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Abstract

At first sight in copyright, moral rights seem to form a less significant part compared with economic rights. However, new technology has strongly overwhelmed traditional moral rights regime and consequently, inherent but concealed conflicts between moral rights and other legitimate interests have become increasingly prominent.

Notwithstanding recognition of moral rights doctrine shows much unevenness both theoretically and in legislation with different jurisdictions in the world, the rush of economic and informational globalization has prompted the convergence of sentiment on moral rights worldwide.

There can be no doubt that the essence of copyright, whether moral part or economic part, is to keep a “balance”. How to strike such a balance in moral rights system is thus becoming the main task of this thesis. Drawing from typical countries’ legislation, this thesis applies a restrictive perspective, to depict the picture of a “balanced” moral rights regime to fit in current trend of globalization.
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*Caird v. Sime* [1887] 12 A.C. 326 (H.L.)

*Hubbard v. Vosper* [1972] 2 QB 84 (Court of Appeal)

The United States of America

Crimi v. Rutgers Presbyterian Church in City of New York [1949] Cite as: 194 Misc. 570, 89 N.Y.S.2d 813 (Supreme Court, New York County, New York)


Nichols v. Universal Pictures Corporation et al. [1930] 45 F. 2d 119; 1930 U.S. App. Lexis 3587 (2d, Cir.)
Table of Legislation (Including Conventions)


Canadian Copyright Act, R.S.C. 1985 c.C-42.


Civil Code of Québec, C.C.Q.

Code de propriete intellectuelle C.P.I.


Copyright Statute of Apr. 22, 1941, [1941] (La Legislazione Italiana)


Chapter 1
Introduction

Conventional wisdom dictates that there is a philosophic and cultural bifurcation within copyright area between civil law jurisdictions and common law jurisdictions – a divide particularly concentrates on the consideration of moral right settings, precisely ranging from recognition of legitimacy of moral rights (It is recorded that moral rights first explicitly recognized in statute in common law jurisdictions was merely over twenty years ago)\(^1\) to the degree of protection of moral rights. In terms of reasons leading to so many differences thereof, the underlying policy especially concerning the question of “what role or objective does copyright regime play in the contemporary economic society?” is one that always lurks in the background\(^2\): does copyright remain as natural right of authors that lasts in perpetuity, to the greatest extent practically, to protect author’s individual interests, or, is it a secondary concern of authors’ interest which should yield relatively to public enjoyment of intellectual products created by those aforesaid cultural elites? What is a delicate copyright regime – given both the consideration on the above propositions at issue? Should we expand or contract protection of copyright products for the sake of achievement of real equity and justification? What are the legitimate thrusts to persuade the extant moral rights system into a modification? How do those factors interfere with extant moral rights regime if at all? – Many other pertinent problems that attract attention.

From the perspective of current policy, with respect to the objective of copyright law, civil law paradigm tends to take up arms under authors’ banner, by focusing on the meaning of natural rights per se. Despite the nuance in its formulation – whether to adopt monism, which views moral rights and economic rights as two inseparable parts of a unique and organic whole and therefore holds that moral rights expire concurrently with economic rights (eg, Germany); or to adopt dualism, which conceives moral rights separable from economic rights and deems moral rights as perpetual (eg, France) - the general key of moral rights protection stays at a similar level: moral rights are crucial to the satisfaction of fundamental human needs as it is an important

“receptacle for personality”, thus, as Justin Hughes reasons “deserves generous legal protection”. The mandated protection of moral rights accordingly rested in a high level and its corresponding restrictions on moral rights is relatively lower than Anglo-American countries. More precisely, moral rights protection is more recognized as a crucial part of copyright in civil law jurisdictions compared with common law countries.

Contrary to civilian countries, moral rights at first sight in the common law context seem to form a rather small and insignificant part of copyright. The common law tradition conversely (the US in particular) bolsters economic exploitation available under copyright law and utilizes copyright as an important instrument for economic development as its main purpose. All the historic and jurisprudential background consequently has determined a much low level protection coupled with a resultant severe limitation. Despite the fact that Canada has made a massive effort to avail itself of international standard of moral rights protection by adopting provisions on moral rights, closely modeled on Article 6bis of the Berne Convention, into its legislation, simultaneously with the fact that the UK has gradually aligned its perception of moral rights with the civil law paradigm, the primary maneuver for moral rights is still suppressive within the common law world.

The two opposite sides of moral right situation inevitably invoked many difficult questions: The civilian countries have their own restriction policies on moral rights, but by contrast to that of common law area, which formulation is superior or inferior? Do we need two sets of restrictive policies, in particular in the area of the most internationalized law – intellectual property law, implemented to distinguish different jurisdictions as based on a globalized world nowadays? What would be an eclectic or at the very least adaptable solution to moral rights regime? I find few guides on the reconciliation of moral rights regimes across different jurisdictions from existing theories. That is however what can be anticipated from my arguments in Chapter 5.

4 Ibid.
5 Rajan, supra note 1 at xix.
6 Goldstein, supra note 2 at 140.
Apart from contemplations on traditional culture of moral rights regime, an eye should be casted on the dynamic environment where new digital technologies, in particular the Internet, commercial development and prosperity of intellectual industry of mankind, have made those moral interests particularly vulnerable to being abused – do these factors account for any robust arguments for restrictions on moral rights? May be or may be not? I will not pause to explore them here but the answer can be expected in Chapter 3.

There is no denying the fact that numerous literatures have proposed and overviewed the harmonization and convergence of copyright protection since the advent of a set of international conventions, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), inter alia, the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) which sets forth minimum standard of copyright protection. So too are the comments on the limitations on copyrights shaped by those conventions as typically as “free uses” doctrine and the “non-voluntary” doctrine of particular acts of exploitation. However, literatures focusing on moral interest issues are far less than those focusing on the property interest issues, not to mention “limitations” – such an abnormal perspective under moral interest topics. There are distinctive reasons with respect to such few comments on moral rights restrictions. For most civilian countries, rooted and shaped by “personality theory”, moral rights are amplified as imprescriptible and thus restriction concerns have gained less currency; meanwhile, for most common law countries, the prolonged indifference of moral rights can hardly attract scholars’ interest. However, it goes without saying that “any type of right cannot be absolutely exercised without restrictions”. More specifically, as the well-accepted universal recognition goes that property right should be limited to establish an orderly and justifiably social and economic development. By analogy, moral rights, as another dimension of copyright, should also be constrained to the most practical extent for the better being of the overall social welfare and indeed the group of authors in a long run within a dynamic perspective rather than in a short term with a stationary vision. Neo-classical economists in general attach strong normative value to a regime of private exchange and private ordering, and often bring some degree of skepticism to bear on the capacity of collective decision

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8 Barry B. Sookman & Steven Mason, Copyright: Cases and Commentary on the Canadian and International law (Toronto: Carswell, 2009) at 9. In some countries, “free uses” doctrine is recognized as “fair use” or “fair dealing” concept.
makers (e.g. legislatures, regulators, bureaucrats, or indeed courts), to adopt policies or legislations that will unambiguously increase net social welfare.\textsuperscript{9} According to their theory, a cost and benefit analysis would firmly give credit to the need to restrict moral rights under a complexity of current situations. Similar analysis from other perspective of sociological scholarship also accounts for justifications of moral rights restrictions. In brief, driven by the desire to fill voids in literature research about moral rights restriction and to explore the most acceptable and applicable model to restrict moral rights, I am hereby proposing this particular topic in my thesis and those reasons will be concretely demonstrated in Chapter 3 Section 1.

To this end, starting from literature review of conceptual frameworks of moral rights in Chapter 2, I highlighted potential problems demanding analysis of moral right restrictions based on the discussion of its major branches in this Chapter.

In Chapter 3, as I sketched above, I set out the reasons to restrict moral rights from different perspectives both theoretically ad in practice.

In Chapter 4, I examine the typical modern legislation of moral rights along with case laws if at all both in civil and common law jurisdictions and pertinent international moral rights regulations as well. Here, my argument is it is understandable that due to different historic and jurisprudential backgrounds, countries differ their attitudes towards the scope and degree of restrictions on moral rights. Nevertheless, still there is a strong tendency that countries of different jurisdictions have undergone a time from divergence to convergence in moral rights restrictions and such a trend overwhelmingly keeps going in the future. Both moral rights protection and restriction are now indisputably internationally recognized and it becomes obviously clear that the continuing harmonization of moral rights regime is possible under and facilitated by the circumstances of international trade liberalization and information globalization.

Moral rights indeed need to be restricted and Berne Union countries have made miscellaneous endeavor already as one can see from Chapter 4; but is there any impliedly similar doctrine extractable for us from reading the different sets of restrictive policies? In another word, is there any commonality rooted in the restrictive rationale among the Union countries – that is what the thesis can be anticipated as a whole. The answer is specifically presented in the Chapter 5.

Chapter 2
Conception of Moral Rights

1 General Understanding of Moral rights

The term “moral rights” was derived from the French expression “droit moral de l’auteur” (author’s moral right) and thus originally flourished in those continental-European countries closely influenced by the French civil law heritage. It was not until when introduced into UK that been translated from “author’s right” to “moral right” – a brand new legal concept – that was added to British own traditional jurisprudence, and it has become the more precise version wildly acknowledged and formally accepted by international consensus nowadays. Therefore, “moral rights” is the terminology I will employ for my thesis.

The expression “moral rights”, though misleading, is not concerned with morality but with the non-pecuniary interests of authors. Theorist Ysolde Gendreu contends that the concept of “moral rights” does not parallel “author’s rights” but rather is a subordinate concept, serving as a counterpart of economic rights. She further argues that moral rights and economic rights coexist in a single legal concept – author’s right – because both are designed to protect the author’s interests that arise from the creation of his or her work.

Other notable scholars like Gillian Davis and Kevin Garnett, suppose that moral rights refer to a cluster of prerogatives which “secure the bond between authors and their works” and “safeguard the expression of the authors’ personality through his work by giving recognition and protection to creative integrity, reputation and personality” as distinguished from his economic rights. William Fisher approves this saying in his explanatory part of “personality” approach to intellectual property theory. Going forward, Masouye Claude goes beyond a similar description

12 Ibid.
13 Davis & Garnett, supra note 10 at 3.
14 Ibid.
15 Fisher, supra note 3 at 174.
by analogizing it to economic rights concluding that they both reflect the author’s need to keep body and soul of his creator together.  

Moreover, it is noteworthy that moral rights are only accorded to natural person authors. Ysolde Gendreau concurs this point of view by stating that moral rights both presuppose and reinforce the idea that the author is a natural person, as opposed to a legal person. The French Civil Code possesses a similar theme by imposing two conditions in order for moral rights to attach: being a natural person, and having in fact, created the work. The French law additionally claims moral rights as perpetual in its unique standpoint though other countries do not agree.

Bearing quite a different view as regards the duration of moral rights from France, the German position adds to moral rights a disparate characteristic that moral rights should be inseparable from property rights and it thus accounts for the legitimacy of its monistic attitude towards moral rights’ duration. In addition, the idea that moral rights should be inalienable has been described as of “transcendent importance” in the German jurisdiction. That is to say even if someone else attains the economic rights of a work, the moral interests still remain with the original creator. lawmakers and theorists in the common law world seem to take the same maneuver on the characteristic of moral rights with the German position.

At any rate, there seems to be without any doubt on the proposition that moral rights are personal, inalienable, unassignable and inprescriptible in their purest form.

