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Moral Rights in the Digital Age: New Possibilities for the Democratisation of Culture.

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"Born in the heart of the poet, [aesthetic experience] flowers as it were in the actor and bears fruit in the spectator. All three in the serene contemplation of the work, form in reality a single knowing object fused together." -Bharata, *Natya Shastra*

I. Introduction

Moral rights protect a variety of special interests which are attributed to creative authors. In different jurisdictions, they are characterised as "non-economic," "non-proprietary," or "personal" rights. The most widely recognised moral rights are the author's right to maintain the attribution of his own work to him and his right to demand the protection of the integrity of his work. The essence of moral rights protection for the attribution and integrity interests of authors is the author's ability to respond to the mistreatment of his work by asserting his rights in a court of law.

The past two decades have seen explosive growth in the means of reproducing and communicating artworks. These technological developments have important consequences for moral rights. New technologies affect artistic works at every stage of their existence, altering the conditions of creation, dissemination and use. Perhaps the most interesting implications of technology for artistic creation arise from "digital" technologies. The "digital" treatment of knowledge has transformed the character of information and knowledge, making it possible to intervene in the body of an artistic work and make changes which blend seamlessly into its original form. The general availability of these kinds of technologies implies that authors are no longer in a position to monitor the ways in which their works are used on any meaningful scale. At best, they can only hope to be aware of the most obvious and highly publicised treatments of their work, representing a very small proportion of overall contact between artistic work and its public.

These conflicts between technology and authors' rights are not restricted to the sphere of moral rights. Rather, they have informed debates on copyright more generally. Leading legal scholars have felt compelled to speculate about the potential disintegration of the copyright framework itself under technological pressures. However, it appears that copyright law has ultimately managed to reinvent itself through the extension of copyright principles to the protection of computer software and other new technologies. The law of copyright deems these new products to be "analogous" to works of creative authorship. In many ways, copyright has become the legal companion to technological creativity, allowing it to attain a new status in the world of information technology.

In contrast, moral rights appear to have fallen by the wayside. At one extreme, the personality-based

interests of creative authorship which they protect are often considered irrelevant to new technologies and, therefore, ignored. At the other extreme, the abrasions between moral rights doctrine and the conditions of new technologies are believed to be indicative of an underlying incompatibility between moral rights and technological change. Moral rights are perceived to be inimical to technological progress, leading to calls for a restrictive approach to the scope of moral rights protections.

In the current legal environment, two kinds of difficulties fundamentally challenge the moral rights of authors. The first of these is the practical problem of enforcing moral rights in a culture where an author's ability to control the use of his work faces severe limitations. The second problem runs still deeper, involving challenges to the conceptual integrity of moral rights doctrine brought about by a transformation of the cultural sphere through technology. The combination of these factors has led to a general malaise among copyright scholars - often unexpressed but implicit in copyright research - and a sense that moral rights have somehow become irrelevant.

The practical and conceptual problems confronting the law of authors' moral rights should not be underestimated; they are grave and fundamental problems going to the heart of the doctrine. It is unlikely that these problems will be resolved by the relatively straightforward, but superficial, approach of determining how to apply and implement moral rights protections for authors more effectively - a technical issue that will be clarified over time through legislative, juridical and jurisprudential development. Rather, the present difficulties of moral rights are, in essence, symptomatic of social concerns. Do moral rights continue to be relevant to today's information-oriented society? If so, in what ways do they continue to reflect social values? How should they evolve, or be adapted by lawmakers to promote present-day social values and priorities?

In order to clarify the situation of author's moral rights, it has become crucial to examine the nexus between technology and culture. The question of whether a chasm has opened between technological development and the social values about culture which are reflected in moral rights doctrine must be addressed. By developing some projections about how the relationship between technology and culture is likely to evolve, it may become possible to identify a more satisfactory set of parameters delineating the possibilities and limitations of moral rights in the future. This paper is concerned with one fundamental element in this process: the evolution of the relationship between authors and their public in the "Digital Age." The future of moral rights lies in our ability to understand these rights as part of a shifting cultural landscape, signifying an unprecedented opportunity for growth. Far from becoming irrelevant, moral rights will play an integral role in realising the truly democratic possibilities for culture created by digital technology.

