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Moral Rights and Copyright Harmonisation: Prospects for an "International Moral Right"?

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I. Introduction

Copyright law, through its international expansion, has become virtually synonymous with the phenomenon known as globalisation. This somewhat awkward term is now the most widely accepted way of expressing a growing sense of interdependence in the international community. Both advocates and opponents of globalisation emphasize its economic dimension, through the growth and intensification of trade. However, its cultural aspect, derived from unprecedented communication and travel, is just as significant. The practical reality of globalisation is reflected in its conceptual counterpart, a developing body of international rules describing and governing the movement of things, people, and ideas across borders. Copyright law finds itself in the very vortex of international regulation, reflecting its peculiar importance in the new environment of intense global exchange.

The role of copyright in globalisation reflects three factors. First, copyright law has become the primary legal mechanism for protecting the new technologies that are central to the global economy, and, in particular, to continued growth in the highly industrialised economies which have a comparative advantage in technology. Perhaps most significantly, computer programs and databases are relatively new types of intellectual creation that are protected through copyright, either as "literary works," in traditional copyright terminology, or as "intellectual creation(s)" in their own right.[1] A second reason for the prominence of copyright is that, alongside the development of copyright protection for new technologies, more traditional "copyright industries" have also become economically important. For example, the film, popular music, and publishing industries have all achieved a global marketplace.[2]

Thirdly, copyright reflects the importance of information, knowledge and other forms of non-material creation for global wealth; it is recognised as the "raw material" for productive activity in the "Information Society." By linking works of the mind with an industrial framework for their publication and distribution, copyright acts as the main method of commercialising knowledge and, more specifically, culture. In 1980, Ploman and Hamilton observed that "copyright is one method for linking the world of ideas to the world of commerce;"[3] in the twenty-first century, it has virtually become the only navigable channel between them.

The advantages of an international standard of protection for intellectual property have long been recognised. Inequities to authors and publishers arising from disparate levels of protection in Europe and the United States were the driving force behind the development of the Berne Convention for the Protection of Literary and Artistic Works, finalised in 1886 as the first instrument of international copyright law.[4] At that time, somewhat ironically, the United States was the main focus of

international censure. European authors whose works were protected by copyright in their home countries found that their works were being "pirated" to the profit of American publishers, due to the lower standards of copyright protection that prevailed across the Atlantic.[5]

The approach to international copyright protection in the Berne Convention was to establish an international baseline standard, to which all member countries were supposed to adhere in their domestic legislation. The means by which individual countries chose to implement the standards in the Convention were left to their authorities. Like other instruments of public international law, the Berne Convention did not have specific measures for enforcement. Rather, the system was based largely on the aspiration towards international consensus in relation to copyright. Not surprisingly, the philosophical orientation of the Berne Convention reflects the intensive involvement of authors and artists' representatives in the negotiations. Article 1 states that the purpose of the Convention is to "constitute a Union for the protection of the rights of authors in their literary and artistic works," with no particular mention of trade or industry.

The contrast with approaches to international copyright in the present century could not be more striking. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which has superseded the Berne Convention in importance, states clearly that its main objective is "to promote effective and adequate protection of intellectual property rights" in order to "reduce distortions and impediments to international trade, and...to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade."[6] The TRIPs Agreement states that "Members shall be free to determine the appropriate method of implementing [its]...provisions within their own legal system in practice." However, in case of disagreements, the copyright provisions and standards of each country are subject to adjudication by an international trade dispute-settlement panel, which is empowered to impose economic penalties across any area of trade upon the defendant.[7] To date, the adjudication of the Dispute Settlement Body suggests that its approach to intellectual property standards will be strict, technical and specialised, rather than comprehensive and creative.[8] Moreover, its ability to accept alternative methods of implementation depends on its capacity to understand and evaluate them within the particular legal contexts of diverse member countries.

International lawyers have emphasized this "linkage" of intellectual property rights with international trade dispute settlement as the single most significant accomplishment of the World Trade Organisation.[9] Copyright lawyers cannot fail to note additionally that this new framework for international copyright has also fundamentally altered the theory and practice of copyright law. Copyright has always represented a delicate balance between a territorially-based right derived from statute and international rules governing the cross-border movement of works; cultural and commercial interests in knowledge; and, in fundamental terms, the power of authors to control their works against publishers who commercialise them, and a public that receives, experiences and re-uses them. The TRIPs Agreement has now tipped this balance strongly to one side; but there is little agreement among negotiators and policy-makers as to how this new balance of power is likely to affect the arts, creativity, or cultural heritage in the long-term.

In the international drive towards the standardisation of copyright norms, one aspect of copyright law remains conspicuously exempt. This is the area of *droit moral,* or "moral rights," which offers legal protection for the personal, "moral" interests of authors and artists in their works.[10] Interestingly, authors' moral rights have been recognised as especially important for the protection of creativity in the environment of digital technology.[11] However, moral rights have generated persistent international controversy, and efforts to harmonise protection have been consistently unsuccessful. International copyright standards have largely been developed through three distinct processes: the TRIPs/WTO system, the World Intellectual Property Organisation (WIPO),[12] and the Copyright Harmonisation Directives of the European Union, whose international influence far exceeds their regional effects.[13] In all three processes, attempts have been made to include moral rights, but none of them has been able even to generate a proposal for an internationally-viable

standard.

This paper examines the treatment of moral rights in processes of copyright standardisation and harmonisation in the WTO, WIPO, and the EU. It seeks to identify the reasons why it has proven to be difficult to achieve an international standard of protection for moral rights. It goes on to address the question of whether it is desirable for moral rights to be included in the internationalisation of copyright, and if so, how an "international moral right" may be achieved.

