



Journal of Information, Law and Technology

Moral Rights and Authors' Rights: The Keys to the Information Age

Mike Holderness

mch@cix.compulink.co.uk

This is a **Refereed Article** published on 27 February 1998.

Citation: Holderness M, 'Moral Rights and Authors' Rights: The Keys to the Information Age', Refereed Article 1998 (1) *The Journal of Information, Law and Technology JILT*.
<http://elj.warwick.ac.uk/jilt/infosoc/98_1hold/>

Moral Rights Asserted

Abstract

Authors' moral rights, because they are poorly incorporated into UK law, are often perceived as a deeply obscure subject. Where strongly implemented in accordance with the international law of the Berne Convention, however, they provide a necessary and ready-made legal framework for the authentication of works in the new media environment. Harmonisation of UK and Irish law with the mainstream of the European Union and full compliance with Berne is necessary, not least as a bulwark against the homogenisation of public expression and suppression of the individual voices of diverse authors by media corporations.

Keywords: Moral rights, copyright, Berne Convention, authors' rights, identification, paternity, integrity, media pluralism, diversity of cultural expression, European Union.

1. Introduction

To 'encourage learned men to compose and write useful books' was the expressed goal of the Statute of Anne (8 Anne, c. 19.) in 1710, generally regarded as the world's first statute to deal with authors' rights in their work. The political background was (of course) more complex: in 1586 the Star Chamber had decreed a stop to 'dyvers contentyous and disorderlye persons professinge the arte or mystere of Pryntinge or sellinge of bookes.' (Star Chamber 1586) To claim that 'the first notions of copyright had their roots in censorship' (Ralph, 1996) may be to exaggerate the case; but it is at least interesting to consider the roots of the Anglo-Saxon tradition of copyright as a regulatory panic arising from the introduction of a new medium of expression and communication. The current emergence of a new medium (or, probably, media) offers at least an equal challenge to that presented by printing - and an opportunity to get it right.

In the aftermath of the French Revolution a quite different tradition arose: 'The most sacred and legitimate, the most unchallengeable and personal of all the properties is the *oeuvre*, the fruits of a writer's thought' [1] (Le Chapelier 1791). The outcome was a framework of legislation in which 'the author, a real person, has intellectual rights [in the work] and in consequence is sovereign in deciding its expression, disposition and distribution. Authors further have "moral rights", to protect their good name, their reputation and their works; the fact that these things are integral to the act of creation justifies these rights being "perpetual" and "inalienable".' [2] (Bécourt 1996)

Thus in the French tradition, which is the inspiration of the mainstream of international law as expressed in the Berne Convention, authors' rights (*Droits d'Auteur*) are *personal* rights, to be discussed on the level of *human* rights. By contrast, the Anglo-Saxon tradition is summarised by the opening words of the UK Act: 'Copyright is a property right'. (Copyright Designs and Patents Act [UK] 1988)

In the Anglo-Saxon tradition, then, a work of creation is in essence a commodity, to be freely traded and under the control of the person or corporation which holds title to it. The concept of 'moral rights' has been grafted onto statute to varying degrees. It maybe for this reason that moral rights are sometimes perceived as esoteric in the UK, and are almost universally so in the USA. The situation is not helped by the fact that the phrase 'moral rights' is itself a very

poor translation of *le droit moral* or *droits moraux* - but we're stuck with it. [3] Section 1 outlines the fundamental moral rights and introduces the argument that they are necessary parts of the legal framework for the new media. Section 2 is an introduction to the moral rights defined in the Berne Convention, and (in Sections 2.1 to 2.4) some of the variants in national legislation.

The following discussion focuses on the position in the UK, (Section 2.5) contrasting it with the European mainstream (2.3) and also briefly noting the positions in the US (2.6) and Japan (2.7), in the context of their economic dominance, and the TRIPS Agreement (2.8).

Media corporations in the UK and US, operating in jurisdictions with restricted recognition of moral rights, are in a position to gain outright control of works, attempting to nullify moral rights even where they exist in law. They are actively doing so, as discussed in Section 2.5.1.

This state of affairs does not, it is argued here, meet the needs of the public or of authors in the context of the new media of expression and communication. These media (of which the Internet is merely a string-and-chewing-gum working model) are, at least in their technological potential, as radically different from the film as this is from the book and as the book was from the pre-existing mass medium, the cathedral, mosque and temple. (Holderness 1995) That potential includes an explosion of diversity of expression by independent authors, as outlined in Section 3. The attempt by media corporations to gain outright control of all 'content', including the attempt to nullify authors' rights, can be seen as undermining this potential, instead re-making the new medium in the image of the old.

Betrayal of technological opportunity is not an offence. The existence of the UK as an offshore zone for free trade in works unrestrained by moral rights, however, is contrary to the spirit of the European Union and may, Section 4 argues, constitute a breach of the Treaty of Rome.

To harmonise UK law with the mainstream of EU national law would be a major advance. Two further points need, however, to be addressed. The first is the economic dominance of the USA in the rapidly-merging fields of computer software and cinematography.

The second concerns the question: Who is an 'author'? National legislation has everywhere been formed to deal with the relatively simple cases presented by the technology of printing. For a book, article, photograph or work of fine art, authorship is *usually* clear. For a film, on the other hand, it is the subject of some dispute; what, for example, are the relative degrees of authorship of scriptwriters, specialist dialogue writers and directors? Many multimedia and new media works are already collaborative works nearly to the extent that films are, and this trend will intensify. The Berne Convention makes special provision for such works, as described in Section 2.2. This in effect quells a film directors' nightmare, in which scriptwriters restrain release of movies on the grounds that the integrity of their scripts has not been honoured. This, together with an absolute right for aggrieved scriptwriters to have their name dissociated from the product, seems reasonable, and will serve as an interim model for multimedia works. More thought may well be needed, however, about clear definition of moral rights in future multimedia works which have both a 'director' and clearly identifiable contributions from individual authors.

