10 Moral rights

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1. The advent of modern copyright law

1.1 Author’s rights tradition and copyright tradition

As is well known, today’s world is divided into two traditions with regard to the legal protection of cultural information: the civil law or continental tradition and the common law or copyright tradition. Both traditions developed in the respective national laws of Western Europe over the course of time, following the introduction of the printing process in the 15th century and as a result of the entry of new economic and communicative elements. In particular, the introduction of new technologies for the production of printed matter in the 19th century and the foundation of new financial incentives in the 20th century further stimulated the development of both traditions. In this chapter, the term copyright law is used as a generic indicator of both traditions. Copyright law, for that matter, is viewed here as a particular variant on the legal regulation of human communication originating within the framework of Western European culture, serving primarily to safeguard the exploitation of cultural information upon its dissemination. Copyright (law) is also the overarching term unifying economic rights and moral rights. Comp. E.W. Ploman and Clark Hamilton, Copyright – Intellectual Property in the Information Age (Routledge & Kegan Paul, London, Boston and Henley, 1980); F.W. Grosheide, Auteursrecht op maat (Kluwer, Deventer, 1986) with an English summary; idem, ‘Paradigms in Copyright Law’, in Brad Sherman and Alain Strowel, Of Authors and Origins (Clarendon Press, Oxford, 1994), pp. 204–33. See on this also generally among others Alain Strowel, Droit d’auteur et Copyright, Divergences et Convergences (LGDJ, Brussels and Paris, 1993); Jane Ginsburg, ‘A Tale of Two Copyrights: Literary Property in Revolutionary France and America’, RIDA No. 147 (1991), p. 125; Adolf Dietz, ‘The Place of Copyright Law within the Hierarchy of Norms: the Constitutional Issue’ (ALAI, Paris, 2005 – Exploring the Sources of Copyright), www.afpida.org and Paul Edward Geller, International Copyright Law and Practice (seminal), volume 1 (§ 2) (Matthew Bender). See for a different view Elizabeth Adeney, The Moral Rights of Authors and Performers: An International and Comparative Analysis, Oxford University Press, Oxford, 2006, supra, note 1, p. 5 (no. In. 15). In my view, her thesis that the 18th-century commonly agreed natural-law basis of copyright law forms an argument against the separation of both traditions is not convincing, since it only exposes that Enlightenment copyright was perceived as a property right.
consequence originally related to cultural products that could be expressed in print (i.e. literature and art).

However, over the years copyright law, perceived in this way, took a different form on the continent and in the British Isles. While the author as a natural person gradually became the focus of the French (droit d’auteur) and the German (Urheberrecht) copyright systems, the British copyright system moved in the direction of a publisher’s right. In other words: one tradition concentrated on the maker, the other on the work. Related to this distinction between maker and work is another distinction that emerged in the same period: that between the work as the immaterial object of protection and the copy as the material carrier thereof. Making this distinction is crucial for the acknowledgement of moral rights.\(^3\)

For a long period both copyright traditions have indiscriminately protected the economic or commercial interests of the author. In fact, concentration on economic interests was one of the main reasons why it became possible as a consequence of the expansion of international trade in cultural products in the second half of the 19th century to internationally harmonize national copyright laws leading to the establishment of the Berne Convention (BC) in 1886.\(^4\)

From a legal/dogmatic point of view, acknowledging economic interests qualified a copyright as an individual property right capable of being transferred to a third party in order to exploit it.

1.2 Rights approach and remedy approach

In fact, modern copyright law finds its identity with the conclusion of the BC. And notwithstanding the endeavours to keep the treaty ideologically neutral, it is clear that the personalist stamp of continental copyright law is engraved upon it. The success of the international copyright law movement attained in Berne should not conceal, however, that there was never unanimity between

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\(^3\) How crucial this is can be illustrated by the English case of *Donaldson v. Beckett* (1774) 2 Bro. P.C. 129, Burr. 2408. In that case the then existing common law copyright was reduced to being merely the right of first publication by the House of Lords. According to L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright* (The University of Georgia Press, Athens and London, 1991), p. 165, ‘(w)hile the House of Lords was sympathetic to the rights of authors, its concern for the power of the booksellers override compassion (…) If the Lords had separated the ownership of the work from ownership of the copyright, it would have been possible for them to have recognized the moral rights of the authors as distinct from the economic rights of the bookseller.’

the epistemic communities involved in the genesis of the convention. In the context of this chapter on moral rights the following two examples of this difference in opinion should be mentioned.