The rise of digital technology has made authors' moral interests particularly vulnerable to disregard, infringement and abuse.[14] In the context of a digital environment, the continued relevance of moral rights will depend on the awareness and support of a public that is ever more closely involved in the creative work of authors and artists.[15] The impact of internationalisation on moral rights should therefore be assessed in light of the special opportunities and challenges for creative expression in the Digital Age.

II. Moral Rights and Globalisation: An Uneasy Alliance

The purpose of copyright law is to protect the interests of creative authors and artists. In the United Kingdom and other countries whose copyright law derives from the common-law tradition, the emphasis of the law is traditionally on the protection of authors' commercial interests. Copyright law is said to provide an economic incentive for certain kinds of creative work.[16]

In contrast, the civil-law traditions of Continental Europe approach authors' rights in a holistic manner. They recognise that a true artist is personally involved in his work, with consequences for him, and for the art-enjoying public, that transcend the realm of purely commercial concerns. Accordingly, their laws provide equally for the protection of authors' commercial and non-commercial interests. In these jurisdictions, the protection of an author's personal interests in his work is accomplished through the legal device of moral rights. The two most widely recognised moral rights are the right of attribution, ensuring that the author is acknowledged as the creator of his own work, and the right of integrity, which allows an author to protest mistreatment or abuse of his work.[17] A third right that is not codified in the Berne Convention, but which is fundamental to the theory of moral rights, is the author's right to determine the circumstances in which his work is first presented to the public, known as the right of "divulgation."[18]

The concept of an artist's personal connection with his work is not, however, limited to the European legal tradition. Commentators who are concerned with authors' moral interests often argue that common-law systems are fundamentally antagonistic to the concept of moral rights;[19] but it is perhaps more accurate to say that the idea of authors' personality interests has developed differently in the common-law world. While the author has been the focus of copyright laws in Continental Europe - reflected, for example, in the terminology of *droit d'auteur* and *Urheberrecht* for "copyright law" in France and Germany - [20] British copyright developed as a publisher's right, leading to an in-built difficulty in prioritising the author over the publisher.[21] Nevertheless, a British judge recognised an author's personal right as early as the eighteenth-century.[22] While this particular precedent was not developed in subsequent case law, some protection for authors' personal interests could be achieved through tort actions, including defamation, injurious falsehood, passing off, and breach of confidence.[23]

Moral rights found their way into international copyright parlance when they were incorporated into the Berne Convention at the 1928 Rome revision conference.[24] When Canada passed moral rights provisions into its copyright law in 1931, it pioneered the inclusion of moral rights legislation within the framework of common-law copyright.[25] The presence of moral rights in copyright law is deeply significant for this branch of commercial law.

Moral rights are representative of social values concerning authorship, creativity and artistic work.

They are based on a belief that artistic creation is something more than an attempt to earn a livelihood. The creative act results in a special relationship between the creator and his work. Both the creative impulse and the work are of value to society; through his work, the artist provides an important service to society. By recognizing these aspects of artistic life, moral rights bring a cultural focus to copyright law. They allow copyright to balance more effectively the diverse and potentially opposing interests involved in creating, publicising, experiencing, and using an artistic work.

Although moral rights were introduced into the Berne Convention in 1928, they have not subsequently been dealt with directly in international processes for harmonising or standardising copyright law. However, moral rights have in a sense become "internationalised" through a different dynamic. Although moral rights originate in the culture of Western Europe, and are traced by current scholars to the historical currents of European Romanticism,[26] the doctrine has proven to be remarkably adaptable. Moral rights provisions have been adopted in the copyright legislation of most countries in the world, including the developing countries of Asia and Africa, some of whom are common-law influenced jurisdictions, and the "transitional" countries of Central and Eastern Europe, post-socialist jurisdictions that identify themselves as part of the civilian stream.[27] Over the past decade, Australia, the United Kingdom and the United States - albeit in a highly reserved and ambiguous manner - have also adopted moral rights statutes, though the implementation of moral rights in at least the last two of these common-law jurisdictions is quite imperfect.[28]

The solid presence of moral rights on the international copyright scene suggests a degree of international consensus that moral rights should be protected. While the details of moral rights provisions may vary considerably between jurisdictions from different legal traditions and at different levels of development, almost every country seems to recognise the protection of moral rights in principle. It is interesting to note that acceptance of moral rights is in fact much wider than international agreement on intellectual property rights that have actually been included on the agenda of internationalisation, for example, certain kinds of patent rights.[29]

It seems that the potential for internationalising moral rights - or, at the very least, harmonising them - is substantial. Given this situation, why have they not been an area of active development in the WTO, WIPO, or EU processes?

Three considerations may begin to provide an answer to this fundamental question. First, although most common-law countries have adopted moral rights provisions, the tensions between copyright and authors' rights systems have not disappeared. The persistence of conceptual differences about the appropriate form of copyright law is apparent in the incomplete and unsatisfactory codification of moral rights in common-law systems. For example, recent British provisions are rendered largely ineffective by comprehensive exceptions and stipulations on waivers.[30] In the United States, which has adopted the sketchiest of all international provisions on moral rights, this situation is compounded by a constitutional framework for copyright protection which specifies that a public right of access must be weighed heavily against the individual rights of authors.[31]

A second and widely-acknowledged reason for hesitation about moral rights has been a degree of concern about their economic effects. Here, too, the common-law countries have been most fearful about the practical consequences of introducing protection for moral rights into systems that traditionally emphasize economic rights. In the United States, a powerful film lobby succeeded in persuading the American government not to enact moral rights protections that might lead to problems with the distribution of movies.[32] A similar situation in the United Kingdom leads Cornish to comment that British moral rights represent "a highly pragmatic outcome," in which "the pressures of interest played a noteworthy part."[33] It is true that the European tradition of strong moral rights protection suggests that the dire consequences anticipated in the common-law countries are unlikely to follow. Nevertheless, the legal treatment of authorship in the common-law countries is deeply entrenched, and change creates a new uncertainty.

