The Moral Right of the Author: Moral Rights and the Common Law Countries

by Gerald Dworkin*

INTRODUCTION

There is a widely held belief, particularly among civil lawyers, that the concept of moral rights is a relatively novel intruder into common law copyright systems;[1] and that such systems, by dint of Article 6[bis] of the Berne Convention, are being compelled, kicking and screaming, to dilute their pure economic approach to copyright with alien personality rights. This is an over-stated, and to a large extent inaccurate, view. Indeed, the great eighteenth century English common lawyer, Lord Mansfield, whether or not he could be claimed as a founding father of moral rights, pronounced weightily upon copyright as a blend of economic and personal

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[Eds. note: All footnotes that have an asterisk following the footnote number were added by the editors to help readers locate secondary sources.]

1. This paper surveys the position of moral rights in common law jurisdictions. These comprise most of those countries which are now members of the Commonwealth or were at one time within what was the British Empire. A considerable amount of British legislation was in force in such countries: the United Kingdom's Copyright Act, 1911 (1 & 2 Geo. 5, ch. 46), for example, was widely applicable. However, much of English law was not contained in legislation but was judge-made; and, even today, the vast body of judicially created principles and rules which, for example, make up contract and tort (the law of obligations), aspects of the law of property and the principles of equity and trusts, is applied in the United Kingdom and in most of the other "common law" jurisdictions. The courts of some countries, for example, Hong Kong, Singapore, Malaysia and Nigeria, still, in practice, tend to accept and follow most English case-law authority, although that situation is beginning to change. The courts of other countries, such as Australia, have, both in theory and in practice, long since treated English case-law authorities as of persuasive authority only and have more readily approved, disapproved or developed existing or new principles in accordance with their own needs. Even where Australian judges have struck out in different directions or have led the way for English courts to follow, the emerging principles, the underlying style of reasoning and the judicial approaches have tended to be similar to the way in which English common law has developed. At the other extreme are some countries, notably Canada, which today look less closely at English case-law. The United States of America is in a quite separate category. In spite of its early English origins, U.S. common law has a long, rich and almost totally independent history. There is only very occasional perceived benefit in looking to foreign common law principles for guidance. Even so, many of the general principles of contract, tort and other relevant law are not dissimilar in kind to the principles applied in most common law countries.

rights of authors in the seminal case of *Millar v. Taylor*:[2]

> From what source, then, is the common law drawn . . . ?
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> . . . [The author] can reap no pecuniary profit, if, the next moment after his work comes out, it may be pirated upon worse paper and in worse print, and in a cheaper volume.
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> The author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He can not prevent additions. He can not retract errors. He can not amend; or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name, which he disapproves, repents and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom his work shall be published.[3]

It is certainly true, however, that the concept of moral rights played little, and some may argue no, role in the subsequent development of copyright in common law countries. The failure of such laws to focus specifically upon moral rights may account to some extent for present misunderstandings. It may help to explain the antipathy of many practitioners in the copyright-related industries of the common law world to moral rights: whereas their civil law brethren have for long had to learn how to achieve their economic objectives within the constraints of moral rights, common law practitioners have been alarmed, perhaps excessively so, at the prospect of their sudden express legislative introduction in an all-embracing and inflexible way.

As yet, there is no commonly accepted agreement as to the full range of moral rights. In addition to the rights of paternity (attribution) and integrity enshrined in Article 6^{bis} of the Berne Convention, many jurisdictions expressly include other moral rights: for example, a right to disclose or first publish a work; a right of modification or withdrawal of a work (normally subject to an obligation to indemnify affected parties in respect of financial losses); a right to prevent excessive criticism of a work; and a right against false attribution. However, for the purposes of this paper, the emphasis will be on the rights of paternity (attribution) and integrity as set out in Article 6^{bis}:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification, or other derogatory action in relation to, the said work, which

2. 98 Eng. Rep. 201 (K.B. 1769).
3. *Id.* at 252.

would be prejudicial to his honour or reputation.

(2) 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 authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification 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.

(3) 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.[4]

This paper will seek to explain and assess the nature and extent of moral rights protection which has been, less directly, built into common law jurisdictions; the significance of Article 6^{bis} of Berne (which many would like to see clearly, proudly, and expressly proclaimed in the legislation of all Member States as the minimum content of moral rights); and the problems that, though not unique to common law systems, face copyright practitioners who are not always, or primarily, concerned only with the interests of authors of copyright works.

I. THE COMMON LAW BACKGROUND TO BERNE

There was no specific moral rights provision in the first text of the Berne Convention. Indeed, it was not until the 1928 Rome Conference that there was sufficient impetus from a number of countries (led by France, Poland, Italy, Romania and Belgium) to provide for Convention recognition of moral rights. The history of this period discloses that the delegates from the common law countries[5] were caught by surprise when moral rights issues surfaced during the Conference.[6] They were not familiar with the concept of moral rights as such, nor did they fully

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4.* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed at Paris, May 4, 1896, revised at Berlin, Nov. 13, 1908, completed at Berne, Mar. 20, 1914, revised at Rome, June 2, 1928, at Brussels, June 26, 1948, at Stockholm, July 14, 1967, and at Paris, July 24, 1971, amended in 1979. Unless otherwise noted, all references are to the Paris Act of the Berne Convention, S. TREATY DOC. NO. 27, 99th Cong., 2d Sess. 37 (1986) [hereinafter Berne or Berne Convention].

5. The United Kingdom, Australia, New Zealand, the Irish Free State, Canada and South Africa.

6. *See* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 paras. 8.92-8.116 (1987); Sam Ricketson, *Moral Rights and the Droit de Suite: International Conditions and Australian Obligations*, 1 ENT. L. REV. 78, 79 (1990).

understand the differences in the nature of legal thought between common law and "continental" systems of copyright. Yet "these countries did not wish to be obstructive and the fact that their laws already provided some limited, albeit incidental, protection for moral rights provided the basis for a compromise draft that subsequently became Article 6[bis] of the text adopted at Rome."[7] The compromise not only refrained from requiring national copyright laws to have express moral rights provisions, but also tacitly acknowledged that the protection then "offered at common law and equity by the common law countries of the Berne Union was adequate for the purpose of the new provision."[8]

An Australian delegate reported that

> one of the arguments addressed to us was that it was hard that we [the common law countries], whose laws, gathered under various heads and found in various branches of our system were together deemed to provide a satisfactory protection for the interests in view, should stand in the way of the establishment of an international obligation to put laws in other countries on . . . proper footing.[9]

As a result, the only country with a common law background (although admittedly with strong French law influences) to enact specific moral rights legislation at the time was Canada.

It is certainly true that all common law countries have some laws which, to a greater or lesser extent, directly or indirectly protect moral rights.[10] Whether or not they do so sufficiently is a matter which will be addressed later in the paper. The United Kingdom, even before its recent express enactment of moral rights, had long had some specific, though limited, moral rights provisions giving artists protection against the unauthorised alteration of their drawings or the fraudulent affixing of signatures to them[11] and a general right against false attribution of authorship.[12] Even general copyright law could be used to some extent to protect moral rights: for example, the publication right could serve as

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7.* Ricketson, *Moral Rights and the Droit de Suite*, *supra* note 6, at 79.

8. *Id.*

9.* *Id.* (quoting REPORT OF THE AUSTRALIAN DELEGATE (SIR W. HARRISON MOORE) TO THE PARLIAMENT OF AUSTRALIA CONCERNING THE INT'L COPYRIGHT CONFERENCE, ROME, MAY AND JUNE 1928, NO. 255, 31 Aug. 1928, at 6ff (brackets in original).

10. See generally Gerald Dworkin, *The Moral Right and English Copyright Law*, 12 INT'L REV. INDUS. PROP. & COPYRIGHT L. 476 (1981), from which some of the following material has been drawn.

11. Fine Arts Copyright Act, 1862, 46 & 47 Vict., ch. 57, § 7 (Eng.) (replaced and widened by Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 43, and the Copyright, Designs and Patents Act, 1988, ch. 48).

12. Copyright Act, 1956, § 43 (replaced by Copyright, Designs and Patents Act, 1988, § 84).

a moral right to disclose or first publish a work;[13] or the adaptation right could protect aspects of the moral right of integrity.

Frequently, the simplest and most effective way of protecting moral rights is by contract. For example, there are favourable contracts and customs in some arts sectors in the United States[14] which serve to protect authors. A copyright owner can expressly provide for a right of paternity and integrity. Common law courts recognise the importance of publicity for an author and have acknowledged how damaging a failure to honour a contractual obligation to that effect can be.[15] Indeed, the courts have so recognised the importance of the publicity value of a name that they have struck down, for example, a clause in a contract which prevented a film star who had built up a reputation under a pseudonym from using that name when appearing in films produced by other companies.[16] The clause was condemned as tyrannous, oppressive and unreasonable and declared to be in restraint of trade.[17]

Thus, it has been said that in most cases the main difference between the right of paternity in common law and civil law countries is that in the former the author's right to accreditation is usually created by contract, whereas in countries with express moral rights provisions it exists by law and may only be waived (where this is permitted) by contract. So also with the integrity right: where an author transfers an interest in his or her work, the express or implied terms of the contract will determine whether, and to what extent, the integrity interest is protected. Where the copyright in a work is assigned, the general principle is that the assignee, as the present owner of the copyright in the work, may alter or amend it as he wishes; but that is subject to any clear contractual terms to the contrary. There is usually greater basic control over a work which is licensed rather than assigned. A licensee

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13. See, e.g., Doyle v. Wright, [1928-33] Macg. Cop. Cas. 243 (Ch. 1931) (Eng.), where a famous author wrote a paper some years before his death (having sent a limited number of confidential copies to some friends only) and then after his death a newspaper published the work in full. An action by the deceased's estate for copyright infringement was successful. A common law action for breach of confidence would also have been available. *See also* Gilbert v. The Star Newspaper Co., 11 T.L.R. 4 (Ch. 1894) (Eng.) (finding publication of detailed plot of comic opera prior to its first public performance a breach of confidence).

14. Examples include many book publishing contracts, the Dramatists Guild Production Agreements, which forbid changes without the author's consent, and the Writers Guild of America (screenwriters) contracts which place control of attribution for screenplays in the Guild's hands.

15. *See* Tolnay v. Criterion Film Prods., [1936] 2 All E.R. 1625, 1626-27 (K.B.) ("All persons who have to make a living by attracting the public to their works, be they artistes in the sense of painters or be they literary men who write books or who perform in other branches of the arts, such as pianists and musicians, must live by getting known to the public.").