2 Components of Moral Rights

Moral rights can be dated back as early as to the era of ancient and medieval Europe – a time even hundreds of years prior to the age of printing – where poets and playwrights were concerned with their words being distributed and plagiarism at that time were deemed as a
nuisance to authors and were condemnable. In the age when printing technology became popularly increasable, original scholarship gained more and more recognition and respect, there were accounts of authors complaining about their publishers, objecting to publication without their consent, false attribution of authorship as well as modifications to the text in the detriment of their reputation.

To date, the content of moral rights does not evolve too much from the ancient. In order to gain a fuller understanding of the term “moral rights” and its potential blemishes that may attract its restriction, it may be useful to approach it in terms of its several components in general. Looking through legislations of different jurisdictions, there are principally two kinds of patterns which I favorably would like to call them “formally parts” and “not formally parts” of moral rights. Those complying with moral rights provisions under the Berne Convention are deemed as “formally parts” and they are unanimously incorporated into domestic legislations.

2.1 Formally part of moral rights:

2.1.1 Right of Paternity

Right of paternity, also known as right of attribution first of all safeguards the “natural link” binding the author to his/her work as long as he/she wishes. This right is subject to three aspects: to indicate real name of the author in his work, to hide behind a pseudonym and to remain anonymous. The right of paternity, at first blush, is readily to be deceptively identified as right of personal identity. It still stays contentious with respect to the distinction between the two in academia. However, nascent legislations establish two types: the majority of lawmakers do not distinguish the right to be named from the right to recognition of authorship; nevertheless, some countries have expressively separated the two in statements of relevant provisions. For instance, Article 21 of the Italian copyright statutes stipulates: The author of an anonymous or pseudonymous work shall at all times have the right to reveal his identity and to have his position as author recognized by judicial procedure. I personally will not stick on the point that which of the two formulations is superior, but I would like to clarify

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21 Davis & Garnett, supra note 10 at 15.
22 Copyright Statute of Apr. 22, 1941, [1941], Art. 21 (La Legislazione Italiana)
the point of view that the right to indicate one’s name is not what copyright law really cares; rather, the right to be recognized as an author is. The primary meaning of indicating one’s name in copyright is claiming authorship. When one talks the two contemporaneously within copyright domain, the meaning is just self-evident. Therefore there is no point in emphasizing other interests but authorship. What copyright captures is that whether one has the right to claim as an author, but not whether one has the right to write his or her name on the cover of that particular creation. In terms of the real name of the author, having a real name or having not, will do nothing with the fact of being an author once he or she actually creates a work. That’s why anonymous and pseudonymous works attract copyright protection as well.

There is another controversy as for the distinction between the paternity right and right of reputation. How do these two conceptions relate to one another? As we all know, practically speaking, the exercise of the paternity right allows an author to do the following things effectively: to claim authorship, to prevent his works from being attributed to someone else and to stop his name from being used on works which he did not in fact create (i.e. false attribution, this may usually happen when the person is a well-known author, and someone hopes to profit from his reputation by affixing his name to a work purported to put on market).23 Under the third category – false attribution, scholarly commentary is equivocal on the ground that whether the right of paternity in this circumstance as a copyright remedy is the right way to protect the interest of the “author” by reason of he or she has not legitimately become a real author in the sense that he or she has no actual creation of a work.24,25 I approve this skepticism and therefore reason that such a claim of moral rights protection should be restricted or more precisely, should be legitimately transferred to general personality rights (the right of reputation) protection.

Notwithstanding the suspicion to extend right of paternity too far, it is relatively less controversial by contrast to other components of moral rights.

2.1.2 Right of Integrity

The connotation of right of integrity can be easily comprehended on the proposition that a work is the embodiment of an author’s distinct personality. It protects the author against any distortion,

23 Dickson, supra note 18 at 9.
24 Gendreau, supra note 11 at 175.
25 Dickson, supra note 18 at 13 & 14.
alteration or mutilation in the detriment of the author’ personality interest and it thus remains to be core of moral rights regime.

Debates upon right of integrity have long been caught into the eyes of many commentators. There are mainly two contentious topics concerning the right of integrity.

First, with respect to what types of activity does right of integrity aim to protect against, close attention has been paid to the issue that whether activity of destruction of a work should be brought into the scope of protection in question. Many theorists have left this question unanswered. However, a corresponding solution has been somehow identified by a master’s student Craig James Dickson from University of Toronto, concluding that there is only one circumstance permitting destruction of a work of art, namely the work is part of the destroyed item, such as a fresco mural painted on the wall of a building. In the course of his argument, he has invoked two French cases and one American case purporting to explicate respectively his contention towards destruction of works which were part and not part of a building. As a matter of fact, courts with different jurisdictions unanimously respond to destruction issues more prudence than enough and always make decisions on a case by case basis. The question remains unpredictable in the sense that courts have to trade off all types of interests involved in a particular case. In cases where owner and artist of a work are separated from each other, artist’s right of integrity will be sharply limited. However, there is still room of discretion on courts at this circumstance. By and large, such flexibility stretches based on different jurisdiction. Generally speaking, civilian courts are relatively more likely to hold for artists than courts in common law jurisdictions. Similar jurisdictional divergence applies to colorization of black-and-white films – judicial decisions in common law countries are more reluctant to weigh for authors than civil law countries. This is another reflection of different level of restriction on moral rights.

26 Dickson, supra note 18 at 27.
27 Ibid at 26 - 28, see case Lacasse et Welcome c. Abbe Quenard (1934), Raymond Sudre c. Commune de Daixas (1936) and Crimi v. Rutgers Presbyterian Church in the City of New York (1949). In the French Lacasse case and the American Crimi case, frescoes of a church were destroyed owing to church owners’ objection and the court held against artists who sought relief for infringement of their right of integrity, the seemingly predictable explanation was that “all the rights of an artist … ceased on the sale of his work” but remained with the owner of the building; in the case Raymond, a sculpture was destroyed from the sculptor’s native village without his consent, and the French court held for the artist finally contending that the village commission had an obligation to publicly exhibit the artist’s work.
As is acknowledged that the behaviors of distortion, mutilation and other modification causing prejudice to authors’ honor or reputation are breaches of right of integrity, another debate on the right of integrity centers on the question of in what degree of such an alteration constitutes an infringement of moral rights. Alternatively, the question would be equally to ask “on what basis the determination of the prejudice of the honor or reputation of the author is to be made”.28 Suggestions are made on two bases, one is an objective basis in a manner similar to the assessment of action for libel or slander, and the other is a subjective basis – the author’s opinion – in assessing whether an infringement is prejudicial.29 The subjective manner is usually adopted by pro-author jurisdictions. By way of example, the French courts take the view that “the respect [for author] is due to the work in the form created by the author. It is not for the judge or any third party to express an opinion on the intention of the author; the right owner of the moral right is the only person qualified to exercise it…”30 Mira Rajan also suggests that the French courts focus almost entirely on the individual interest of the author, with little overt attempt to weight public against the author’s desire.31 However, no matter which criterion is to be adopted, reasonable or necessary alteration would be an effective defense or limitation on the infringement of right of integrity.

2.2 Not formally parts of moral rights:

2.2.1 Right of Divulgation

It is also variously called as “right of disclosure” or “right of publication” as it deals with the right to control first publication. Therefore, the right of divulgation is usually considered as the start of other moral interests, even indeed the start of the whole copyright, and is thus without any doubt overarching among all the other components of moral rights. The right of divulgation bestows an author complete authority over the decision of when, by whom, whether, in what form and on what term, his work will be made public for the first time.32 An author technically has the exclusive discretion to decide the manner to unveil and present his personhood as expressed in his work; any third party, even the owner of the existing work, without valid

29 Ibid.
30 Maria Mercedes Frabboni, “Chapter 12 France”, in Davis & Garnett, supra note 10 at 374. See case Jerome Lindon et SACD v. La Compagnie Brut de Beton.
31 Rajan, supra note 1 at 11.
32 Davis & Garnett, supra note 10 at 6.
reasons, cannot stop the author’s decision which is made to dispose with his own work. Following this reasoning, right of divulgation secures an author against any action of coercion by counterparty as well such as judicial seizure. That is to say, counterparty cannot unilaterally take any advantage of his or her debtor’s right of divulgation to pay off any money debts that individual author owes to him. Even the least pro-author country – the United States’ legislation grants no effects on such actions of coercion. The recognition of restriction on right of divulgation has long been recognized in practice. As a matter of fact, right of divulgation is among the trickiest moral interests that demand sharp limitations. Where should the entitlements of an author to decide disclosure issues of his or her work stop so that it will not counter the dissemination and circulation of the work? I suggest, such a discussion retain considerable value in practice. One of the burdens of my thesis is make reference from current acceptable legislation – to depict a generally feasible restriction policy.

2.2.2 Right of Withdrawal and Repentance

As Ysolde Gendreau contends, the right of withdrawal and repentance is the corollary of the right of divulgation, since it enables the author to withdraw the work from the public circulation and modify it. It may be simply known as “right of modification” or “right of retraction”. Unlike integrity right which negatively prevents others from modification, right of withdrawal and repentance is a positive right, which ensures an author to modify his/her works in his/her own initiative. Indeed, the theoretical foundation is obviously justifiable that only the author himself can determine the destiny of his personality by stopping, altering and whatsoever he/she wishes. However, this type of right is mainly recognized in the civil law heritage. Different from other branches of moral rights, the justification of right of withdrawal and repentance has been criticized a lot nonetheless based on the ground that it is quite easily to affect a transferee’s economic interests and therefore, the exercise of such a right has been limited to a large extent within an indemnity to the transferee.

33 Copyright Law, 17 U.S.C. § 201(e) (1976). It reads that: “When an individual author’s ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect... .”.
34 Gendreau, supra note 1 at 173.
2.2.3 Right of Access

Some commentators proposed right of access also be part of moral rights. It is the right of author to demand access to a work from the owner of the original work, such as a painting or sculpture, or a copy of the work, to the extent necessary for the making of reproductions or adaptations.\(^{35}\) And to me, this right is particularly significant to the recourse of recovery when a work is destroyed. In practice, few countries have incorporated such type of right into their moral rights statutes. This is regrettable especially for countries whose lawmakers are reluctant to grant destruction of a work the protection under right of integrity as discussed previously. Notwithstanding its theoretical justification, pragmatic disidentification strongly excludes such a right from my thesis for the sake of coherence and relevance.

3 A Comparison between Moral Rights and General Personality Rights – Why Protect Moral Rights Separately?

As we deem moral rights as personal, inalienable, unassignable and inprescriptible and it safeguards authors’ personality through their works – all these characteristics echo general personality rights which are usually accommodated under civil law sector, such as the right to life, the right to health, the right to human dignity, the right to personal image and the right to privacy, etc. For example, the new Civil Code of Quebec enshrines personality rights set forth in Article \(^{36}\); China, with a civil law heritage, protects right of life and health, right of personal name, right of portrait, right of reputation as well as right of honor under General Principle of Civil Law.\(^{37}\)

Nevertheless, moral rights are still disparate from general personality rights considering the following three aspects:

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\(^{35}\) Davis & Garnett, supra note 10 at 6.
\(^{36}\) Civil Code of Québec, Art. 3 C.C.Q. This article reads: “Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy. These rights are inalienable.”
1. The acquisition of rights. General personality rights accrue to a person upon his or her birth and ceased upon his or her death, they are fundamental rights to human beings. Birth is the only legal fact of a natural person to attract protection of general personality rights; while copyright presupposes the completion of the “creation of a work” (quotations as emphasizing) which is a legal action rather a legal fact – based on the identity of authorship. In fact, where there is no creation, there is no copyright – creation is one of its many preconditions of copyright protection. With that said, we can simply detect the inherent difference that general personality rights are self-evidently congenital at one’s birth, whereas moral rights as we discussed within copyright sector are not self-evident legal rights, they are prerogatives requiring intellectual rationalization to justify its existence and are acquired after one’s birth. Going forward, a doctrinal argument would speak volume for the difference between these two types of rights: General personality rights, as the eminent philosopher and jurisprudent Rousseau grappled with this problem at earlier time, are “human rights endowed by God” (quotations as emphasizing), they are as most fundamental as pertaining to human nature; however, moral rights are not naturally endowed by God, they are products of a dynamic social integration and of the game between assorted types of interactive rights and interests among a multitude of social stakeholders. Throughout the development of moral rights, unlike general personality rights which were cognized as a resultant triumph the bourgeoisie has fought for human rights during the Renaissance, they are creatures of technological advancement and social development. By quoting a notable dictum of the ancient Roman jurist Publius Iuventius Celsus who concerned law as “the art of the good and equitable”, 38 moral rights therefore base its justification on the goodness, justice and equitable relief for rights holders by seeking for balances between social stakeholders in a dynamic mechanism.