2. What are Moral Rights *for*?

In the mainland European tradition, there is little more need to argue for moral rights than there is to argue for literacy or for freedom of expression; they are fundamental. However, in arguing for proper recognition of moral rights in the UK in the context of the emergence of new media, it is appropriate to discuss what effect they have.

The two moral rights which are most relevant are:

The right of identification, sometimes referred to in international treaty contexts as the 'right of paternity'. In effect, this gives authors the right to a credit or by-line, or to none if they choose; and it protects against mis-identification of a work.

- The right of integrity: in UK law this is diluted to the 'right to object to derogatory treatment'.

2.1 *Rights and reward*

The right of identification is critical to authors' livelihoods, especially in the early stages of their careers. Equally, the right of integrity has a direct economic impact. To put it negatively: a distributed work which is not an accurate reflection of an author's skill discourages learned people from composing - or at least from getting an advance for - future works. For example, those film directors who do not retain 'final cut' control over their work - which is most - must have the right *not* to be identified as the author of a re-edited film which does not represent their skill and creativity.

2.2 *Responsibility and authenticity*

With the right to identification as author of a work comes personal responsibility for its content. Electronic publication raises the question for scholars: 'how do we know this work is what it says it is?' The standard technical solution to this is to create standards for 'digital signature' of works - for example the World-Wide Web Consortium's DSig project. (Chu et al 1997) A 'digital signature' uses the mathematics of encryption to generate an assertion that a particular author created a document in a particular form; alteration of the document provably invalidates the assertion.

Cryptography has, of course, nothing to say about the validity of the original assertion. The rights of identification and of integrity together provide a satisfactory legal framework for such assertions, based in existing international law: false assertions are subject at least to civil action by the actual author. This alone is sufficient reason to argue for proper implementation of these moral rights in all jurisdictions. They arguably operate independently of statutory recognition of digital signatures, since these are self-evidently assertions of authorship. (Such statutory recognition will, however, be necessary in many jurisdictions to deal with documents, such as payment mandates, which have no literary or artistic content.)

Reporters and documentary makers working in all media have particular concerns. While editing is essential to the production of high-quality reportage, if this materially distorts the published report - whether to add 'spin' or through ignorance on the part of an over-stretched sub-editor - the results can be life-threatening. Alan Pierce, for example, reported from Afghanistan for the BBC World Service until he was severely beaten by guerrillas - as a direct result, he believes, of the transmission of inaccurately translated reports. (Pierce 1998) 'It's too much to say that the Persian-language service supports the former government and the Pushtu

service supports the Taliban. But when Kabul fell the Persian report inserted a line in my copy saying "there's no way that the Taliban can capture the capital". On another occasion there had been an overnight assault. In the morning Alan had filed a report saying all was quiet, and then another reporting that the attack had re-started. 'At 5pm we're listening to the broadcast and my interpreter is screaming that they're running the first, "all quiet" report while the shells are slamming into the streets around us.' The guerrillas, not being familiar with the intricacies of radio news production, understandably saw such events as biased reporting, not by the BBC collectively but by Alan as an individual.

Under UK law there is no moral right of integrity in work produced for the purpose of reporting current events. (Section 2.5). Waving a writ against one's employer at a bunch of angry Afghani guerrillas - or Los Angeles drug dealers or Indonesian security police - may not be immediately palliative. The existence of such a right, however, would serve to discourage such distortions.

The authenticity of documents is a matter for wider public policy concern. Technology currently permits, for example, the rapid manipulation of still photographs so that the resulting illustration could be accepted by many readers as an actual representation of reality. Combined with the advent of digital cameras - which at present have no clearly defined 'original' in the sense that a photographic negative is clearly original - this raises serious questions over the remaining credibility of news photography with the public; which in turn throws into question the notion that democracy is founded on citizens voting according to reliable information supplied by independent sources. (NUJ 1996) It also casts a deep shadow over the evidential value of photographs in court proceedings.

Already, real-time manipulation of moving pictures is being proposed in the context of inserting home-language (or non-tobacco) advertising into video from foreign football stadia. The much-vaunted *Daily Me* personalised multimedia newspaper proposed by (among others) the MIT Media Lab (Bender 1994) opens up both exciting possibilities for personalised filters to combat information overload and alarming possibilities for manipulation of content. (NUJ1995a)

To dramatise the issue: a photographer who has strong moral rights can stand up in court and affirm that 'this is what was in front of the lens when I pressed the button'. A photographer who has strong moral rights and strong morals can and will sue a publisher or producer who distributes a manipulated distortion of her picture.

In all cases where a work is produced by an individual, a strong and enforceable moral right of integrity is a simple public guarantee of such personal responsibility for the content. The right of integrity generally concerns only changes which damage an author's standing or reputation - so in the context of news reporting it does not have any bearing on copy-editing for length, style and clarity, nor on cropping of a photograph which does not affect its 'reading'. In the collaborative arts the case is more subtle, and hinges on the definition of 'a work' - see Section 2.2 below .

The January 1998 UK government Green Paper on Crown Copyright (Cm 3819 1998) makes the connection between moral rights and integrity of a work clear, though without mentioning the concept explicitly. In discussing whether UK government documents should be made Public Domain, as US government documents are, it notes (para 2.8):

Crown copyright reflects those issues of integrity, authority and accuracy where the stamp of official authorship is key to that information being recognised as being authoritative.