16. Hepworth Mfg. Co. v. Ryott, [1920] 1 Ch. 1 (C.A. 1919) (Eng.).

17. *Id.* at 13.

may only use the licensed work in accordance with the terms of the license and the courts are often ready to protect an author's reasonable interests by introducing "implied" terms into the agreement.

A useful illustration is provided by a case where the plaintiff had been commissioned by the British Broadcasting Corporation (BBC) to write a television play.[18] It contractually reserved the power to make minor non-structural alterations to the script without the consent of the author. The dispute turned on whether the BBC could delete one line of the script which it regarded as a minor alteration but which the author considered to be of great importance to his play. It was a difficult question of interpretation as to whether the contract between the parties had effected a limited assignment of the copyright (which would have put the BBC in a stronger position) or simply a copyright license. The court concluded that only a license had been granted, that it was proper to imply into it a term limiting the right to make alterations, and that weight had to be given to the author's view that the line was structural. Accordingly, the court found for the author, thereby indirectly protecting an integrity interest.

Of broader application are the various, and sometimes overlapping, common law torts which protect personal or business reputation. As judicially created actions, they have evolved and have been developed to provide remedies for many cases of justifiable grievances. The torts of passing off (sometimes boosted by statutory additions, such as § 52 of the Australian Trade Practices Act, 1974 relating to deceptive or misleading conduct), injurious falsehood and defamation have been used indirectly to protect the right to disclaim[19] or claim authorship of a work and the right of integrity;[20] and there has even been some judicial consideration as to whether and how a right of recall because of a change of opinion

18. Frisby v. British Broadcasting Corp., 1967 Ch. 932 (Eng.). *See also* Joseph v. National Magazine Co., 1959 Ch. 14 (1958) (Eng.).

19. *See, e.g.*, Landa v. Greenberg, 24 T.L.R. 441 (Ch. 1908) (Eng.) (holding that an employee journalist who had created and used a *nom de plume* in a series of newspaper articles, and who had established a reputation in that name, could use the tort of passing off to prevent other journalists from continuing to use the *nom de plume* after she had left that newspaper).

20. *See, e.g.*, Lee v. Gibbings, 67 L.T.R. 263, (Ch. 1892) (Eng.) (publishing of scholarly work in smaller, cheaper form that omitted the preface, introduction, bibliography and index, and without indication that this mutilated work was taken from the author's earlier original work held actionable); Moseley v. Stanley Paul & Co. [1917-23] Macg. Cop. Cas. 341 (Ch. 1922) (Eng.) (publishing of a book with a vulgar and offensive paper jacket might libel author by suggesting that the book was of the same quality); Archbold, Esquire v. Sweet 174 Eng. Rep. 55 (K.B. 1832) (holding actionable author's complaint where the author had sold the copyright in a book to publishers who had prepared a new edition which contained errors and inaccuracies and held it out as having been edited by the original author).

could be protected.[21] The action for breach of confidence has also been used to protect a right of publication.[22]

The range of common law actions available to aggrieved litigants in the United States is probably wider at present than in most other common law jurisdictions: apart from defamation, unfair competition laws[23] and similar actions, American courts are expanding the scope of privacy and personality rights[24] to such an extent that, in conjunction

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21. Southey v. Sherwood, 35 Eng. Rep. 1006 (Ch. 1817), concerned a young author under 21 years of age who left a poem for publication with a bookseller. Although it was unclear how the defendant had acquired the work, the defendant published the poem 23 years after the boy had left it with the bookseller. The plaintiff, without establishing his copyright interest in the book, unsuccessfully sought to restrain publication on the ground that he no longer held his youthful views and that the publication now damaged his reputation. He claimed that he actually changed his mind about publishing the poem years earlier, but had completely forgotten about the copy left with the bookseller, thus accounting for his inaction in the ensuing years. Lord Eldon did say that a principle might be found to apply to a case where a man, having composed a work, of which he afterwards repents, wishes to withhhold it from the public. Lord Eldon distinguished the facts in the case on the grounds that the plaintiff's inaction forfeited any control over the poem. *Id.* at 1007.

In Chaplin v. Leslie Frewin (Publishers) Ltd., 1966 Ch. 71 (C.A. 1965) (Eng.), the nineteen year old son of Charlie Chaplin had assigned the copyright in his life story but later repented and wished to restrain publication; but the court refused to intervene. However, Lord Denning dissented and said: "I cannot think that a contract is for the benefit of a young man if it is to be a means of purveying scandalous information. Certainly not if it brings shame and disgrace on others; invades the privacy of family life; and exposes him to claims of libel." *Id.* at 88; "I know he has been foolish, but he should be allowed a space for repentance even at the eleventh hour." *Id.* at 90.

The U.S. Copyright Act of 1976 (as amended) contains a quasi-"moral right" of termination of contracts. This right attaches to authors and empowers them to put an end (subject to limitations respecting works for hire and derivative works) to exploitation agreements — whether for economic or "moral" reasons — after 35 years. *See* 17 U.S.C. § 203 (1988).

22. *See, e.g.*, Gilbert v. The Star Newspaper Co., 11 T.L.R. 4 (Ch. 1894) (Eng.) (action against a newspaper for publishing the detailed plot of a comic opera before its first public performance).

23. In the U.S. "unfair competition" provides a more limited remedy than in many civil law countries, being roughly equivalent to the English passing off action.

24. For example in Big Seven Music Corp. v. Lennon, 554 F.2d 504 (2d Cir. 1977), John Lennon was able to stop the distribution of a recording of his music on the grounds that poor editing and an unartistic cover design amounted to mutilation of his work. The case of Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976) provides an interesting illustration of an American court consciously upholding the right of integrity in an indirect way. There, the authors of the successful British television comedy series, "Monty Python's Flying Circus" entered into license agreements with the BBC which permitted it to make only minor alterations to the scripts without consulting the authors. The BBC licensed Time-Life Films to distribute the "Monty Python" television programs in the U.S.A. and agreed to a standard clause which permitted Time-Life to edit the programs "for insertion of commercials, applicable censorship or governmental . . . rules . . . and National Association of Broadcasters and time segment requirements." Time-Life, in turn, licensed some of the programs to the American Broadcasting Company (ABC) and

with developments in the application of Section 43(a) of the Lanham Act, some commentators assert that there is adequate protection in respect of most paternity and integrity complaints.[25] However, other commentators are less convinced. It was never clear whether the sum total of the various direct and indirect actions available in common law countries provided, as a minimum, at least the same protection as did those jurisdictions that expressly incorporated Article 6bis and other moral rights into their legislation. Leaving the protection of moral rights to contractual arrangement was not sufficient. Even those with bargaining strength may find their contractual rights inadequate when a claim is being made against third parties, particularly after copyright interests have been assigned.

The need to search for some kind of category, albeit indirect, into which a complaint can be fitted, while not unusual in the common law, may prove to be fruitless. Thus one English judge, in sympathizing with the plaintiffs' fury at the defendant's behaviour, remarked that "justifiable fury . . . is not a cause of action and [the plaintiffs] have to find a cause of action before they can" proceed.[26] Even where categories

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agreed that the programs could be edited and otherwise be made to conform fully to the policies of ABC's Department of Broadcasting Standards and Practice. Thus, through a chain of apparently standard transactions, the limited editing rights which had been granted by the plaintiffs had developed into very wide powers in the hands of the ABC. It broadcast a 90 minute "Monty Python" program and, in accordance with the powers it had negotiated, it deleted 24 minutes of the original material to make advertising space available. The authors' complaint was upheld: the defendants were liable under the Lanham Act for misrepresentation and also for *copyright* infringement since they had exceeded the terms of the original licence granted to the BBC.

25. *See* Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y 1 (1980).

> Thus, despite the traditional failure of American law to protect the right of integrity as it is known in France, there is little question that at least a right to protect art works from mutilation is emerging . . . . Case law upholds the right under tort and contract theories, and scholars agree that there is ample room for expansion of those doctrines.

Id. at 47 (footnotes omitted).

For a recent assessment of the development of the right of publicity, see Diana Elzey Pinover, *The Rights of Authors, Artists and Performers under Section 43(a) of the Lanham Act*, 83 TRADEMARK REP. 38 (1993). It is worth noticing that such protection extends also to performers. Thus, performers have secured protection against false attributions of credits for their performances (*see, e.g.*, Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981)) and in two well-known decisions trademark law and the common law of unfair competition have been applied to protect singers against deceptive exploitations in television commercials of "sound alike" renditions of music with which the performers were closely associated. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), *cert. denied*, 503 U.S. 951 (1992); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

26. Harrison v. Polydor Ltd., 1977 F.S.R. 1 (Ch. 1976) (Eng.). Here, the defendants proposed to issue a record comprising taped interviews with the Beatles, interspersed with extracts of their music. The defendants owned the copyright in the recordings of the interviews and also had a statutory licence to use the music. The Beatles attempted to

are available, they are not always easy to use: for example, in the U.K. and related jurisdictions, to succeed in passing off an author would have to show that there is some goodwill to be protected; to succeed in trade libel it is necessary to prove malice; and the availability of defamation in practice is restricted, since it is a notoriously expensive and hazardous area of litigation.

There are many cases in the law reports where plaintiffs have been denied remedies in connection with moral-rights type grievances, although it is not always clear whether they would have been successful in countries with codes of moral rights.[27] However, there is at least one case where a direct comparison can be made. In *Shostakovich v. Twentieth Century-Fox Film Corp.*[28] several Russian composers complained that the defendants had played *faithful* recordings of their works as background music for a film which was derogatory of the Soviet Union. They objected to the use of their works and names in this context on the ground that it implied their approval of the film's political stance. They failed in the United States, but succeeded in France! In more recent years, the question whether common law countries comply fully with Article 6^{bis} has become much more controversial and has been considered by influential bodies in some of the major jurisdictions.

A. UNITED KINGDOM COMMON LAW

The matter has been considered by copyright reform committees twice in the United Kingdom. In 1952, the Gregory Committee Report on Copyright Law[29] (which led to the Copyright Act, 1956) examined the matter in a fairly cursory way: existing provisions in U.K. common law

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restrain publication of this record, complaining that they would suffer damage to their reputations and embarrassment (for example, one of the photographs on the record sleeve was of one of the plaintiffs with his former wife) since their views and personal circumstances had changed in the 15 years since the interviews had been recorded. The plaintiffs were unsuccessful in finding an appropriate cause of action.