2. The laws governing the rights. It is grounded on the conception that general personality rights are elementary rights in comparison with moral rights, therefore they are commonly prescribed under civil law regime; however, with respect to moral rights, they are normally codified simply under copyright act.

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3. The duration of rights. It is uncontroversial that general personality rights of a person expire with the death of that particular person. They are premised on the survival of an individual person, they aim to protect the person per se. Nonetheless, moral rights’ duration has gained much more debates as I have indicated above. Extreme legislation is the French copyright law deeming moral rights to be perpetual but still with reservations of that sentiment thereof – only paternity right and integrity right survive an author’ death but the other two do not. Other copyright laws integrate moral rights coupled with economic rights into the whole copyright regime and therefore reason that moral rights subsist with economic rights.

Albeit similar to general personality rights, it is not difficult to extrapolate from my argument above that the core of moral rights protection does not lie in the author per se, but in his reputation, honor, personality, etc. – the persona as expressed in his work.

The interrelationship may be better understood by the following analyses:
To begin with, the right of integrity indeed guards an author against any distortion, mutilation or other unauthorized modification which is harmful to his honor or reputation or other personality interests. However, it is not equal to right of reputation per se: it is only a legitimate method vested to the author by law to protect right of reputation. A method to protect targeted general personality rights cannot be those targeted rights as such. Metaphorically, the well-approved technological protection measures (TPMs) conferred under the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), to copyright holders with digital content interests are effective self-assist remedies against those unlawful digital pirates. However, they cannot be “copyright” per se. By virtue of their pervasive presence in a complicated social architecture, multifarious rights coming from different hierarchies inevitably interact with each other, the guarantee of one type of right is always for the purpose to exacerbate the anticipation, acquirement or realization of another right (the latter is usually more fundamental or ranking higher in the rights hierarchy system than the former).

39 Dickson, supra note 18 at 39.
Likewise, such a means-end analysis applies to the right of withdrawal and repentance – also merely a method to ensure an author to achieve his reputation, honor or other general personality rights.

The relationship between right of divulgation and right of reputation can be understood from another analogous standpoint resembling the mean-end analysis – the “influencing and be influenced” analysis.(quotations as emphasizing) That is to say despite the fact that a disclosure of a work or other publication issues may be some factors that may impact an author’s reputation or honor, such an influencing factor can be by no means the right as such to be influenced.

In terms of the right of paternity, as I have argued in brief elsewhere though, there is no point in confusing the right to claim name and the right to claim authorship. The means-end analysis here would further justify what I have argued in early chapters – to indicate one’s name on his or her work is only one of its voluminous methods to claim authorship, and is thus distinct from the identity right as such it purports to protect. In addition, rights of authorship arises upon creation of a work, how or in what manner the author claim his or her authorship does not interfere with the fact that he has the identity of author upon his creation.

In a nutshell, moral rights are not as rigidly and absolutely protected as general personality rights under a constitutional regime, they are only effective measures to secure authors’ personal interests due to the fact of creation of a work and other ensuing legal nexus resulting from the creation of the work, whilst they are subject to changes with the development of social economy as well as restrictions to a large extent.
Chapter 3
Jurisprudential Analysis of Restrictions on Moral Rights

Motivated by the impulsion to compensate the lacuna in academic researches commenting on the restriction issues of moral rights and further put forward a set of proposals of my own this thesis will pause to examine ample justifications both theoretically and pragmatically for such a discussion in question.

1 Legitimate Foundations of Rights Restrictions

1.1 A Law and Economics Analysis

Law and economics analysis is an important approach to profuse areas of legal scholarship specifically when pertaining to property entitlements. Their central preoccupation is the question of choice under conditions of limited social resources. There are two models under the law and economics scholarship which are conventionally referred to as normative analysis and positive analysis.

1.1.1 Normative Analysis:

This style of analysis conventionally referred to as welfare economics. In the context of normative analysis, the concept of Kaldor-Hicks efficiency (also called cost-benefit analysis) can strongly speak volume of justifications for rights restriction. This concept deals with the question – would a particular collective decision (e.g. a particular change in legal rules or a particular legal policy) generate sufficient gains to the beneficiaries of the change that they could, hypothetically, compensate the losers from the change so as to render the latter fully indifferent to it but still gains left over for themselves. Such a statement sounds abstract and perplexing. Assume the famous “Kaldor-Hicks efficiency” criterion with no exception applies to moral rights restriction. What kind of restriction policy then, after “cost and benefit” analysis, will most improve social welfare? What status can be called the “maximization of social welfare”?(quotations as emphasizing) One can measure without difficulty with his or her mathematical sense that, only when marginal benefits equal marginal costs, the resultant welfare

42 Trebilcock, supra note 9 at 133.
will become maximized. The marginal benefits and marginal costs, in other words, when being balanced, can engender the optimal model of rights regime. A provocative and persuasive answer may be found in William Fisher’s essay, “Theories of Intellectual Property”, arguing that lawmakers are always trying to “strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations”. Such a “balance” would best interpret the balance between “marginal benefits” and “marginal costs”.

With the awareness of such a balance economically, restriction is justified to correct an ongoing biased moral rights regime in practice. In terms of what is the current “imbalance”? Section 2 of this chapter is going to deploy it further.

1.1.2 Positive Analysis:

Though gain less popularity than normative approach in academia, positive analysis would still prove to be a tenable perspective in property rights theory. Positive economics often referred to as “behavioral” or “predictive” law and economics, draws on findings from psychology to contest various features of the rational actor model in the way in which individuals process information and react to risks and opportunities.

A rational actor model is a key framework when one makes predictions of human behaviors under positive analysis. Albeit there are controversial standards (utility function maximization, material self-interest maximization and profit maximization) in observing whether an individual’s response is rational or not, we may still discern the consensus among these scholars that rational means “cost-minimizing”.

That is to say, according to positive analysts, most individual are motivated by cost-minimizing ways to choose the way they act in order to maximize their individual utilities. And this assumption helps to explain the reasonability of restrictions of moral rights – from the standpoint of legislators, if moral rights are not to be restricted to some extent (internalize private cost), it will generate negative externality (external cost – the sacrifice for other private interests) because authors are always in pursuit of maximization of their individual interest.

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43 Fisher, supra note 3 at 168.
44 Trebilcock, supra note 9 at 125.
45 Ibid at 126-129.
46 Ibid at 119.
1.2 A Sociological Jurisprudence Analysis

Sociology of law is another interdisciplinary approach efficient in explaining various legal choices. It combines both the two established disciplines of law and sociology. This methodology to study legal scholarship has been cultivated since a century ago and its paramount achievement referred to as “sociological jurisprudence” was originally dictated by the world’s most preeminent US socio-legal scholar – Roscoe Pound. Sociological jurisprudence has exalted traditional legal jurisprudence from concentrating on a logical and philosophical study of the law to the study of a so-called “dynamic law”. Consequentially, law was defined by adherents of sociological jurisprudence not as a system of stationary norms but chiefly as a “matrix of relationships”.

Pound’s deliberation on a rational individual, which as a comprising unit of the “matrix of relationships”, on one hand, entails an inherent nature of mutual cooperation with other individuals, whilst on the other, retains the nature of individualism. With that considered, Pound has posited that the conflicts between individual interests, between individual interests and public interests even between individual interests and the overall social welfare – all come down to lack of an effective social control on the inherent nature of individual human beings’ behavior. Pound has also advanced the “theory of social interest” which in point of fact lies as the core of sociological jurisprudence. Theory of interest was previously developed by Rudolf von Jhering, a German jurist, when he changed his jurisprudential position from legal formalism to legal instrumentalism, famously defining an individual legal right as a “legally protected interest” and asserting that the object of law is to serve social interest. The legitimacy of his theory was grounded upon its source in posited legislation needed to resolve potential conflicts between unsystematic individual interests. The resolution, in the asserting view of another German jurist Philip Heck appears to be a balance struck among those potential conflicting interests.

48 Ibid.
50 Ibid.
1.3 A “Balance” Theory in Intellectual Property Law

Indeed, copyright law, as well as other branches of intellectual property law, fleshes out both the abstract law and economics and legal sociological theory of “balance” by incorporating such a tenet in numerous legislations and case laws. Justice Walker of the United States Court of Appeals has written in his judgment of the well-known case *Computer Associates International, Inc. v. Altai, Inc.* that “copyright law seeks to establish a delicate equilibrium” between author’s interests and public interests. The Canadian Supreme Court has reiterated such a principle in the case *CCH* in 2004 explicating that copyright is purporting to “maintain the proper balance between the rights of the copyright owner and users’ interests”. The marked embodiment of the endeavor to strike a balance is the restriction of copyright such as fair dealing, compulsory licensing, finite duration of term, etc.

Generally speaking, copyright law partially targets to encourage incentives for the creation and dissemination of labor creation, to “promote Science and useful Arts” and its ultimate goal is to serve for overall social welfare or social interest. Assumingly, if authors’ rights, no matter moral rights or property rights, have become a hurdle of progress of arts and science in the context of social development, for the sake of cultural industry’s long-term interest, the overall welfare of mankind as well as the progress of useful arts and science in a long run, such individual authors’ rights whether morally or economically, should be limited insofar as to establish a delicate balance between not discouraging authors and avoiding the effects of monopolistic stagnation.

2 Pragmatic Foundations of Restrictions on Moral Rights

2.1 Conflicts between Moral Rights and Public Interests

An imprudent exertion of moral rights, in particular the right of divulgence and right of integrity, may easily challenge public interest in many circumstances.

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54 Supra note 52 at paragraph 2.
First, as we all know, “the sine qua non of copyright is originality”. Although the standard of originality has been open to controversy for over decades, a work as long as owing originality to its author should be subject to copyright protection. However, a question may potentially arise that works though originally created are not all proper subject deserving a full protection for the reason that such works may erode robust mindset or justice social values of individuals, especially to those adolescents who are psychologically and physically immature; worse still, there are works instigating disunity of a nation – which would unavoidably have an adverse impact on the public. Bearing that in mind, we have to refer to a secondary question: why do we give legal recognition to author’s intellectual activity? Is protecting author’s interest the final goal of a deliberate copyright regime? One initial answer is likely to be: Yes or no. The answer is indeed invisible to lay persons of legal scholarship. However, every person is supposed to retain the knowledge that culture is only a component of social ideology (i.e. the superstructure) and that superstructure serves the “economic basis” (quotations as emphasizing) ultimately. This notion was actually endorsed by the supreme court of the United States that “the economic philosophy behind the [protection of copyright]… is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare…” Public welfare – the law and economic conception perhaps is the best answer to explain what exactly “economic basis” at issue is. Also as one can recall, both from the law and economics and the sociological jurisprudence explication, public welfare is presumably supposed to override an individual author’s interest. Therefore, if disclosing a work is highly likely to jeopardize public welfare – marginal costs exceed marginal benefits, i.e. a “balance” in copyright regime cannot be retained ideally – its access to public should be limited to the extent where a “balance” can be reestablished. Practically speaking, when a work is totally scatological with not any good but only evil to lead public illusions, it should be prevented from publishing. For example, the creation of a book which told people how to organize terrorism crimes should be cut off from the outset of publishing chain. In situations where a work has already been published, modification or destruction may appear less offensive then.