The clear implication, in the context of forthcoming Freedom of Information legislative proposals, is that this need could be met by Her Majesty's Government retaining a form of copyright while issuing a general public licence to make copies of certain categories of document. A more radical proposal, not proposed in the Green Paper, would be to extend moral rights to the actual authors. Paying damages to Her Majesty's Government for the damage to its reputation caused by an inaccurate representation of a document is one thing; paying additional damages to an actual civil servant might well be yet more of a deterrent.

2.3 Diversity

The rôle of moral rights in encouraging a diversity of news reporting and cultural expression is indirect, but clear.

The existence of moral rights encourages the perception that works are created by real persons, by breathing individuals (collaborating to different degrees of intensity, to be sure). By contrast, the position in the UK and US where authors have no moral rights in works created in the course of employment (Section 2) - and where the economic rights in these belong outright to the employer - encourages a perception that cultural products (including news reporting) are commodities.

One effect of the lack of moral rights for news reporting in the UK (Section 2) is that a newspaper reporter can turn in a reasonably balanced story in the sure and certain knowledge that it will be re-written on the sub-editors' desk to fit the perceived 'line' of the proprietor or (allegedly) the marketing department. Fatalism and abnegation of personal responsibility are encouraged at every stage.

In the context of the new media, the Authors' Rights regime in which moral rights are central offers the most hope of creating the economic conditions in which diversity can flourish. The effect of strong moral rights considered as separate from economic rights is symbolic - but the point is that moral rights are the starting point in the Authors' Rights regime and economic rights flow from them.

3. The Legal Frameworks

International law on authors' rights and copyright is, as is well known, enshrined in the Berne Convention. (WIPO 1979) Moral rights are probably the one area in which national legislation shows greatest divergence.

3.1 Moral Rights under Berne

The relevant section of the Berne Convention is clear and brief enough to quote in full:

Article 6bis

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

relation to, the said work, which would be prejudicial to his honor or reputation.

2. The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
3. The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

It seems clear that this is intended to introduce only two savings or grounds for exception: that certain countries may limit the rights of identification and integrity to the lifetime of the author; and that redress is a matter for national treatment. One significant further exception to authors' rights in general is provided for by Articles 1(8):

Article 1

8. The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

It seems clear that this is intended to refer to the *content* of 'mere items of press information' and not the protected *expression*.

3.2 Definition of 'a work' and 'the author'

The Berne Convention defines 'a work' thus:

Article 1

1. The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works

of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

3. Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

The 'author' is not explicitly defined. However, explicit provision is made for collaborative works in the form of cinematographic works in Article 14bis (2) and (3):

Article 14bis

2.
 - (a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.
 - (b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

[(c) and (d) define 'stipulation']

3. Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

A clear distinction is thus drawn between (to use the language perhaps somewhat loosely) works intended for communication to the public, and 'intermediate' works such as scenarios, storyboards and scripts. It would seem reasonable to treat new forms of multimedia work as 'cinematographic' for these purposes.

3.3 Mainstream European legislation

With the exception of the UK and the Republic of Ireland, all European Union member states have *authors' rights* legislation, as distinguished from *copyright* in the Introduction. Moral rights are thus central. They are inalienable - that is to say, they cannot be transferred or

waived, whatever the disposition of rights to exploitation, distribution, etc. Dutch legislation is an exception to this: an author may contract to waive the rights

to be mentioned by name, to restrain publication of the work under a name other than his own, and reasonably to restrain modifications of his work (Jehoram 1993:185)

Authors in the Netherlands may not, however, waive the right to object to distortions, mutilations or other modifications of the work prejudicial to their honour, reputation or value.

Exercise of the right of integrity is everywhere subject to a test of reasonableness. This may be expressed in statute, as in for example in the Netherlands. (Jehoram 1993:184) It may be held, as in Belgium, that though national law grants an absolute right of integrity, 'an author, in making a contract, gives tacit permission to make those modifications which are inherent to the mode of exploitation'. [4] (Vanhees 1993:171) Reasonableness is everywhere applied as a criterion by the courts, as in a Danish case in which a sculptor's objection to use of a photograph of a work to illustrate a magazine article on sexual problems was denied. (*UFR 1969 p. 544*, cited in Koktvedgaard 1993:118)

Naturally, such interpretation is a part of national tradition: a court in the Netherlands in 1988 rejected Samuel Beckett's motion to prevent an all-female production of *Waiting for Godot* (Arnolds 1993) whereas such a production is forbidden in France. (Brut de Béton 1992) This situation does, however, point to a bizarre form of restraint of intra-Community trade in Europe: either certain productions of Beckett plays may only be 'exported', or authors may wish to refuse all exports to countries with weaker moral rights régimes lest the integrity of the work be compromised.

One of the more notorious cases, of course, was Huston's injunction against a colorized version of *Asphalt Jungle*. (Huston 1991) Those cases involving cinematographic works which should probably worry commercial interests more, however, involve the cutting of films to accommodate television schedules and commercials. For example, the Société Métropole Télévision M6 in 1990 paid damages to Claude Sautet after cutting his film *Les choses de la vie* from 80 minutes to 64. (Sautet 1990)

3.4 Droits moraux beyond identification and integrity

For completeness, it should be noted that further moral rights are enshrined in certain countries' Civil Codes:

- The right to withdraw a work (*le droit de repentir*): this applies at least in France, Germany, Italy and Spain, and 'probably' in Belgium. (Dietz 1993:59) Dietz notes that:

There is... a certain amount of scepticism about the theoretical and practical foundation of this law.... It cannot be doubted, however, that there are extreme situations where the author's social or political or even physical existence is at stake, in such a measure that society should respect and allow his decision to withdraw former works from circulation.