27. For example, in an American decision, Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947), an artist who sold his drawings to a magazine which published them without attributing authorship to the artist was denied a remedy. In the absence of a contractual provision requiring that his name be used, he had no right to claim authorship. (It may well be, though, that American courts today would take a different view on such facts.) A case demonstrating that there is no automatic legal right of integrity is Preminger v. Columbia Pictures Corp., 267 N.Y.S.2d 594 (Sup. Ct.), *aff'd*, 269 N.Y.S.2d 913 (App. Div.), *aff'd mem.*, 219 N.E.2d 431 (N.Y. 1966), where the plaintiff claimed that his film was mutilated when the defendant, which obtained a license to televise the film, made minor cuts and added commercial breaks. The court ignored a provision in the licensing agreement that required the plaintiff's approval on the "final edit" of the television-version of the film, and dismissed plaintiff's complaint on the grounds that it was standard industry practice for minor edits to be made to works when adapting them for television.

28. 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (App. Div. 1949).

29. 1952, Cmd. 8662, ¶¶ 219-26.

and statute law could cope; in any event, most problems could be dealt with satisfactorily by contract; no one had complained that the U.K. was in breach of its obligations under Article 6[bis], and in any event, moral rights were so vague and ill-defined that it seemed impossible, even if it were considered desirable, to frame legislative proposals to meet all possible problems. As a consequence, the Copyright Act, 1956 contained no express moral rights provisions apart from the renewal of the right against false attribution of authorship.[30]

Twenty-five years later, the Whitford Committee came to the opposite conclusion: existing English law was not sufficient to meet its Convention obligations; and the Committee inclined towards the introduction of express legislative moral rights provisions.[31] Only two difficulties were adverted to. First, it was pointed out that the introduction of a long-term right to object to changes in a work could allow an author's heirs to hold to ransom film makers and broadcasters who, having acquired the copyright in a given work, needed to make alterations or omissions. Secondly, if the right to claim authorship is interpreted as a right to insist that every copy bears the author's name, there could be considerable difficulties in some cases, for example, design teams, where many people contribute to the creation of a work.

Bearing in mind such difficulties, the Whitford Committee recommended legislation on similar lines to the flexible provisions of Article 25 of the Netherlands Copyright Act (1912-1972) which contained, in its view, several attractive features: the right of integrity was not enforceable where it would be unreasonable for an author to object; the author retained a right to make "such modifications to a work as he may make in good faith in acccordance with the rules established by social custom"; and the right could in appropriate circumstances be waived.[32] Although the United Kingdom followed the main recommendation and introduced moral rights provisions in the Copyright, Designs and Patents Act, 1988, it did not follow the Netherlands model. An assessment of these provisions will be made later in this paper.

B. AUSTRALIAN COMMON LAW

The Australian Copyright Law Review Committee published a *Report on Moral Rights* in 1988 in which it concluded by a bare majority of 5 to 4 that its existing laws (which in this respect are virtually identical to the English case law) were sufficient to comply with Article 6[bis] of the Berne Convention and that there was no need to enact specific moral

30. Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, §43 (Eng.).

31. COPYRIGHT AND DESIGNS LAW, REPORT OF THE COMMITTEE TO CONSIDER THE LAW ON COPYRIGHT AND DESIGNS, 1977, Cmnd. 6732, at 16-18, ¶¶ 51-57.

32. *Id.*

rights legislation.[33] It was stated that there was insufficient support from authors and artists, there would be practical problems if any such legislation was to be introduced, and there were probably too few instances of "moral rights abuse" to warrant new legislation.

This controversial conclusion, of course, was in direct conflict with that of the Whitford Committee and has been challenged by at least one distinguished Australian copyright lawyer who argues that Australia presently stands in breach of Art. 6^{bis} in so far as the right to claim authorship is only partially protected and in so far as the protection accorded to both rights of attribution and integrity only survive the author in very limited circumstances.[34] Specific legislative reform is clearly required in order to fill these gaps and it is regrettable that the Copyright Law Review Committee should have come to the contrary conclusion.

C. UNITED STATES COMMON LAW

The United States did not accede to the Berne Convention until 1989. For many years prior to that, consideration had been given to the various changes in U.S. copyright law which would be necessary to bring it in line with Convention requirements, perhaps the most controversial being the introduction of moral rights. Many analysts, with justification, considered that the U.S. stood in no significantly different position to other common law countries in this matter. Although its common law and limited statutory protection may perhaps have provided slightly greater indirect protection for moral rights than was the case in, say, the U.K. and Australia, it still did not match up to the protection which would be afforded by the introduction of express and unqualified rights as set out in Article 6^{bis}.

However, the nature of the moral rights debate in the United States and the explanation for what occurred must be understood in its practical and political context. By 1988, the U.S. at last was intent upon joining the Berne Convention. Yet it was not anxious to effect major changes in its copyright law. Therefore, in framing the Berne Convention Implementation Act 1988, the dominant theme was a "minimalist" approach: no changes would be made in U.S. copyright law unless deemed to be absolutely necessary in order to comply with Berne Convention obligations. Coupled with this reluctance to tinker too much with U.S. copyright law, was also the fear felt in some powerful copyright

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33. COPYRIGHT LAW REVIEW COMM., REPORT ON MORAL RIGHTS 1988 (Australian Government Publishing Service, Jan. 1988).

34. *See* Sam Ricketson, *Moral Rights and the Droit De Suite*, *supra* note 6, at 86. For an excellent account of the situation in Australia and in common law jurisdictions generally, see the collected papers in MORAL RIGHTS PROTECTION IN A COPYRIGHT SYSTEM (Peter Anderson and David Saunders eds., 1992).

industries, in particular the film industry, that the express enactment of Article 6bis would create major and unacceptable problems. It was widely believed that any hope of U.S. adherence to Berne hinged on finding a way of avoiding the express implementation of Article 6bis into U.S. law.

A bandwagon against change began to develop. Leading U.S. experts maintained that express implementation was unnecessary[35] and it was also pointed out with justification that many Berne Convention countries appeared not to match up fully with the full-blooded version of Article 6bis.[36] Accordingly, the Committee on the Judiciary was able to conclude that it had

> been persuaded by the testimony of the majority of the witnesses before the Subcommittee, the conclusions of the international copyright experts whose advice the Subcommittee sought, and the comments of many other distinguished interested parties. Based on a comparison of its laws with those of Berne member countries, and on the current status of Federal and State protections of the rights of paternity and integrity, the Committee finds that current United States law [which arose almost entirely outside the Copyright Act, namely unfair competition, privacy, defamation and misrepresentation, the Lanham Act, etc.] meets the requirements of Art.6bis.[37]

Support for this approach came also from Dr. Arpad Bogsch, Director General of the World Intellectual Property Organization (WIPO) and a guardian of the Convention:

> In my view, it is not necessary for the United States of America to enact

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35. For example, the former Commissioner of Copyrights, Barbara Ringer, declared that "current U.S. legislation and jurisprudence, especially the common law, are fully sufficient to meet [U.S.] obligations under Berne without the need for federal statutory provisions on the so-called 'moral right'." *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st and 2nd Sess. 692 (1987-88). *See also id.* at 881 (copy of a letter from John M. Kernochan, Nash Professor of Law, Columbia University School of Law, to Representative Kastenmeier (Feb. 18, 1988)).

36. It has not escaped notice in the U.S. that Berne-member legislation and Berne-member action to enforce rights of integrity range from total absence of effective protection to detailed and thorough regulation. The U.S. is certainly not in the lowest end of the range and its awareness and activity are certainly growing. In many ways the concept of moral right is still inchoate, even in "advanced" moral rights nations, with respect to its impact in many practical situations. It may even be hoped that U.S. experience and efforts will help to clarify the emerging issues as they confront the tide of new technology, new media, and new art forms.

Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 37 n.133 (1988).

37.* H.R. REP. NO. 609, 100th Cong., 2nd Sess. 38 (1988).

> statutory provisions on moral rights in order to comply with Article 6bis of the Berne Convention. The requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by the common law and other statutes. I believe that in the United States the common law and such statutes (Section 43(a) of the Lanham Act) contain the necessary law to fulfill any obligation . . . under Article 6bis.[38]

Whether all other Berne Convention member states were so convinced is not clear but the clear benefits to them of U.S. membership militated against any country attempting to block accession on this ground.

Maintenance of the status quo was not enough to satisfy some U.S. opponents of moral rights who feared that the influence of Article 6bis could infiltrate U.S. law in some other way. Although the Berne Convention is not self-executing, change being possible only through U.S. domestic law, some wanted to see this principle clearly re-stated. Others were concerned that, since the common law is flexible and constantly evolving, courts in the U.S. might be unduly influenced by Berne membership to interpret and develop existing domestic law in line with Article 6bis and its interpretation in other foreign jurisdictions which apply it. Attempts were made to show that Berne membership, in itself, would not change anything in U.S. law or practice. The Berne Convention Implementation Act 1988 contained a declaration that "the amendments made by this Act, together with the laws that exist on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention" with respect to moral rights.[39] In addition, to satisfy those who still remained worried that this did not spell the position out sufficiently clearly, there was a detailed gloss by the House of Representatives Committee on the Judiciary on the impact on domestic law of adherence to the Berne Convention:

> *Since the Committee finds that existing law is sufficient to enable the United States to adhere to the Berne Convention, the implementing legislation is completely neutral on the issue of whether and how protection of the rights of paternity and integrity should develop in the future.* The Committee stresses that the [wording in the Act] . . . is intended to assure United States courts that adherence to Berne is not, of itself, a basis for any cause

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38. *The Berne Convention: Hearings on S. 1301 and S. 1971 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 100th Cong., 2nd Sess. 323 (1988) (letter of Arpad Bogsch, Director General of WIPO, to Irwin Karp, Charman of the National Committee for the Berne Convention, (June 16, 1987)).

39. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2(3), 102 Stat. 2853, 2853. A similar sentiment is expressed in the recent North American Free Trade Agreement: "this Agreement confers no rights and imposes no obligations on the United States with respect to Article 6bis of the Berne Convention, or the rights derived from that Article." North American Free Trade Agreement, Nov. 4, 1993, Annex 1701.3(2).

> of action. Outside the context of Berne, the courts and legislatures are free to act, or not to act, on questions concerning the rights of paternity and integrity.
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> . . . .
>
> . . . Section 4(b) of the bill tracks the language of Article 6[bis], and provides that any right of an author to paternity or integrity, whether claimed under Federal or State statutory or common law, is not expanded or reduced by Berne adherence and the satisfaction of our obligations under Berne. . . .
>
> . . . Furthermore, any rights . . . [protected under United States domestic law] shall not be expanded or reduced by virtue of, or in reliance upon, the Convention's provisions or the United States' adherence to the Convention. In other words, Berne's provisions themselves, and the simple fact of adherence to the Convention, will not in any way affect current law or its future development. . . . To the extent that courts, in interpreting our domestic laws, properly look to the laws of foreign countries, they may continue to do so. The fact of Berne adherence will not enable them to look to such laws to any greater or lesser degree.
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> . . . .
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> . . . Courts remain free to apply common law principles, to interpret statutory provisions, and to consider the experience of foreign countries to the same extent as they would be in the absence of United States adherence to Berne.[40]

There are those, of course, who support the spirit and purpose of Article 6[bis] and who are critical of the way the U.S. has handled moral rights.[41] Nevertheless, for a country such as the United States, which has such a dynamic and developing common law system, it is difficult to believe that some courts will not be influenced by the Berne background when deciding how its domestic law should be applied and developed.