The flip side, however, would be that, where a work is dangerous to public welfare when unpublished, such a work should be disclosed, even if the author requires it to be confidential or

56 Supra note 52 at paragraph 2.
the transferee has a contractual obligation not to divulge it, the author still might fail in claiming for breach of such legal or contractual obligation. For example, in *Hubbard v. Vosper*, the defendant Mr. Vosper was previously enrolled in a course taught by the authority of a church of Scientology, which was only available to members of cult. The plaintiff Mr. Hubbard was the inventor of the religious word “Scientology” who wrote numerous literary works about this cult and circulated these works only to members of cult. Those whoever took the courses of scientology were regarded by the authority as bearing the duty of keep these course materials confidential. However, Mr. Vosper did not complete the course. Shortly afterwards, he became disillusioned with scientology and published a book denouncing scientology using the so-called “confidential” information acquired during the course of his training and therefore became “fair game” that any scientologist could take action against with impunity. During the adjudication, the British court of appeal ruled that despite the fact that Mr. Vosper used information that the author claimed to be confidential, he may have a sound defense. Lord Denning stated that “there are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret”. Those claimed confidential information were too dangerous if practiced closed doors. It was the public interest that these goings-on should be made known. I personally propose that, though provocative enough, similar approach should be employed in trade secret law, that is to say when a trade secret is hazardous when practiced closed doors, the one who holds it can unveil it at a reasonable manner by his or her judgment without bearing any legal liability. The corresponding legitimacy is self-evident thus far. Back to moral rights issue, although this cases deals with fair dealing issues, but as far as I am concerned, it is one of best cases speaking volume of the legitimate ground to restrict authors’ right of divulgation.

A third situation that authors’ exercise of moral right may be undermined is that when a work was born with public safety concerns (most for artistic works, such as a sculpture, a construction design), the author’s right of integrity should be overridden. For example, there was a French case took place in 1976, in which the plaintiff, Roussel, a sculptor, had once erected a monument built from railroad ties in a park. A few years later, the monument disintegrated and the city had

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57 *Hubbard v. Vosper* [1972] 2 QB 84 (Court of Appeal).
58 *Ibid* at paragraph 4 of the second part of Lord Denning’s judgement.
59 *Ibid* at paragraph 5 of the second part of Lord Denning’s judgement.
the fragment removed. Roussel thus sued to have the work reassembled in the same spot but the court ruled for the city. It was noted by the court that there were public safety concerns and these concerns must prevail over personal rights. Likewise, another French court held that the architect of a corporate headquarters with a vast open entrance hall could not object when the company built temporary showrooms in that hall. Despite the architect’s complaints that the showrooms mutilated the entrance hall and its view, the court highlighted that the utilitarian purposes of the building and its corresponding modifications might be shield from infringement of right of integrity.

2.2 The Intrusion upon Other Private Rights

In deed authors normally have exclusive rights to dispose their intellectual works subject to copyright protection. However, this does not mean that these rights are enforced regardless of its potential illegitimate impact on interrelated rights of other individuals. Individual private right is a sound example. The legitimacy of copyright protection is partially constitutionally approved by conferring citizens with rights of expression and rights of speech. Unfortunately, in point of fact, a practically full and complete enjoyment of the exclusive copyright is subject to lots of limitations in context of a nexus of social relationships. A seemingly legitimate exercise of moral rights – say you are uploading a video clip to YouTube – may vulnerable to infringements of other individuals’ private rights on the ground that the video includes a shot at Peter (a hypothetical person) even as a minor background but without his knowledge and consent – you definitely have infringed Peter’s right of portraiture as long as people can spot him. The potential problems with suchlike intrusion on private rights cannot be exhausted here.

Works of cinematography are in point of fact a powerful weapon to infringe another individual’s right of portraiture or right of privacy, etc. To my knowledge, perhaps the best example to explicate the intrusion that exercise of moral rights have on individual private rights concerns the case of Jia, Guihua v. Youth Film Studio of Beijing Film Academy taking place in 1993 in China. The plaintiff Jia, Guihua was an austere rural woman living in an underdeveloped city in Shaanxi Province of North China Region, who was feeding on selling cotton candy in her local community. During filming, the film crew took the portrait of Jia Guihua as component of their

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60 Dickson, supra note 18 at 29.
61 Ibid at 18.
film without her consent for as long as four seconds and made Jia’s portrait accounting for a whole half of the film screen with high resolution recognizable to audience. The premiere of this film made Jia targets of public ridicule in her community. Acquaintances around her laughed at her unsightly appearance on the film and joked at her “star dream” as well. Her son was also sneered by classmates at school. Moreover, Jia herself had both physical and psychological problems on picture taking or video shooting, not to mention becoming a “background actor” of a public movie. Jia could not tolerate living in such a state suffering from mental distress and accordingly sued for infringement of her right of portraiture against the film studio. The court’s decision was not satisfying at the end of the day and thus sparked a furore in the Chinese legal academia. The aim I make the reference is to argue that the exercise of moral rights, for example, the right of divulgation and the right of integrity here in the particular case, should take other individuals’ private rights into consideration no matter by ex ante prevention or ex post remedy. As I have argued at length elsewhere, general personality rights, like right of portrait, which are generally endorsed constitutionally, are higher in context of legal hierarchy than moral rights which are prescribed under the department of copyright law. More importantly, we should be mindful all the time that, as theorists Philip Heck emphasizes we should strike a balance “among those conflicting interests that are involved”\textsuperscript{62} in the complexity of all kinds of stakeholders in the society.

Another problem which could not be taken lightly is the intrusion on private information through cyberspace. Ever since the accelerating development of digital technology, the Internet in particular, a threat to privacy has become unprecedentedly formidable. A disguised “lawful” operation of moral rights through cyberspace, eg, through various sorts of software bearing the technology of encryption, decryption, hacker, etc, has rampantly intruded a multitude of end users’ private domain(I will further explore the problem in the subsequent part 2.3).

In addition, a more thought-provoking line of argument may be less visible to majority – the “imbalance” of capability of writing and publishing between literate people who are probable to be authors and illiterate persons who lack the ability to write and thus circulate their works. The problem thus arises from the possibility that those literate persons may well probable to take advantage of their intellectual genius to defame whoever they harbor vindictive feelings towards

\textsuperscript{62} Spector, supra note 49 at 359.
but without ability to fight back through battle of words. In particular, literary works, including novels, dramas and poets are highly likely to be manipulated as instruments of aforesaid torts of libel or defamation. In reality, though freedom of creation and personality rights are both protected by legislation, they frequently may become at odds with each other at large. Especially with the proliferating dissemination of cyber-works, it has offered much more and easier access for one to defame others in a total anonymous or pseudonymous way.

2.3 The Impact Technological Evolution Has on Moral Rights

One of the truisms of intellectual property law is that it is driven by technological changes. Historically speaking, since 1970s, there are three predominant technological revolutions (the videocassette recorder, digital revolution and the Internet) that have continuously challenged traditional copyright regime, especially since the advent of Internet in the 1990s.

It is true that nowadays mounting problems on Internet have stretched beyond the capability of traditional copyright regime and have therefore become the major thrust to have the conventional copyright system redressed to be adaptable to the incessant digital revolutionary changes.

And from the perspective of moral rights, at one level, in context of the advancement of Internet, intellectual products become more and more easily to be disclosed and modified in cyberspace; consequently, it becomes much more difficult to identify authorship, namely the exact person that has created the digital work originally. A corollary of this situation is to make exercise of moral rights much more unpredictable and indeterminate, especially when a work remains pseudonymous or anonymous. At another level, mounting problems arise from another side-effect of technological development – a bunch of advanced software are developed purporting to assist average users with much easier access to a professional technique, which artificially lowers the threshold of originality to create a work in digital format so that a minimum exercise of skill and judgment of operation of software may result in a “creation” of a “copyrighted work”. This made it much easier to claim authorship and simultaneously claim moral rights.

In addition, another sensitive problem strikes me when concerning the influence of Internet over moral rights exercise – the technological protection measures (TPMs), such as encryption with

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subscriber or fee-based keys, which are implemented by authors to limit users’ access to their digital contents in cyber space. Indeed, TPMs with justifications sanctioned by international conventions seem to be sound and effective methods to protect right of integrity in digital forms, but are also not without problems contemporaneously. The more layers of protection measures an author place on his/her work, the more difficult the work finds its way to get to users, contemporary commercialization of digital contents in that sense to some extent hampers dissemination of works in public circulation. The detrimental influence of TPMs is going to be detailed as follows:

2.3.1 TPMs Go against Fair Dealing Doctrine

The Supreme Court of Canada made a new finding of fair dealing doctrine as user’s right rather than a defense for copyright infringement.\textsuperscript{64} Presumably, if fair dealing is user’s right, we should not set the threshold too high to capture as much user’s legitimate activities as possible but rather give it a liberal and broad interpretation. Yet TPMs which are gradually endorsed domestically and internationally have potentially worsened user’s rights. Generally speaking, there are two major problems with respect to TPMs within the fair dealing concern:

First of all, TPMs not only prevent unlawful action to digital content, but also excludes situations where fair dealing takes place. It remains true that it is justifiable for a copyright holder to fence their monopoly in order to disable others from trespassing their fenced area. But there is lesser justification to have such “fence” (quotations as emphasizing) preclude all persons, even including friendly visitors, from stepping into the owners’ personal area – letting them have no choice but to resort to authorization from the owner or pay certain amount of money to cheer the owner up. By analogy, fair dealing users when confronted with TPMs have to ask copyright holders for permits (license) vis-à-vis or pay for it even if they merely purport to use the work for doing research or other private study by appropriating barely a small portion; otherwise, they have no choice but seek for circumvention of those protection measures. This is a misallocation and inefficient operation of finite resources. To make matters worse, it is really an intricate situation where fair dealing users once make it successful in circumventing TPMs, because even if they succeed, they have little chance to win a copyright prosecution – once confronting a copyright infringement action, the only chance for them to survive the suit is to prove that the

\textsuperscript{64} Supra note 53 at paragraph 48.
protection measures are ineffective. Practically speaking, such a burden is unduly heavy for them to adduce required evidences.

Secondly, the statutory prohibition of circumvention is in practice necessarily coupled with prohibition of devices used to circumvent. As implied above, by virtue of costly technology to circumvent TPMs and to insure themselves against frivolous lawsuits as well, an individual fair dealing user normally would prefer the assistance from a third party bearing powerful technological capability. However, the prohibition of circumvention alongside with its devices would by every means render such a countermeasure totally unaided.

Thus far, the right of integrity under the effective protection of TPMs is ensured, yet user’s rights are largely threatened.