A third and deeper reason underlying the exclusion of moral rights from international harmonisation efforts may have to do with a fundamental incompatibility between the philosophy of moral rights and the commercial thrust of the international copyright regime. The TRIPs Agreement explicitly brings copyright into the framework of international trade, and it specifies that consistently high standards of copyright protection are viewed as a basic component of a successful trade regime. Similarly, the latest EU directive on Copyright in the Information Society specifically identifies the role of copyright in consolidating the Internal Market.[34] Copyright harmonisation in the EU, and standardisation in TRIPs, are primarily commercial undertakings, whose main purpose is to facilitate the free flow of information, knowledge and culture across borders for economic purposes. They are based on the principle of reducing the costs and inconveniences arising out of inconsistent standards of protection in different jurisdictions.

Moral rights present an uncomfortable contrast to this strong commercial drive. The avowed goal of international processes is to accelerate the commodification and commercialisation of knowledge in order to improve the economic power of cultural industries. Moral rights are concerned with protecting authors and their works; through them, moral rights protection aims to make a larger contribution to the preservation of cultural heritage and the encouragement of creativity. In the guise of global copyright, the individual author is in a sense pitted against international forces as powerful as any empire of the past. Moral rights attempt to provide shelter from this strong international current.

In these circumstances, is it necessarily disadvantageous for moral rights to be excluded from globalisation? Indeed, there are clear benefits to maintaining a separate regime for moral rights: both the extent of the rights and the procedures they involve remain flexible, with their precise shape ultimately determined by domestic policy concerns. Moral rights oppose trends towards cultural homogeneity that may be encouraged by the drive towards uniformity in the legal and regulatory treatment of culture.

An example serves to illustrate this point. Like any other regulatory framework, Western copyright law entails the prioritisation of certain interests over others according to its underlying cultural models. For example, it is a basic requirement of Western-style copyright protection that a work must be "fixed" in a permanent form before it is eligible for copyright protection. This "idea-expression dichotomy" automatically excludes works of oral culture from copyright protection. In many societies, however, oral works are an important part of cultural heritage. In these and other ways, a uniform approach to copyright around the world may prove to be ill-suited to the diversity of international cultures and levels of economic development.[35]

Unfortunately, the costs of maintaining a separate approach to moral rights are substantial. Since there is little international pressure to maintain strong protection of moral rights, they may come to be perceived as less important than economic rights. This loss of prestige could even translate into open neglect in many countries. Moreover, the failure to negotiate an international standard of protection for moral rights allows an ongoing situation of lack of clarity and commitment to authors' moral interests to continue indefinitely at the international level.

In fact, moral rights issues have infiltrated their way into international copyright negotiations. A consideration of their treatment in the WTO, WIPO and EU processes reveals that they are not absent from the international copyright regime. Rather, they are an important source of unresolved tension and inconsistency.

III. Moral Rights and Ambiguity in the TRIPs Agreement

The TRIPs Agreement has replaced the Berne Convention as the primary instrument of international copyright law. While the TRIPs Agreement has superseded Berne in importance, it has not actually replaced the copyright provisions of the earlier Convention. Rather, Article 9.1 of the TRIPs

Agreement incorporates the substantive provisions of the Berne Convention.[36]

Among other provisions, Article 9.1 also includes the moral rights protections of Article 6*bis* of the Berne Convention. However, an unusual formula is reserved for incorporating moral rights, alone. Article 9.1 of the TRIPs Agreement states:

Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of... [the Berne] Convention or of the rights derived therefrom.

The effect of this provision is, quite simply, that the general dispute settlement mechanism of the TRIPs Agreement will not apply to moral rights. This means that the WTO Dispute Settlement Understanding cannot be invoked to protect moral rights,[37] and that any other procedures relating to the implementation of intellectual property rights or their enforcement through the Council for TRIPs will also not apply to moral rights.[38] Member countries cannot expect to claim violations of the moral rights of their authors within the TRIPs system.

So central to the TRIPs Agreement is the enforcement of intellectual property standards through the Dispute Settlement Understanding of the WTO, that the exclusion of moral rights from dispute settlement procedures has led many observers to conclude that moral rights are effectively excluded from TRIPs.[39] However, this assessment may not be entirely accurate. Surely the inclusion of Article 6*bis* in the TRIPs Agreement, in whatever form, indicates some degree of awareness of authors' moral rights. What is certain is that the failure to make moral rights "enforceable" through standard measures that apply to all other intellectual property rights in the Agreement indicates a lack of commitment among trade negotiators.

The recognition of moral rights in the TRIPs Agreement, if only in the "softest" kind of international formulation, does appear to have generated an uneasy sense of obligation towards these rights internationally. For example, the United States, which of all countries was perhaps most opposed to creating an international moral right through TRIPs, found itself pressured into a reassessment of its own treatment of authors' moral interests, even under the limited inclusion of Article 6*bis*. At the time of joining the Berne Convention in 1989, it had argued that sufficient protections for moral rights could be found in American common law.[40] Nevertheless, in 1992, it adopted a Visual Artists' Rights Act which explicitly offered protection for the moral rights of visual artists, somewhat discrediting its earlier claims to an adequate moral rights regime.[41]

IV. The WIPO Treaties: A New International Guideline?

With the creation of the TRIPs Agreement, copyright moved out of the United Nations framework - WIPO is a specialist agency of UNESCO - and into the international trade regime. This shift in the international development and administration of intellectual property rights has left WIPO in an ambiguous position. WIPO is no longer the primary forum for international intellectual property law. However, it has accumulated unparalleled expertise in this area. Indeed, the success of the TRIPs system, particularly in its early years and among developing jurisdictions, may depend partly on its ability to maintain close ties with WIPO, exploiting its accumulated wealth of knowledge, and seeking its support for WTO initiatives.[42] An agreement between WIPO and the WTO, concluded in 1995, emphasizes the importance of a "mutually supportive relationship," based on "cooperation."[43] It suggests that the future role of WIPO in the international intellectual property arena will mainly involve research, the provision of information about intellectual property law, and technical assistance for law reform in the developing world.[44] This new role for WIPO seems to be supported in the TRIPs Agreement, itself, where Article 68 specifies that it is an important function of the Council for TRIPs to establish a working relationship with WIPO. Given these considerations, any progress on moral rights through WIPO may act as an important influence on the future development of the TRIPs Agreement, or at the very least, as a counterweight to its restrictive treatment of moral rights.

