additional right, separate from their copyright. The reason is that art has always been seen as the work of a creative mind, an artist unlike a labourer has to apply his knowledge to his ideas to form a work. A labourer on the other hand only does a mechanical job and there is no creativity involved so it is the artist or author who brings out his personality in his work and this personality, he should have a right to protect.⁸ Up until the rise of Michelangelo most painters worked on a commission by their patrons and so the artist had little control over his work. He painted what he was asked to, in the manner that he was asked to and since the art belonged to the patron it was his wish to maintain its integrity or to defile it⁸ but after Michelangelo's rise to cross-border fame he was able to bargain his own terms and conditions while making contracts.⁹ After this there were many other artists who were able to negotiate with their patrons to some extent for a bargain of their moral rights however it would take a few more centuries before moral rights of an author could be given statutory protection.

Another reason for growth of moral rights in the European nations was that these countries already had stable governments by then and thus society was developed too, basic amenities like food, housing etc. were already catered and that is why the rulers and the noblemen could afford investing in works of literary and artistic value and since they were ready to pay hence the ordinary citizen was ready to work in this field. Thus literary and artistic works contributed heavily to the culture of European nations.¹⁰

By the time America got its independence on 4th of July 1776, moral rights had already been well established across the Atlantic, but being a nation in its infant stage; the leaders of U.S.A had more important agenda than to patronize art and artists.

Savigny, considered to be the father of the historical school has argued in his article *Vom Beruf* that a nation should not blindly copy the laws of another nation, for laws cannot be forced upon the people, it is something which grows within a nation, with the growth of the people. Also customs, culture, political and economic situations of one nation differs from another and therefore the lawmakers should look at the present needs of it people while keeping in mind the historical developments while framing a law.¹¹

Savigny's theory as explained above can well be used to understand the difference between the approach of European nations and U.S.A. with respect to moral rights. George Washington and the later Presidents of U.S.A had the task of building a nation they simply could not waste time in philosophical or abstract ideas of natural law (on which moral rights are based) and thus America's jurisprudence is based on legal realism. Mass production was the need of the hour, individual creativity and works of art and literature were left on the sidelines. America is known as the pioneer of capitalism so much so that even in their Constitution the law protecting copyrights is based on economic interests of the author rather than his moral rights. Also the basis for providing this right is not to appreciate the relationship between the author and his work but rather to encourage them to make more works for the ultimate benefit of the society.¹² So, the approach of copyright protection in U.S.A. is for the growth of society and not to put laurels on the author. It is for these reasons that U.S.A has always seen moral rights of little value to its growth; in fact it would not be wrong to say that it sees moral rights as an impediment to development of

society and economy rather than as a reason for development.

Moral Rights in France, USA and UK

France

The law regarding moral rights in France is covered by the statute passed in 1992.¹³ As we have seen above France leads in providing moral rights to authors, also known as '*droit moral*' in that country, it recognizes all four forms of moral rights and also provides an additional resale right to authors known as '*droit de suite*' which allows the artist to receive some amount as compensation each time his work is further sold. The logic behind such right is that, it is generally seen that many artists are not recognized in their early struggling phases and so they end up selling their creations for meagre amounts to sustain their livelihood, but once the artist becomes famous then their works new as well as the older ones are sold at exorbitant prices. France feels that the author should be given his due as he has created that work also it is only because of his current reputation that his older works are being sold at such high prices. However this right has been strongly opposed by the art houses, who seek to make all the profits for themselves.

