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Moral rights and their position in the digital world

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Abstract:

The proliferation of technology and the internet has made moral rights more vulnerable than ever. Although the digital age plays a significant role in disseminating culture to a larger audience, the online environment also comes with a threat to the author's personal interests. Their "spiritual children" are more easily under attack. However, under international law, moral rights have not been considered duly. The Berne Convention, the TRIPS Agreement, WIPO Internet Treaties, and even EU Harmonize Directives all shy away from the moral rights issue in the "Digital age". In an era when technology is developing faster than the laws regulating it, the exigency for moral rights development in copyright law must be paid more attention. This paper examines how the internet influences the protection of moral rights and to what extent it has made them more susceptible.

Keywords: **moral rights, the author's right, the internet.**

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Introduction

Defining property only as something tangible has passed a long time ago. Since the time of the Romans, people have been aware of a property's value, which comes from a human's mind. It is not less important or valuable than material assets like houses, land, trees, cattle, precious stones, or jewellery. Along with the industrial and transport revolutions, the demand for protecting inventions and works of art from another's use without creators' permission was raised. As a result, intellectual property (IP) rights under the primary forms of patents, trademarks, and copyright came into the world.

Despite being a part of or a separate part of copyright (depending on whether you are a common law or civil law scholar), moral rights have not been paid as much attention as their comrade economic rights. The biggest reason for this "discrimination" is that civil law and common law systems approach moral rights differently. The resulting outcome is that moral rights carry less weight than economic rights. While countries like France and Germany have long time recognised "an authors' rights framework" (*Droit d'auteur* in French or *Urheberrecht* in German) since the time of the Roman Empire against plagiarism [1], the United Kingdom (UK) and the United States (US) did not adopt privacy or personality rights of the author until becoming the signatory members of the Berne Convention [2].

The proliferation of technology and the internet has made moral rights more vulnerable than ever. Although the digital age disseminates culture to a larger audience, the online environment also threatens the author's personal interests. Their "spiritual children" are more easily attacked, but moral rights have not been considered duly under

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international law. The Berne Convention, the TRIPS Agreement, WIPO Internet Treaties, and even EU Harmonize Directives all shy away from the moral rights issue in the "Digital age". This paper examines how the internet influences the protection of moral rights and to what extent it has made them more susceptible.

Copyright in the common law system

The history of British copyright law is closely attached to printing technology's advent. In the past, wealthy and powerful people such as kings, lords, or religious leaders financially supported talented people in return for gaining a monopoly on their works of art. Consequently, the public could not access these works because they were unique and kept private for the sponsors' enjoyment. Gutenberg's invention of the moveable type in 1455 and the development of the printing press, which later led to the first "bestseller" of Chaucer's Canterbury Tales in 1478, made a breakthrough in the printing industry. Those inventions spurred printing multiple copies quickly and at little expense, providing many copies of works to more people. To restrict and control printing, Henry VIII set up a privilege system to limit certain registered members of the Stationers' Chamber who could print books. The book titles must be entered on the Company's Register before publication. Because only the members of the Company had the right to publish their books in perpetuity, this right was called "copyright", which means the right to make copies [3]. The history of copyright in England proves that the early idea of copyright solely focused on the economic interests a work would bring to an author, or the sponsor, rather than emphasising the author himself.

The privilege system was then replaced by the world's first copyright law - the Statute of Anne, enacted in England in 1710. The Statute restrained the publishing industry, destroyed its monopoly power, and permitted the importation of books in foreign languages rather than directed toward the authors of books and their rights. The right to copy, which had been restricted to the Stationers before, was now granted to everyone. However, instead of being a perpetual right, the new copyright would expire after fourteen years, with a renewal for the same period.