In spite of the apparent subordination of WIPO to the WTO, WIPO has nevertheless continued to generate new rules on intellectual property. In 1996, it finalised two important new treaties, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.[45] The WIPO treaties may not have the same international force as TRIPs; however, they can provide influential guidelines on legal reform in the area of intellectual property rights, and, no doubt, a less coercive approach to law reform. As such, have either of the WIPO treaties attempted to deal with the area of moral rights?

In fact, Article 5 of the WIPO Performance and Phonograms Treaty extends the moral rights recognised in Article 6*bis* of the Berne Convention to performers. The right is nicely adapted to the somewhat different character of performances, as opposed to other works, in the sense that the performer's moral right applies both to recorded and "live aural" performances; fixation *per se* is not required.

The influence of moral rights on the WIPO Copyright Treaty is more difficult to assess. The Treaty does not deal explicitly with moral rights. However, its Preamble points out that it is, in part, a response to "the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works." Among the measures that address this particular issue is Article 8, which protects a "right of communication to the public."

Article 8 provides:

[A]uthors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public access these works from a place and at a time individually chosen by them.

The right of communication to the public, along with the right of reproduction, is one of the fundamental economic rights of the author. It has traditionally served to protect works that are disseminated to the public through non-material representations, such as dramatic or musical performances.[46] The character of the right is reflected in its French name, the right of "*représentation.*"[47] With the growth of digital reproduction technologies and technologies of instantaneous communication, the scope of the communication right has become much broader. The language of Article 8 clearly attempts to incorporate dissemination through broadcasting, cable and satellite technologies, and, of course, the Internet. The purpose of the Article is clearly to update the author's right of communication for the "Digital Age."

Article 8 does not make explicit reference to moral rights. However, its resemblance to the moral right of "divulgation," or first publication, is striking. The right of communication in Article 8 aims to protect the economic gains to the author from the dissemination of his work through modern technologies. However, does it not also emphasize the author's right to present his work to the public as a matter of personal choice, whether it is a question of professional integrity or personal privacy?

The idea that an author should be able to determine the conditions in which his work first appears before the public is fundamental to moral rights theory. Indeed, it lies at the origin of both the author's economic and moral rights. As Claude Colombet points out:

C'est le droit de divulgation qui, chronologiquement, précède les autres, car c'est à partir de son exercice que l'oeuvre, arrachée à son auteur, entre dans le circuit économique, devient un bien patriomonial sur lequel pourront s'exercer les autres attributs, tant moraux que pécuniaires, du droit d'auteur.[48]

If, indeed, Article 8 of the WIPO Copyright Treaty can serve the purpose of helping authors to cope

with the erosion of their moral interests in the digital environment, it is disappointing that the right of divulgation should not have found expression alongside the right of communication. In the "Digital Age", it has become especially difficult to separate the moral from the material concerns of authors.[49] The right of communication seems to imply some recognition that authors' moral interests are at stake as never before in the environment of new technology.

V. Moral Rights and European Copyright Harmonisation: Unfulfilled Promise

In contrast to both the WTO and WIPO, the European Union copyright harmonisation process involves a much greater potential for developing a Europe-wide appreciation of moral rights. The most powerful members of the EU, France and Germany, are also the heartland of moral rights doctrine.[50] American objections to moral rights at the WTO resulted in a half-hearted treatment in the TRIPs Agreement. However, the United Kingdom, Europe's only common-law jurisdiction, has perhaps been more prepared to adapt to a changing copyright landscape, at least in principle, by adopting legislative protections for moral rights. The treatment of moral rights in the UK Copyright, Designs and Patents Act of 1988 leaves much to be desired; but their presence in British copyright, for the first time in the history of UK legislation, is itself an important sign of progress.[51]

An additional factor that may make the EU a better candidate for the development of an international moral rights standard is the role of adjudication. At the WTO, moral rights are excluded from the adjudicative capacity of the Dispute Settlement Body. In the EU, however, the European Court of Justice is a strong force to be reckoned with in issues arising out of the trans-border movement of intellectual property. For example, in the seminal *Phil Collins* judgement of 1993, the court asserted that moral rights, with particular emphasis on the integrity right, were included in a Europe-wide regime for the protection of copyright.[52]

It is also worth noting that the European concept of legal harmonisation should be distinguished somewhat from the philosophical orientation of the WTO. This subtle difference in character may involve a hidden potential for moral rights. The TRIPs Agreement is perhaps more accurately characterised as an experiment in legal "standardisation" at the international level, rather than "harmonisation" *per se.* The objective of the WTO system is to achieve a uniform level of protection across borders; the nature of the dispute settlement mechanism also lends itself to greater uniformity in standards. While the purpose of European legal harmonisation is to favour freedom of movement across borders in the Internal Market, its attempt is to bring national standards into congruity on a culturally-sensitive basis.[53]

In a 1995 Green Paper on Copyright and Related Rights in the Information Society, the European Commission made a number of statements about the need to include moral rights in the process of copyright harmonisation.[54] It observed:

With the arrival of the information society the question of moral rights is becoming more urgent than it was. Digital technology is making it easier to modify works. The Commission believes there is a need for an examination of the question whether the present lack of harmonization will continue to be acceptable in the new digital environment.[55]

In spite of this commitment at the level of policy, and an apparently more favorable regional environment in which to develop moral rights, the EU has not made significant progress in harmonisation. None of the six copyright harmonisation directives to date has dealt with the problem of moral rights. For example, the Computer Programs Directive explicitly addresses only the economic rights in computer programs.[56] The Term Directive states that it "shall be without prejudice to the provisions of the Member States regulating moral rights."[57] A similar approach is taken in the Database Directive, which specifies that "the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention...;... such moral rights remain outside the

scope of this Directive."[58]

The latest directive on Copyright in the Information Society is the most ambitious harmonisation initiative to date, and it could have provided an ideal opportunity to address the issue of moral rights. This directive attempts to harmonise the reproduction right - what Michael Hart calls the "very core of copyright law" - as well as the rights of distribution and communication to the public.[59] However, moral rights appear only in Recital 19 of the directive, which provides, in a formula that is uncomfortably reminiscent of Article 9.1 of the TRIPs Agreement:

The moral rights of right holders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.[60]

The directive on Copyright in the Information Society is closely based on the WIPO Copyright Treaty. As such, it emphasizes the changing quality of authors' rights in a digital environment, especially in relation to the issue of representation, or communication to the public. Article 3 of the Directive sets out details of the right, including, in broader language than the WIPO Copyright Treaty, an "exclusive right to authorize *or prohibit* any communication to the public... including the making available to the public of their works in such a way that members of the public access them from a place and at a time individually chosen by them [italics mine]." In Article 3.2, the right is explicitly extended to apply to performers in the case of a fixation of their performances, and to phonogram producers in their phonograms. As in the WIPO Copyright Treaty, it seems difficult to divide this digital-era right of representation into neat economic and personal compartments. Indeed, the explicit right of the author to prohibit communication of the work to the public seems, if anything, to make this right even more powerful and significant than it is in the WIPO Treaty.

Despite the greater potential for harmonising moral rights at the level of the EU, the copyright harmonisation directives have not succeeded in confronting the issue directly. Rather, the latest Directive on Copyright in the Information Society seems to grant tacit recognition to an author's moral right of divulgation in the form of an extended right of communication to the public - without, however, identifying authors' moral interests openly. In this approach to copyright, the Directive closely follows the WIPO Copyright Treaty, though its treatment of the communication right is somewhat broader than the WIPO approach.

In terms of the moral rights of attribution and integrity, the European process has not made any progress to date. On the basis of EU policy pronouncements and long-standing European tradition, it seems reasonable to expect a greater degree of openness towards moral rights than may be found in other international fora. The failure of the harmonisation process in this regard is surprising and disappointing.

VI. Conclusion: Prospects for an International Moral Right

A consideration of moral rights on the international scene reveals a pervasive dilemma. On the one hand, awareness of authors' moral interests, particularly in the environment of new technologies, appears to be growing. On the other hand, international negotiators seem to have reached a stalemate in their efforts to develop a harmonisation program for moral rights. The controversy over authors' moral interests runs deep. Clarification of this aspect of intellectual property rights at the international level will require the resolution of complex and fundamental conflicts - divergent legal traditions, the appropriate social role of creative authorship, and the very logic of internationalisation, itself.

On balance, it seems that the maintenance of a separate regime for the protection of moral rights, independent of the global trend towards copyright harmonisation, may produce more negative than

positive results. When moral rights do not enjoy a status equal to that of economic rights of authorship, important cultural values fall under attack. Internationalising moral rights would allow them to keep pace with other aspects of copyright. Their presence in international copyright law could also bring a renewed cultural focus to a sphere of regulation that has become almost exclusively commercial and commodity-driven.

While it is beyond the scope of this paper to present detailed provisions for an international moral right, the discussion of international processes to date suggests a framework for developing one. In relation to moral rights, the initial objective of harmonisation should be the achievement of an international baseline standard. The starting point of the harmonisation process should be a high basic standard, as the well-established European principle of "upward harmonisation" might allow, with the possibility of national standards that are both higher than, and different from, the international right. Attribution and integrity rights, as well as the right of divulgation, should be included in a harmonised right. What is equally important, exceptions to moral rights provisions, such as the conditions in which waivers will be allowed, should also be harmonised.[61] In the process of developing a harmonised moral right, the experience of the copyright harmonisation process in the EU may prove to be invaluable. Given its potentially greater cultural compatibility with moral rights protection, the EU should assume leadership and attempt to pioneer progress in this area.

It remains true that the effects of a harmonised international moral right on culture and creativity cannot be fully anticipated. In this regard, harmonization should be approached with caution, and on the basis of careful analysis and adequate research. An international moral right could not only have unforeseen economic effects, but it might also entail ambiguous cultural consequences. Moral rights do come from a cultural environment where the creativity of the individual artist is valued as the ultimate expression of human creativity. This cultural model may not be universally valid, as different cultural traditions may prioritise different kinds of creative expression, favoring communal creativity, not recognising proprietary rights, or - a profound challenge to the right of attribution - even assigning special prestige to anonymous artworks.[62] A recent Australian case, in which an artist from an Australian indigenous group vindicated his copyright in spite of his community's disapproval of his individualistic actions, illustrates the kind of confusion that may arise when international standards become the norm in the cultural sphere.[63]