Another peculiarity of the French law is that it recognises absolute inalienability of the moral rights given to an author which means that even if an author wants to he cannot part away with his moral rights. Now this does not mean that if an author enters into a contract with another party for adaptation of his work then that contract cannot be enforced instead what it does mean is that in spite of the contract if the author later feels that his work is not being treated properly by the other party then he may stop that other party from further degradation of his work. This is in contrast with the British laws wherein an author can waive off his moral rights, while the Indian copyright does not expressly mention the waiver of moral rights yet it has been the view of a few authors that a moral right may be allowed to be waived if it is in writing and applies to specific alterations rather than a blanket waiver;¹⁴ this of course seems to be taken by the French view. The right of divulgation is also inalienable for e.g if an author was commissioned for a work then not only can he decide when his work is complete and should be put for display; but also after the work is complete and delivered he can ask the owner to stop it from being put on further public

display. In such situations he would have to indemnify the owner of the work.

There are two leading case laws which show the stark differences between the French law and the American laws regarding moral rights, the first is the *Asphalt Jungle* case. In this case suits were brought simultaneously in U.S.A.¹⁵ and France by the daughter of the director of a movie named *Asphalt Jungle* produced in 1950. The daughter contented that the colourization of the movie by the current copyright holders amounted to mutilation of the original work and since it was being done without the permission of the author it was infringing his moral rights. The courts in U.S.A held that colourization of the movie is a valid adaptation and does not amount to mutilation, while the Supreme Court in France held that the colourization of the work resulted in transgression on the author's rights and hence the television channel *La Cinq* which had acquired rights to broadcast the show in France were prohibited from further airing of the show.¹⁶ Such is the level of protection granted to integrity of authors that an author can also stop his movie from being shown in parts and thus as a result most films in France are shown without commercials.

The other famous case is that of the *Iron Curtain* case.¹⁷ In this case 4 Russian singers had composed a song which was now in the public domain the defendant, an American motion pictures company had used the song in the movie *Iron curtain*. The movie depicted an anti-communism theme and therefore the artists felt that their song being used and their names appearing in the credits would show them in bad light in their own country. They filed a suit against the Twentieth Century Fox films and requested to court to grant permanent injunction from their work being used. The court in U.S.A held that since the work was in public domain the original artists could not claim anymore rights over them. This judgement was again in sharp contrast with the French Judgement in *Fox Europa*.¹⁸ The movie *iron curtain* was releasing France in 1949 under the title *Le Rideau de Fer*, the rights to the musical works of the Russian singers were bought by *Le Chant du Monde* and they filed a suit for permanent injunction on behalf of the moral rights of the Russian Singers. The French Court held that there was clear damage to the reputation of the Russian singers by incorporating their song in a movie which had an anti-soviet theme, and hence was an infringement on their moral rights. Thus we can that

on one hand the approach of moral rights in France is wide open while in the U.S the same case with the same facts leads to a completely different judgement which shows the very narrow approach of U.S. with respect to moral rights.

U.S.A

Copyright law in U.S.A is economy based and looks to fulfill the utilitarian concept of social utility, rather than to protect authors. In America authors rights are seen as monopoly privileges and are given only as an incentive to the author so that he may create more works for the ultimate benefit of the society. The U.S constitution states that "Congress shall have the Power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and inventors the exclusive Right to their respective Writings and Discoveries."¹⁹

The United States had also for more than a century stayed away from signing the Berne Convention, as Article 6bis of the convention required a member nation to provide for moral rights to an author and this was clearly against the American view which advocated market efficiency and not safeguarding authors rights.²⁰ So, after signing the Berne Convention it was thought that the U.S. would finally agree to recognize moral rights and would come up with a statute for protection of the same, but that was not to be. The U.S gave a very narrow interpretation to Article 6bis and contested that it already had laws to protect the right of attribution of authors.³

Although the American stance on moral rights is very restrictive yet one cannot say that the U.S. has completely ignored the rights of authors. In 1990 two years after signing the Berne Convention, Congress enacted the Visual Artists Rights Act (hereinafter VARA) which in its limited way provided for the protection of rights of visual artists.²¹ However, as the name signifies this Act only protects visual artists. The U.S. recognises two types of work under visual art one is "painting, drawing, print or sculpture" and the other is "a still photographic image produced for exhibition purpose only".²² In the sphere of visual art also there are further exceptions for e.g. maps, posters, technical drawings etc. are not covered, and also if a work is made for hire then it shall not be protected under VARA.²³