II. Challenges to Moral Rights

While legal scholarship on copyright and information technology is extensive, the specific concerns surrounding moral rights remain somewhat neglected in research. Current scholarship has not yet achieved a clear picture of the challenges confronting moral rights. Rather, studies to date have emphasised the overwhelming influence of technology on moral rights at the expense of placing technological developments in their larger cultural and international context.

Undoubtedly, information technology presents some of the most important and self-evident challenges to authors' moral rights. However, the implications of technology for moral rights are quite complex and many of their subtler consequences deserve to be explored in greater detail. Far from being a self-contained area, the influence of technology on copyright appears to be one element in a series of interconnected factors. The doctrine of moral rights is in a sense entangled in a web of new cultural concepts.

In the current legal environment, it has become a critical issue to arrive at a comprehensive understanding of both the challenges to which moral rights theory must respond and the environment

in which moral rights protections must be functional. The most prominent international trends affecting moral rights include a growing consciousness of cultural self-determination among diverse countries and peoples, the internationalisation of legal norms affecting culture, and cultural developments in Western countries which have brought about a degree of breakdown in moral rights doctrine at the conceptual level. Technological developments in the highly industrialised world must arguably be seen in relation to these larger international trends, movements which are in part spurred by technology, and which have in turn acted as an indirect stimulus to technological growth in their own right.

1. Technology and Artistic Creation

New technologies confront moral rights doctrine with three kinds of challenges. These arise in relation to the dissemination of works, the creation of opportunities for intervening in a "finished" work and changing its content, and the process of implementing and enforcing authors' moral rights.

(1) Dissemination

Communications technologies have made it possible to disseminate works on an unprecedented scale. On the one hand, these include the rise of new technologies for reproducing works - particularly digital technologies, which allow images and sound to be reproduced with virtually no loss of quality between copies. Means of reproducing works have become widely accessible to the public, since many of the most advanced technologies are also relatively inexpensive to implement and use.

On the other hand, the growth of electronic communication through the Internet has made the dissemination of works easier and faster than ever before. Once a work has been transformed into an electronic format, the author's ability either to be aware of the scale on which his work is distributed or to control the conditions of its distribution is utterly inadequate.

(2) Intervention

In the process of transferring a creative work to the digital medium, the user of the work has an unprecedented opportunity to alter a work. He may edit the work, add images, text or music, delete portions of the work, remove or replace the author's name, and effect a virtually infinite universe of changes to its content. Moreover, these changes can be integrated into the final product in such a way that a future user will be unable to tell that the work was altered. The scale on which such alterations may potentially occur - every user of a work in digital format will have the opportunity to make such changes - means that an author is unlikely to be aware of most modifications to his work.

Technology may also intervene directly in the creative process itself. The use of new technologies allows authors to use new methods to create traditional works - such as computer software which allows words or music to be registered by dictation - and to work in new forms of expression, such as "multimedia" works. An extreme example of this kind of situation might be computer-generated works, where the author's "creative act" is the composition of a computer program which will actually generate the images, music or words that ultimately compose the "artwork." In these kinds of situations, the connection between an author and his work becomes tenuous, and may even be severed altogether at some point. Moral rights are premised upon an unbreakable, continuous and enduring relationship between the creator and his creation. The amorphousness of the artist as a creative personality in a creative environment based on new technology brings doubt to the status of moral rights in these works.

(3) Implementation and Enforcement

When the author does become aware of interference with his work and wishes to assert his right to

the integrity of the work, he is faced with technological and regulatory obstacles to its protection. The recent French ruling in the *Yahoo* case suggests that the technological difficulties of controlling access to works will not be accepted over the long-term by courts and regulatory agencies who are concerned with the maintenance of broader policy objectives as a valid reason for failing to control the dissemination of certain kinds of materials. At the same time, attempts to restrict the flow of information through the Internet and communications technologies strikes at the root of the values associated with the global "information society." The possibilities of free access to knowledge are widely championed by activists in the cause of worldwide democracy. The growing deployment of restrictive technologies may, therefore, have unforeseeable negative consequences.