First, in accordance with the underlying national copyright laws, the introduction of a special international legal regime for the protection of authors was not welcomed by everyone. The argument was made that focusing on the individual interests of the author disregarded the equally important interests of the public at large. In the debate this led to the juxtaposition of the so-called *rights approach* and the *remedy approach*. In the remedy approach – so it was held – better than in the rights approach, account could be taken of what, in a particular issue, was the most expedient way of balancing individual interests and general interests.5

Second, another but related juxtaposition divided the international copyright community at the time: that between legally founding copyright law either in the author’s personality or in an act by the legislator. The *ex persona* view was taken by the civil law countries indicating that they had already moved in a personalist direction. The *ex lege* view was retained by the common law countries, illustrating their concentration on the product instead of the author. Since the BC took no stance in this debate, both copyright traditions could join it. In addition, it should be noted that the possibility offered by the BC to join the convention text that best accorded with the preferences of a particular country, together with the system of so-called reservations with regard to the applicability of a particular convention text adhered to, made it possible, on the one hand, for countries of different legal cultures to adhere to the BC, but, on the other, certainly led to a complicated and unbalanced interstate international legal regime.

With regard to the legal nature of copyright law, the BC codified the proprietary aspect: protection is accorded to the form that lends itself to communicating copies of the work. And all this within a uniform legal regime that, in principle, equally protects against unauthorized exploitation of works protected by copyright law, without any differentiation as to the subject or object and as to commercial or non-commercial application. Copyright law thus perceived will operate as a determining factor, with the one notable exception that is at issue in this chapter, and this would not essentially change for the next hundred years following the conclusion of the BC. However, two interconnected societal phenomena would interfere with this steady process in the last quarter of the 20th century:

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5 Interestingly, the American common law-based copyright law articulates the public interest of copyright law by referring to it in Article I, 8 US Constitution: ‘To promote the Progress of Science and useful Arts by Securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries’.
(1) the changed relationship between the industrialized and the non-
industrialized world;
(2) the changes in the hidden code of the industrialized world, in particular
the evolution from the industrial era into the information era.\textsuperscript{6}

Particularly the second phenomenon is of interest here. The following new
societal and paradigmatic components of the hidden code will prove to be
determinative: the development of technology, the expansion of the possibili-
ties to communicate, the creation of the welfare state and the related increase
in cultural participation, the dominance of ideological utilitarianism, short-
term compromise politics and an instrumental approach to the law.

1.3 Individual rights and communal rights
The personalist conception of a copyright – copyright law protecting the propri-
etarian rights of individual authors in their works – as developed during the 19th
century and consolidated in the BC, remained substantially unchallenged until
the 1920s. In fact, it is still the dominant conception today. However, in light of
the recent approach of copyright law from a more communal point of view, it is
interesting to note that this later approach had already manifested itself in the
course of the 1920s. In that period, particularly in what was then still imperial
Germany, greater emphasis was placed on the rights of the community and the
position of the work in society.\textsuperscript{7} This insistence on the collective and social
nature of authorship later merged with the nationalist and socialist thinking of
the inter-war period. General interests then dominated over individual interests.
The following quotation, taken from a text written by Kauschansky in 1933, is
illustrative of this, at the time, new way of thinking:

We live in an age when social law is supplanting the outdated individualist system.
Never more than during the War, and only fully after the War, has the individualist
concept shown how untenable it is.\textsuperscript{8,9}