In 1790, the first US Congress transposed similar content of the Statute of Anne into the US Copyright Act 1790, an Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies. The law granted American authors the right to print, reprint, or publish their work for fourteen years and a right of renewal for the same term [4]. Until now, this Act experienced several revisions. While the first revision in 1831 expanded the term of protection to twenty-eight years plus a fourteen-year extension, the second time in 1870 focused on administrative registration. The major revision occurred in 1909, broadening the scope of subject matters to all works of authorship and extending the renewal term to twenty-eight years.

The most significant change was undertaken in 1976 for two main reasons. Firstly, the US realised the existing copyright provisions could not keep pace with technology development, so an effort should be made to cope quickly with scientific advances. Secondly, it was a preparatory step to the US's participation in the Berne Convention. While some concepts such as fair use, first sale doctrines, and library photocopying were available in other jurisdictions, they were not adopted in the US before 1976.

Copyright in the civil law system

In contrast, the civil law system uses the term *Droit d'auteur* or the author's rights to recognise

the author's creativity and emphasise the natural rights in their creation. The concept of moral rights can be traced back to Ancient Greece and the Roman Empire, when copyright works were supposed to imbue with the author's personality [5]; hence, those rights were more concerned with protecting their works from being copied and put under another person's name. Moral rights are non-proprietary rights based on the theory that an author is a genius individual capable of producing extraordinary works. Consequently, they and their works are closely connected. The work reflects one's unique personality; any damage - even if it is not physical - could affect them personally, intellectually, and spiritually. The scholars living in ancient times were the first to be recognised as the authors of their works; however, they did not have any economic rights to control dissemination and copying. Notably, the value of authorship is more than the merely financial aspect because it is not only the cream of intellectual work but also the author's "spiritual child". As the cream of the intellectual work, an artist is entitled to receive remuneration for their time and effort. As the "spiritual child" that the creator brings into the world, they are free to control its destiny and object to infringement on their work.

Common law versus civil law

The difference between "common law copyright" and "civil law author's rights" creates different treatments of moral rights and affects legal matters such as originality, formalities, and duration. For example, if the civil law system requires originality as the author's intellectual creation for a copyrightable work[1], the common law system sets a lower threshold. Firstly, to be considered an original work under UK law, a work must not be a copy. The word "original" does not require "the expression of original or inventive thought"[2]. Secondly, the work must be crystallised from a sufficient level of independent skill, labour, or judgment[3]. In other words, the UK concept of originality focuses on the input that the author contributed to the resulting work.

A similar trend can be found regarding the formality of copyright protection. The work is automatically protected when it comes under a specific material; some common law countries, namely the US, require formalities such as registration, notice, or deposit if an author wants to seek the protection. However, formalities are not conditions to grant copyright protection but serve as initial proof in the case of a dispute. The Anglo-Saxon copyright regime believes that since copyright is the remuneration for one's creative work, formality is necessary to prove such work's fruits. Furthermore, the protection term granted by civil law countries was longer than the common law nations; in France, moral rights last forever. Economically, copyright, like patents or trademarks, is a monopoly (even when it is called a weaker monopoly than others); the protection is granted long enough for the author to recoup his investment and profit from his work. It then falls into the public domain when the author's exclusive right expires.

Nevertheless, the most significant difference between the two legal systems is the position on moral rights. The civil author's rights framework comprises two sets of rights: economic and non-economic rights, known as moral rights. While the former emphasises commercial exploitation of a work, moral rights are personal rights relating to

[1]Case C-5/08. Judgment of the Court (Fourth Chamber) of 16 July 2009. Infopaq International A/S v Danske Dagblades Forening; Cofemel v G-Star Raw (C-683/17); SI and Brompton Bicycle Ltd v Chedech/Get2Get (Case C-833/18).

[2]University of London Press v University Tutorial Press [1916] Ch 601.

[3]Ibid.

an author himself instead of his output. Put another way, while copyright is a property right relating to the physical aspect, moral rights are considered a human right involved more in the philosophical view [6]. Only the individual creators, not their work, are protected by moral rights. Civil law countries rank the author's moral interest at the first spot and put the economic aspect second. In contrast, the UK and the US did not adopt moral rights in their copyright legislation until the nineteenth century.