2.3.2 TPMs Have Encroached Public Domain

It becomes trite to say now that copyright law seeks to establish a delicate equilibrium between authors and public. On one hand, it affords protection to authors as an incentive to creation, and, on the other, it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation. While we are as aware as anyone that the line between public and interest is difficult to draw and that nobody has ever been able to fix that boundary, and nobody ever can. On this footing, the legitimacy of TPMs has to be taken with a large pinch of salt. Perhaps, “balance” here as everywhere, is the only utilitarian principle we should bear in mind when we contemplate cases, legislations and policies.

Obviously, back to the “fence” analogy, it is incontestable for one to fence an area around his or her private property, but it is illegitimate to fence an area in the public domain. TPMs, which target the overall public access to copyrighted works, are therefore lack of sound justifications in law. Relative concerns are twofold:

First and most obviously, the ratification of TPMs’ protection will render copyright protection term meaningless. Under monism, the term of moral rights goes the same with economic rights, namely, the life of the author plus 50 years (in some countries it may go up to 70 years). Once  

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65 Supra note 52 at paragraph 2.

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the term expires, the formerly copyrighted work enters the public domain and may be freely exploited by anyone. However, with the existing technological measures, the formerly copyrighted works will never enter public domain if the corresponding TPM is not unlocked, which followed by the result that nobody could ever be able to access said works unless they are able to grapple with these protection measures, needless to say the possibility of modification or other disposal of the work.

Furthermore, TPMs treat other publicly available resources with no difference. Though unintentional, it is highly likely that the protection measures would include public domain elements into the ambit of its “protection”. More astoundingly, it is indicated that nowadays, there is an increasing trend of plundering public domain resources by TPM implementers in cyberspace driven by their private interests. Such a phenomenon is by no means beneficial to the “balance” between public and author in copyright regime and to the overall social welfare as well.

2.3.3 TPMs Conflict with Exhaustion Doctrine

On one hand, divulgation right empowers an author to control the destiny of their works; on the other hand, once an author chooses to lay his work open to public inspection, he would lose certain control over his work after first publication subject to the well-settled “exhaustion doctrine”. The essence of disclosing a work is to make this work accessible to the public and make it rotated in circulation. On the contrary, TPMs tend to entitle authors or their representatives with a “power” indeed, to perpetuate control on their published works online and that phenomenon is virtually known as “information monopoly”. This goes against the deliberated doctrine of “first sale”. In fact, after first sale, author still retain right of withdrawal and repentance and that is intentionally designed to offset the curtailment of lost powers of those authors. TPMs in this concern have tipped the delicate balance back to “authors”.

2.3.4 TPMs March against User’s Privacy

The proliferation of TPMs, as reported, are virtually manipulated, to the detriment of users, rather than protecting digital contents. Out of self-interests, the manipulation of TPMs has increasingly threatened users’ privacy in some covert manners by excuses of protecting authors’
right of integrity in cyberspace. For instance, an author (also a manipulator) can use TPMs in a way far less obvious for the purpose of tracking and monitoring an end-user’s information but under the banner of “legitimately prevent their works from being modified”. (quotations as emphasizing) It is reported that in 2001, the Electronic Privacy Information Center (EPIC) and a coalition of consumer advocacy groups filed complaints with the Federal Trade Commission (FTC) detailing the privacy risks associated with users’ passwords. It is said that the Microsoft MSN had illegally shared users’ passwords without users’ consent. Those complaints resulted in an investigation and consent order with Microsoft.\(^\text{67}\)

In light of the development of Internet technology and the expanding of digital content market, there is every indication that the malicious manipulation of TPMs, in a covert manner but under the banner of “digital content protection” (quotations as emphasizing) – specifically protection of their right of integrity in moral sense, is marching against users’ legitimate interest, especially users’ rights of privacy.

Grounded in the discussions above, the rights assigned to copyright owner have exhibited a tendency toward power expansion, and the possible consequence is that the anticipated balance between encouraging creation and dissemination of works, and obtaining a just reward for the creator is losing its way.

Then what is the way out to compensate the “imbalance” of current moral right regime? How to restrict moral rights to the perfect extent applicable? The following chapter which canvasses a wide variety of ponderable legislation tries to inspire us with some thoughts.

\(^{67}\) “EU: Microsoft to Modify Passport,” online: Electronic Privacy Information Center <http://epic.org/privacy/consumer/microsoft/passport.html>.

Chapter 4
Modern Legislation on Moral Rights Restrictions

In this chapter, I investigate important legislation (including case laws) in moral rights area, in particular try to figure out the philosophy underlying the statutory restrictions. I singled out several typical countries from both civil law and common law jurisdictions. But before dipping into domestic legislation, it would be wise to take an overall look at some influential international conventions.

1 International Restrictions on Moral Rights

The international legislation governing moral right restriction is not intricate. The Berne Convention for the Protection of Literary and Artistic Works has only set forth one provision to regulate moral rights – Article 6bis; and only formally integrated right of paternity and right of integrity into its content. On top of that, this stingy provision has simply provided the minimum standard of restriction for contracting parties to comply, which is “be prejudicial to the author’s honour or reputation”. A couple of ensuing WIPO treaties known as WCT and WPPT have consistently taken the same tack. It is worthy of underscoring within WPPT, moral rights are granted to the performers for the first time and corresponding restrictions therefore applies as well.

2 Typical Civil Law Countries

2.1 France – Intellectual Property Code [CPI]

As I have indicated above, moral right has its origins in France. The word “droit moral de l’auteur” was the earliest version of expression of moral rights several hundreds of years ago. Due to its particular historical background and judicially created doctrines, France employed a

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68 Supra note 7, Art. 6bis (1). It reads: “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 of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.”
69 Code de proprieté intellectuelle C.P.I.
70 See supra note 10.
pro-author position with respect to moral rights protection. France even acknowledges itself as
being dualist as regards the duration of moral rights and economic rights. French legal literature
and courts concur that moral rights are perpetual due to their conviction on the proposition that
moral rights live on because the works to which they are linked normally survive their authors’
death and moral rights are indivisible from the works. In addition, unlike the Berne Convention
and most other domestic laws, French legislation does not require the authors to show any
prejudice to their honor or reputation in the exercise of their moral rights (here in particular right
of integrity), because the French court believed that “moral right is attached to the person of the
author, it carries the absolute right to respect for the work, whatever its merit or purpose, so that
any substantial alteration thereof constitutes an infringement of this right”.71

Despite the strong protection of moral rights in France, limitations on moral rights still emerge
from both the legislation and case laws. There are generally two types of works that weaken
authors’ moral rights.

i. Adaptations or Derived Works

The author who has granted a right of adaptation and translation of his/her work normally
maintains the right to have his/her original work respected, but by the very nature of the
aforesaid economic rights which have been transferred, the work can be modified without
penalty.72 This idea grounds its justification on the consideration that an adaptation may
ineluctably entail a shift of genre or form of expression to become operable or economically
valuable (e.g. a adaptation from a literally work to a cinematographic work) which though in
copyright sense is incontestable “distortion” to the original work. Such “distortion” is necessary
and reasonable. In cases where litigations involve an adaptation or derived works, courts tend to
be reluctant to hold that there was distortion of the original work.

Parody is another good example of derivative works. According to case law, a parody is less
likely for a French court to rule as an infringement to right of integrity of the author when
someone else adapted a work into a parodied version, but rather vest parodist some extent of
freedom with totally impunity instead.

71 Frabboni, supra note 30 at 374. See case Hong Yon Park et SPADEM v. Association des Amis de la Chapelle de la
Spalpetriere.
72 Frabboni, supra note 30 at 378.
ii. Utilitarian Works

There are mainly four sub-types of utilitarian works.

a. Works of Architecture

Works of architecture have a distinctive characteristic that they are easily to be merged with ownership of the architecture once finished, thus may potentially engender conflicts with owners of the architectural work.73 In this situation, a court tends to grant more rights of control to owners of architectural works than they would recognize with respect to owners of other types of works.74 The underlying justification is the presumption that realizing an architectural work is usually much more costly than that of a statute or painting.75 That is only part of the story, French courts are also aware of the functionality of architecture based on owners’ needs which would be better exerted in owner’s initiative.

As I have articulated in Section 2 of Chapter 2 already, the foregoing reasoning applies to works of visual arts which have become part of architecture.

To summarize, the moral rights of a group of authors whose works have been merged into owner’s property, become weaker than that of authors of other types of works.

b. Works of Applied Arts

In large part, its legitimacy derives from the fact that works of applied arts are often made to fulfill a specific function. It is therefore logical that the user may be permitted to make alterations if needed in order for the work to be operated as required.76

c. Computer Programs

There are expressed restrictions on integrity rights of software authors in the French CPI. Article L. 121 – 7 of this code establishes that “except for any stipulation more favorable to the author, such author may not … oppose modification of the software by the assignee of the rights referred

73 Ibid at 380.
74 Ibid at 381.
75 Ibid at 380 – 381.
76 Ibid at 381.
d. Databases

As per French case law, it highlights the situation when a work has been integrated into a database, the exercise of moral rights of a pre-existing work’s author cannot claim any moral right due to the integration of his work. Oddly enough, as I observe on this issue, the Canadian legislation has an exactly opposite point of view towards the same issue. Section 2.1(2) of the Canadian Copyright Act states that “the mere fact that a work is included in a compilation does not increase, decrease or otherwise affect the protection conferred by this Act in respect of the copyright in the work or the moral rights in respect of the work”. In situations where there is overlapping copyrights, it seems that the Canadian policy holds in favor of the author. The reason I suppose is because Canadian lawmakers believe that the pre-existing work’s author retains an unmodified copyright including moral right in his or her own contribution even if the author of the database (work of compilation) has gained another copyright through his or her “selection or arrangement” of those individual works. I would agree that this line of thought is true. However, when read section 2.1(1) in combination with section 13(3) under the Canadian act, there is no difficulty to explore the underlying mystery. The wording “otherwise than as part of a newspaper …” appearing in the last sentence of section 13(3) indicates that section 2.1(2) does not apply in situations of “as part of [the compilation work]”. Back to the French legislation now, on a second thought, the reason is manifested thus far by the words “integrated into” – another expression of saying “part of”. The two statutes are not opposite in fact because they stand on the same position on the “public interest” proviso, as Justice Abella provides the jurisprudential underpinning in his judgment for the case Robertson v. Thomson Corp., explaining how public interest interferes here: “The public interest is particularly significant in the context of archived newspapers. These materials are a primary resource for teachers, students, writers, reporters, and researchers. It is this interest that hang in the balance between the

77 Ibid at 382.
78 Ibid at 383.
79 Canadian Copyright Act, R.S.C. 1985 c.C-42, ss 2.1(2).
80 Ibid, s 2.
competing rights of the two groups of creators in this case, the authors and publishers." With explicated above, there is no confusion upon such sort of rule as acceptable as universal exception to moral rights protection in principal.

Public interest such as public safety is another consideration which overrides moral interests into the bargain in the French law. Its solid justification has been explained in Chapter 3.

Another explicit proviso reflecting French lawmakers prudence over moral rights restriction is Article L. 121 – 3 of the Code which establishes that “in the event of manifest abuse in the exercise of the right of disclosure by the deceased author’s representatives, the first instance court may order any appropriate measure [against such abused exercise of right of disclosure]”.

2.2 Germany – Germany Copyright Law

To reiterate, Germany is a typical monistic country with respect to moral rights duration. In German copyright law, only right of disclosure (Article 12), right of paternity (Article 13) and right of integrity (Article 14) are statutory recognized, but it does not preclude the rest components of moral rights from existing in German case law.