One would not expect proposals to introduce such a right into UK law to gain wide support within the academic and library communities. It is not at all clear that the *droit de repentir* is enforceable for works which are accessible through international data networks.

- The 'right of divulgation' (*le droit de divulgation*): Dietz (1993:58) notes that this:

reserves to the author the fundamental decision whether at all and when and how to release his work from the private sphere and to expose it to the public.... According, in particular, to French theory, this decision not only is an absolutely personal and discretionary act of the author but it also determines the moment when the work enters the financial or commercial sphere...

Dietz observes that this right is covered in other jurisdictions by the author's exclusive right to licence exploitation, copying, distribution and so forth. Its naming as a separate right would be a question of nit-picking semantics, were it not for the possibility that (only) in jurisdictions with a *droit de divulgation* authors working under contract of employment have absolute discretion over when the work is ready for release.

Neither of these doctrines is explicitly reflected in Berne and (at risk of raising objections from those, especially French, authorities who are passionate about them) it should be noted that the author has never encountered any suggestion that they should be incorporated in UK law.

3.5 Moral rights in the UK

The Copyright Designs and Patents Act 1988 grants authors the right of identification (s. 77); the right applies only where it has been asserted in writing in the work or in an assignment or licence covering the work. (s. 78)

The Act then removes the right of identification (s. 79) from any:

- computer program;
- design of a typeface;
- computer-generated work;
- work created in the course of employment of the author or director;
- work subject to Crown or Parliamentary copyright;
- work made for the purpose of reporting current events;
- work published in a newspaper, magazine or similar periodical;
- work published in an encyclopaedia, dictionary, yearbook or other collective work of reference.

An author has, however, an additional right (s. 84):

- not to have a literary, dramatic, musical or artistic work (or film) falsely attributed to him as author (or director); and
- not to have altered works dealt in or represented as originals.

This right is not subject to the exceptions listed above.

The right of integrity is expressed (s. 80) as the author's right 'not to have his work subjected to derogatory treatment'. The Act then removes this right (s. 81) from any:

- work made for the purpose of reporting current events;
- work published in a newspaper, magazine or similar periodical;
- work published in an encyclopaedia, dictionary, yearbook or other collective work of reference.

and further (s. 82) from work created in the course of employment, and from work subject to Crown or Parliamentary copyright, unless the author is or has been identified.

As if that weren't enough exceptions, Section 87 provides that

- (2) Any [moral right] may be waived by instrument in writing signed by the person giving up the right.
- (3) A waiver -
 - (a) may relate to a specific work, to works of a specified description or to works generally, and may relate to existing or future works, and
 - (b) may be conditional or unconditional and may be expressed to be subject to revocation...

It is understood (from private communication) that the drafters viewed the waiver provisions in Section 87 as a technical saving to give effect to the principle that UK law does not admit inalienable rights. It is not and should not have been surprising, however, that this provision was taken up by publishers: see Section 2.5.1 below.

In mainstream Civil Code authors' rights jurisdictions, the concept that moral rights can be waived verges on the nonsensical. Barrister Alistair Kelman puts it thus: 'Under French law, what you create is part of your soul.' (Kelman 1995) Moral rights are not a bolt-on addition to the property right which is copyright, but are an integral part of *inalienable* authors' rights which pertain to real persons, to individual humans. As noted above, the Netherlands is an exception to this rule.

As far as the author is aware, such moral rights as are granted may be waived in any of the Common Law jurisdictions. This is certainly the case for the highly restricted Visual Artists' Right in the USA (see Section 2.6 below) and for the more general moral right in Canada (Knopf 1998).

In the course of extensive and intensive enquiries over four years the author has failed to discover any UK case-law on moral rights. In the summer of 1997 the eminent anti-war photographer Philip Jones Griffiths reached a 'very satisfactory' settlement with agency Saatchi, which had faked up one of his pictures for use in an army recruitment advert. He had, obviously, claimed for defamation. Saatchi also settled a claim for 'derogatory treatment' of a photograph by Bruno Barbey, which they used in the fake. (Holderness 1997c)

3.5.1 UK periodical publishers and moral rights

The publisher of computer magazines and journals VNU in December 1994 demanded that each contributor 'irrevocably and unconditionally waives all moral rights' in their work. (VNU 1994) EMAP Business Publishing in November 1995 sent its freelance contributors a contract, (EMAP 1995) demanding *inter alia* that they: 'waive the benefit of any moral rights in such work and agree that you may edit, alter and adapt it.' In each case there was an implicit threat that contributors would find that they were ex-contributors if they did not sign; in EMAP's case the draft contract leaked to the National Union of Journalists concluded 'PAYMENT WILL ONLY BE MADE ON RECEIPT OF THIS SIGNED FORM,' suggesting an after-the-fact imposition of new conditions on works already commissioned.

Wherever the possibility of waiving moral rights exists, such pressure will always be applied. While individual authors depend on economically powerful publishers and producers, the resulting contracts will always be struck between unequal partners.

It is notable that the examples above are redundant within a solely UK context: UK-based authors, as shown, have no moral rights in works destined for publication in magazines. It may be that the publishers are attempting to ward off the consequences of possible future harmonisation of UK law towards the European standard. This view is supported by a covering note for the proposed contract supplied by EMAP's lawyers to its management: 'English copyright law does not acknowledge the moral rights of contributors to periodicals; however, elsewhere moral rights can be an issue, and the waiver seeks to eliminate any potential problem.' (EMAP 1995)

In November 1995 the Periodical Publishers' Association issued a position paper on copyright, which included the assertion that 'moral rights must be negotiable'. (Locks 1995) Publication of this paper followed a spate of contracts 'offered' to freelance contributors by, among others, EMAP, VNU, IPC, Dennis, the *Telegraph* and News International. All contained long, lawyerly shopping-lists of terms concerning economic rights, and in the case of EMAP's Metro division the list includes the notorious 'assign all rights... throughout the Universe...' in all media, including those yet to be invented.