Moral rights in international agreements

Copyright internationalisation began with the Berne Convention for the Protection of Literary and Artistic Work in 1886. It bridged the gap between two legal systems by requiring member states to recognise the moral rights of paternity (or attribution) and integrity. To implement the Berne Convention, the UK adopted the Copyright, Designs, & Patents Act 1988 (the 1988 Act), which confers the moral rights of specific works. The US, in contrast, delayed joining the Berne Convention more than a hundred years after its creation. When the US finally decided to become a Berne member in 1989, moral rights were exercised, but provisions were limited to meet the minimum requirements only [6].

One year after its participation, the US Congress enacted the Visual Artists Rights Act (VARA) - the first federal legislation which granted the moral rights of paternity and integrity to solely visual artists. However, the US VARA restricted the subjects and range of moral rights. While some European countries provide moral rights of publication and withdrawal in addition to two central moral rights (attribution and integrity), these extra moral rights are not considered in any US legislation yet. Furthermore, only the visual artists can be protected from any distortion modification that might contravene the author's original output; other creative activities like music works are excluded because they cannot meet the definition of "visual art"[4]. Because of such restrictions, since signing the Berne Convention, the US does not sufficiently comply with Article 6*bis* - the provision addressing moral rights. Therefore, whether moral rights are recognised and exercised in the USA is unclear [7].

The Berne Convention

The Berne Convention is the first international treaty that harmonised copyright laws between the continental and Anglo-Saxon standpoints. However, the first version of the Convention left moral rights in the margin of protection. After several modifications in Brussels (1948), Stockholm (1967), and Paris (1971), minimum requirements of moral rights were set up in Article 6*bis*; the signatory parties could provide higher protection if they chose to. Article 6*bis* protects the right of paternity and the right of integrity only. The right of paternity or attribution refers to the author's right to have their name on a work, use a pseudonym, or remain anonymous. The right of integrity permits an author to control the form of his work. France provides two additional rights: the right of publication, the one not to reveal a work before the creator agrees, and the right of retraction, the one to withdraw a work after it has been published because the author is not happy with its display anymore [6].

As mentioned above, because the Berne Convention sets out the minimum protection, Article 6*bis* leaves some questions unanswered. Firstly, it is unclear whether the right of paternity includes the right not to be identified as the author of a work (the right to object against false attribution). Secondly, it is unclear whether the

[4] 17 US Code ξ 101.

destruction of a work, especially in cases where such destruction does not affect an author's "honour or reputation", can be seen as infringing the right of integrity. Thirdly, Article 6*bis* is silent on the appropriate duration of moral rights. Fourthly, it does not reveal whether the right of paternity and integrity should be transferable or can be waived. Finally, confusion can be found in the relationship between the two rights stated by the Article. Although a scholar believes those rights overlap, the wording differentiates the right of attribution and integrity [7]. Despite these grey areas, the Berne Convention has created a landmark when it claimed the independence and difference of moral rights from economic rights for the first time. Even when the latter is transferred to another party or the creator is not the copyright owner (e.g., employees produce the work under the contract), the author still possesses personal rights. In this way, Article 6*bis* strongly affirms the author's unique personality embodied in his work.

To conclude, not only does the Berne Convention shorten the distance between two legal systems, but it also provides the essential basis for pursuing creative activity - recognition and fair reward. It has laid the foundation for the harmonisation of copyright law.

