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ANALYSE TO WHAT EXTENT MORAL RIGHTS PROTECT THE AUTHOR IN THE ENTERTAINMENT BUSINESS

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ABSTRACT

The entertainment business today is an international concern. Any legal analysis of authorial protection must consider the laws of multiple jurisdictions, as well as relevant international treaties. Moral Rights are normally considered to be a typically continental development and their application in Common Law nations has been an uneasy one. To that end this essay will, having defined the classic doctrine, consider the implementation of moral rights laws in: the Berne Convention, France, England, and the United States of America. The effect of each jurisdiction's implementation on authors will then be considered.

John Merryman, of Stanford University, identifies the three principal elements of Moral Rights as: integrity, paternity, and divulgation. These four rights are commonly acknowledged as the classical doctrine. Occasionally a fourth right is included: the right to withdrawal.

Paternity gives the author a right to receive proper acknowledgment for his work. Normally this is settled by prominent display of the author's name. The right has been recognised in courts since 1837. The most commonly cited example is the case of Guille c. Colmane. Here an artist was able to escape a contract with an art dealer that required him to sign all of his works under a pseudonym for 10 years.

The right to divulgation protects the author's interest in choosing when to release a work; only the author may decide when his work is complete. In the case of Whistler c. Eden the artist, Whistler, was allowed to withhold delivery of a painting to a paying customer, so long as damages were paid in lieu of delivery.

These rights were incorporated into continental legal systems during the 18th and 19th centuries to protect the personal interests of authors in their work. Immanuel Kant is often credited as providing the theoretical foundations of the doctrine. He wrote that a book is the publication of a personal discourse, one that belonged to the author as a part of himself. To Kant's mind all work was inseparably imbued with its author's personality, even after sale to a purchaser for value. This reflects "the intimate bond which exists between a literary or artistic work and its author's personality". In an ideal theoretical world, infringement would always be an issue for the judgment of the author.

KEY WORDS:
moral rights, author, Berne Convention, acknowledgment, Paternity

THE BERNE CONVENTION

The Berne Convention was established to provide an international minimum standard for protection and equal treatment of copyright works. France, England and the United States of America are all signatories of the Convention. Moral Rights only appeared in the Convention following the Rome conference of 1928, at least a century after their incorporation into the French jurisprudence. Ricketson and Ginsburg write that because of the disagreements in wording between the Common Law nations and the French, several significant compromises had to be made when incorporating Moral Rights. One such compromise was that the "modification of works prejudicial to the moral interests" of the author (already in itself a softened right to integrity), a provision suggested by France, was incorporated as "prejudicial to (the author's) honour or reputation" at the request of the English delegation. It must be emphasised that, as the Berne Convention only provides for minimum standards, national legislatures are not prevented from affording a higher degree of protection than that set out in the text of the Convention. Moral Rights are set out in Article 6bis, which gives the author the "right to claim authorship" and protects against the distortion, mutilation or other modification of, or other derogatory action in relation to, the work, which would be prejudicial to his honour or reputation". These two rights correspond only roughly to the rights to paternity and integrity. Disclosure and withdrawal are not mentioned in the texts. A further safeguard to Article 6bis is provided by Article 5(2) of the Convention. Moral Rights must not "be subject to any formality".

By comparison to the right of integrity, the Berne Convention provides limited protection. The language used does not give authors the right to subjectively decide when an infringement has occurred. In the context of a composer's soundtrack for a film, for example, this means that he would, under Berne, have no legal foundation for complaint simply due to his work being modified in some way to better fit the film. He would be required to demonstrate that any treatment of the work was prejudicial to his honour or reputation. It has been undecided as to whether this means his honour as an artist, or more broadly as an individual. The right of attribution, on the other hand, remains as it was originally conceived.

The international minimum standard of protection for an author in the entertainment business will rarely make an impact on national legal regimes. The fact that there has been no legal challenge to perceived infringements by the United States and England is testament to this. From an author's perspective there is, in theory, an international guarantee that their personal interests in their work are safeguarded. In practice, this may not be the case given that the Convention has never been evoked against a national provision.

FRANCE

France still maintains the strongest protection for authors. The four Moral Rights traditionally guaranteed are still in operation, and the legislative provisions incorporating these rights continue go beyond the Berne Convention minimum standards.