Similar concerns are apparent in relation to the *droit de suite,* a right that allows visual artists to profit from sales of their work after the first sale by the artist, himself, although the artist is not a party to these subsequent transactions. The droit de suite is classified as an economic right,[64] but a personality-based justification is implicit within it: the full monetary value of the work may not be realised in the initial transaction, but the profits of future sellers are surely based on the value of the artistic personality embodied in the work. Like moral rights, the droit de suite, in its own way, has great cultural significance. The European Commission has proposed harmonisation of this right; but the problems with harmonisation are pointed out by David Booton:

[T]he cultural impact of harmonisation should not be overlooked. While the economic influence of the droit de suite is given considerable attention as part of the Commission's attempts to justify its proposal, there is no express consideration of the right's contribution to artistic creation and cultural development in the Member States nor is there any consideration of the effects that implementation of a droit de suite may have on the capacity of Member States to preserve "the balance of creative and artistic activity". If the Community blindly pursues the goal of economic integration without consideration of the cultural impacts of harmonisation, then there is the danger that European copyright law will come to reflect the values of Oscar Wilde's cynic who knew the cost of everything, but the value of nothing.[65]

In spite of the need for caution, there is encouraging evidence that moral rights are seen by many countries as a valid and useful means of protecting culture. The flexibility and range of the doctrine

has been proven through diverse legislative and judicial treatments. At a time when culture is at once most vulnerable and most vital, every means of helping it to flourish must be fully explored. The challenge of international efforts will be to achieve recognition for moral rights while allowing the doctrine to continue to grow and change as the international legal community becomes ever more diverse.

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[1]For example, see Annex 1C to the *Agreement Estabishing the World Trade Organisation,* 15 April 1994, 33 ILM 1197 (entered into force 1 January 1996), online: WTO Homepage (Legal Texts) <http://www.wto.org/english/docs_e/legal_e/final_e.htm> (date accessed: 19 March 2002) (entered into force 1 January 1995), Article 10 [hereinafter TRIPs Agreement]; and the WIPO Copyright Treaty (December 20, 1996), adopted by the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva, Articles 4 and 5 [hereinafter WIPO Copyright Treaty]; WIPO Collection of Laws for Electronic Access, online: < (date accessed: 19 March 2002). Databases are protected through both copyright and a sui generis right in the EU directive on databases: see Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (27/03/1996), OJ L77/20, Chapter III, Arts 7-11 [hereinafter Databases Directive]. The EU also protects computer programs as "literary works": see Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (17/05/1991), OJ L122/42 [hereinafter Computer Programs Directive].

[2]The problems of globalisation in "cultural industries," with a special focus on film, are discussed in detail in S Fraser "Berne, CFTA, NAFTA & GATT: The Implications of Copyright *Droit Moral* and Cultural Exemptions in International Trade Law" (1996) 18 Hastings Comm & Ent LJ 287, 304-20. See also D Nimmer "Conventional Copyright: A Morality Play" (1992) 3 Ent L Rev 94.

[3]EW Ploman & LC Hamilton *Copyright: Intellectual Property in the Information Age* (Routledge & Kegan Paul London 1980) 1.

[4]9 September 1886, as am, 828 UNTS 221, World Intellectual Property Organisation (WIPO) Collection of Laws for Electronic Access, online: < (date accessed: 26 Feb 2002)[hereinafter Berne Convention]. The genesis of the Convention is described by S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Kluwer Centre for Commercial Law Studies, Queen Mary College London 1987) c 2. Victor Hugo and Turgenev were among the distinguished names involved.

[5]The situation is discussed in detail, with reference to both the United States and various European countries, by Ricketson (above) paras 1.20-24.

[6]TRIPs Agreement (n 1 above), Preamble.

[7]See *Understanding on Rules and Procedures Governing the Settlement of Disputes,* Annex 2 to the *Agreement Establishing the World Trade Organisation,* 15 April 1994, online: WTO Homepage (Legal Texts) <http://www.wto.org/english/docs_e/legal_e/final_e.htm> (date accessed: 19 March 2002) (entered into force 1 January 1995), Article 22 [hereinafter Dispute Settlement Understanding].

[8]An example is provided by the first dispute adjudicated under TRIPs, a conflict over pharmaceutical patents brought by the United States against India. Among other points, India tried to argue that the TRIPs provisions should be interpreted in the light of its special features as a

developing country. The argument was ignored by the dispute-settlement body, which dealt with the matter in a thoroughly technical manner. See *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complaint by the United States)* (1997), WTO Doc. WT/DS50/R (Panel Report), WTO online: <http://www.wto.org/wto/dispute /distab.htm> (last modified: 31 May 1999).

[9]For example, see RC Dreyfuss & AF Lowenfeld "Two Achievements of the Uruguay Round: Putting TRIPs and Dispute Settlement Together" (1997) Va J Int'l L 275, 294-95. They also argue for leniency in dispute settlement, especially towards developing countries.

[10]Translating *droit moral* into English is problematic; the words moral/*moral* are "false friends" that do not mean precisely the same thing in the two languages. The issue is discussed by Ricketson (n 4 above) para 8.93.

[11]For example, see the discussion in the Commission of the European Communities Green Paper on Copyright and Related Rights in the Information Society (19.07.1995), COM (95) 382 final, VII [hereinafter Green Paper]; or, the Canadian counterpart to moral rights reform, Information Highway Advisory Council *Copyright and the Information Highway: Final Report of the Copyright Subcommittee* (1995), 18-21 [hereinafter Canadian Report].

[12]The most important recent initiatives of WIPO are the WIPO Copyright Treaty (n 1 above), and the WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference on December 20, 1996 [hereinafter WIPO Performances Treaty]. Available online: WIPO Collection of Laws for Electronic Access (n 1 above).