3.5.2 The UK and Berne

'The exceptions and qualifications to moral rights... were attempts by the UK government to modify, some would say to emasculate, moral rights in the light of business reality.' (Dworkin 1993:105) Dworkin quotes others who are yet more forthright: 'Britain lost sight of its goal in the legislative process, and the result was the creation of rights that are well below the Berne Convention standard.' (McCartney 1991)

3.6 Moral rights in the USA

The only expression of moral rights in US legislation is contained in the Visual Artists Rights Act 1990, which introduced a section to the Copyright Act. (Copyright Act [USA] s. 106A) This grants authors of 'works of visual art' the rights to identification, to object to false attribution, to prevent distortion or mutilation prejudicial to the artist's reputation, and to prevent destruction of 'a work of recognised stature'. A 'work of visual art' is defined as a painting, drawing, print, sculpture or a photograph made only for exhibition, produced in a signed and numbered edition of 200 copies or fewer. 'Works made for hire' are excluded, and in US law this means that a commissioner need only state in a contract that it concerns 'work made for hire' to avoid invocation of the rights. The rights may be waived in writing.

Dworkin asks why Congress passed this law when it had earlier insisted that no steps were necessary for compliance with Berne. (Dworkin 1993:102) He reports Jane Ginsburg as commenting that VARA may have been passed to placate those who thought that the USA had not honoured its Berne commitments. The fact that the USA was at the time on the brink of trade war with China over allegations of mass violation of software copyrights may well have been significant. A more grudgingly tokenistic implementation of moral rights is difficult to imagine.

Dworkin notes that the US movie industry would have strongly opposed wide-ranging moral rights in the US; in the context of the 'director's nightmare' mentioned in the Introduction this is not surprising. Those rights which authors in the US movie business do enjoy, they hold by virtue of collective bargaining. Directors' contracts thus frequently do give them a close approximation to a 'right of integrity', and on the other hand in recent years marketing departments have made much of 'authorial integrity' by releasing 'Directors' Cut' versions of movies which were - at the behest of those same marketing departments - first released in a form about which the director was not ecstatic.

Directors in the UK are in a much more difficult position. UK law defines the 'author' of a cinematographic or musical work as:

the person by whom the arrangements necessary for the making of the recording or film are undertaken (Copyright Designs and Patents Act [UK] 1988 s. 9(2)a)

More significantly, they have much less organised influence than their US colleagues, and at least some believe that the raft of trade union legislation passed between 1979 and 1997 throw into doubt the legality of collective bargaining over such matters. (Crone 1997)

3.7 Moral rights in Japan

Though Japanese works clearly do not have the world market presence of US works, the extensive stakes held in the US cinematographic corporations by Japanese companies makes its law globally relevant. Japanese law appears to include a right of divulgation in its paragraph 18(1). (Doi 1993:474) It has a right of identification (including the explicit right to use a *nom de plume*) and a right of integrity (paragraphs 19(1) and 20(1)). The 'author's moral right is exclusively personal to him and is inalienable' (*op cit*).

3.8 The TRIPS Agreement

The preamble to the World Trade Organization (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods* (the 'TRIPS Agreement') concludes:

Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (WIPO) as well as other relevant international organisations; (WTO 1994)

The cynical might well ask: 'If this were true, why would it need to be said?' Article 9(1) of TRIPS states:

Relation to Berne Convention

1. Members shall comply with Articles 1-21 and the Appendix of the Berne Convention (1971). However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom. (WTO 1994)

In other words, the instrument by which the USA seeks to protect its considerable overseas trade in intellectual property excludes in terms moral rights. This came about specifically at the behest of the US delegation:

The United States has consistently protested the inclusion of moral rights in TRIPS as well as other international conventions, including the European Copyright Directive... The drafters of TRIPS agreed to U.S. desires to exclude moral rights from the minimum protections required. (Doyle S J 1994)

However, Article 16, dealing with trademarks, includes the following:

2. Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, account shall be taken of the knowledge of the trademark in the relevant sector of the public, including knowledge in that Member obtained as a result of the promotion of the trademark. (WTO 1994)

Under TRIPS, therefore, Ronald McDonald® has moral rights and Mohandas K 'Mahatma' Gandhi does not.

Nevertheless, it remains the case that the Berne Convention expresses international law on intellectual property.

4. Two possible multimedia futures

The respective effects of a strengthening or weakening of moral rights can be illustrated through outlines of two possible directions for the development of the new media. These can be nothing more than outlines: Holderness's First Law of Forecasting states that 'Whatever you predict, something more interesting than that will happen.' And of course, there are very many more differences between these possible futures and between the conditions which promote them than can be discussed here.