II. MORAL RIGHTS LEGISLATION IN COMMON LAW COUNTRIES

Whether or not the reluctance of those in common law jurisdictions to legislate expressly for moral rights laws is based upon real or false fears

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40. H.R. REP. NO. 609, *supra* note 37, at 38-40 (italics in original). There were also earlier drafts of Berne Implementation legislation which attempted to prevent any future development of moral rights under copyright or other theories. *See* Ginsburg and Kernochan, *supra* note 36, at 30-31.

41. [No] matter how diligently a state may try to protect moral rights, the failure of the federal copyright law even to address the issue creates a national standard of indifference toward artists' rights, and firmly establishes a legal notion of intellectual property which puts the rights of the copyright proprietor above the rights of the artistic creator. By ignoring moral rights, federal law creates a fundamentally "amoral" copyright.

DaSilva, *supra* note 25, at 6.

is debateable. It is certainly true, though, that a deeply rooted suspicion of such legislation existed and continues to exist. An account of legislative activity, primarily in Canada, the United Kingdom and the United States, will illustrate the varying approaches which have been adopted so far.

A. CANADA

Canada in some respects provides a bridge between the approach to moral rights in common law and civil law systems. Although primarily a common law country, its laws have been influenced by the civil law principles of Quebec. The most senior judges in Canada are drawn from both jurisdictions; their background is sometimes reflected in their legal analyses;[42] and they have been prepared to look to civil law jurisdictions when considering moral rights.[43]

Canada was, in 1931, the first common law country to enact specific moral rights laws when it adhered to the Rome text of Berne.[44] The legislation followed Article 6[bis] very closely but was criticised by a leading Canadian lawyer for being "conceived in vagueness, poorly drafted, sententious in utterance, and useless in practical application."[45]

Although this assessment may have been overly harsh, for moral rights were successfully enforced on occasions,[46] the courts in general appeared not to be too sympathetic to moral rights claims and construed the provisions narrowly.[47] Accordingly, it was encouraging, when law reform was being discussed half a century later, that one report proclaimed that "moral rights were as important as economic rights and

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42. *See, e.g.*, Le Seuer v. Morang & Co. 45 S.C.R. 95 (1911) (Can.).

43. For example, in John Maryon Int'l Ltd. v. New Brunswick Tel. Co., 141 D.L.R.3d 193 (N.B. Ct. App. 1982), Justice La Forest, a New Brunswick judge, sought the assistance of French law to support his interpretation of a moral rights provision.

44.* An Act to Amend the Copyright Act, 21-22 George V, ch.8, § 5, 1930-31 S.C. 41, 44 (Can.).

45. Harold G. Fox, *Some Points of Interest in the Law of Copyright*, 6 U. TORONTO L.J. 100, 126 (1946).

46. *See, e.g.*, Snow v. The Eaton Centre Ltd., 70 C.P.R.2d 105 (Ont. High Ct. of Justice, 1982) (enjoining shopping mall operator from covering artist's sculpture of geese with Christmas ribbons).

47. Moral rights were generally thought inferior to copyrights or rights of physical ownership. Sculptures were dumped into a river and wrecked, ballets were staged by persons other than the original choreographer, cartoon characters were modified, engineering plans were changed to prevent a building from falling over: authors lost in all these cases — sometimes for sound, other times for less sound, reasons.

David Vaver, *Canada Starts Reforming Its Copyright Law*, MEDIA L. & PRAC., June 1989, at 58, 59.

should be strengthened and clarified."[48] The right of attribution was to operate "where reasonable in the circumstances" thus limiting the power, for example, of employee authors or ghostwriters from going back on express or implicit understandings.[49]

The right of integrity is now enforceable where a work is "(a) distorted, mutilated or otherwise modified; or (b) used in association with a product, service, cause or institution" in a way which is prejudicial to honour and reputation.[50] There was thought to be a particular problem with regard to unique artistic works; artists felt

> that the right to restrain any distortion, mutilation or modification prejudicial to their honour or reputation [did] not provide sufficient protection. It is often difficult to demonstrate such harm. Many artists [were] of the opinion that the unauthorised alteration of an original artistic work (eg. modification for advertising purposes) may by itself be prejudicial to the author's honour or reputation, even if it is not possible to quantify the damage.[51]

It was therefore provided that where a painting, sculpture or engraving is modified without consent, prejudice to reputation is presumed.[52] To prevent what was feared could be possible misuse of the integrity right, it was provided that changes in a work's location, the physical means by which it is exposed or the physical structure containing it, and good faith steps taken to restore or preserve the work, were not in themselves modifications.[53]

Moral rights are conferred not only upon authors of copyright works within the Berne Convention, but also in respect of sound recordings; accordingly, corporations may exercise moral rights where they qualify as authors.

1. Waiver

Moral rights, of course, cannot be assigned, but waiver has always been possible. In Canada, moral rights can be waived expressly or by implication, and there is no requirement that it must be in writing. The critical question, then, is whether the legislative principle of moral rights is undermined by the realities of waivers in practice. Although it is not

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48.* *Id.* (citing a 1985 House of Commons sub-committee report entitled *A Charter of Rights for Creators*).

49.* *Id.*

50.* The Copyright Act, R.S.C., ch. C-42, § 28.2(1) (1992) (Can.). *See also* § 14.1.

51. FROM GUTENBERG TO TELIDON: CANADIAN WHITE PAPER ON COPYRIGHT 26-27 (1984).

52.* Copyright Act § 28.2(2).

53.* Copyright Act § 28.2(3).

always the case,[54] most persons commercially involved with authors would prefer blanket waivers of moral rights. Waivers eliminate potential difficulties, at least in law. Although it is possible for courts to exercise some control over waivers by use of common law doctrines such as restraint of trade or undue influence, such occasions are likely to be rare, and the reality is that moral rights protection is subject to the economic necessities of the market place and dependent upon the strength of the parties' negotiating positions. Thus, the distinguished Canadian lawyer, Professor Vaver, has assessed Canada's moral rights provisions in the following terms:

> A balance must obviously be struck between lofty statements of principle, which lead to judges making *ad hoc* decisions without giving much guidance for the future, and over-precision, which leads to narrow, crabbed reasoning and an inability to cope with new situations as they arise. Canada has yet to strike a satisfactory balance.
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> Generality versus precision is, however, not the real debate in Canada. So long as moral rights can be freely waived, informally, even impliedly, everyone — lawyers, businesses, collecting societies — everyone, that is apart from the author, is relatively content. Moral rights exist on the books, but in reality all they may have accomplished is the insertion of an extra paragraph in the transfer and sale agreement between the purchaser and the artist.[55]

B. THE UNITED KINGDOM

The United Kingdom Government acknowledged the importance of moral rights when it effected a major overhaul of copyright law in 1988.[56] It also accepted the general conclusion of the Whitford Committee that existing laws were inadequate to comply with Berne and express statutory rights were necessary. However, the concerns of the copyright industries' pressure groups coloured the extensive Parliamentary debates on the matter and influenced considerably the final form of the legislation. Adopting a typically British legislative style,

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54. The preservation of moral rights can sometimes be of benefit to copyright owners: it may add another string to their bow if they can demand that an employee-author, for example, exercises moral rights in support of their economic interests. An illustration of this, although unsuccessful on the facts, occurred in the recent case of Nintendo of Am., Inc. v. Camerica Corp., 34 C.P.R.3d 193, 199 (Fed. Ct.), *aff'd*, 36 C.P.R.3d 352 (Ct. App. 1991) (Can.). The plaintiff employers sued competitors in the computer games industry for copyright and trade mark infringement and a supporting moral rights claim was brought by the employee author of a computer game alleging that his moral right of integrity had been violated.

55.* Questionnaire on Canadian moral rights submitted at the Antwerp Conference.

56. "Moral rights are of great importance to authors and other originators of copyright works, who value their artistic reputations as much as the financial rewards for their works." 489 PARL. DEB., H.L. (5th Ser.) 1478 (1987) (statement of Lord Young).

a detailed and complex moral rights code was favoured in preference to a simple restatement of the general principles set out in Article 6[bis] Berne which would have left the courts with too free a hand to work out how they should apply. The Act sets out the rights, the conditions which must be satisfied in order for them to be acquired, their scope and, in particular, the numerous exceptions and qualifications to them which were designed to satisfy sectional interests.

A careful examination of these rights is necessary in order to determine whether they confer greater protection for moral rights than existed heretofore and whether or not they match up to Article 6[bis] or to the equivalent moral rights laws of civil law countries.

There are four rights in the new moral rights code:[57]

> (1) the right to be identified as author or director (the right of paternity or attribution);
> (2) the right to object to derogatory treatment of a work (right of integrity);
> (3) the right not to be falsely attributed as author or director (false attribution of work); and
> (4) the right to privacy of certain photographs and films.

Before looking in more detail at the rights of paternity and integrity, it is convenient here to examine briefly the latter two rights.

1. False Attribution

The false attribution provision confers a right not to have a literary, dramatic, musical or artistic work or a film falsely attributed to a person as author or director.[58] It is the converse of a paternity right (the person concerned is complaining that he is *not* the author of the work), and is frequently linked with it, although it is argued by some that it is not a moral right *stricto sensu*. It already existed in a broadly similar form in the United Kingdom and overlaps to some extent with the common law passing off action. It can be exercised by any person, whether or not an author, and in respect of any work, whether or not it enjoys copyright protection, and subsists during the life of any person and twenty years thereafter.

2. Right to Privacy in Relation to Certain Photographs and Films

A person who for private and domestic purposes commissions the taking of a photograph or the making of a film, where copyright subsists in the resulting work, has certain rights not to have copies of the work

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57. Copyright, Designs and Patents Act (CDPA), 1988, §§ 77-89, 94-95, 103 (Eng.); *see also* sched. 1, ¶¶ 22-24 (containing important transitional provisions).

58.* CDPA § 84. In relation to joint works, see § 88(4), (5).

issued to the public or the work exhibited or shown in public or broadcast.[59] Under the earlier legislation, the Copyright Act, 1956, the privacy of a person who commissioned the taking of a portrait, photograph or engraving was safeguarded because the copyright in such works was vested in the commissioner subject to any agreement to the contrary.[60] Now, copyright principles are honoured by ensuring that the author of such a work has the copyright, but the right to privacy of the commissioner is recognized by this power to restrain unauthorized use of the work.[61] This right also, is not a moral right *stricto sensu*: it does not confer any additional rights upon the author of the copyright of an artistic work; the personal right is that of the commissioner.