Integrity remains, as in Millet, a subjectively applied right. Article 121-1 of the French Copyright Code protects the author's right to respect for his work. It has been widely criticised as providing authors with too wide a discretion to bring proceedings at the slightest hint of treatment of their work. Amy Adler observes that pandering to the author in this way can lead to undesirable results. She points to the German Bundesgerichtshof's decision in the Hundertwasser case as an example of this. Here the artist successfully sued an art gallery for simply displaying his work in custom frames. Adler points out that often modification and even damage by galleries can add value to a work. Her example is that painted sculptures made by the artist David Smith substantially increased in market value when Clement Greenburg stripped them of their paint so that they were more in keeping with the unpainted steel works that made Smith famous.

Authors cannot always exercise their right to integrity. It was held that property rights take precedence over Moral Rights in the case of Lacasse c. Abbé Quénard. Here an unauthorised painting on a church wall was removed despite the inevitable destruction of the work. In Legère c. Reunion des Theatres Lyriques Nationaux it was held that the producer of an Opera had the right to remove an artist's set from the production, so long as a note was made of the change in the programme. The decision in Legère highlights the problems caused by excessive authorial control in scenarios involving multiple authors. With the birth of the film industry, these problems were significantly exacerbated. The Copyright Code tries to remedy this problem by only allowing for the release of a film on "common accord between the director or, possibly, the joint authors, on the one hand, and the producer, on the other". This is not a wholly satisfactory solution, as it provides neither producers nor authors with guidance as to how to approach a legal challenge after release.

Paternity still exists as the right to respect for the author's name under article 121-1. The right causes few problems in practice and is fully compliant with the Berne Convention; it shall not be considered any further.

Unlike the other jurisdictions discussed, French Moral Rights are perpetual. England and America are both dualist nations, and their Moral Rights terminate with an author's economic rights. This causes particular problems for the right to divulgation, now codified by article 121-2 (although problem applies equally to the right of integrity, as all Moral Rights are perpetual in France). In the case of Bowers c. Bonnard it was held that the court must ultimately decide whether a work is complete or not. The problem operates on two levels. First, it causes uncertainty, as the court must wrestle with the undisclosed wishes of a deceased author. There can be awkward commercial consequences as a result of this. An example is the case of Roualt c. Consorts Vollard , where an otherwise valid contract for the transfer of a collection of paintings was held to be void after the death of the artist, as the court determined that his works were unfinished. Secondly, the fact that the ultimate decision as to whether a work is finished rests with the court departs from the principles that establish the right in the first place. Disclosure is intended to provide the author, not the courts, with the means to protect his interests.

An author can withdraw his work only if he agrees to indemnify any assignee for potential damage and offers first right of refusal to that assignee should the author decide to place it back on the market. This allows gives authors in the entertainment industry a greater degree of protection than that required by Berne, and also provides a sensible scheme for compensation. The provision is rarely used or challenged in practice.

The high degree of protection given to authors in the entertainment business by French Moral Rights often comes at the price of legal and commercial certainty. This is particularly evident in situations involving joint authorship. Sarraute notes that the difficulties presented by Moral Rights in cinema are a French peculiarity, and absent in Common Law countries. One might therefore argue that protection is too high for the operation of a competitive entertainment business. However, not all arguments against Moral Rights are convincing. Surely there can be no sensible objection to Hundertwasser's desire to control modifications made to his own paintings without consultation. Adler's other argument is that owners often know what is best for their work, but the cleansing and destruction of work is not always popular. One need only look to the popular condemnation of the cleansing of the Parthenon Marbles by the British Museum to see that purchasers are no better placed than authors to determine what is best for a work. In reality there is little damage done to the entertainment industry in France by the actions of sole authors. The author is only an economic danger to an entertainment project in circumstances involving multiple contributors.

ENGLAND

The Statute of Anne in 1710, served to encourage the availability and production of works. Utility had been the sole focus of England's authorial legislation up to the introduction of moral rights in the 1988 Copyright, Designs and Patents Act ("CDPA"). England was largely unconcerned with the artistic interests of an author in his spiritual offspring. Defamation, passing off, and contract were seen as adequate remedies in place of integrity, paternity, and divulgation and withdrawal. It therefore should come as no surprise that the English legal provisions dealing with Moral Rights in the CDPA offer minimal protection to the author in the entertainment business. Prolonged lobbying by the record and film industries have ensured that the focus is still economic utility rather than authorial protection. The Act offers protection against derogatory treatment of an author's work and the right to be identified as an author. It also places the right to privacy in photographs and film, and false attribution under the heading of Moral rights.