The protection of moral rights in Germany is relatively not as radical as in France and its relevant statutes are much easier to ascertain as well.

According to the Germany copyright law coupled with judicial decisions, differentiating from the French law as illustrated above, it is demonstrated that in Germany the right of integrity is not an absolute discretionary right of the author, but that in almost all cases, the courts try hard to balance the moral interests of the author against counter-interests of the user on a case by case basis; it is only when the final assessment shows its preference with author that the author can win. In the judicial practice, there are well-settled “three-step test” on the assessment of such a balance:

82 Refer to the section of “conflicts between moral rights and public interest” of this thesis.
83 Adolf Dietz, “Chapter 13 Germany”, in Davis & Garnett, supra note 10 at 420.
84 Ibid.
1. Make sure that the criterion of distortion or mutilation of the work under Article 14 be satisfied;\(^85\)

2. Establish whether there is prejudice to the author’s moral interests;

3. Consider whether in the framework of the balance of interests the author’s moral interests should prevail, i.e. whether the author could not, in good faith, refuse to allow authorized users to make the necessary changes.

Going forward, based on the principle of “reasonableness” or “good faith”, as anchored in Article 39(2), the author is deemed to have consented to the changes if they were foreseeable.\(^86\)

To be more precise, the right of integrity in particular, is subject to four imitations: \(^87\)

1. The provisions of Article 39 apply, so that alterations to the work and its title which the author cannot reasonably refuse are permissible;

2. Certain alterations are permitted where the purpose of the use of the economic right so demands, such as translations or extracts and transpositions into another musical key or, with respect to artistic works and photographs, conversion to a different scale, to the extent required by the method of reproduction.

3. When Article 46 allows compilations for religious, school, or other instructional use to be made in return for remuneration, but such restriction is subject to strict limitation.\(^88\)

4. In the special field of cinematographic works, the special rule limiting author’s moral right of integrity in Article 93 makes gross distortion or other gross mutilations of such works actionable.\(^89\)

\(^85\) Urheberrechtsgesetz (UrhG), 9.9.1965, BGBl. 1994, § 4, Art. 14. It reads that: “The author shall have the right to prohibit any distortion or any other mutilation of his work which would jeopardize his legitimate intellectual or personal interests in the work.”

\(^86\) Dietz, supra note 83 at 420.

\(^87\) Ibid at 420, 421, 431.

\(^88\) Supra note 85, § 6, Art. 46.

\(^89\) Ibid, § 1, Art. 93. It reads that: “The authors of a cinematographic work and of works used in its production, and the holders of neighboring rights who participate in the production of the cinematographic work or whose contributions are used in its production may prohibit in accordance with Articles 14 and 83 only gross distortions or other gross mutilations of their works or of their contributions, with respect to the production and exploitation of the cinematographic work. Each author or right holder shall take the others and the film producer into due account when exercising the right.”
In addition, there are specific limitations as regards right of paternity. Article 63(1) third sentence provides that “There shall be no obligation to acknowledge sources if no source is given either on the copy of the work used or with the reproduction of the work used and if no source is otherwise known to the person entitled to reproduce.”

Last but not least, similar to French legislations which I skipped over previously, with respect to performers’ moral rights, only principal performers are entitled to moral rights, i.e., other performers’ moral rights other than the principal’s are restrained sharply.

2.3 Japan – Copyright Law

At first glance, yet Japan has a certain strength of restrictions on moral rights which is manifested by its systematic and concrete limitation provisions of the Japanese Copyright Law, its level of moral right protection is still low-pitched by contrast to common law jurisdictions. For example, unlike the majority countries, Article 50 of the Japanese Copyright Law highlights that “fair practice” (equals “fair dealing” in common law sense) provisions is not applicable to moral rights. In other words, fair dealing can limit economic rights but cannot limit moral rights. Though explicitly presented here, there are still provisions going against such statement which concerns the reservation of “fair practice” doctrine.

I am going to make a summary below of a statutory reading of the moral rights’ restrictions in the Japanese law:

i. Restrictions on the Right of Paternity – Article 19(2) – (4)

Once a work has already been published, Article 19(2) provides that a person using the published work “may indicate the name of the author in the same manner as that already adopted by the author” if no contrary intention declared by the author. The text ostensibly addresses the only situation where an author has indicated his/her name. However, the subtext suggests that if a

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90 Ibid, § 6, Art. 63(1).
91 Chosakukenhō [Copyright Law] Law No. 48 of May 6, 1970 art. 50, as last amended by Law No. 53 of Jun. 19, 2009.
92 See supra note 91.
93 Ibid, art. 19(2). It reads that: “In the absence of any declaration of the intention of the author to the contrary, a person exploiting his work may indicate the name of the author in the same manner as that already adopted by the author.”
work remains pseudonymous or anonymous, any person may lawfully exploit it without tracking the author.

The following subsection Article 19(3) reads more dreadly “It shall be permissible to omit the name of the author where ... there is no risk of damage to the interests of the author in his claim to authorship in the light of the purpose and the manner of exploiting his work and in so far as such omission is compatible with fair practice.”94 A parallel provision applies to performers.

In addition, state power can also override paternity right in some occasions. Article 19(4)(i) and (ii) stipulate that when an administrative organ makes an administrative document available pursuant to a request made under the Information Disclosure Law or its pertinent regulations, it can either indicate the author’s name in the same manner as that already adopted but the author, or even “omit”(quotations as emphasizing) the author’s name in the case of documents only partially disclosed as per Article 6(2) of the Information Disclosure Law. Equivalent provisions apply to performers.95 This provision is open to critique though in many other countries especially the common law allies in the suspicion of contempt on author’s human rights; Japan, however, has its own national understating of the justification on such a provision based on its unique national conditions, cultural traditions as well as its jurisprudential convictions.

ii. Restrictions on the Right of Integrity – Article 20(2)

Article 20(2) specifies that the exercise of right of integrity “shall not apply to the following modifications:
(i) change of ideographs or words or mother modifications deemed unavoidable for the purpose of school education...;
(ii) modification of an architectural work by means of extension, rebuilding, repairing or remodeling;
(iii) modification which is necessary for enabling use on a particular computer a program work which is otherwise unusable on that computer, or to make more effective the use of a program work on a computer;

94 Ibid, art. 19(3).
95 Kristn Lingren, “Chapter 26 Japan”, in Davis & Garnett, supra note 10 at 779.
(iv) other modifications ...which are deemed unavoidable in the light of the nature of a work as well as the purpose and the manner of exploiting it.” 96

By and large, two categories of consideration dominate the rationalization of these provisos, namely utilitarian considerations and the public interest concern.

iii. Restrictions on the Right of Disclosure – Article 18 (2) – (4)

Japanese law generously grants a considerate statutory foundation on restriction of right of disclosure as well. Under Article 18(2), the author is presumed to have consented to certain actions regarding his or her right of divulgation: 97

(i) when an undisclosed work transferred by the author, the author is presumed to have consented to the offering and making of the work publicly available by exercise of the transferred copyright;

(ii) when an undisclosed artistic or photographic work transferred by the author, the author is presumed to have consented to the public exhibition of the original work;

(iii) when the copyright ownership of a cinematographic work belongs to the producer, the author is presumed to have consented to offering and making the work publicly available by exercise of the copyright.

Same as limitations on paternity rights, state power can prevail upon individual author’s right of divulgation. That is, as addressed by Article 18(3), government organizations are entitled to disclose a work directly unless contrary intention is declared by the author.

Furthermore, Article 18(4)(i) – (iv) essentially nullify right of disclosure where the public interest is deemed to override an individual’s interest in non-disclosure. Under these provisions, specified public entities or officials may, without impunity, made such undisclosed work publicly available when such disclosure, generally speaking: 98

a. is necessary to protect the life, health, livelihood or property of a person or persons;

b. is made at the discretion of the administrative organ when deemed essential for the public interest; or

96 Supra note 91, art. 20(2).
97 Supra note 95 at 790–791.
98 Ibid at 791–792.
c. is made in the course of public servant’s performance of his official duties.

I found it difficult to give credit to b and c circumstances since I am not that optimistic to ensure that public or administrative power not be abused over legitimate individual interest without any further substantive or procedural regulations and it thus renders the provisions in question totally of no sense.

At first blush, the civilian countries have deliberate efforts to craft rules in order to restrict moral rights, however, it is hard to tell whether such set of restrictive system works as ideal as expected. Before approaching the answer, let’s just take another glance at the common law world.

3 Typical Common Law Countries


The UK has come a long way from initially suspicious on moral right to a significant endeavor on moral rights recognition and protection against its historical background through the enactment of the Copyright, Designs and Patents Act 1988.

The UK version of moral rights includes four components: right to be identified as author or director (right of paternity), right to object to derogatory treatment of work (right of integrity), right against false attribution and right to privacy of certain photograph and films.

With respect to right against false attribution, strictly speaking, as one can recall from Chapter 2, it is not considered as the legitimate jurisdiction of copyright because there is not actually a creation of a work. Nor is the right to privacy of certain photograph and films which, as one can refer to section 3 of Chapter 2, is a proper subject of general personality rights. This is the first point that reflects a careless and ambiguous understanding of moral right regime in the UK statute. However, I don’t want pause to explore more on this issue here because it is not pertaining to moral rights restriction issues.
Nevertheless, the crux of the matter is on the first two types of rights: right to be identified as author or director (right of paternity), right to object to derogatory treatment of work (right of integrity).

i. Restrictions on the Right to be identified as Author or Director - Right of Paternity

Unlike provisions of Canadian copyright law which will be illustrated subsequently, there is no aspect of the right to remain anonymous within right of paternity reflected by section 77. Reading this section in conjunction with section 78, the discrimination of right to anonymousness is consistent with its requirement that the right of paternity must be asserted in the manner prescribed under section 78 (that is to say authorship must be identifiable). 

Nonrecognition of a right is substantive restriction on such a right.

The right is further restricted by a serious of exceptions. For instance, it does not apply to computer-related works, employee’s works, public-interest-related works, etc. and this is as kind of a mild restriction as the civilian logic which is acceptable.

ii. Restrictions on the Right to Object to Derogatory Treatment of Work – Right of Integrity

In addition to inherent limitations to integrity rights, namely, be prejudicial to the author’s honor or reputation as in compliance with the Berne Convention, there are several extra limitations as specified by section 81 whose scope is approximate to the scope of section 79 as exemptions of right of paternity.

3.2 Canada – *Copyright Act*

There are two types of statutory moral rights pursuant to subsection 14.1(1) (right to the integrity of the work and right to be associated with the work or to remain anonymous) and section 28.2(nature of right of integrity) of the Canadian *Copyright Act* explicitly and implicitly.

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99 Gendreau, supra note 11 at 190.
100 *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c 4, ss 79(2) to (5).
101 *Ibid*, c 4, ss 81(2) to (5).
102 Supra note 79, s 14.1(1).
i. Restrictions on the Right to be Associated with the Work or to Remain Anonymous (Right of Paternity)

The right of paternity is mentioned in subsection 14.1(1) by the last sentence, which established three circumstances: real name, pseudonym and anonymous. The exercise of the right of paternity is subject to several limitations.

Firstly, the elaborated wording of subsection 14.1(1) clearly demonstrates that paternity right shall only be exercised “where reasonable in the circumstances, to be associated with the work…” . The philosophy behind this statutory condition is the fear that the paternity right could be invoked in a capricious manner at any moment and that the stability of commercial transactions would thus be at the mercy of an author’s whimsical fancy. Such a restriction is lethal to authors in practice because whenever they want to claim the right of paternity, they have to prove “reasonableness”. Immersion in such a heavy procedural onus for authors, however, suggests disguised limitation of moral rights.