In respect of duration of moral rights the Americans have taken a completely different view with those of France. The U.S. code states that moral

rights for all works produced after 1990 will end upon the author's death.²⁴ This is a clear instance where there may be a copyright which may still subsist in the legal heirs of the artist but his moral rights will be extinguished. Moral rights under VARA are further restricted by provisions of fair use in fact Section 107 provides that even if a work is unpublished then also its use may fall under fair use, this shows that VARA does not protect the right of divulgation.

The other often cited law for protection of author's paternity and integrity rights is Section 43(a) of Lanham Act, 1946, which would seem rather out of place as this section is essentially a trademark protection act. Lanham Act was enacted to protect the consumers from being deceived due to false advertising, and incorrect statements made with regard to description or origin of product. Nonetheless as they say necessity is the mother of invention so since U.S does not have express laws to protect moral rights of an author the lawyers have come up with an indirect method of trying to get protection for authors through other laws.

Section 43(a) deals with false advertisement and passing off (including reverse passing off). To fulfil the criteria of reverse passing off the litigant must show that the accused has misrepresented the work of the litigant to be his own and that by such misrepresentation there is likelihood of damage to be caused to the author. The courts while trying to interpret this clause for giving credit to the author for his work which is his right to paternity give two justifications, firstly, if the author is not given credit for his work then the consumer will not know from where the work originated thus it will cause confusion in the mind of the consumer, and secondly if author is not given due credit then nobody will recognise his works which will cause stagnation of his reputation, and ultimately result in loss of probable income.²⁵

The most cited case for protection of author's integrity rights through Section 43(a) is *Gilliam v. American Broadcasting Corp.*²⁶ The court held in this case that unauthorised alterations to the works of an author to a degree such that the consumer would be confused to its origin is a clear violation of Section 43(a).²⁶ Many saw this judgement as the beginning of acceptance of moral rights by U.S. Courts however the excitement was rather short lived as Judge Gurfein in his concurring judgement held that "Lanham act is a trademark statute and not a copyright statute ... The Copyright Act provides no recognition of the so-

called *droit moral*, or moral right of authors. Nor are such rights recognised in the field of copyright law in the United States... So far as the Lanham Act is concerned it is not a substitute for *droit moral* which authors in the United States enjoy."²⁶ Thus it was made clear that moral rights had no place in U.S. The facts in *Gilliam* case were unique and cannot be used to enforce moral rights under all situations.

United Kingdom

Being part of the European Community one would think that the British provide just as much moral rights protection to authors as provided in France. But the truth is a little disappointing, the British do fare better than the Americans, however their protection of moral rights seems to be a half-hearted effort to incorporate the standards provided for by the Berne convention.

The Copyright, Designs and Patents Act 1988 provides for two types of rights under the umbrella of moral rights. They are:

- 1) Right to be identified as the author of a work (Section 77-79) (right to paternity)
- 2) Right of an author to object to derogatory treatment of his work (Section 80-83) (right to integrity).²⁷

These rights do not extend to all the works which can be protected under copyrights, also they are subjected to multiple levels of exceptions, for e.g. computer programs and works created by the computer are exempted also works the copyright of which is held by the employer cannot be given moral rights protection. Section 79(4) restricts moral right from being applied on works which would fall under fair dealing. This clearly shows that the British approach towards author's rights is monist in nature. They do not treat the moral rights as separate from the copyright in the sense that if an author creates a work for his employer then he neither has the copyright nor the moral rights to that work. The provisions for protection of moral rights then seem to be a mere formality for compliance with Berne.