Neither privacy nor false-attribution are Moral Rights in the traditional sense: the privacy right suggests that one is the author of one's own face. Professor Cornish explains that it is the probable result of the removal of the commissioned photo provision in the 1956 Copyright Act rather than an intentional classification. False-attribution has nothing to do with the relationship between an author and his work- it serves to protect him instead from association with works that he has not created. Stamatoudi notes that it is not a Moral Right strictu sensu. In the context of protecting authors in the entertainment business, it can perhaps be said that the CDPA offers more protection than the classical model. However, whether this protection should be categorised as Moral Rights protection is open to debate.

The provision against derogatory treatment mirrors the language found in the Berne Convention. Unlike the right to integrity, destruction of a work is not covered and the test covers only derogatory treatment. In the case of Confetti Records v. Warner Brothers Lewinson J held that "the mere fact that the work has been distorted gives rise to no claim". A further difference is that the test is not wholly subjective. Overend J held in the case of Pasterfield v. Denham that an author's grievance alone was not sufficient grounds to bring an action. It has not yet been settled quite how subjective the test is. The case of Tidy v. Trustees of the Natural History Museum considered a Canadian authority on the matter: Snow v Eaton Centre. In that case there was held to be a "certain subjective element" in ascertaining derogatory treatment. Unfortunately Tidy did not develop the principle any further, and the issue has been labelled a "shadowy force".

The right to object to derogatory treatment can be waived under section 87 by an instrument made in writing and there are a large number of exceptions to the right under the Act. The result of these provisos is that an author with weak bargaining power in commercial situations will rarely be able to exert his moral rights, as he will be forced to waive them by the stronger party. Cornish notes that the inclusion of a waiver produced relief in many entrepreneurs. The unfortunate upshot is that, as Stamatoudi argues, the whole system of Moral Rights is destabilised.

The right to attribution is also subject to waiver and a number of exceptions under the Act, but in order to claim the right in the first place, it must be also asserted by the author via a written instrument. Ginsburg states that assertion "torture(s)" the Berne Convention text, and almost certainly violates the requirement under article 5(2) that Moral Rights should not be subject to any formality. Although at first glance this seems grim for authors, the harmless nature of attribution means that attribution will rarely be objected to. Even if an author fails to assert, anonymity is the likely damage he will suffer- any other outcome would likely be fraudulent.

England fails to protect authors in the entertainment business to the same extent as France. However, the operation of contractual obligations and other legal remedies means that the only area in which authors are likely to suffer limited protection is in their attempts to object to derogatory treatment. Waiver will be a particular issue for authors in large productions and unknown sole authors. However it is generally impractical for assignees to act in a manner that would be inconsistent with this right, even if an author were forced to waive. England dramatically neglects the author in theory, but in practice the results may not be quite as punishing.

THE ORIGINS OF MORAL RIGHTS

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The right to integrity was recognised in French courts as early as 1814. The case of Millet c. Kühn et Kunzli Frères presents the classic statement: "Il et l'intérêt supérieur du genie humain que tout oeuvre soît protégée et maintenue telle qu'elle est sortie de l'imagination de son auteur" – it is in the supreme interests of human genius that all works are maintained in the same state as that in which they left the mind of their author. Any treatment of the work whatsoever must be carried out only with the express permission of the author, regardless of whether the treatment is derogatory or not. The principle also extends to the presentation of a work in a context not anticipated by the author and to destruction of the work. In Société Le Chant du Monde c. Société Fox Europa Shostakovich and other Russian composers successfully claimed for a breach of integrity when their music was used in a film with anti-communist undertones. In Sudre c. Commune de Baixas a statue was destroyed to fill potholes and this gave rise to a successful claim in damages under the right to integrity.

Paternity gives the author a right to receive proper acknowledgment for his work. Normally this is settled by prominent display of the author's name. The right has been recognised in courts since 1837. The most commonly cited example is the case of Guille c. Colmane. Here an artist was able to escape a contract with an art dealer that required him to sign all of his works under a pseudonym for 10 years.
The right to divulgation protects the author's interest in choosing when to release a work; only the author may decide when his work is complete. In the case of Whistler c. Eden the artist, Whistler, was allowed to withhold delivery of a painting to a paying customer, so long as damages were paid in lieu of delivery.

Lastly, the right to withdrawal, which is a peculiarity of Civil Law jurisdictions, recognises the author's interest in taking his work off the market at will.