The TRIPS Agreement

The TRIPS Agreement has exerted the most influence on global IP norm-setting. The failure to include IP rights on the agenda in the previous round-the Tokyo Round-did not deter the US and European Community from bringing IP issues as a part of the compulsory negotiation package. After several working programs, the TRIPS Agreement went into force in 1994. This document dubbed a "milestone" in international IP law, reinforced the role of the Berne Convention when a state can only join the TRIPS after ratifying the Berne. However, moral rights are not included in TRIPS; they are left to domestic legislation. The reason can be found in the agreement's title, which only covered in Trade-Related Aspects, whereas moral rights, in contrast, fall outside the economic scope of IP rights. On the one hand, the silence of the TRIPS is not disadvantageous because the member states have great latitude in approaching moral rights. On the other hand, this exclusion weakens the position of those non-proprietary rights in international copyright standards. In addition, the TRIPS Agreement did not accommodate nor advance a digital agenda.

WIPO Internet Treaties

WIPO Copyright Treaty (WCT): the WCT setting out provisions relating to the so-called "digital agenda" covers the following issues: the rights applicable for the storage and transmission of works in a digital system, the limitations on and exceptions in a digital environment, technological measures of protection and rights management information. One more time, moral rights in the cyber world are continuously on the margin of international copyright concern.

WIPO Treaty on Performances and Phonograms (WTPP): along with the WCT, the Treaty on Performances and Phonograms in 1996 amounts to the "Internet Treaties" adopted by WIPO to address the copyright and related rights of the digital age. Although WTPP focuses on neighbouring rights rather than copyright, Article 5 regulates the rights of attribution and integrity of performers, which is precisely parallel to Article 6*bis* of Berne. Similarly, these rights were recognised independent of the economic rights and are still valid after the performer's death, at least until the extinction of his economic rights.

The UK Copyright, Designs, and Patents Act (CDPA) 1988

The CDPA 1988, apart from two core moral rights, has the right not to be named as the author of a work which one did not create (the right to

object against false attribution) and the right to privacy of certain photographs and films (the right to privacy). The rights of paternity, integrity and privacy exist as long as copyright exists in the work[5]. The right against false attribution, while available in some common law countries, is treated as a part of the ordinary law of obligations rather than a type of moral right [8]. Under the CDPA, this right continues for 20 years after the death of the person falsely attributed as the author[6]. UK's moral rights are more limited than those in some other jurisdictions [9]. Several countries also recognise different types of moral rights, such as the right to control the publication of the work (the right of disclosure) and the right to withdraw a work after it has been published (the right of withdrawal).

The right of paternity or attribution is one of the most recognised rights of moral rights. It is a right to be identified as the author of the work. Distinct borders were drawn to distinguish different expressions of paternity. The right of identification implies that the author freely remains anonymous, such as a name, pseudonym, or symbol to be identified as the creator. When the author wants to reveal his hiding identity, that is known as the right of disclosure. Another version, the right of assertion, aims to prevent the usurpation of paternity and affirm his authorship even when it is not a case of usurped paternity [10].

The right of integrity is to protect the work from distortion or mutilation where the creator may only protest the change to the work that negatively affects his "honour or reputation". It is unnecessary to require the definition of honour or reputation; however, in the cyber world where a work is possibly removed, extracted, ripped, and even mixed with others to create a new object, the assessment of honour or reputation is more difficult to assess. Should the injury to an author's prestige be determined based on the public's reaction or the author's personal view? What happens if the modification amplifies his name to a large audience, yet the author supposes it severely mutates the original context? Even though honour or reputation is an ambiguous and discretionary concept to give a consensus definition, the determining criteria should be set to avoid arbitrariness when settling a copyright dispute.

Moral rights in Vietnam

On 16 June 2022, Vietnam adopted the third Amendment of its 2005 IP law. The moral rights of authors/creators are regulated as follows[7]: 1) The right to name the work. This right can be transferred; 2) The right to attach their real names or pseudonyms to their works and to have their real names or pseudonyms acknowledged when their works are published or used; 3) The right to publish their works or authorize others to publish their works; 4) The right to protect the integrity of the work from being misrepresented by others; not allow others to modify or mutilate the work in any way that is detrimental to the honour and reputation of the author.