4.1 *The many-to-many world*

The invention of movable type produced a revolution in human communications. One author's work could thenceforth be distributed in identical, fixed copies to an arbitrarily large segment of the literate population. Printing can be characterised as a 'one-to-many' technology for dissemination of fixed works; and contrasted with the previous 'technologies' of the unfixed, one-to-many communication of the public orator and the fixed, one-to-very-few communication of the manuscript. Indeed, some would hold that this led to a change in what it is to be human. Printing eventually gave large numbers of people access to *identical*, permanent, shared 'memory extensions'. (e.g. Stewart & Cohen 1997)

The World-Wide Web, as originally envisaged by its founders Tim Berners-Lee and Robert Caillau, was something new in human culture: a *many-to-many* medium. The first Web browser program, which Berners-Lee hacked together in three days of 1989 on a NextCube computer, placed the authoring of pages on a par with their reading. (Caillau 1996)

Those parts of the Web which are accessible without charge or formality constitute the largest single information resource ever assembled: by December 1997 the AltaVista 'search engine'

had indexed the full text of 88 million Web pages. The comparison to Borges's 'The Library of Babel', which contains all possible texts, (Borges 1941) is irresistible. This total notably excludes, however, newspaper articles; when these are made available on the Web they are almost invariably 'hidden' behind a subscription mechanism, even where no charges are currently levied. (Holderness 1997a)

If, however, Web publications were made available on a 'pay-per-view' basis, then the *entire* Web (and at least the textual portions of future multimedia forms) would be openly accessible. The barriers to becoming a publisher would be lower than at any previous time. Works involving significant investment would of course continue to appear; but a new sector involving a direct financial transaction between author and reader/viewer could flourish alongside it. (Holderness 1997a) (Holderness 1997b) In this scenario, strong moral rights of the individual author serve as the reader/viewer's guarantee of the authenticity of the work, filling the traditional rôle of the publisher/producer in this respect.

The predicted outcome for the culture at large is an unprecedented flowering of diversity of political and artistic expression.

4.2 Remaking the Web as broadcast

Quite different multimedia technologies are, however, under construction: the work of DAVIC, the Digital Audio-Visual Industries Council - a consortium with more than 200 members, ranging from the BBC to Nokia to Microsoft to Lucent (ex Bell Labs) to Nynex, BT and Pacific Bell - serves as an exemplar. DAVIC's primary activity is to generate a set of standards for delivery of multimedia (largely, it seems, to the home).

The current DAVIC proposal for access control and content management operates on the 'cable TV' model. The proposed standard assumes that all transactions take place between a central Service Provider and a consumer: the consumer requests a 'programme', the Service Provider runs a credit check and takes the money if it chooses. (DAVIC 1997) The moral rights model, like the financial model implicit in the current DAVIC proposal, appears to be that works are owned outright and controlled by broadcaster-publishers.

Mike Feintuck comments, in the context of regulation of broadcast media, that 'arguably, an obvious potential for domination of this brave new world by unaccountable and unashamedly commercial international conglomerates has developed.' (Feintuck 1997) This could equally be applied to the ownership and control of 'content'.

The technical issues of network design; those over 'micro-billing' and the battles with governments over the encryption technology involved; and the race for ownership and control of the 'set-top-box'; none of these should obscure the fundamental point that a choice is to be made, with significant social and policy implications. On the one hand is the realisation of the potential for many-to-many media, in which moral rights form a ready-made (but not universally applied) legal framework for identification and integrity of the individual works. On the other is, to put it bluntly, the spectre of Bill Gates, Rupert Murdoch, and a handful of other corporations owning significant parts of the culture outright - and having their right to amend it as their commercial interests dictate.

5. The Need for Harmonisation

'The Information Society' is given considerable prominence in the European Union's thinking (Bangemann 1994). Authors' rights are recognised as the key to a legal framework for electronic commerce:

If the information society is to develop successfully, the many new services and products being created must be able to benefit fully from the information superhighway. Their expansion must take place in a regulatory framework which is coherent at national, Community and international levels. There is no doubt that laws will have to be adapted in order to respond to the new and varied requirements which may appear, raising unprecedented issues. One of these is the adaptation of the legal environment for intellectual property. (EU 1995)

It would at first sight appear that harmonisation of legislation across the EU would be a priority. Indeed the Green Paper introduces its section on moral rights thus:

In an interactive environment such as that of the information society, where it will be very easy to modify and adapt existing works, one vital consideration will be the author's moral rights, including the right to object to any unauthorized modification of his work and to claim the right of author's paternity. These rights are handled very differently in different legal systems, and give rise to serious controversy. (*op. cit.*)

However, the situation closely parallels that discussed by Gillian Doyle with regard to concentration of ownership in more traditional media:

[There is a] range of conflicting opinions within Europe about what the aims and the substance of a collective policy on media ownership ought to be. Such conflicts partly reflect the fundamental question of whether the European Commission has any right to pursue policies aimed at safeguarding pluralism. (Doyle G 1997)

The Green Paper on Copyright concluded that

at the present time moral rights did not pose any real problems as far as the Internal Market was concerned. (*op. cit.*)

Energetic representations were made to the EU in response to the Green Paper. For example, the National Union of Journalists submitted that:

There are two reasons why the preservation of moral rights is crucial. First, because the integrity and authenticity of an artist's work is of importance to society as a whole. The enduring value of a piece of writing or a photograph or a design may not be immediately recognised. Unless moral rights are preserved there is a danger that the original work will be modified to make it commercially 'successful'. Very quickly the vigour and variety of our culture will degenerate into what is merely easy to sell.

The second reason why we are emphatic and unequivocal in our support for the preservation of moral rights is that we represent journalists. The constant use and re-use of editorial material, altered, modified or distorted to suit every conceivable niche

in the market, is not a happy prospect. The citizen/consumer in our 'information society' must be able to trust - to rely on - the authenticity of the images and information which are being provided. That trust cannot be located in an anonymous corporation - whether it be the BBC or News International - but in the moral and ethical standards of journalists themselves. Far from making it easier to waive moral rights, we believe the European Union should be extending and reinforcing the moral rights of authors and all creative workers. (NUJ 1995b)

Nevertheless, the recent Draft Directive on Copyright recommends no action on moral rights, instead concluding that:

With respect to some of the issues, market developments need to be further studied before a policy decision on their follow_up can be taken. This is in particular true with respect to the issue of moral rights protection in the Information Society context where an initiative for harmonization could be prepared as soon as the need occurs. (EU 1997)

As one commentator notes:

It is desirable to harmonise the terms of protection if you can point out some cases where the exploitation of works is hampered by different terms of protection. (Kotvedgaard 1993:122)

In order to persuade the Commission that harmonisation is both desirable and within its remit, therefore, it seems that cases where the lack of moral rights in the UK and/or Ireland has hampered the free flow of goods and services may need to be found. The open question is whether the Commission will accept the general argument that, in the absence of moral rights in a wide range of works in the UK and Eire, readers and viewers are denied a guarantee of authenticity. The publishing and film industries will certainly resist such a move; it may be that a case will need to be argued through the courts.