[13]The European Union has adopted six copyright harmonisation directives to date: the Computer Programs Directive (n 1 above); Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (27/11/1992), OJ L346/61; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (06/10/1993), OJ L248/15; Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (24/11/1993), OJ L290/9; Databases Directive (n1 above); and Directive 2001/29/EEC of the European Parliament under the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (22/06/2001), OJ L167/10. The directives are all available online through the EU database of Community Legislation in Force, Eur-Lex: < (date accessed: March 19, 2002).

[14]For example, see the discussion in the Canadian Report (n 11 above) 18-21.

[15]The essential role of the public in maintaining the viability of copyright in an environment dominated by digital technology is pointed out by JAL Sterling "Philosophical and Legal Challenges in the Context of Copyright and Digital Technology" (2000) 31:5 IIC 508, 525. The importance of public support for protecting moral rights, in particular, is explored in detail in M Sundara Rajan "Moral Rights in the Digital Age: New Possibilities for the Democratisation of Culture" (Jun 2002) 16 Int'l Rev L, Computers & Tech (forthcoming).

[16]Copyright provides an incentive for work that requires heavy investment - an area that is much emphasized in the Directive on Copyright in the Information Society (n 13 above), for example, at Recitals 2 and 3 - and for work that has mass popular appeal. Copyright theory does not claim to explain the creation of artistic masterpieces.

[17]Moral rights in some jurisdictions - notably, France and countries influenced by French legal tradition - protect other interests, as well. For example, there is a moral right of "withdrawal," which

allows an author to withdraw copies of his work from circulation on personal grounds, and a right against "vexatious" criticism. The latter right is discussed by G Michaélidès-Nouaros, *Le droit moral de l'auteur: Étude de droit français, de droit comparé et de droit international* (Librairie Arthur Rousseau Paris 1935) para 168.

[18]See Ricketson (n 4 above) para 8.93.

[19]For example, Gendreau refers to the "hostility" of common-law countries towards moral rights: see Y Gendreau "The Copyright Civilization in Canada" (2000) IPQ 84, 89.

[20]Author's right and creator's right, respectively.

[21]For discussion of the origins of British copyright in the eighteenth-century Statute of Anne, see M Rose *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993)**.** Ploman & Hamilton (n 3 above) 26 observe: "In an extreme form, copyright would be the rights granted to authors of works in order to make possible the transfer of exclusive rights to publishers, without the author having any inherent rights in the intangible property he has created."

[22]The judge was Lord Mansfield, and the case is *Millar* v *Taylor* (1769), 98 Eng Rep 210 (KB); it is discussed in Rose (above) 5, and it also finds mention in G Dworkin "The Moral Right of the Author: Moral Rights and the Common Law Countries" (1995) Colum-VLA J Law & Arts 229, 229-30.

[23]For a discussion of some of the role of common-law torts in protecting authors' personal interests, see Dworkin (above) 231-37.

[24]The treatment of moral rights at the Rome conference is summarised by Ricketson (n 4 above) para 3.28; moral rights were extended in the 1948 Brussels revision conference to include a provision on the term of moral rights - protected at a minimum until the expiry of economic rights. See Ricketson (n 4 above) para 3.40.

[25]D Vaver *Intellectual Property Law: Copyright, Patents, Trade-marks,* Essentials of Canadian Law Series, with a Foreword by Madam Justice Beverly McLachlin (Irwin Law Concord 1997) 158-60.

[26]See Martha Woodmansee's seminal study on the issue: M Woodmansee "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the `Author'" (1984) 17 Eighteenth-Century Studies 425.

[27]Examples include India and Nigeria, discussed in Dworkin (n 19 above) 262-63, and Russia: see Law on Copyright and Neighboring Rights, No 5351-I of July 9, 1993, Article 15, Russian Patent & Trademark Office, online: <www.rupto.ru/ruptoen/law/intel.htm>.

[28]For a detailed critique of the UK provisions, see WR Cornish "Moral Rights under the 1988 Act" (1989) 11:12 EIPR 449; the scope and limitations of Australian moral rights, which represent important progress in Australian law, are considered comprehensively by E Adeney "Defining the Shape of Australia's Moral Rights: A Review of the New Laws" (2001) 4 IPQ 291. In the United States, limited moral rights provisions have been enacted in the Visual Artists Rights Act, exclusively providing protection for the moral rights of visual artists: Visual Artists Rights Act of 1990, 104 Stat 5089, Pub L No 101-650, 17 USCA s101, Title 6, ss 601-610. The ambiguous achievement represented by the Act is discussed by Nimmer (n 2 above).

[29]In particular, the TRIPs provisions dealing with process patent regimes should be noted: see US-India case (n 8 above).

[30]See UK Copyright, Designs and Patents Act 1988, c 48, s 87; the significance of the provisions on waiver are dealt with by Cornish (n 28 above) 451-52.

[31]The Constitution of the United States, Article I, Section 8, Clause 8: the purpose of copyright protection is to "promote the Progress of Science and useful Arts." For a discussion of the provision, S Fraser "The Conflict between the First Amendment and Copyright Law and its Impact on the Internet" (1998) 16 Cardozo A & E LJ 1, 12.

[32]This situation is discussed in detail by Nimmer (n 2 above) and Fraser (n 2 above).

[33]See Cornish (n 28 above) 449.

[34]See n 13 above, Recital 1.

[35]For example, this might be the case in relation to the cultures of developing countries and the world's indigenous peoples. For a discussion of the latter situation, see J Tunney "E. U., I.P., Indigenous People and the Digital Age: Intersecting Circles?" [1998] EIPR 335, 335-39.

[36]The TRIPs Agreement incorporates Articles 1-21 of the Berne Convention, and the Appendix on Special Provisions Regarding Developing Countries. Only the procedural aspects of the Berne Union are not included.

[37]See Dispute Settlement Understanding (n 7 above).

[38]See Article 68 of the TRIPs Agreement (n 1 above) on the Council for TRIPs.