3. The Rights of Paternity and Integrity

The rights of paternity and integrity are enjoyed by the authors of copyright literary, dramatic, musical or artistic works.[62] They are also enjoyed by directors of copyrighted films.[63] This was an interesting development since, at present, film directors in the U.K. (and in most other common law countries) are not, as such, authors of the films they direct. Thus, the copyright in a film (normally in the producer as deemed author) and the moral right of the director, in the first instance, would be vested in different persons. This, perhaps belated, recognition that a film director is entitled to certain interests in a film foreshadowed more recent developments in the European Directive on Rental Rights and the draft Directive on Duration which provide that directors be regarded as authors or co-authors of films.

Each author of a work of joint authorship is entitled to exercise moral rights in the same way as a sole author.[64] The rights of paternity and integrity (and the right of privacy) endure for the same length of time as the copyright in the relevant work (at present, life plus fifty years or fifty years in the case of a film).[65] As moral rights are, by their very nature, personal to the individual concerned, they cannot be assigned.[66] That, however, does not affect the issue of waiver of rights, which will be addressed later.

59.* CDPA § 85. For rights of co-commissioners, see § 88(6).
60.* Copyright Act, 1956, 4 & 5 Eliz. 2, ch. 74, § 4(3) (superceeded by CDPA, § 9).
61.* CDPA § 9 (authorship), § 85 (right of privacy).
62.* CDPA § 77 (paternity), § 80 (integrity).
63.* CDPA §§ 77(6), 80(b).
64.* CDPA § 88.
65.* CDPA § 86.
66.* CDPA § 94.

a) The right of paternity

The right of an author or director to be identified as such differs slightly depending upon the type of copyright work involved. In most cases it operates whenever the work is performed in public, or is issued to the public, or whenever it is commercially exploited, and includes the right to be identified as the author of a work from which any adaptation is made.[67] However, no credits are required for musical performance:[68] the right of paternity is denied to the public performance of musical works on the ground that it would be impractical, for example, to require broadcast programs to list the composers of all of the music which is played in whole or in part on television or radio.[69] On the other hand, the author of an artistic work, who has no exclusive performing right under U.K. copyright law (anybody in possession of a painting, in the absence of agreement to the contrary, may show it in public), nevertheless has the right to be identified as the artist should it in fact be shown in public.

A very controversial limitation imposed upon the paternity right was that the right must first be "asserted" by the author; infringement can occur only after assertion.[70] This condition precedent to the exercise of the right was introduced to protect publishers and others who deal with copyright material and who need to know exactly what their responsibilities are. Although it serves to limit the operation and scope of the right, and by imposing a formal requirement, arguably is incompatible with the Berne Convention,[71] emphasis was placed on the wording in Article 6[bis] that the author only has the right "to claim" authorship![72]

67.* CDPA § 77(2)-(4).

68.* CDPA § 77(7).

69. "[S]o much music is used in broadcasting that it really would be absurd if every composer had to be credited." (per Lord Lloyd, Nov. 25, 1987).

> I can understand the difficulties broadcasters might have if they always had to identify the composer of a musical work which was broadcast. This would create considerable difficulties in respect of programs featuring records of popular music, for example, or of advertisements with a musical content. But for this very reason the [CDPA] Bill omits any right for an author or composer to be identified when a musical work or its accompanying lyrics are broadcast.

493 PARL. DEB., H.L. (5th Ser.) 1327 (1988) (statement of Lord Beaverbrook).

70.* CDPA § 78(1).

71. *See* Sheila J. McCartney, *Moral Rights under the United Kingdom's Copyright, Designs and Patents Act of 1988*, 15 COLUM.-VLA J.L. & ARTS 205, 239 (1991).

72. "Publishers and others who deal in copyright material need to know exactly what their responsibilities are in this matter. They cannot be expected to operate under a constant danger of action for infringement. . . . As a practical matter, we believe assertion is essential if [it] is to work properly." 491 PARL. DEB., H.L. (5th Ser.) 352 (1987) (statement of Lord Beaverbrook).

> [Assertion] is fully consistent with the Berne Convention which requires that authors

Furthermore, the assertion of the paternity right must be done formally, by instrument in writing signed by the author or director or by a statement in an assignment of copyright in the work.[73] Understandably, the author of a literary work would be surprised to learn that, although his name featured prominently on the work, this is not of itself sufficient to satisfy the formalities for assertion. However, after much pressure the assertion requirement was relaxed slightly in connection with the public exhibition of artistic works; usually the name of the author on the original or authorized copy, or on the frame to which the artistic work is attached will be sufficient for assertion purposes.[74] The assertion requirement in practice will restrict further the operation and effectiveness of the right in the United Kingdom.[75]

b) The right of integrity (The right to object to derogatory treatment)

Authors of works and film directors may object to certain types of "treatment" of their works or films. "Treatment" means any addition to, deletion from or alteration to, or adaptation of the relevant work.[76] However, it does not cover translations of literary or dramatic works or any arrangements or transcription of a musical work involving no more than a change of key or register[77]: it was maintained, unconvincingly, that such types of treatment in most cases preserve the basic integrity of a work.[78]

While the right of integrity seemingly provides wide protection, the definition of "treatment" imposes some significant limitations upon its operation. Certain types of "derogatory" action do not come within the expression "treatment." To place an artistic work in an inappropriate context may be damaging and objectionable to the artist (for example,

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should have a right to claim authorship, not an absolute right to be identified. Indeed, it is interesting in this context that the Guide to the Convention produced by the World Intellectual Property Organisation which provides a quasi-official commentary on the convention's provisions says this of Article 6[bis]: "This provision enshrines two of the author's prerogatives: first and foremost, to claim the paternity of his work — to assert that he is its creator."

Id.

73.* CDPA § 78(2).

74.* CDPA § 78(3), 4(c)-(d).

75. "[B]y insisting that an author must assert his rights [there] is a real diminution in the value and strength of moral rights . . . [and] power is shifted from the author to the proprietor, publisher or other source of economic strength." Statement by Mark Fisher MP in the House of Commons Standing Committee's consideration of the provisions on May 26, 1988.

76.* CDPA § 80(2)(a).

77.* CDPA § 80(2)(a)(i)-(ii).

78. For a criticism of this view, see W.R. Cornish, *Moral Rights under the 1988 Act*, 12 EUR. INTELL. PROP. REV. 449, 451 (1989).

placing a "respectable" artistic work in an exhibition of pornographic material or using it for advertising) but it falls outside the definition.

Another illustration of the narrowness of the definition can be seen when applying it to the the facts of a case mentioned earlier, *Shostakovich v. Twentieth Century-Fox Film Corp.*,[79] where several Russian composers complained that the defendants had played *faithful* recordings of their works as background music for a film which was derogatory of the Soviet Union. They objected to the use of their works and names in this context on the ground that it implied their approval of the film's political stance. It will be recalled that an action failed in the United States where there were no express moral right provisions but succeeded in France, where there were. The new U.K. provisions would have been of no benefit to the composers (had the film been made after July 1989) because the use of the music in films in this way does not not constitute "treatment." On the other hand, the controversial practice of "colorizing," that is colouring classic black and white films, appears to come within the definition, although once again, none of the famous films which have been colorized without consent would be protected since they were made before the Act came into force.[80]

The right of integrity does not extend to, or encompass, the physical relocation of a work (for example, where a sculpture commissioned with a view to being displayed in a town centre meets with the disapproval of the local council and is relegated to a distant part) or the physical means by which the work is displayed or exhibited. Any alteration, destruction or change in the structure containing a work is not actionable. Nor can the right be used to prevent destruction of a work. Graham Sutherland's controversial portrait of Sir Winston Churchill was destroyed by members of his family after his death. Even had all the events occurred after the 1988 Act came into force, nothing could have been done by the artist. Nor is there any statutory obligation imposed upon persons to ensure that a work is well maintained and does not fall into such a state of disrepair as to "embarrass" the artist. Should any legitimate restoration or preservation be done to a work, again this will not necessarily be actionable derogatory treatment even though the author may disapprove of what has been done.

While it is arguable that the definition of "treatment" is too narrow to meet the requirements of Article 6^{bis}, it appears that, however desirable from an author's point of view, there is no absolute Convention

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79.* 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (App. Div. 1949). *See supra* text accompanying note 28.

80. CDPA, sched. 1, ¶ 23(2).

requirement to prevent the destruction of works.[81] Even where works have been subjected to "treatment" within the definition in the Act, the right of the author to object arises only where such treatment is "derogatory," that is, where it amounts to "distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director."[82]

In some cases, an author's contractual rights may operate in parallel with the right of integrity and either right will produce the same result. In *Joseph v. National Magazine Co.*,[83] a decision prior to the 1988 Act, the plaintiff author, who was an expert on jade, had been commissioned to write an advertisement in the form of a connisseur's article for the defendant's art magazine. The defendant revised the work, changed the title and conclusions, and made considerable stylistic and factual alterations. An action for breach of contract was successful, since the contract was for the plaintiff to write in his own way; and damages were awarded for the loss of the plaintiff's chance to enhance his reputation. Under the new law the plaintiff could rely upon both his contractual and his integrity rights (if his reputation was affected), although where there is no contractual relationship the right of integrity alone would apply.

Sometimes the contractual and integrity rights will not necessarily coincide. For example, in the case mentioned earlier where the BBC unsuccessfully attempted to omit a line in a commissioned play against the wishes of the author, weight was given to the author's view of the significance of the deleted line and the plaintiff succeeded.[84] The result is unlikely to be different under the present law, for there is nothing to prevent the plaintiff from using the same contractual arguments. Whether he can also successfully rely upon the right of integrity will depend on whether the deletion of the line is a matter prejudicial to honour or reputation of the author; the answer to which turns on whether the court takes an objective or subjective view of what is prejudicial to the author. If it were to hold that the honour or reputation requirement is not satisfied, then contract will have been proved to be

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81. In some countries there has been strong debate as to whether destruction of a work does, or should, contravene moral rights protection. There were proposals at Brussels to include destruction in the list of acts under Art. 6^{bis}, but that proposal was not adopted. Delegates disagreed as to whether or not destruction was a genuine interference with the right of integrity, but the Conference passed a Resolution suggesting that member countries should prevent destruction as part of their moral rights protection. The inference to be drawn from this is that while there is no specific requirement under the Convention that destruction be included within moral rights protection, it is desirable for member countries to do so on an individual basis. *See generally* RICKETSON, THE BERNE CONVENTION, *supra* note 6, para. 8.109.