The basis for such a case certainly exists in principle; authors may or should be unwilling for their works to be distributed in the UK where arbitrary changes may be made. Bernard Tavernier, for example, insists that his films be transmitted without commercial breaks; (Crone 1997) his power to enforce this stipulation in his home country is based on a human right, but in the UK depends solely on economic clout.

Authors and publisher/producers in the mainstream countries also have a strong argument that the UK and Ireland at present constitute an offshore moral-rights-free-zone, to their economic detriment.

The objection that inalienable rights are alien to British law is countered by the incorporation of such a right with the implementation of the EU Lending and Rental Directive. Publishers and producers in the UK and Ireland will without doubt argue that harmonisation will place them at a disadvantage compared to their US-based competitors - if only from force of habit of resisting authors' rights and all regulation. The long-term answer, of course, is for the US to comply properly with the terms of the Berne Convention. This in turn will be strongly resisted, as evinced by the exclusion of moral rights from the TRIPS Agreements. (EU 1995)

The immediate answer to such objections could be that the Unique Selling Proposition of works authored in Europe can and should be precisely that they are works with integrity, that they are the works of individual humans exercising their rights and creativity.

6. Conclusion

The needs of the citizen and of society for trustworthy news and innovative entertainment are best met by the direct relationship of the citizen with individual human authors which is at the heart of the Berne Convention. Such a relationship forms the legal basis for a People's Media - for the potential of the technologies to be developed to maximise open and trustworthy communication with and between citizens.

It is true that this argument, coming from a journalist, is self-serving - but only in that it defends the income and influence of the individual journalist (and artist and performer) against the US 'work made for hire' doctrine and against the treatment of works as commodities in which authors have no rights. The alternative to moral rights is a future in which all news and entertainment - most of the public culture - is under the outright ownership and legal control of the media corporations.

If legislatures seize the opportunity to strengthen and harmonise the appropriate laws, the media corporations will adapt - with the recuperative power which is the hallmark of capitalism - to new roles as brokers and packagers. If they do not, the media corporations will adapt the laws to re-make the new media in their own old image.

References

- Arnolds (1993) in *The moral right of the author*, ALAI (Association littéraire et artistique internationale); the case is Pres. Rechtbank Haarlem 29 April 1988, *AMI* 1988 n No. 4/83
- Bangemann M et al (1994) *Recommendations to the European Council: Europe and the global information society* (Brussels: CEC)
<<http://www.ccg.uc.pt/wise/english/rd/prog/general/report.html>>
- Bécourt, Daniel (1996) *Révolution française et droit d'auteur: Pour un nouvel universalisme* at <<http://www.argia.fr/lij/ArticleMai96-2.html>>.
- Bender W (1994) 'Read all about it in the Daily You' in *Communicating Business* Winter 1994/95 (London: Forward Publishing) and at <<http://nif.www.media.mit.edu/papers/forward.html>>
- Borges JL (1941) 'La biblioteca de Babel' in *El jardín de senderos que se bifurcan* (Buenos Aires: Sur; translated as 'The Library of Babel' in *Ficciones*, New York: Grove Press, 1962)
- Brut de Béton S/ Jérôme Lindon* (1992) 3ème Chambre du Tribunal de Grande Instance de Paris a, 15 Octobre 1992, (*RIDA* No. 155 - Janvier 1993)
- Caillau R (1996) Presentation at World-Wide Web Consortium European launch, Paris.
- Chu Y *et al* (1997) Chu, Yang-hua; DesAutels, Philip; LaMacchia, Brian; and Lipp, Peter 'DSig 1.0 Signature Labels' public working draft at <<http://www.w3.org/TR/PR-DSig-label.html>>