In addition, it was not until 1997 that works of sound recording has become a proper subject matter subject to right of paternity.  

Moreover, according to subsection 64(3), any moral right protection will not apply to designs of useful article or artistic work which is reproduced or used for producing for more than fifty in quantity. Moreover, as per subsection 64.1(1), it is no infringement for certain acts to be taken pertaining to utilitarian function of useful articles. The right of paternity thus falls into these exceptions.

ii. Restrictions on the Right to the Integrity of the Work (Right of Integrity)

The right of integrity is subject to a universally significant limitation stated under subsection 28.2(1) claiming only causing prejudice to the author’s honor or reputation can be actionable.

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104 Gendreau, supra note 11 at 176.
105 Ibid at 175 – 176.
106 Supra note 79, s 64(3).
107 Ibid, s 64.1(1).
108 See supra note 103.
With respect to the definition of “prejudice” to the author’s honor or reputation, the following two subsections respectively delimit the ambit of such a prejudice:

a. Subsection 28.2(2) facilitates the proof of prejudice by deeming the existence of the prejudice when the distortion, mutilation or other modification is that of a painting, a sculpture or an engraving.\(^{109}\)

b. Subsection 28.2(3) delineates certain spatial changes or conservation effort may not be prohibited acts:
   - A change in the location of a work;
   - A change in the physical means by which a work is exposed;
   - A change in the physical structure containing a work; and
   - Steps taken in good faith to restore or preserve the work.

The first three exceptions represent Parliament’s decision to give priority to an owner’s right to move and display a work, without changing the visual aspect of a work, over an author’s interest in having the work exposed to the public as envisioned. This thought is aligned with the civilian thoughts on architectural work or work of visual arts which is easily to be merged with the ownership of the targeted property. Consideration on public safety is another uniform code in dealing with moral rights restriction. In Canadian case law, there is a famous case *Theberge* dealing with right of integrity and the court ruled that a change in “physical structure containing the work” within subsection 28.2(3) does not constitute infringement of integrity right.\(^{110}\)

As can be seen, prudence does indeed seem to be the hallmark of the Canadian moral rights provisions.\(^{111}\)

iii. Time Limit for Civil Actions for Moral Rights

\(^{109}\) Gendreau, supra note 11 at 178.

\(^{110}\) *Theberge v. Galerie d’art du Petit Champlain Inc.* [2002] 2 S.C.R. 336 (SCC) at paragraph 58. In this case, the respondent Theberge was a great Canadian painter. He wanted to stop the appellants who produce poster art from transferring authorized reproductions from a paper substrate to a canvas substrate for purposes of resale. Justice Binnie found that the change in substrate at issue constituted a change in “physical structure containing ”, as per subsection 28.2(3) of the Act, such a change “shall not, by that act alone, constitute a distortion, mutilation or other modification of the work”.

\(^{111}\) Gendreau, supra note 11 at 178.
The Canadian law has another restriction code way beyond general – a time limitation for actions for moral rights protection. According to subsection 41(1) of the Act, not only time limit applies to civil actions for moral rights, but this time limit is rather as short as three years.\textsuperscript{112}

iv. Other Limitations

Performers under the nascent Copyright Act are not entitled with moral rights protection. That is why the Parliament are continuously introducing bills (e.g. Bill c-60, Bill c-61, etc.) to upgrade current legislations to fulfill its conventional obligations under the WIPO treaties.

3.3 The United States of America – Visual Artists Rights Act of 1990 (VARA), also Section106A under the US Copyright Act

Rooted in the inherent common law apprehension of moral rights that it is highly likely to thwart the exercise of economic rights, the US takes the most mistrust view upon moral rights and such suspicion towards moral rights has remained and continues to be even more higher in the cultural sector than that prevailed in the UK and Canada.\textsuperscript{113} With that said, moral rights protection is the most repressed in the US law and correspondingly, its restriction is the most stringent.

Albeit with plenty of federal and state legislation on moral rights, the level of protection still remains chaotic and protective legislation is lack of systematicness.

However, landmark legislation worthy of mentioning which firstly and formally introduces moral rights is the Visual Artists Rights Act of 1990 (VARA). Regrettably, as its name indicated, it merely protects visual artists’ moral rights and notwithstanding the stingy protection, there are extraordinarily voluminous extra restrictions.

First, the scope of eligible works is subject to severe limitations. To attract moral rights protection, a work must qualify as a “work of visual art” under section 101 of the US Copyright Act and not fall within any of the exceptions.\textsuperscript{114} Basically, there are two kinds of works recognized as “work of visual art”: one is “a painting, drawing, print, or sculpture” and the other

\textsuperscript{112} Supra note 79, s 41(1).
\textsuperscript{113} Gendreau, supra note 11 at 193.
\textsuperscript{114} Kristn Lingren, “Chapter 28 United States of America”, in Davis & Garnett, supra note 10 at 863.
is “a still photographic image produced for exhibition purposes only”. In addition, each work must only be produced for 200 or fewer and must be signed and numbered. Whist many other types of works are excluded from the ambit of eligible works: works with utilitarian purpose (e.g. poster, map, globe, chart, technical drawing, etc.), works made for hire and works not subject to copyright protection (e.g. a work does not own originality to the author, a work whose subject matter is not apropos). This policy, somehow, by restricting the qualification of protected work is the one of most formidable and deadly restriction of moral rights.

Second, in terms of allowable duration of moral rights, the act casts different attitudes towards works produced before and after the year 1990 which is the time of the enactment of the VARA. For works created before 1990, when the author also owns the economic rights at that time, moral rights last as long as the economic rights – substantially known as monism. However, as for works created after 1990, moral rights last even shorter – expire upon author’s death – a thoroughly opposite viewpoint of French position.

The formally recognized moral rights are also only two types involved under the act, namely, right of paternity and right of integrity.

i. Restrictions on the Right of Paternity

As seen above, the definition of a “work of visual art” has already limited the scope of qualified works substantively, however, section 106A(c)(3) further shrinks its horizon. Under this section, the paternity right does not apply to any mass reproduction or use of work in connection with books, periodical or other commercial media. An author thus will have no recourse against a third party who uses their work in a commercially propagandized media without indicating their authorship.

115 Supra note 33, § 101
116 Ibid.
117 Ibid.
118 Gendreau, supra note 1 at 196.
119 Supra note 33, § 106A(c)(3). It reads that: “The rights … shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of “work of visual art” in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).”
Nevertheless, it is understandable that in certain circumstances, an author’s right to prevent use of his name in the event of a prejudicial modification will be limited if the work of visual art at issue has been incorporated into a building.\textsuperscript{120}

Last but not least, “fair use” is also a tricky defense to circumscribe paternity rights.

\textbf{ii. Restrictions on the Right of Integrity}

Unexceptional to the Berne Convention and the most other countries, only distortion, mutilation or other modification of the work that would be “prejudicial” to his honor or reputation would trigger integrity rights protection. However, in the US law, such “prejudice” provision set the threshold much higher for the author to prove than otherwise prescribed in other legislation – namely the author must adduce evidence of “intentional” alteration. Mere negligent or even grossly negligent cannot offence such a right. In addition, alterations which are resulted from natural consequences of elapse of time, nature of the material that are used, conservational result and public presentation can also shield one from infringement to right of integrity.\textsuperscript{121}

Furthermore, like paternity right, integrity right also does not apply to any mass reproduction or use of work in connection with books, periodical or other commercial media; fair use defense and works incorporated in buildings also exert significant functions to confine such a legitimate right.

There is an additional kind of work having the capacity to impede the exercise of right integrity – “site-specific” art – which is artwork that takes into consideration the natural environment in which it is installed or in which one of the component physical objects is the location of the art.\textsuperscript{122} Yet it is furiously argued that a relocation of a “site-specific work” falling within the scope of “visual art work”, constitutes mutilation or distortion or even destroyed the work.. The answer is thus far from clear.

\textsuperscript{120} Lingren, supra note 114 at 873.
\textsuperscript{121} Supra note 33, §§106A(c)(1) to (2). The provisions read that: “(1) The modification of a work of visual art which is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification described in subsection (a)(3)(A). (2) The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification described in subsection (a)(3) unless the modification is caused by gross negligence.”
\textsuperscript{122} Lingren, supra note 114 at 880.
Surprisingly enough, same act additionally addresses the solution of destruction of a protected work – render it as actionable.\textsuperscript{123} However, this protection confronts strict limits. First, this protection is subject to requirement of “recognized stature” and only an “intentional” or “grossly negligent” destruction permits an author to recover damages under the act. To reiterate, the natural consequences of the passage of time or of the nature material that are used, as well as the result of conservation or the public presentation do not constitute destruction.\textsuperscript{124}

The reason accounting for the heterogeneity of U.S. moral rights protection, as far as I am concerned, is owing to the fact that the U.S. has the most prosperous cultural industry in the world, which has brought this nation with colossal commercial profits and remarkable artistic achievements annually. It is estimated from \textit{The 2011 Report of the Copyright Industry in the U.S. Economy} that the value added for the core copyright industries from 2007 to 2010 has increased from $904.34 billion to $931.82 billion and corresponding share of core copyright industries of the U.S. GDP account for 6.36% in the year 2010 and the core copyright industries has employed 5.098 million workers in 2010.\textsuperscript{125} This result leaves the rest of the world in the dust. The statistics seems to be capable to justify the lower protection of moral rights; however, it is hard to discern a delicate “balance” in copyright design through such rigorous limitations to moral rights. It appears that different countries embedded in different comprehensions of such a “balance” in copyright, but at least one can feel safe to say that the US \textit{VARA 1990} and its other copyright legislation have downplayed moral rights to excess. All the residual of the US copyright is utilitarianism – that is moral rights must yield to and serve economic interests.

Thus far, where is an apropos restriction regime on moral rights to go – neither too benign nor too harsh – the “balanced” one? Do we need a new international convention to offer a more concrete guideline of moral rights restriction for countries to follow or remain the \textit{status quo}? After doing the researches of different domestic legislation, it is not hard for one to discover commonalities between the two jurisdictions with regard to moral rights restrictions. Hopefully,

\textsuperscript{123} Supra note 33, § 106A(c)(3). It reads that: “subject to the limitations set forth in section 113 (d), shall have the right— ... to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”

\textsuperscript{124} See supra note 114.

one can get enlightened either by the multifarious legislations presented in this chapter. Let us now discuss what a balanced or eclectic moral rights system may probably be.
Chapter 5
Contemplations on Restrictions on Moral Rights

Though few guides can be drawn directly from theorists on the most adaptable settings of moral rights restriction, countries have their own convictions on their ongoing legislations respectively. The most equitable and justifiable moral rights regime I personally would like to depict, after a deep exploration of different legislations in combination with the arguments I have made on moral rights restriction theories, would be clarified as follows:

1 A Discussion of How to Properly Restrict Different Components of Moral Rights

1.1 Restrictions on Right of Paternity

i. First and foremost, a full connotation of right of paternity should legitimately entail the right to indicate a real name, to remain pseudonymous as well as anonymous (the UK and US copyright laws on relevant issues therefore typically are not good laws). However, the right against false attribution should be precluded from the domain of paternity right protection because the author has not created a work in fact and thus has no legitimate interest over a “work” in copyright sense. This is the first restriction as a restriction on the content of the right.

ii. When a work is of the following circumstances, the paternity right of the author should be restricted:
   a. Anonymous:
   b. No source is given either on the copy of the work used or with the reproduction of the work used;
   c. No source is otherwise known to the person entitled to reproduce.