There are few observations of Vietnam's relevant provisions. Firstly, it is not clear whether such moral rights are waivable, and this issue has never been tested before the court or other authorities. Secondly, it is very bizarre that the legislators regard the name of the work and the work itself as two separate parts by giving them different rights. Last but not least, the right to publish, which is an economic right in other jurisdictions, is viewed as a moral right in Vietnam. Consequently, the right to publish the work can be transferred and protected for 50 years post-mortem[8].

[5]The Copyright, Designs, & Patents Act 1988, s 86 (1).

[6]The Copyright, Designs, & Patents Act 1988, s 86 (2).

[7]Article 19 of Vietnam's IP law (amended in 2022).

[8]Article 20.1(a) of Vietnam's IP law (amended in 2022).

Moral rights and the internet

The internet and technologies change the way creators produce their works. A study by the EU indicates two ways digital technology also helps safeguard moral rights. Firstly, identifying a work has become more accessible thanks to different technological identification systems [11]. The creation of a standardised code for literary material (ISBN), phonograms (ISRC number) and audio-visual material (ISAN number) by digital technology can be regarded as a new form of paternity right. Although those systems might not reveal the author of the work, they can be used "as a tool to authenticate the work" [11]. They do not precisely refer to the creator's name but are capable of providing the origin of the work in a commercial exploitation environment. The study equates copyright authentication to trademark because it invokes the commercial origin [11].

Secondly, digital technology can protect the integrity of a work from illegal modification. Technical protection methods like encryption, digital signature, and identification system strengthen the integrity of works because they help the authors to prove that their results have been distorted. However, these methods cannot replace moral rights; their roles are limited to supporting the right holders in tracking and proving infringements of moral rights [11].

On the other hand, the internet and the digital environment potentially threaten the author's non-economic rights. The Digital Age creates a new conflict between users and authors. It has furnished the users with infinite means and opportunities to manipulate, adapt, and transform the fruit of creative labour in digital form without the copyright owner's consent [12]. A user may be unaware of the exact content of the original work or ignore the author's real identity. New realities of the digital environment play a newer justification to retain moral rights. They could serve the public interest and preserve our intellectual history and cultural heritage in an environment where original versions of works are hard to maintain and trace.

Unlike patents or trademarks that need registration to seek protection, copyright does not require such, so its territorial nature is weaker than other types of IP rights. In addition, the philosophical aspect of copyright is becoming more and more vulnerable due to the mobility of the internet. The internet permits wide dissemination of works at the speed of light. Only one click can transmit the information from one side of the globe to the other. Thus, nothing stops these works from uploading, compressing, and downloading.

Traditionally the tenet "there is no copyright in an idea; copyright only subsists in the expression" is one of the fundamental copyright principles. A poem cannot be protected unless the author transforms it into a material form. Similarly, a composer only seeks protection for his musical work through a recording expression. Today the right to integrity becomes weaker in the digital age. To be understood by computers and disseminated online, a work cannot be preserved in its originality. It must be translated into a digital form, leading to a loss in quality. The difference in loss of quality will vary from one work to another. For instance, the colour and the nuances of an original painting might not be maintained under the compressed version. However, it is problematic whether this alteration sullies the author's honour or reputation or not because the degree of damage based on assessing the injury to his prestige is a subjective decision. The reduction in the quality of any output, such as a movie, a song, or a piece of music, may always make authors unhappy because they devote their lives to creating and disseminating art, knowledge, and culture. They want to preserve the

work precisely as designed, without alterations. However, not every modification is prejudicial. For example, a musician composes a song with the length of 4 minutes 30 seconds, but that song ends at 4:23 minutes; the remaining 7 seconds without music are added just for an echo effect. Technology tools can entirely compress it with the new length of 4 minutes 23 seconds to decrease the capacity. Undeniably the integrity of the composer's work is distorted, yet the issue raised here is whether this distortion is severe enough to his honour or reputation?