Regulation has not only had difficulties in keeping pace with technological developments, but it has also been largely unsuccessful in achieving a satisfactory balance of social interests around the spread of knowledge through information technology. With respect to moral rights, it has become increasingly difficult to determine, for example, what kinds of modifications to works will be acceptable, the standard of proof for establishing that a modification is damaging to an author's reputation, and upon whom the burden of proof should fall in a claim based on the right of integrity. Lack of clarity also affects the moral right of attribution, where such basic problems as the criteria for establishing authorship of a work where technology intervenes in the creative process remain unresolved.

2. Cultural Diversity

As globalisation through technology has become a theme of economic discourse, cultural issues have also gained increasing prominence. The development of greater consciousness in relation to cultural issues in diverse international quarters clearly reflects the improved circulation of knowledge brought about by communications technologies. Notably, technology and law have both become increasingly accessible to formerly dispossessed groups including developing countries, the aboriginal peoples of both Western and developing countries, and other sub-national minority groups such as the Roma peoples and the Basques. Taken together, these groups represent tremendous cultural diversity. Their cultural heritage prominently features artistic works of joint, communal and unknown authorship, including works of folklore. It includes certain kinds of artistic forms which are unknown in Western cultures. Underlying all, culture in these societies has generally developed around a non-commercial understanding of cultural property. Creative work is believed to fulfill important social functions, enriching the knowledge and experience of members of society quite independent of its economic valuation. This perspective is the very antithesis of Western industrial culture: the West apparently depends on the commodification of culture for its continued vitality.

These cultural perspectives affect moral rights by challenging the conceptual foundations of the doctrine. Moral rights are based on individual authorship, but non-Western cultures offer a plethora of forms of authorship which the law is not accustomed to accommodating. The idea of a "work" is also fairly well defined in moral rights law, particularly in its distinctiveness from commonly created and owned "cultural property." However, in cultures where the line between cultural and intellectual property is more fluid, the concept of the work must also be re-assessed. The nature of the relationship between author and work is at the root of moral rights doctrine, yet the shifting identities of author and work in a non-Western cultural paradigm bring the integrity of this relationship itself into question. It is especially interesting to note the apparent parallels between the pressures brought to bear on moral rights by new technologies and the world-views of non-Western cultures.

3. Internationalisation of Copyright Norms in the TRIPs Agreement

The adoption of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs) in 1995 as one of the founding instruments of the World Trade Organisation (WTO) marked the beginning of a new era in international copyright relations. The internationalisation of copyright norms has been a preoccupation of copyright policy since negotiations for international standards led

to the adoption of the *Berne Convention for the Protection of Literary and Artistic Works* in 1886. However, the TRIPs Agreement has broken from the traditions accumulated in the Berne Union over more than a century in radical ways. Most significantly, the TRIPs Agreement represents a new approach to international copyright standards. While the Berne Convention was fundamentally based on a consensus-oriented treatment of copyright issues, TRIPs represents a harder legal regime. The integration of intellectual property rights into a general regime for developing international trade has largely been accomplished by linking TRIPs to a powerful mechanism for the settlement of international trade disputes, the WTO Dispute Settlement Body (DSB). In effect, the DSB can impose trade-related sanctions of a general kind to penalise countries for infractions of the intellectual property protections of TRIPs. This kind of enforcement mechanism was never available in the Berne Union. Indeed, the concept of enforcing intellectual property rights through economic measures would probably have been viewed as coercive and inimical to the basic character of the Berne system.

The treatment of moral rights in the TRIPs Agreement has major implications for the future development of moral rights principles in the international copyright arena. The approach to moral rights in TRIPs is distinct from the treatment of any other intellectual property right. Article 9.1 of the TRIPs Agreement requires members of the WTO to adhere to the rights protected in Articles 1 to 21 of the Berne Convention. Under TRIPs, these copyright standards become subject to WTO measures for their implementation and enforcement, in part, as these are shaped over time by WTO dispute settlement. Normally, these rights should include moral rights provisions for the protection of authors' attribution and integrity interests, which are set out in Article 6*bis* of Berne. However, moral rights are expressly excluded from this arrangement. Instead, Article 9.1 of the TRIPs Agreement states that, "[m]embers shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom."