82.* CDPA § 80(2)(b).

83. 1959 Ch. 14 (1958) (Eng.).

84. Frisby v. British Broadcasting Corp., 1967 Ch. 932 (Eng.). *See supra* text accompanying note 18.

the stronger protection. While it would not be of importance on these facts, it could adversely affect an author in circumstances where the copyright in the play is assigned and the deletions are made by a person not a party to the original contract.

It will be recalled that the Whitford Committee recommended building into the integrity right a requirement to act "reasonably" as a safeguard against authors abusing their right and acting oppressively. Although the Government at first decided to accept this recommendation, it changed its mind on the ground that there was no such requirement in Article 6^{bis},[85] a line of argument it did not follow when dealing with other parts of the moral rights code!

4. Exceptions to the Rights of Paternity and Integrity

There is a remarkable list of exemptions and qualifications. They were introduced to placate different copyright interests on the grounds that otherwise moral rights would cause greater burdens than benefits.[86] The following are the most noteworthy.

a) Computer programs and computer generated works

Neither the right of paternity nor the right of integrity applies to these works. The reason for this exclusion was similar to that justifying other exceptions — practicality:

> [G]iving the authors of computer programs and typefaces the paternity right would cause numerous practical problems . . . . Although literary works, programs are different in many ways from books and other material regarded as literary works. It would not, for example, be appropriate for the authors of the computer programs running teletext services to be identified each time someone wants the latest news or cricket score. . . . It is worth observing that even in France, where legal recognition of moral rights is perhaps most fully developed, there are no such rights in computer

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85. See INTELLECTUAL PROPERTY AND INNOVATION, 1986, Cmnd. 9712, at 73, where it was proposed that authors would not have the right to object to "modification of a work to which they could not *reasonably* refuse consent" (emphasis added). Clause 75(2)(b) of the 1988 Bill provided that: "modification is justified only if it is reasonable in the circumstances and is not prejudicial to the honour or reputation of the author or director." This was subsequently withdrawn:

> We . . . accept that the right . . . goes rather unnecessarily wide of the Berne Convention in subjecting modifications both to a test of reasonableness and to a test of avoidance of prejudice to honour and reputation. Only the second test is strictly required by the Convention and we therefore agree that the test of reasonableness should be dropped.

86. John Butcher MP. HC Debates. 26th May 1988.

programs.[87]

b) Employees

Employees (including employee-film directors) who produce works in the course of their employment cannot exercise any paternity rights in connection with anything done by or with the authority of their employer or a subsequent copyright owner. (Of course, frequently such rights may be acquired by contract). Nor does an employee have any statutory right of integrity in relation to such works unless the author or director had at some time been identified with the works. Even then, the extent of the employee's right of integrity is simply to insist that there is a clear and reasonably prominent indication that the work has been subjected to treatment to which the author or director has not consented.[88] This may not satisfy authors who object to their work being treated in a certain way, even when a disclaimer is attached to the work.

c) Reporting current events

Neither the right of paternity nor the right of integrity applies "in relation to any work made for the purpose of reporting current events."[89]

d) Publishing in newspapers, magazines or similar periodicals; and publications in encyclopedias, dictionaries, year-books or other collective works of reference

The press proprietors' lobby was successful in ensuring that statutory moral rights do not apply to works produced either by employed or freelance journalists.[90]

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87. 491 PARL. DEB., H.L. 366 (1987) (statement of Lord Beaverbrook). See also the comments of Lord Lloyd of Kilgerran:

> [Paternity rights] would lead to an impossible situation. . . . [C]omputer programs necessarily contain many hundreds of names in the codes and take up valuable computer storage space. The copyright owners will not be able to maintain the programs by means of modernisation and improvements without obtaining the consent of all the producers of programs.

Id. at 367.

88. CDPA §§ 79(3), 82.

89. CDPA §§ 79(5), 81(3). The precise ambit of this exception could give rise to difficulty: a work which refers to current events may not necessarily have been "made for the purpose of" reporting current events. In such a case, the author's rights of paternity and integrity will subsist.

90. Various reasons were given as to why newspapers and periodicals should not be subject to moral rights: tight deadlines, the prospect of costly and cumbersome administration and the nature of the relationship between editors, freelance journalists and photographers. For example, it was said by *The Economist*, which does not publish signed

5. Copyright Exemptions

A range of permitted acts which do not infringe copyright, for example, fair dealing for specific purposes, do not infringe the right of paternity.[91] These permitted acts do not, however, generally affect the right of integrity.

a) Statutory, regulatory and "good taste" requirements

The right of integrity does not operate in relation "to anything done to a work for the purpose of (a) avoiding the commission of an offence; (b) complying with a [statutory] duty . . . ; or, (c) in the case of the British Broadcasting Corporation, avoiding the inclusion in a programme broadcast by them of anything which offends against good taste or decency or which is likely to encourage or incite to crime or to lead to disorder or be offensive to public feeling."[92]

This exemption is designed to permit broadcasters and others to have the freedom to delete or amend material to comply with the law and with appropriate standards of broadcasting. However, where the author has been identified at some time, there must be a sufficient disclaimer: a clear and reasonably prominent indication that the author has not consented to the alteration. The exemption, though seemingly wide, does have its limits. For example, on the same facts as in the American case mentioned earlier, *Gilliam v. American Broadcasting Cos., Inc.*,[93] where twenty-four minutes of an original ninety minute program had been deleted for advertising purposes, the right of integrity would now be available. It is unlikely that reliance could be placed upon the above

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articles, that the impact would be damaging:

> A system based on the assertion of the right to attribution and upon waivers or consents to modification is completely impractical for a newspaper working to tight deadlines. It could easily put [the editor] in a position of either having to abandon an article or risking legal action from, say, a photographer whose picture is to be cropped but who cannot be contacted for consent before our deadline.

491 PARL. DEB., H.L. (5th Ser.) 376 (1987) (statement of Lord McGregor, quoting from a letter by the editor of *The Economist* addressed to several members of the House of Lords). Lord McGregor, an expert on Press affairs, said that this would create "a conflict when this protection, necessary for some, is achieved at the price of making the efficient conduct of newspapers and periodicals impossible." *Id.* At first the Government's response was not sympathetic: "in several European countries moral rights are much more favourable to the author than our proposals. Yet newspapers are still produced and publishing houses continue to function. Claims that the moral rights provisions . . . will totally disrupt newspaper and book production seem to be greatly exaggerated." *Id.* at 381 (statement of Lord Beaverbrook). Yet, the Government later conceded the case!

91. CDPA § 79(4).

92. CDPA § 81(6). *Cf.* Frisby v. British Broadcasting Corp., 1967 ch. 932 (Eng.); *see supra* text accompanying note 84.

93. 538 F.2d 14 (2d Cir. 1976). *See supra* note 24.

exemption since the decision to interfere with the program to facilitate advertising was not in compliance with any statutory duty nor had it been taken under the "good taste and decency" provisions.

6. Transmission of Rights

Although moral rights are not assignable *inter vivos*, there are detailed provisions governing their transmission on death.[94] The rights of paternity, integrity, and of privacy of certain photographs and films can be specifically bequeathed.[95] If there is no such direction in a will, but the copyright in the work in question forms part of the estate, the right passes to the person to whom the copyright passes.[96] However, if neither of these situations applies, then the right is exercisable by the author's personal representatives.[97]

These complex provisions can create considerable difficulties in practice where, as will frequently be the case, the copyright and moral rights are split.[98] For example, an author may have sold different exclusive rights in his novel and may also have made specific provision in his will to different people relating to moral rights. Bearing in mind that these rights will usually last for fifty years from the death of the author, it may become very difficult indeed to identify who can exercise them.

7. Remedies

Infringement of a moral right is actionable as a breach of statutory duty.[99] It is arguable that this should include a power to award additional punitive or exemplary damages in cases of flagrant abuse, but it is not clear whether such a power, which does apply to copyright infringement,[100] also applies to moral right infringements.

There are a few noteworthy matters affecting remedies. First, in connection with the right of integrity, the court has power, if it thinks it is an adequate remedy in the circumstances, to grant an injunction prohibiting an act unless an approved disclaimer is made dissociating the author or director from the treatment of the work.[101] This is a major restriction on the right of integrity and will be particularly important in circumstances where, perhaps, the cost involved in avoiding the

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94.* *See* CDPA § 95.
95.* CDPA § 95(1)(a).
96.* CDPA § 95(1)(b).
97.* CDPA § 95(1)(c).
98.* CDPA § 95(2)-(3).
99.* CDPA § 103.
100.* CDPA § 97.
101.* CDPA § 103(2).

infringement altogether would be excessive compared with the particular harm involved. Secondly, in relation to the right of paternity, the court, when considering remedies, is required to take into account any delay in asserting the right.[102] This is a type of estoppel where, for example, publishers have invested heavily in preparing a work for publication before the author chooses to assert the right. Thirdly, the author of a work of architecture in the form of a building, who is identified on the building, has the more limited right to require the identification to be removed if the building has been subjected to derogatory treatment.[103]

8. Transitional Provisions

There are important transitional provisions designed to protect those who had acquired rights before 1989.[104] Nothing *done* before August 1st, 1989 is actionable by virtue of the moral rights provisions in the Copyright, Designs and Patents Act of 1988. The rights of paternity and integrity do not apply in relation to any films made before August 1st, 1989, or to any literary, dramatic, musical or artistic work of an author who died before then. Where the author of a literary, dramatic, musical or artistic work had assigned or licensed it before August 1st, 1989, or where the copyright first vested in a person other than the author, no moral rights can be exercised in relation to anything done by virtue of such assignment or licence.[105] Thus, the full effect of the moral rights regime will develop over a number of years. Meanwhile, many activities will still be untouched by the 1988 code.

9. Consent and Waiver of Moral Rights

The exceptions and qualifications to moral rights which have already been described were attempts by the United Kingdom's government to modify, some would say emasculate, moral rights in the light of business reality. The U.K. moral rights legislation is a considerably truncated version of what many might have expected.