Another digital tool that affects a work's structure is deleting parts or mixing one piece with another. Technologies allow removing or extracting positions from their original context and combining them to create complete works. It is impossible to detect the change [11] leading to the new role of authors, switching from "authoring" to "contributing" [12].

The right to integrity suffers from the internet, and so does the right to paternity. Movies are usually recorded in DVD (digital versatile disc) and VHS (video home system) formats. For these movies to be shared, the data will be ripped and converted from the MPEG-2 (moving pictures expert group) to other portable formats like DivX, AVI (audio video interleave) and many different forms. Such conversion might reduce the resolution, impeding the audience's enjoyment. Another example can be found in sound recordings. The music is also ripped from CDs and converted from audio CD format to MP3 (MPEG-1 audio layer 3) format to reduce the size and facilitate the transmission. The transformation of file formatting allows the user to quickly put the work on websites but the fear that the quality cannot remain the same as the originality is evident.

Although coding, ripping, transcoding, and conversion may not fall in the coverage of the definition of adaptation and translation in copyright law, they still violate Article 6*bis* of the Berne Convention because the right to receive credit as an author has been ignored. In a standard DVD movie, the audience can recognise the author's name through the labels and the prints on the disc or in the recording as in the acknowledgements and the digital rights management (DRM) codes embedded in the disc. Music listeners are also aware of moral rights through labels and the DRMs [12].

However, the internet inevitably makes moral rights more susceptible even when these works are legally uploaded. Although the minimum information on the work's authorship will be revealed, the data may be lost when a work is downloaded or sent over a website under a false author name [10]. Moreover, unlawful distribution on the internet gives little care to moral rights. The file ripper embeds their information in the movie or song file, claiming authorship. DRMs are usually removed to make the files more portable, but the uploaders do not replace them with any measure to guarantee the right of attribution [13]. This conduct can be regarded as "plagiarism", stealing others' work rather than putting it under their name.

The internet has made it possible to disseminate works on an unprecedented scale. In the meantime, the right to withdraw a work is also affected. Before the internet era, an author could retract his output when he was not happy with it anymore or when its display no longer reflects the author's worldview. However, the internet nullifies this right. Once a work is distributed online, it is impossible to take it back.

Nevertheless, stricter protection of moral rights can hinder the growth of cultural industries such as music, movie, and tourism. It inhibits the exploitation and experiment of the creation

of new art. Furthermore, the abuse of the right of withdrawal might cause a significant loss to a publisher if an author wants to retract his work out of the marketing display; mainly, many companies currently have used the internet as the primary channel to popularise new works. The film industry and music industry are strong cases in point.

Conclusions

The internet has internationalised our lives since its creation. Its appearance upsets the definition of "distance" leading to the erosion of geographical boundaries. The world has become smaller and flatter, but the scope of the conflict is broader and more diversified than ever. Moral rights are inherent and do not produce economic benefits to the copyright owners. The position of moral rights is weaker and far more disadvantageous in the digital age when the right to paternity and the right to integrity are attacked by advanced technology. The creator's ability to control the destiny of his "spiritual child" falls out of his hand. Work unity relies on users' altruistic motives, which seems a wholly ineffective response.

Once a work has been published online, monitoring its circulation is impractical. Trailing the transmission requires international cooperation, both technical and legal. Mutual technical assistance and mutual judicial cooperation amongst countries is the key to mitigating and punishing copyright infringement.

The above analysis points out that the internet has weakened moral rights; therefore, the author argues that moral rights should be acknowledged in a more flexible manner. Internet and digital technologies have resulted in revisions of some traditional concepts. The protection of moral rights should be loosened to resolve the conflict between users and authors. To some extent, in the digital age, the author should learn how to coexist with acceptable modifications to work as long as they do not cause significant harm to his honour or reputation.

COMPETING INTERESTS

The author declares that there is no conflict of interest regarding the publication of this article.

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