A good example maybe found in the German legislation. Recall that one of the objectives of copyright law is simultaneously to increase incentives for work dissemination and to facilitate social welfare. Compliance with the original status of an anonymous work or no-source trackable work both respects author’s real intention (remain his name unknown to public) and reduces
costs in tracking the author’s name, asking for his or her permission and finally dissemination of such works.

iii. Where a work is made for hire or under the commission of someone else, the ghost writer’s paternity right should be restricted. This line of logic typically dominates the common law statutes and sounds quite reasonable. Indeed, many Berne Union countries have reached on consensus upon this proposition. The rationale behind this approach is because the employer is always the person who bears risks of the publishing and dissemination issues of the work and arranges all negotiation stuffs with potential stakeholders. From another perspective, in practice, usually (though not always), the ghost writer can be compensated by considerable amount of remuneration and other benefits governed by contract between him or her and the employer.

iv. Where mass production of a utilitarian or functional work is made, the economic interest should prevail upon moral interests. This proposal is enlightened by the Canadian legislation. The reason why such a proposal values is not only determined by the nature of the work per se, namely, being utilitarian or functional, but also for the purpose of facilitating such useful works’ entry into the market for the benefit of overall social welfare.

v. “Fair use” in the sense of copying one’s work in good faith for the making of an architecture work, applied art work or other functional work is also a proper case to limit right of paternity, in particular in situations where such an original work is copied subconsciously. Take for example, it is unavoidable to shoot some outstandingly typical architecture works into a cinematographic work particularly in some blockbusters for the purpose of embellishing the background image of the film, such as shooting the Sydney Opera House into a well-known film, it is impractical and uneconomic to pinpoint the exact author and indicate his name on said works.

With the above proposals, I still feel a need to point out here that “fair use” in the traditional sense (i.e. private study, educational purpose, criticism, etc.) should not outweigh paternity rights. On the one hand, when one aims to conduct the aforesaid activities, one is always clear about the targeted work and its author. On the other hand, practically speaking, it is not costly to pinpoint such a author when the targeted work is accessible.
Also, I don’t think that administrative use of a work is a graceful excuse to trample right of paternity provided that there are no standardized provisions to regulate such administrative acts as demonstrated by the Japanese legislation.

1.2 Restrictions on Right of Integrity

i. “Prejudice to author’s honor or reputation” is required as is the minimum standard demonstrated in the Berne Convention. However, intention or gross negligence is not a judicious restriction based on the well-established evidential doctrine of “who asserts must prove”, the onus is always on the author to prove “intention” or “gross negligence”. (quotations as emphasizing) Practically speaking, this statutory setting has no doubt added unnecessary burdens and difficulties on the author to claim his legitimate rights. Evidential advantages are normally on the offenders’ side in those cases unless the burden of proof is reversed.

ii. As I summarize, in the following circumstances, the right of integrity are supposed to yield to certain counter interests:
   a. In situations the author has granted a right of adaptation, translation or other economic right of his work and such economic right by its nature necessitate an alteration of such a work.
   b. Utilitarian works, such as architecture work, work of applied arts, computer-related work etc.
   c. Modifications in light of the nature of the work or good conservations taken in good faith. Section 28.2(3) of the Canada Copyright Act perhaps is the best illustration to follow.
   d. Modifications made for the public interest, such as public safety, or as I have illustrated in Chapter 2, for public robust mindset or justice social values. Such as the modifications or destruction to certain amounts of works full of violence or pornography.
   e. In situations of “fair dealing”.

iii. With respect to destructions of work, I personally would side with the opinion that it constitutes infringement to the right of integrity but it should subject to same limitations as modifications as illustrated in ii.
1.3 Restrictions on Right of Disclosure

i. As seen from the Japanese legislation, where it is necessary to protect the life, health, livelihood or property of a person, an undisclosed work may be made publicly available by authorities. This is good law as I suppose in the sense that it best reflects how public interests override individual author’s will. A good illustration of this perspective would be, say, a scientist has hypothetically worked out a solution to the 2012 dooms day, he then has the obligation if so to disclose his research achievements to the public to contribute to mortal survive; if not, he cannot claim any coverage by the disclosure of authorities as I believe the survival of human being is one of the overarching issues in cosmos.

ii. When a work is transferred to a publisher by an author, the author should be presumably treated as authorizing right of divulgation of his/her work. This right of disclosing individual authors’ works creates no unfairness to those authors because of the nature of the publisher: authors are presumed to know in the first place the obligation of publishers is to make valuable cultural products open to all mankind to create thriving cultural market. However, additional attention should be paid to non-profitable transferees other than publishers, those individual transferees as I deem them, might not have the exemption of infringing right of divulgation as a publisher. This concern was similarly expressed by Lord Halsbury over one and a half centuries ago in the great case Caird v. Sime: “The case of private letters … is an illustration of a communication which does not permit the infringement of the proprietary right which could be involved in their unauthorized general publication”. The case of personal manuscript delivering by circulation of written or printed copies seems to be simple to identify, however, in situations, where oral deliverings are involved, such as lectures, become a far more complicated thing. Lord Halsbury has suggested in the case Caird v. Sime that one should differentiate “delivering classroom lectures of one’s own composition” with “delivering university lectures on the university’s behalf” because of the very nature of the lecture. More precisely, whether the restriction on right of divulgation arises should be determined by a serious of factors, say the nature of recipients of the unpublished work, the manner of transferring, the expressed or implied real intention of the author and stuff as a whole on a case by case basis. No one-size-sitze-fits-all

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127 Ibid.
conclusion would perfectly solve the restriction of right of divulgation, but rather the conclusion should base on the combination of fact and law analysis. Otherwise, the restriction is too harsh and would never be good law. (the Japanese Copyright Law Article 18(2)(i) and (ii) are too harsh).

iii. When the copyright ownership of a cinematographic work belongs to the producer, the director and other authors whose work is included in the cinematographic work as well as other performers are presumed to have consented to offering and making the work publicly available by the producer’s exercise of the copyright. A good example would be the Japanese Copyright Law Article 18(2)(iii). The underlying policy will be further deployed in the next section on the discussion of cinematographic works.

1.4 Restrictions on Right of Withdrawal and Repentance

Relevant legislative reference is scant with respect to such a right restriction. Nevertheless, a one-size-fits-all criterion of public interests and utilitarian purpose concern may override such rights whenever applicable. In addition, as indicated in Chapter 2, exercise of modification right is quite easily to affect a transferee’s economic interests and on this footing, such a right should be limited to a large extent within an indemnity to the transferee.

2 A Discussion of How to Properly Restrict Certain Categories of Works

There is no fear of exaggeration to say that to date, my enumerations about restrictions on moral right have already been sufficient to map out a systematic and enlightening framework of moral rights restrictions. However, I still feel a necessity to complement my arguments by illustrating miscellaneous measures to restrict several categories of works typically deserve a restriction on moral rights.

2.1 Anonymous Works – restrict paternity right

Confronting with an anonymous work, recall that to remain the same manner an anonymous is as a matter of fact showing respect to the author’s intention. The Germany and Japanese legislation has correlating regulations which can be referred to. This strategy simultaneously has
provided a highly feasible and rational guideline in coping with cyber works where a majority of works thereof remain anonymous.

2.2 Cinematographic Works – restrict moral rights except right of paternity

Recall that when the copyright ownership of a cinematographic work belongs to the producer, the real authors and other performers are presumed to have consented to offering and making the work publicly available by the exercise of the copyright.

The rationale behind this approach is to facilitate the film’s entry into the market by avoiding cumbersome negotiations with numerous right owners. Another justification is the conviction that it is important to strike a balance between the interests of the intellectual creator and of the individual or company who has made enormous investment and taken on risk of loss. Producers are often the investors and related economic risk bearers of a film, it thus would be a fair practice to entitle them with copyright. And the balance is reflected normally through a contract entailing entitlements and obligations of both parties.

Under cinematographic work, director and other authors whose work is included in the cinematographic work as well as other performers retained the right of paternity and reasonable economic rights, but are deprived of the rest of moral rights.

2.3 Works Made for Hire and Commissioned Works – totally governed by contract

Similar to the grounds discussed in the cinematographic works, moral rights of the so-called ghost writers are also restricted by contract reached between his or her employer or commissioner discussed briefly in Chapter 5 Section 1.1 iii.

2.4 Utilitarian Works – restrict the right of integrity

The essentiality of a utilitarian work is the function it exerts to realize a certain object and its contributions to the technological advancement and social development. Utilitarian works always

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entail certain degree of ingenuity and utility and thus can complicate rights protection issues. One should always be mindful when dispose intellectual property law that, on one hand, it is worthwhile to create incentives to create, and on the other, “it must appropriately limit the extent of that protection so as to avoid the effects of monopolistic stagnation”.129 And in this particular situation of utilitarian works, not to restrict the integrity right of the author would be equal to grant a monopoly of the author in the market in the sense that others cannot stand on his should to make progress to that particular technology and that would be equally to protect the work as a patent. To say the very least, even patent applies a relatively short protection term than copyright to prevent a technological monopoly. The whimsical fancy of the author vouched would be detrimental to overall social welfare. Conversely, restriction right of integrity in this context would encourage the progress of “science and useful arts”.130

Lastly, works which need to be preserved or other disposed in light of its particular nature is also justifiable instances to restrict the right of integrity.

129 See footnote 62.
130 See footnote 51.
Chapter 6
Conclusion

It is more than time to incorporate moral rights into domestic legislation universally, from being isolated beachhead of no significance to form an important part of modern laws. However, in academia, such a convergence still finds its way hard to gain foothold internationally. Much less clarity is gained with moral rights restriction both theoretically and pragmatically – the extraordinary question which is by every means a fundamental and indispensable part rooted in the legislation of international conventions and domestic laws because of the dictum “where there is right protection there is right restriction”. And the basic rationale as I addressed throughout this thesis is the universal “balance” theory. Admittedly, different countries have distinct historic background and extant economic needs, but society is keep changing and all stakeholders involved in such a dynamic social reform are keeping altering as well. Besides, the globalization and modernization of current “one world” call on a unified, or at the very least, harmonized standard of social norm including the moral rights restriction issues. Traditional moral rights regime whose development tends to always lag behind economic or property interests regime indeed needs to be redressed to fit in the ongoing social development.

Back to the “balance” theory, this has been and will always be “where the shoe pinches” in intellectual property and with no exception applies to copyright law. Different countries though have different scale to measure it, the dual-objective framework of copyright remains unchanged, namely, protecting author while protecting public or user. Hopefully, the exhibition of legislation of different jurisdictions can beacon the reform of current moral rights regime – whether to extract the many commonalities between the Berne Union countries or to redraft a more clear and administrable conventional obligations for countries to follow – are all practical ways to work on.. Nevertheless, those legislation invoked as part of my thesis are only the tip of the iceberg.

I avail myself this opportunity to write this thesis in the hope that it can enable readers to depict a “balanced” moral rights regime based on my arguments or to say the very least stimulate some resonance on this topic which I am trying to bring to the table.
Bibliography


Dietz, Adolf. “Chapter 13 Germanny”, in Davis & Garnett at 420.


Frabboni, Maria Mercedes. “Chapter 12 France”, in Davis & Garnett at 374.


Lingren, Kristn. “Chapter 26 Japan”, in Davis & Garnett at 779.

Lingren, Kristn “Chapter 28 United States of America”, in Davis & Garnett at 863.