These rights were incorporated into continental legal systems during the 18th and 19th centuries to protect the personal interests of authors in their work. Immanuel Kant is often credited as providing the theoretical foundations of the doctrine. He wrote that a book is the publication of a personal discourse, one that belonged to the author as a part of himself. To Kant's mind all work was inseparably imbued with its author's personality, even after sale to a purchaser for value. This reflects "the intimate bond which exists between a literary or artistic work and its author's personality". In an ideal theoretical world, infringement would always be an issue for the judgment of the author.

These paragraphs represent a brief summary of the development of Moral Rights. The international application of these ideas does not stay true to the standard established in France. In fact, it is only France that retains what might be considered a pure system of Moral Rights.

THE UNITED STATES OF AMERICA

Moral Rights were not codified in the United States until the introduction of the Visual Artists Rights Act of 1990 ("VARA"), the USA was not even a member of the Berne Convention until 1989. Bird suggests three possible reasons for the late adoption. First, there is a deep-rooted suspicion of foreign law. Bird cites the dissent of Justice Scalia in Lawrence v. Texas as an example of this. Scalia lamented the reliance on "foreign fads" such as the Convention on Human Rights. Secondly, the industrial and puritanical focus of American history from the 17th century onwards ran contrary to the apparent self-indulgence of Moral Rights. Thirdly, American jurisprudence had never previously recognised a right of an author's interest in his work post-sale. Lastly, the name itself provoked suspicion. The conglomeration of the words 'moral' and 'rights' is not acceptable to a legal system that does not cater for morality as a guiding principle.

There were brief attempts under s43(a) of the Lanham Act, which codified reverse passing off, to bring in a form of attribution right before VARA was enacted. Notably in the case of Gilliam v American Broadcasting, where a highly edited series of Monty Python sketches were held in breach of the provision. Gilliam had right to have the work attributed to him in the form it was created- a combination of integrity and attribution to the continental eye. However, the back door was soon closed by the cases of Choe v Fordham and Dastar, if it even was a back door to begin with. Suhl suggests that the onerous tests required by the doctrine of passing off means that it did not operate as a Moral Right at all.

VARA is now section 106A of the United States Copyright Code. Significantly for the entertainment industry as a whole, the provisions cover only authors of "visual art" of less than 200 copies. It does not cover site-specific art, works made for hire, or applied art. A composer of a film score would therefore not receive any Moral Rights protection whatsoever. Bird dismisses VARA as a "stingy law" for precisely this reason. For those fortunate authors who are covered, there are provisions for the right to attribution and to object to derogatory treatment. However, VARA, just like the CDPA, provides for waiver in section 106A(e)(1). The same criticisms that were levelled at the English Act apply here. Even where the artist has not waived his rights, successful claims under VARA are extremely rare. In Carter v Helmsley-Spear the removal of a sculpture in a hotel lobby was permitted as it was held to be a work for hire, any commissioned work is a work for hire. This leaves a good part of the arts business unprotected. In Pavia v 1120 Avenue of the Americas a sculpture was removed from the lobby of the Hilton, and this was permitted because the work was displayed before the enactment of VARA, even though the damage happened afterwards.

The difficulties faced by authors in the entertainment business in obtaining Moral Rights protection in the United States are more substantial than those faced by authors in England. The fact that only authors of visual arts can benefit is a clear breach of the Berne Convention's application to all protected works under article 2, works that are not limited to the visual arts.

CONCLUSIONS

The excessive amount of protection, given to an author in France is unlikely to be desirable in other jurisdictions.
Even the extent of protection for sole authors can be seen as far too high in continental jurisdictions. Italy, for example, has legislated against the integrity right being applied to works of architecture to avoid creating difficulties for homeowners. France needs to reconsider its legislation to allow for changes in the modern entertainment business. Authors are no longer suffering for their art in poverty without a penny to their name, and the smooth operation of the entertainment buiness is now the most pressing issue.
Common Law jurisdictions push the standards provided by the Berne Convention too far. Authors currently are not protected to the extent that they deserve, i.e. the minimum standards set out in Berne. In the United States Moral Rights protection is exclusivist, in England formalities rob Moral Rights of any meaning. If minimum standards were eventually met, authors would be well protected in a global entertainment business. As it stands, the inability to bring countries reneging on their obligations to accountability leaves a gap in protection beyond the borders of continental jurisdictions. This is something that must be dealt with at subsequent Berne Convention conferences.