The TRIPs approach to moral rights places these rights in an ambiguous position internationally. On the one hand, the TRIPs treatment is not entirely disadvantageous for authors' moral interests. The exclusion of moral rights from the TRIPs regime allows countries to approach these rights with a degree of flexibility in setting standards and implementing them that is no longer available in relation to other intellectual property rights. On the other hand, the progress of TRIPs without moral rights threatens to relegate moral rights to a position of international weakness. As other areas of copyright are subject to scrutiny and analysis in the interests of bringing diverse national laws into conformity with TRIPs, moral rights are likely to be neglected. Paradoxically, the absence of an international baseline standard for moral rights in an age of growing globalisation may entail a general loss of status, prestige and practical value for authors' moral interests.

4. Breakdown of the Conceptual Foundations of Moral Rights

Moral rights are also affected by certain movements within Western intellectual circles that have heralded the birth of a new, distinctly late twentieth-century approach to culture. The development of literary theory since the 1960s has resulted in a breakdown of the concepts of authorship, literary work and originality which dominated the Western psyche during the nineteenth century and which, today, we particularly identify with Western European Romanticism. The connections between a Romantic view of authorship and moral rights are explored in detail by Martha Woodmansee in a pioneering article on the subject, and this thread has subsequently been taken up by some of the most influential contemporary theorists of copyright. If indeed contemporary Western society has outgrown the concept of original authorship, the rationale underlying moral rights protections must be re-examined. Unless moral rights can be associated with a broader understanding of creativity, their relevance to modern Western culture becomes questionable.

It is interesting to note that modern technologies may intensify these disintegrating tendencies within Western culture by emphasising the relativisation of social values, the fluidity of knowledge and

truth, and the ambiguous nature of authorship sensed, and feared, by critical theorists. These concerns also strike at the heart of moral rights doctrine. If technology has made it difficult to identify and protect authors and creative works, cultural developments in the West have brought into question their right to protection and privilege. These conflicts too will have to be resolved in the moral rights regime of the future.

III. Moral Rights Reincarnated

The difficulties confronting moral rights, both practical and conceptual in nature, would seem to foreshadow a period of great uncertainty for authors' moral interests. Moral rights might emerge from this confusion transformed beyond recognition - or they might simply disappear into the historical annals of copyright developments, having become an area of impossible controversy and, ultimately, unenforceability.

In fact, there are several reasons to believe that moral rights will continue to be a vital part of international copyright. Indeed, current developments that threaten the survival of moral rights concepts are matched by contemporary change suggesting that moral rights are already evolving to meet the challenges and needs of the future. While the shape of things to come is not yet entirely clear, it is increasingly apparent that the moral rights of the future will be ever more closely linked to cultural policy. In contrast to the individualistic and historically-specific past of the doctrine, which has focussed on original authorship as the sole means of protecting the intangible values inherent in culture, the wider cultural possibilities implicit in moral rights will provide the key to the survival and future utility of the doctrine.

1. Persistence of Creativity

In spite of the technological and social developments which have redefined the international copyright arena, the need for culture is a persistent reality of the new order. Without works of cultural knowledge and value - whether they are classical artworks, new kinds of technological art or works of folklore - the possibilities for growth and development offered by technology will remain largely unrealised.

Proclamations of the "death of literature," the disappearance of the author and the dissolution of the work in Western cultures do not appear to be matched by a corresponding decline in public interest in the arts and creative professions. On the contrary, literature and the other arts have both practitioners and lay champions, and debates surrounding the meaning of artistic quality have intensified.

The same can be said with still greater force of the cultures of developing countries, aboriginal peoples and other minorities. Among these groups, there appears to be an increasing awareness of the value of cultural heritage and traditions, and a desire on the part of governments and other authorities to preserve and promote culture. Cultural vitality has become a valued and sought-after goal among the most disenfranchised peoples. The need to encourage creativity has involved both attempts to encourage the creative impulse in members of society, and measures for protecting existing cultural heritage. In the pursuit of these interests, moral rights have appeared as a potentially valuable instrument of implementing cultural policies.