Another major area of concern is Section 78 of the Act which states that "A person does not infringe the right conferred by section 77 (right to be identified as author or director) by doing any of the acts mentioned in that section unless the right has been asserted in accordance with the following provisions so as to bind him in relation to that act." Further sub-section 2,3 and 4 of section 78 lay down the specific ways in

which attribution must be claimed. Also courts take into consideration the time lapse for asserting paternity. Also the right to be identified as the author and to object to a derogatory statement lasts only as long as the moral rights.²⁸

Moral Rights Regime in India

Literary and artistic works have long been patronised in India, and unlike the capitalist ideology of the United States, India follows a socialistic approach therefore monetary returns is not the highest goal of India. It has a rich and diverse cultural heritage and the rights of authors have been statutorily protected by the Indian Copyright Act, 1957.²⁹

Section 57 of the Act provides for Author's special rights³⁰ it is primarily based on Article 6bis of the Berne Convention³¹ and in compliance with the same it provides for two distinct types of moral rights. Firstly the right to claim authorship of work also known as the right to paternity and secondly the right to restrain or claim damages for any derogation of their work (Rajan, 2001). The sincerity of India towards protection of the author's rights is manifested by the fact that unlike the British laws, Section 57 of the Indian Copyright Act does not have any qualifications necessary to enforce these rights. Also the only exception provided is that of computer programs and as such their authors cannot claim moral rights over their work.

It is important to point here that Section 57 as it stood before the amendment allowed for an action against distortion of work irrespective of the fact that there was any harm caused to the honour and reputation of the author. So it is clear that the older provision was wider as the author was under no liability to prove any prejudice against his honour, as is now required by the present wording of Section 57.

One of the most landmark judgements with respect to protection of moral rights of authors in India is the case of Amar Nath Sehgal.³² He was a sculptor of international fame and was commissioned by the Government of India to construct a mural to be placed in the Vigyan Bhawan. After years of hard work the mural was finally completed and was placed in the bhawan. Unfortunately sometime in the year 1979 the mural was pulled down and put away. The author sued the Government for restoration of his work. The government contended that the artist had given up his rights in the work and therefore it was up to the government to decide what to do with the

mural. The Honourable High Court of Delhi rejected the government's contentions and held that the artist continued to have the moral rights associated with his work irrespective of the fact that he held the copyrights or not, and so the court found that indeed there has been an infringement of the moral rights of the author and the defendants were ordered to return the mural to the author along with damages.³²

Another important case is that of Mannu Bhandari.³³ Smt. Mannu Bhandari is a well known Hindi language novelist and she had allowed Kala Vikas Motion Pictures to produce a 'Samay ki dhara' based on her novel 'Aapka Bunty' however after the production she was not pleased with the way the movie turned out and she feared that her reputation would be damaged if the distorted work was allowed to continue. She then filed a suit for a permanent injunction to restrain the producer from screening of the work. Thereafter during the pendency of the appeal the parties reached an out of court settlement however Mannu Bhandari requested the court to deliver a judgement as there was no authoritative judgement on the moral rights of an author at that time. The court felt that the main question was "whether the assignment of filming rights means the end of author's rights."³³ The honourable court while interpreting Section 57 held that the "contract of assignment would be read subject to the provisions of Section 57 and the terms of the contract cannot negate the special rights and remedies guaranteed by Section 57. Thus it is clear that the moral rights of the author subsist in the author even after assignment.

In a more recent judgement the Delhi High Court refused to accept the existence of moral rights of an architect.³⁴ The facts of the case related to an iconic building, by the name Hall of Nations, which was demolished in April 2017.³⁵ The Hall of Nations was built to celebrate 25 years of the independence of India. It stood on the grounds of Pragati Maidan in Delhi, which belongs to the Indian Trade Promotion Organisation (ITPO). ITPO wanted to demolish the building to make way for a "world class, iconic, state of the art" Integrated Exhibition and Convention Centre (IECC).³⁶ Hall of Nations in itself was a masterpiece. It was the world's largest- span space-frame structure built in reinforced concrete. In a previous judgement the Court refused to grant the building a 'heritage' status, which might have prevented it from being demolished. After its