A critical question, however, concerns the rights which are left. Are they sacrosant? The Government was persuaded that they were not. The difficulties which could arise if an author or director or his personal representatives exercised continuing control over his works, regardless of any agreement expressed in a contract, would create, it was thought, too much uncertainty in connection with the exploitation of copyright works. Therefore provision was made not only permitting a person to

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102.* CDPA § 78(5).
103.* CDPA § 80(5).
104.* CDPA sched. 1, ¶¶ 22-23.
105.* *Id.*

consent to any specific acts which otherwise would constitute infringement of moral rights, but also permitting *waiver*.[106] Any of these inalienable rights may be waived by written instrument signed by the author,[107] either in relation to a specific work, to works generally or to existing or future works, and the waiver may be conditional or unconditional.[108] In spite of the express requirement for writing, the Act also allows for informal waiver under general contract or estoppel law.[109]

Whatever views one may have about moral rights, most objective observers would acknowledge that such wide waiver provisions, both in theory and in practice, erode significantly, indeed drive a coach and horses through, the moral rights provisions. Yet Professor Ricketson, a distinguished authority on the Berne Convention, maintains that waiver provisions are not inconsistent with the obligations under Article 6^{bis}.[110]

10. Assessment of U.K. Moral Right Provisions

There are many critics of the United Kingdom's moral right provisions, at home and abroad. It is said that they "reflect the inadequacies and emptiness of seeking merely to pacify conflicting economic interests without any regard to legal principles. [They] are granted to appease one group but are easily restricted in order to please another section of the community." The existence of an uncontrolled power to "agree" to waive moral rights calls into question the effectiveness of the entire code of moral rights. Presumably, unless a contract can be attacked on the grounds of undue influence or restraint of trade, standard waiver clauses will strip many authors of all moral rights. "The commercial reality is that there is very little in relation to moral rights which cannot be excluded, varied or limited by contractual provisions." For all save the most successful authors that indeed seems to be their fate.

Professor Ginsburg suggests that:

> [i]f many of the CDPA moral rights provisions seem cynical, or at least half-hearted, that may be because their drafters seem to have lacked real

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106.* CDPA § 87.

107.* CDPA § 87(2).

108.* CDPA § 87(3).

109.* CDPA § 87(4).

110. There is no specific reference to any requirement for [Art. 6^{bis}] rights to be inalienable. In other words, there is no specific bar on these rights themselves being capable of assignment, *waiver* or any other form of cession. It is true that in the report of the rapporteur for the Rome Revision Conference, the view is expressed that inalienability is required but there is no reference to this in the actual text. Because it is mentioned in respect of *droit de suite* but not in Art. 6^{bis}, my view is that inalienability is not a specific requirement. It is therefore open to countries to provide for waiver of those rights if they so desire.

> conviction in the desirability of moral rights. . . . The debates in the Houses of Commons and Lords suggest that the law's drafters were primarily concerned to preserve the interests of exploiter groups against moral rights encroachments, rather than to recognise and enforce authors' interests. The resulting legislation reflects that ambivalence.[111]

Indeed, another commentator has roundly declared that in its desire to appease the special interest groups, "Britain lost sight of its goal in the legislative process, and the result was the creation of rights that are well below the Berne Convention standard."[112]

Professor Cornish has sounded a slightly more optimistic note:

> Let us hope for one thing from the explicit adoption of particular moral rights *eo nomine* in English law: that the significance of the root idea will begin to penetrate judicial attitudes, so as to lay a foundation for somewhat less meagre protection in future statutes. In Continental Europe, moral rights did not emerge in their full glory in a single triumphant burst. They were the product of an evolution, much of it in case-law, a process which bears a definite resemblance to common law method. While the new statutory provisions lay very considerable constraints on the operation of the new law, there also remains room for manoeuvre by the courts. They should strive to ensure that the less established and less self-possessed authors, artists and directors have a degree of aid in establishing norms of reasonable commercial behaviour among those who exploit their creations. The new provisions do not have to be treated as tokenism.[113]

What the Act certainly does is to raise awareness of moral rights and it is a matter which normally will have to be addressed expressly in all authorised dealings with copyright works. Even where authors discover that those with whom they are dealing are seeking to limit or exclude their rights by waiver, that in itself can serve as a valuable reminder in the negotiating process. It should also be noted, of course, that insofar as moral rights were to a large extent indirectly protected under the pre-1988 law, all rights and remedies under such law will still be available unless they, too, have been waived or otherwise excluded.

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111. Jane Ginsburg, *Moral Rights in a Common Law System*, 1 ENT. L.R. 121, 129 (1990).

112. McCartney, *supra* note 71, at 245.

113. Cornish, *supra* note 78, at 452.

C. THE UNITED STATES

Various attempts have been made In the last two decades to introduce general moral rights provisions, all to no avail.[114] Until recently, the only success had been at the state level in connection with works of fine art: the California Art Preservation Act of 1979, which was followed by similar legislation in several other States.[115] In themselves, they did not measure up to Article 6^{bis}.[116] However, a major federal development occurred with the Visual Artist's Rights Act of 1990 (VARA): for the first time, specific, though limited, moral rights were incorporated into the U.S. Copyright Act.[117]

The obvious question to put is this: Why did the United States introduce moral rights legislation so soon after it had maintained so emphatically that legislation was unnecessary? Various answers have been proffered: one person disingenuously explained that VARA was not necessary for Berne compliance but "that it certainly strengthens our commitment to that Convention"[118] and provides a source of additional protection for artists' rights in qualifying works. Another commentator suggested more plausibly that VARA may have been passed to placate those who thought that the United States had not honoured its Berne commitment; and that the form of this legislation was narrowly written so as not to cause a major problem with those opposed to moral rights in the wider industries.[119] This latter point is of some significance and an

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114. *E.g.*, H.R. 8261, 95th Cong., 1st Sess. (1977); H.R. 288, 96th Cong., 1st Sess. (1979); H.R. 1623, 100th Cong., 1st Sess. (1987) (introduced by Representative Kastenmeier). As originally submitted in 1987, section 7 of H.R. 1623 proposed the addition of § 106A, "Moral rights of the author," to Title 17 of the U.S. Code. Kastenmeier later amended the bill by removing the moral rights proposal. *See* H.R. REP. NO. 609, *supra* note 37, at 7-10.

115. For analyses of the Californian and later statutes, see DaSilva, *supra* note 25, at 48-51; Edward J. Damich, *State "Moral Rights" Statutes: An Analysis and Critique,* 13 COLUM.-VLA J.L. & ARTS 291 (1989).

116. They apply to a much smaller class of works (mainly restricted to visual and graphic arts); several statutes provide that the rights are inapplicable to works prepared for commercial use; some exclude works prepared by an employee; although they address paternity and attribution, the qualifications placed upon these rights often seriously undermine their efficacy; and complete waivability largely defeats the purpose of the statutes and amounts to a denial that the creative personality is in any way inviolate. Damich, *supra* note 115, at 293-94.

117. Visual Artist's Rights Act of 1990, 17 U.S.C. §§ 106A, 113(d) (Supp. V 1993). It appears that the Federal Act pre-empts the State laws which will only be applicable when the Federal rights expire.

118. David Nimmer, *Conventional Copyright: A Morality Play,* 3 ENT. L.R. 94, 96 (1992) (quoting an unidentified source from the legislative history of VARA). "Congress had contorted itself into a pretzel and could not even proclaim to the world its new-found compliance in part with Article 6^{bis}, which would undermine its previous declarations that the United States was already fully in compliance with Article 6^{bis}." *Id.*

119. Ginsburg, *supra* note 111, at 125.

examination of VARA will indicate its scope.

The legislation confers rights of paternity, false attribution and integrity upon authors of "works of visual art." A qualifying work consists of a "painting, drawing, print, or sculpture existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author" or a photograph if it is "a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author" or issued in a similarly limited edition.[120] Most works of fine art which are used in commerce are excluded,[121] as also is the very broad category of "works made for hire."[122] Nor are any rights conferred in connection with reproductions, depictions, portrayals or other use of a protected work in connection with any excluded items. In short, the Act was designed to grant additional rights to artists who create works of fine art in single copies or limited editions, but not to change the present legal treatment in the U.S. of films, news photographs and similar types of works which are generally produced and commercially exploited in multiple copies (in cinemas throughout the country) and physically reconfigured for different markets (edited for TV and airlines and rented in video stores for home use). The Act accomplishes this in two ways: by excluding "mass market" works from the definition of works of visual art and by excluding works made for hire, which is how these works are generally created.[123]

There are various restrictions on the moral rights. Unlike in the United Kingdom, the author's integrity right extends to intentional or negligent destruction or attempted destruction of works, provided they are of "recognized stature." Assessing whether a work is of recognized stature involves a qualitative assessment: courts tend to be reluctant to determine such matters alone and, no doubt, the assistance of expert testimony will have to be sought.

The right to prevent destruction and the right to prevent mutilations,

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120. 17 U.S.C. § 101 (Supp. V 1993). With sculptures the multiples may be carved, cast or fabricated and in lieu of a signature the artist may use an identifying mark.

121. *Id.* Excluded items include posters, maps, globes, charts, technical drawings, diagrams, models, applied art, motion pictures or other audio-visual works, books, magazines, newspapers, periodicals, databases, electronic information services, and electronic or similar publications. Also excluded are any merchandising items or advertising, promotional, descriptive, covering or packaging materials or containers.

122. *Id.* For the definition of works made for hire, see 17 U.S.C. § 101 (1988). Thus, in many cases, artists may find that as a result of producing commissioned works, they acquire no moral rights.

123. [The Act] should more truthfully be labelled the "Visual *Artifact* Protection Act of 1990" because its scope is limited to those artifacts hanging on the walls and it does not apply to *art*, which is a broader term which the author would contend embraces the reproductions as well as the originals.

Nimmer, *supra* note 118, at 97.

distortions and other modifications are subject to an exception for changes which are the result of "conservation" or "public presentation including lighting and placement," unless such destruction or modifications result from gross negligence. The removal of a work from a specific location is deemed within this exception because location is a matter of presentation.[124]

Works of visual art incorporated in buildings are given strong protection. Where it is not possible to remove a work installed in a building (after the Act came into force) without causing its destruction, distortion, mutilation or other modification prejudicial to the author's honour or reputation it is only possible for the building owner to remove it if there is prior written agreement. The duration of protection for works of visual art under the Act is the life of the author only, thus falling short of Article 6[bis]. However, where there are State laws protecting such works for the full copyright period, they may come into operation once VARA has ceased to have effect.

1. Waiver

The power to waive rights seems to be stricter in the United States than in the United Kingdom. In particular, blanket waivers are prohibited.