[39]For example, Fraser (n 2 above) 314 points out that, "[a]lthough alone amongst all the countries involved in its opposition, the United States managed to have moral rights excluded from the TRIPs Agreement...[T]he United States can continue to avoid the Article 6*bis* requirements of protection of moral rights since the enforcement measures of the WTO will not apply."

[40]A similar argument served for a long time as Britain's explanation for why it had not introduced moral rights legislation. Cornish suggests that US law does achieve a somewhat better standard of protection for moral rights than was available at common-law in England: see Cornish (n 28 above) 449. Nevertheless, the adoption of moral rights legislation in the United Kingdom in 1988 seemed to repudiate this position, however unsatisfactory and incomplete the final provisions may be.

[41]See VARA (n 25 above). The embarrassing contradictions of the US position on moral rights are discussed in detail by Nimmer (n 2 above).

[42]While the WIPO system had its problems, one relatively positive feature was that it had managed to develop a basic level of consensus on intellectual property rights among countries at different levels of development. Developing countries enjoyed a degree of political power in the WIPO system, which was based on UN-style voting procedures, in contrast to their sense of exploitation in the TRIPs process. This point is developed by RL Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) 24 Denv J Int'l L & Pol'y 109, 121. A consideration of the negotiating history of the Convention, and of the involvement of developing countries, in particular, supports this view: see Ricketson (n 4 above) 11.1-11.48, 11.103-11.106.

[43]See Agreement between the World Intellectual Property Organisation and World Trade Organisation, Geneva, 22 December 1995; Preamble [hereinafter Cooperation Agreement], online: WIPO Collection of Laws for Electronic Access (n 1 above).

[44]Cooperation Agreement (above), Articles 2 and 4.

[45]N 11 above. See WIPO Press Release No. 106, WIPO online: < (date accessed: 19 March 2002).

[46]The right is analysed by Ricketson (n 4 above) para 8.63.

[47]For example, see the discussion of the right in J-M Pontier, J-C Ricci & J Bourdon *Droit de la culture* (2e éd) (Dalloz Paris 1996) para 347.

[48]"It is the right of divulgation which, chronologically, precedes the other [moral rights], for, by its exercise, the work, removed from its author, enters into the economic cycle, and becomes an economic good on the basis of which the other attributes of the author's right, whether moral or economic, can be exercised." C Colombet *Grands principes du droit d'auteur et des droits voisins dans le monde: Approche de droit comparé* (2d ed) (Unesco Paris 1992) 42 (translation mine).

[49]The close relationship between "moral" and economic interests is also noted by Dworkin (n 22 above) 232. He also cites the common law tort of "breach of confidence" as akin to the divulgation right, and some precedents in support of this view.

[50]The doctrine has been part of the natural development of authorship rights in both countries. France is usually identified as the home of the "dualist" school, which grants perpetual protection to moral rights regardless of the term of protection for economic rights, while Germany is associated with the "monist" school, providing an equal term of protection for both. Even this distinction is not entirely clear-cut; see S Strömholm "Droit Moral - The International and Comparative Seen from the Scandinavian Viewpoint" (1983) 14:1 IIC 1,10-12. He shows that the modern understanding of moral rights is a mixture of "French practical solutions" with "German theorizing."

[51]Cornish (n 28 above) 449, expresses the hope that, "in time they will grow the sturdier." The United States continues to rely on the common law for the protection of moral rights, with the partial and controversial exception of VARA (n 25 above).

[52][1993] 3 CMLR 773, para 20-22 (joined cases C-92/92 and C-326/92). The case is also mentioned in the Green Paper (n 10 above)VII, 2.2 (p 66).

[53]For example, see EU Directive on Copyright and Information Society (n 13 above) Recital 11, on the contribution of copyright to "ensuring that European cultural creativity and production receive the necessary resources and...safeguarding the independence and dignity of artistic creators and performers"; and Recital 12 on the importance of copyright in protecting "copyright works and subject-matters of related rights... from a cultural standpoint."

[54]Green Paper (n 11 above).

[55]Green Paper (above), VII, 3 (p 67); see also Sundara Rajan (n 15 above).

[56]Term Directive (n 13 above); for example, see Art 2(3) on economic rights in the situation of an employer-employee relationship, where the employee creates a work.

[57]Green Paper (n 11 above), VII, 2.2. See M Hart "The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame About the Exceptions" [1998] EIPR 169, 169.

[58]Databases Directive (n 13 above), Recital 28.

[59]Hart (n 57 above) 169. Dietz affirms that "the right of reproduction and the right of communication to the public traditionally form the very core of the content of copyright protection":

see A Dietz "The Protection of Intellectual Property and Information Age - the Draft E.U. Copyright Directive of November 1997" (1998) 4 IPQ 335, 335. Clearly, these are the two rights on which an author's ability to make a living out of his work is based.

[60]Copyright in the Information Society (n 13 above).

[61]The importance of harmonising exceptions as well as the rights, themselves, is emphasized by Hart (n 57 above).

[62]See S Pandit, *An Approach to the Indian Theory of Art and Aesthetics* (Sterling New Delhi 1977) 120, 134; Pandit quotes from AK Coomaraswamy *The Philosophy of Asiatic Art* (Reprinted in M.R Anand, *Hindu View of Art*) 110.

[63]The case is *Yumbulul* v *Reserve Bank of Australia* (1991), 21 IPR 481; a summary is provided in M Blakeney "Protecting Expressions of Australian Aboriginal Folklore under Copyright Law" [1995] 9 EIPR 442, 442.

[64]For example, see Colombet (n 48 above) 78-82, who identifies its as a third type of *droit patrimonial*.

[65]DL Booton "A Critical Analysis of the European Commission's Proposal for A Directive Harmonising the Droit De Suite" (1998) 2 IPQ 165, 190-91.