demolition, the architect filed a suit before the Delhi High Court praying that he be compensated for the demolition of his work and that the building be reconstructed in accordance with the original design. The arguments of the plaintiff were based on Section 57 of the Copyright Act which provides moral rights to an author. From a combined reading of section 2(b), (c), and (d) of the Copyright Act, it can be clearly said that an architect is the author of a building. Hence Raj Rewal had the moral rights guaranteed under section 57. The issue before the court was whether an author of artistic work of architecture has the right to restrain the owner of the building from destroying it, and if the building be demolished, then does he have the right to claim compensation including demand a reconstruction of the original building.³⁴

The Hon'ble Delhi High Court refused to grant any relief to Raj Rewal on the grounds that Right to Property was a constitutionally guaranteed right under article 300A of the Constitution of India, while moral rights were a statutory right. In the event of a conflict such as the one in the present case it was the constitutional right which ought to prevail over the statutory right. Article 300A provides that "no person shall be deprived of his property save by authority of law".³⁷ The court while interpreting this provision stated that the words "save by authority of law" mean that it is only through an express provision that a person may be deprived of his property. Section 57 does not provide any express provision so as to deprive the owner of the property from using his property in any manner, including his right to destroy it.³⁴

Another major reasoning provided by the court with respect to moral rights was that the moral rights of an author extended only to the extent of preventing distortion, mutilation or modification of the work. The court reasoned that 'complete destruction' of a work stands on a different footing from 'distortion, mutilation or modification'; in the sense that once the work has been destroyed it cannot be seen by the public. The court stated "*that what cannot be viewed, seen, heard or felt, cannot be imperfect and cannot affect the honour or reputation of the author.*"³⁴

It is important to note that the above judgement by the Delhi High court has been passed in complete contrast with the judgement passed by a coordinate bench in Amar Nath Sehgal case. In Amar Nath Sehgal the court had held that "*it was necessary to*

interpret Section 57 in its widest amplitude to include destruction of a work of art, being the extreme form of mutilation, since by reducing the volume of the author's creative corpus it affects his reputation prejudicially as being actionable under said section."³² It therefore remains to be seen in which direction, future courts will interpret moral rights guaranteed under the Indian copyright regime.

Conclusion

Article 6bis of the Berne Convention of 1886 expressly provided for the protection of moral rights of authors while The Agreement on Trade Related Aspects of Intellectual Property Rights of 1995 (hereinafter TRIPS) does not mention the same, clearly moral rights seem to be a thorn in those nations who see it as a hurdle in their economic growth. Since TRIPS was largely based on the U.S. proposal³⁸ and since moral rights have been vehemently opposed by the entertainment industry in the U.S. it is of little doubt that the exclusion of moral rights from TRIPS was on the insistence of the Americans. But the question lies in the fact that is the world really developing by exclusion of moral rights? The reputation of an author is just as much, if not more important to him than his wealth. An author does not merely write a book to earn money, he shares his personality in the book and he should be given the right to claim authorship to it and to protect its integrity. Moral rights act as a balance to the ever growing commercial nature of the copyright system under TRIPS.

After going through the various laws in the U.S.A., U.K., France and India it becomes clear that France continues to be the champion of moral rights. India also has provisions for strong protection of moral rights; however the growth of overall intellectual property rights in India is slow. Not many people file suits for enforcement of moral rights, this could be because of the lack of knowledge of the intellectual property rights or due to the long and cumbersome court procedures and low amount of damages awarded by the courts in India. The British seem to have taken a rather balanced approach by providing moral rights but subject to a number of exceptions while the U.S. continues to see moral rights with suspicion. U.S. being one of the biggest markets in the world ought to provide some form of protection to the author's rights. But then since it is the biggest market it knows that authors are compelled to sell

their works in the U.S and so maybe this is the reason why they continue to flout the requirements of the Berne Convention.

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