2. Internationalisation of Moral Rights

As copyright has become an international force of new strength and influence through the TRIPs Agreement, moral rights have also experienced a process of internationalisation. However, the international spread of moral rights principles has occurred in very different circumstances from other intellectual property rights. Indeed, the effective exclusion of moral rights from TRIPs has meant that these rights have diversified outside the international copyright arena. They have done so

through the voluntary adoption of moral rights by diverse groups of countries, ranging from developing countries such as India to the "transitional" countries of Central and Eastern Europe, which largely fall outside the cultural and legal models provided by Western countries. These countries have not only embraced the basic moral rights set out in the Berne Convention, but they have also brought innovative approaches to the legislative, jurisprudential and juridical understanding of these rights. Cultural claims based on moral rights have also been pursued aggressively by aboriginal peoples in Australia and North America - for example, vindicating their exclusive rights to use certain cultural symbols and designs, or to determine the appropriate circumstance of their use.

These diverse approaches to moral rights are unified by common concerns about culture. The treatment of moral rights by most of these groups is informed by a heightened awareness of their own cultural situations, particularly their need to protect and develop their cultural traditions to meet the challenges of the "information age." In their hands, moral rights doctrine has proven to be surprisingly flexible, accommodating diverse models of authorship and creativity which purists traditionally do not locate within moral rights theory. For example, moral rights have been extended to the protection of anonymous works of "folklore"; they have also served to protect artworks from destruction, and provided a cause of action against governmental negligence and mismanagement. These issues are in many cases typical of the cultural scene in the non-Western world - but moral rights have been able to provide a basis for action that appears to be quite consistent with these cultural needs.

3. Prominence of Cultural Issues

International awareness of cultural issues appears to be an important element in the exchange of knowledge made possible at the global level by information technology. In some cases, globalisation and international competition have been perceived as a threat to cultural survival, for example, by encouraging the use of the English language as the dominant language of choice for international communications. However, many groups have been quick to seize the opportunities for cultural development offered by new technologies. Information and communications technologies offer an unprecedented capacity to promote knowledge and education about diverse cultures. Moral rights have been part of this movement towards the employment of technological means for the fulfilment of cultural goals.

IV. Moral Rights in the Digital Age

In spite of the challenges to authors' moral interests presented by new technologies, moral rights continue to reflect important social values. However, moral rights have assumed new and surprising forms in the struggle to reconcile technological growth with cultural continuity. In many parts of the world, moral rights have come to be associated with larger objectives of cultural policy and are quite distinct from their traditional theoretical bases in fixed notions of authorship, work and creativity. These developments suggest that moral rights doctrine is itself in need of modernisation. Moral rights in the Digital Age must successfully accommodate the new dimensions which technology has brought to creativity.

It is apparent that digital technologies present a difficult challenge for the ability of creative authors to control the treatment of their work and the conditions of its distribution. However, it is equally important for authors to become aware of the extraordinary new opportunities for creativity offered by technology. Technology brings to the fore new methods of creation and new ways of thinking about creative works, as well as a growing ability to reach a global audience beyond the limits of time and space.

In fact, the perceived disadvantages to authors generated by new technologies have their roots in an anachronistic conception of authors' role in the creative process, and through it, society. Digital

technology has permanently altered the balance of power in the relationship between authors and their public. The preservation, dissemination and proper treatment of creative works now depend as much on the knowledge and good will of the public as on authors' personal initiative. Creativity itself has also become more easily accessible than ever before. Technology places the means of altering and contributing to creative works at the disposal of the public in a way that has so far been unknown to modern societies. The moral interests of authors are, therefore, dependent on public awareness and understanding; their implementation and enforcement are largely the province of public safe-keeping.

The relationship between creator and public in the Digital Age is no longer one of hierarchy. Instead, the interests of authors and audiences have merged in the work and in the intangible essence which it embodies - creativity. It is this new relationship, reflecting the democratic possibilities of culture, that will provide moral rights in the Digital Age with renewed vitality and conceptual sophistication. Moral rights will be dedicated to protecting, not merely the individual author, but the flowering and fruition of creative genius in all its forms.

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