- Cm 3819 (1998) *Crown Copyright in the Information Age*, A consultation document on access to public sector information (London: HMSO UK Parliamentary Paper Cm 3819) and at <<http://www.hmso.gov.uk/document/cfcont.htm> >
- Copyright Act USA:106A s. 106A: 'Rights of certain authors to attribution and integrity' available at <<http://www.law.cornell.edu:80/usc/17/106A.shtml> >
- Crone J (1997) Director John Crone; personal communication.
- DAVIC (1997) *DRAFT: DAVIC 1.0 part 11, Usage Information Protocols* (Geneva: Digital Audio-Visual Industries Council) at <<http://media.etri.re.kr/DAVIC/spec/spec10/part11/part11.html> >
- Dietz A (1993:59) 'Legal Principles of Moral Rights (Civil Law)' in *The moral right of the author* (Paris: ALAI / Association littéraire et artistique internationale): 59
- Doi T (1993) brief report in *The moral right of the author* (Paris: ALAI): 474
- Doyle S J (1994) 'GATT, TRIPS, and High Tech' at <<http://www.modl.com/corp/gatt.html>>
- Doyle G (1997) 'From "Pluralism" to "Ownership": Europe's emergent policy on Media Concentrations navigates the doldrums' *JILT* 1997 (3) at <http://elj.warwick.ac.uk/jilt/commsreg/97_3doyl/default.htm >
- Dworkin G (1993):105 'Moral Rights and the Common Law countries' in *The moral right of the author* (Paris: ALAI): 105
- Dworkin G (1993):102 *ibid.* p. 102 ff
- EMAP (1995) Text faxed anonymously to the National Union of Journalists.
- EU (1995) Green Paper *Copyright and Related Rights in the Information Society*; available at <<http://www.gn.apc.org/media/eugp.html> >
- EU (1997) *Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society* (Brussels: European Union paper COM(97) 628 final 97/0359 (COD)) available via <<http://europa.eu.int/comm/dg15/en/intprop/intprop/1100.htm>>
- Feintuck M (1997) 'Regulating the Media Revolution: In Search of the Public Interest' *JILT* 1997 (3) at <http://jilt.law.strath.ac.uk/jilt/commsreg/97_3fein/default.htm>
- Fleming (1993) in *The moral right of the author* (Paris: ALAI): 552
- Holderness M (1995) 'Creators are the Key to the Information Society', Telepathic Project CD-ROM and at <<http://www.gn.apc.org/media/culture.html> >
- Holderness M (1997a) 'The Librarian of Babel: The key to the stacks', *Ariadne* issue 9 (Bath, UKOLN) at <<http://www.ariadne.ac.uk/issue9/babel/> >
- Holderness (1997b) 'Superhighway robbery and how to stop it', paper at City University NetMedia 1997 and at <<http://www.poptel.org.uk/nuj/mike/city-c.htm> >

- Holderness M (1997c) 'This is a picture' in *Freelance* newsletter Sep/Oct 1997:3 (London: National Union of Journalists) and at <http://www.gn.apc.org/media/9709mani.html> >
- Huston (1991) *Huston C / Turner Entertainment et le CINQ*, Cour de Cassation à Paris 26 Mai 1991, *RIDA* No. 149 - p. 197
- Jehoram H C (1993:185) 'National Report on moral right in the Netherlands' in *The moral right of the author* (Paris: ALAI): 185
- Kelman A (1995) Speaking to a meeting of contributors to VNU magazines, 4 April 1995
- Knopf H (1998) Howard Knopf, Attorney, Ottawa, in message to <cni-copyright > mailing list, 24 January 1998
- Koktvedgaard M (1993):118 'Moral Rights Denmark' (1993) in *The moral right of the author* (Paris: ALAI): 118
- (Le Chapelier 1791) quoted in Bécourt D 'Révolution française et droit d'auteur: Pour un nouvel universalisme' at <http://www.argia.fr/lij/ArticleMai96-2.html> >
- Locks I (1995) Chairman's statement in Periodical Publishers' Association position paper on copyright.
- McCartney S (1991) 'Moral Rights under the United Kingdom's Copyright, Designs and Patents Act 1988', *Columbia VLA Journal of Law and the Arts*, volume 15, Winter 1991 (Columbia: Columbia) quoted in (Dworkin 1993:105)
- NUJ (1995a) *Digital Media Working Group Draft Report* (London: National Union of Journalists) at <http://www.gn.apc.org/media/dmwig.html> >
- NUJ (1995b) *Response to the European Commission (Directorate General XV) on the Green Paper: 'Copyright and Related Rights in the Information Society'* (London: National Union of Journalists) at <http://www.gn.apc.org/media/nuj-eugp.html>>
- NUJ (1996) 'Marking manipulated photographs' (London: National Union of Journalists) at <http://www.gn.apc.org/media/manip.html>>
- Pierce A (1998) Telephone interview January 1998
- Ralph R D (1996) *Copyright and Fair Use: The American Geophysical Union vs. Texaco Corporation* at <http://www.netstrider.com/documents/copyright/> >
- Sautet* (1990) Tribunal de Grande Instance de Paris, 14 Mars 1990, *Revue de la SACD* No. 1 - 1er trimestre 1992, p. 59
- Star Chamber (1586) Quoted in John Shelton Lawrence and Bernard Timberg, *Fair Use and Free Inquiry, Copyright Law and the New Media* (Norwood, NJ: Ablex Publishing Corp., 1989), 4.
- Stewart I & Cohen J (1997) *Figments of Reality* (Cambridge: Cambridge University Press)
- Vanhees H (1993):171 'Les droits moraux en Belgique' in *The moral right of the author* (Paris: ALAI): 171
- VNU (1994) Quote supplied to the National Union of Journalists in electronic mail by a concerned contributor.
- WIPO (1979) Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September

- WTO (1994) 28, 1979, (Geneva: WIPO Publication: No. 287(E)) available at <http://www.wipo.org/eng/iplex/wo_ber0_.htm>
Agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods (Geneva: World Trade Organization) available at <<http://www.wto.org/wto/intellec/1-ipcon.htm>>

Notes

- [1] Author's translation; original reads *"la plus sacrée et la plus légitime, la plus inattaquable et la plus personnelle de toutes les propriétés est l'ouvrage, fruit de la pensée d'un écrivain"*;
- [2] Original reads *L'auteur, personne physique, jouit de prérogatives d'ordre intellectuel et, à ce titre, décide en maître souverain de la réalisation et de l'achèvement de son oeuvre ainsi que de sa divulgation. Il dispose, en outre, de prérogatives d'ordre moral, destinées à protéger son nom, sa qualité et son oeuvre, tous éléments inhérents à la création, justifiant que ce droit soit édicté comme "perpétuel" et "inaliénable"*
- [3] Justin Fleming proposes 'personal rights in authorship' (Fleming 1993)
- [4] Original reads *... un auteur, quand il conclut un contrat d'auteur, donne tacitement sa permission pour apporter à son oeuvre les modifications qui sont inhérentes à la façon dont sa oeuvre va être exploitée*