> [R]espect for the independence of moral rights suggests that any waiver, to be effective, must be stated with considerable specificity. Were a federal visual artists' rights law to permit art owners and exploiters to shake off artists' rights restraints by means of a blanket, boiler-plate waiver, then the US would be honouring the precepts of the Berne Convention in only the most formalistic, indeed cynical way. Happily, the bill as drafted requires that any waiver be specifically set forth both respecting the work and the owners' use.
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> . . . Arguably, the best recognition of moral rights would countenance no waivers. This position, however, is probably too extreme for the U.S., nor does Berne require it. As a practical matter, moreover, despite their formal prohibition, *de facto* waivers are likely to occur. The artist is protected under a regime requiring specificity of waivers better than under one where an ideologically pure no-waiver law is in fact rarely observed.[125]

Nevertheless, Congress recognized that the success of this limited legislation to a great extent depended upon how much, and what kind of, use of waivers was made. Accordingly the U.S. Copyright Office was instructed to conduct a study of the practice developed under the Act's

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124. The exception for changes which result from the "passage of time or the inherent nature of materials" applies only to modifications and does not apply to destruction.

125. Ginsburg, *supra* note 111, at 126.

waiver clause.

One commentator, in assessing the Act, described it as "very complicated legislation that takes into account virtually all the considerations in providing moral rights to artists, and on each issue it represents a delicate compromise between artists and user groups."[126]

D. OTHER COMMON LAW JURISDICTIONS

The four common law jurisdictions mentioned so far, namely Australia, Canada, the United Kingdom and the United States, have had cause, in different ways, to address carefully the moral rights dilemma. There are many other, generally smaller, common law and common law related jurisdictions which have no history of hostility to, or great public interest in, the issue. Article 6^{bis} has been introduced, with slight variations from country to country, into many copyright laws with little fanfare. They appear, so far, to have caused no major problems in practice; or, if they have, there is little published information about them. For example, legislation in broad accord with Article 6^{bis} exists now in jurisdictions as diverse as India, Israel, Lesotho and Nigeria. The precise detail of such legislation differs slightly from system to system.

Whereas most moral rights endure for the same period as copyright, in Nigeria, for example, the rights are perpetual. In line with Article 6^{bis}, most laws tend to be silent as to the possibility of waiver, although Nigeria expressly provides that they are "inalienable and imprescriptible." It has been judicially determined in India that moral rights are not waivable, at least insofar as any modifications go beyond the authorised use of the copyright work.[127]

There are few countries which impose constraints on the exercise of moral rights or have any requirement that authors must act reasonably. Malaysia provides that modifications may be made to works if it is reasonable to expect that an "authorised" use could not take place without the modifications. However, it is then stated that nothing shall permit modification of a work which interferes with the basic right of integrity; thus apparently removing any control over the way in which authors exercise the integrity right! South Africa, a Roman-Dutch system with many common law links, does qualify the right of integrity where authors authorise the use of their works in films or television broadcasts: they cannot prevent or object to modifications "that are absolutely necessary on technical grounds" (which is clear and understandable) "or

126. Peter H. Karlen, *Moral Rights in the USA: Visual Artist's Rights Act of 1990 discussed*, COPYRIGHT WORLD, Nov.-Dec. 1991, at 16, 19.

127. Mannu Bhandari v. Kala Vikas Pictures, Ltd. 13 A.I.R. (1987) (Delhi). *See also* Pravin Anand, *The Concept of Moral Rights under Indian Copyright Law*, COPYRIGHT WORLD, Feb. 1993, at 35-37.

for the purpose of commercial exploitation of the work" (which, if read at face value, suggests that once the author has consented to the use of his work for such purposes, there is an automatic legislative waiver of the right of integrity in respect of all commercial exploitation). This provision was extended to cover also computer programs when, in 1992, the South African Copyright Act of 1978 was amended to give express recognition to computer programs as literary works.

CONCLUSIONS

What conclusions can be drawn from this sketch of common law attitudes to Article 6[bis]? In spite of the strong body of opinion in many common law countries that the rights in Article 6[bis] are satisfactorily protected indirectly by other provisions, it is submitted that this is not the case. No common law country, without express moral rights provisions, lives up to that Article adequately. Why, then, has there been such opposition to the express implementation of Article 6[bis]?

In a copyright world free of economic considerations, none would deny the claims of authors that their personalities should be unreservedly linked to their works: at the very least, they should be entitled to decide if and when their works are released to the public, and they should have rights of attribution and integrity. Indeed, the present limitation of the integrity right to cases where the author's honour or reputation are at stake does not properly protect the personality of authors, who on occasions may have good cause to object to activities which do not affect honour or reputation.[128] But, once an author's work is placed on the market, the situation changes and economic considerations do become relevant. An author's moral rights should not cease to exist; but account must be taken of the legitimate interests of those who have now come on to the scene.

The simple fact is that moral rights impinge upon economic activity and, where they exist, cannot be ignored. It may be that some fears are exaggerated and that the opposition to moral rights has at times bordered on the hysterical; but industry hostility, to unqualified moral rights in the United Kingdom, and to general moral rights legislation in the United States, cannot simply be dismissed as irrational or unreasonable. Those exploiting copyright works have good reason to be concerned about the existence of high sounding rights which may be used by authors or their estates to interfere with or block the way in which they wish to use the product they have acquired. They have a legitimate point of view.

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128. There is no such qualification to an author's right of integrity under Indian law at present, although there are proposals for amendments and restricttions of the right of integrity in line with the Berne Convention. *See* Anand, *supra* note 127, at 35.

If the genuine fears of the copyright industries in common law countries are not met, then we will have a perpetuation of what is happening now: either moral rights laws satisfactory to authors will not be introduced (as in the United States, save in those areas where it is thought that there will be no major industry repercussions), or, (as in the United Kingdom), moral rights will be introduced, but with such broad exceptions and qualifications and waiver provisions that they totally undermine the rights themselves.

Thus, there is an artificial and unsatisfactory situation in common law countries at present; and in this "all-or-nothing" approach, it is often the author who is left with nothing. It is necessary to move away from such an approach to one which provides a fair balance between the genuine moral interests of the author and the genuine economic interests of those using and exploiting copyright works. There must be a degree of restraint and flexibility from both sides.

From the authors' point of view, a preliminary question to be addressed is whether all works are worthy of the same moral rights: should there be a uniformity of approach, or is there room for exceptions? For example, even if it is widely accepted at present that computer programs or databases should be classified as literary works, it may not necessarily follow that their authors should be entitled to any, or the same, moral rights as for other works. Works produced and updated by many authors may require different consideration. A related question, though possibly outside the scope of this paper, is whether those entitled to neighbouring rights, especially performers, should also be accorded moral rights.

It is also important for it to be seen that authors do not abuse their moral rights. A mechanism is required to prevent moral rights from being enforced in a way which primarily promotes an author's economic interests under the guise of protecting his personality interests.[129] Remedies, too, require consideration. Perhaps remedies for interference with moral rights should be slightly different to those which are available for infringement of economic rights; although consideration must also be given to whether special remedies, such as the right of an author to be "dissociated" from a work, are likely to be adequate in all cases. In addition, it might be desirable to provide for a representative body, in some cases possibly a collecting society, to exercise all or some moral rights on behalf of authors.

Authors' personality interests are in need of protection. In many cases

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129. Some critics argue that moral rights are used essentially for economic purposes. Thus, according to Brett Cottle, the "real motivation for moral rights legislation [may have] had nothing to do with moral rights. Rather it was to alter the bargaining position between authors, artists and those who use their material. Here the question of moral rights is tied up with the difficult issue of waiver."

authors are neither in a strong negotiating position nor in a position to litigate to protect themselves. Therefore, urgent consideration must be given to the question of whether waiver should be prohibited (as in Nigeria) or permissible, and, if so, to what extent. For example, in the United States, VARA permits waiver in certain situations only and so is more considerate of authors than the United Kingdom's Act which allows all moral rights, whether or not in existence and whether or not of real relevance to the current negotiations, to be waived.[130]

Above all, if a proper balance is to be struck between the personality rights of authors and the economic rights of current copyright owners and exploiters, it is necessary to ensure that all rights are exercised reasonably. This points to introducing a control into all moral rights legislation, whether paternity, integrity, retraction or whatever: namely that authors should not be allowed to act unreasonably. What is unreasonable will depend upon the circumstances.

It is said by opponents of such a proposal that it cannot work in practice, that it would create unacceptable uncertainty and, in any event, the courts or other bodies would not be able to decide what or was not an unreasonable demand by an author. This, with respect, is unconvincing: it may be difficult, from time to time, for courts or other adjudicators to come to a decision as to whether or not an author in particular circumstances is acting unreasonably, but in many cases the answer would be clear. When it was not clear, the tribunals deciding the issue would be faced with no greater problems than they are frequently faced with when asked to make a judgment as to what is reasonable care or, as in the recent European Directive on the Harmonization of Trade Marks Law, "honest practice."

This need to ensure that moral rights laws are sufficiently flexible to provide a fair and satisfactory balance between authors and owners of copyright is not something which has arisen in common law countries alone. The need is exactly the same in the civil law jurisdictions.[131] The difference, perhaps, is that less attention has been focussed on the difficulties which exist in civil law countries and on the means of overcoming them. The potential clashes between personality and economic interests exist everywhere and are likely to increase significantly as further multimedia technological developments threaten

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130. Ginsburg, in comparing the U.K. and U.S. legislation, suggests that the more limited U.S. approach is better. "[It] may be harder to repair the damage done by a half-hearted statute, than to continue to work slowly towards real guarantees." Ginsburg, *supra* note 111, at 129.

131. For a short, interesting, comparison between attempts in common law copyright systems to introduce elements of moral rights laws and attempts in civil law systems to redress the moral rights balance in favour of economic copyright principles, see Saunders, *Bridging the Channel? It's Copyright in France but Moral Right in the UK*, COPYRIGHT WORLD, Jan. 1988, at 21.

them all.[132]

From this perspective, then, the fault may not lie with the common law countries, but rather with Article 6[bis].[133] The time is ripe, surely, for a major study of Article 6[bis] to be undertaken with a view to replacing it with a more flexible system. It will then better serve authors in all jurisdictions.

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132. Nimmer, *supra* note 118, at 98.

133. One of the responses by Professor Kernochan to the questionnaire on the U.S. moral rights position assessed Article 6[bis] in the following way:

> [T]he broad and unlimited phrasing of the principle of moral rights in Article 6[bis] arouses in many quarters a strong resistance to adoption of such rights. Accordingly, it would seem desirable to try to clarify the rights and regulate them in greater detail. Even in some countries where the rights have long been honored, courts and legislatures have felt impelled to impose limitations. . . . In relation to large, costly collaborative works, chaos, litigation, and even extortion, with resulting discouragement of investment, can result unless there is recognition of the need for some certainty to encourage investment, and to consider, for example, centralizing the moral rights in the person or persons who are in charge of realizing the artistic work as a whole. Under the U.S. Dramatists Guild agreements, the right of integrity is accorded only to the playwright. The need to take some account of the interests of investors obviously grows as the costs of production rise for complex works and as the media of exploitation (some unforeseeable) increase in number and variety.

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