\textsuperscript{6} Comp. A. Toffler, \textit{The Third Wave} (Pan Books Ltd., 1981).
\textsuperscript{7} This development coincided with the establishment of the Weimar Republic
(1919–33), the first democratically organized German form of government after the
First World War consisting of social democrats and right-wing centrists, merging vari-
ous forms of democratic institutions taken from, among others, Switzerland and the
United States.
\textsuperscript{8} D.M. Kauschansky, ‘Evolution des Autorrechts, die moderne Auffassung
über die sociale Funktion der Erzeugnisse geistiger Tätigkeit und die Förderung des
\textsuperscript{9} Adeney, \textit{supra}, note 1, p. 72 (no. 3.08); p. 100 (no. 6.14), observes that the
period indicated of course followed the Russian Revolution and encompassed the
fascist reign in Germany and Italy.
On the continent the emergence of communal thinking led to a polarization between French and German doctrine as is illustrated in the following quotation taken from a text by De Boor written in 1934:

The National Socialist notion of law takes as its starting point the people as a whole. (. . .) All private law, including the law of authors’ rights, becomes socially concerned law. Here lies the basic difference between the German and the French concepts of law, the French concept taking as its starting point the right of the individual.10

Again Adeney, with reference to representative studies of the respective period, reports that German doctrine placed the work, and not the author, at the centre of protection. Emanating from a collectivist notion of creation, the work was seen as a product that could only come into existence because the community made it possible for the author to make it. The author had not only the right, but also the duty, to create on behalf of the community. Not surprisingly, this communal approach was particularly followed in the socialist countries, copyright being viewed as an instrument for the management of cultural processes. In 1980 Eminescu was still writing as follows in this respect:

Daneben soll das Urheberrecht als ein Instrument zur Stimulierung des schöpferischen Tätigkeit, zur Schaffung einer socialistischen Gesellschaft und zur Erziehung der Bürger beitragen. (. . .) Besonders typisch ist hier das Gesetz der DDR. (. . .) Konkret heisst es u.a. §1 dazu, dass das Urheberrecht ‘eine breite Wirkung und Nutzbarmächung aller literarischen, Künstlerischen oder wissenschaftlichen Werke ermöglicht, die den gesellschaftlichen Fortschritt, der Verbreitung humanistische Ideen und der Sicherung des Friedens und der Völkerfreundschaft dienen’.11

Although communal or collectivist views were also influential in France, the dominant view there in the respective period remained personalist or individualist.12 It is of note that in the common law countries, abstaining from the general moral rights debate, these ideas of the inter-war period found – as Adeney calls it – an ‘immediate and respective audience (. . .), particularly in

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12 Adeney, supra, note 1, p. 85 (no. 350).
the United States’. This positive acceptance can be understood given the common law’s instrumentalist approach towards copyright law. Interestingly, the inter-war development described coincided with the ongoing debate on the introduction of moral rights in the BC. In Section 2.1 it will be seen whether this development was influential in that respect. In that section attention will also be given to the previously indicated actual revival of the communal approach of copyright law as related to both moral rights and human rights issues.

The fact that the BC in its early stages on the one hand approaches copyright law in a personalist perspective but, on the other, solely protects the economic interests of authors provides evidence of a clear ambiguity. For, indeed already in the 19th century and well into the 20th century, French and German doctrine and court decisions predominantly conceive of authorial interests as protectable rights with regard to the human personality. This obviously anticipated what would later be called the moral rights of the author.

1.4 Moral rights and human rights

For a good understanding of the relationship between moral rights and human rights a general insight into the relationship between human rights and intellectual property rights is required.

It should be clear, then, that two schools of thought have developed in this respect. The first school maintains that human rights and intellectual property rights (perceived as protecting individual economic interests) are in fundamental conflict since the strong legal protection of intellectual property rights is considered to be incompatible with human rights obligations. In order to overcome the tension between the two, it is suggested that human rights always prevail over intellectual property rights. The second school holds that human rights and intellectual property rights pursue the same aim. This means, on the one hand, defining the appropriate scope of private monopoly power to create incentives for authors and inventors and, on the other, at the same time ensuring adequate access to intellectual products for the public. In that latter perspective human rights and intellectual property rights are indeed compatible, although a balance should be struck between protection and access. It

13 Ibid.
follows that in the first school of thought moral rights cannot be considered as human rights, whereas in the second school of thought such consideration is indeed possible. In the latter case this will require, under the circumstances, the complicated exercise of balancing the one human right (e.g. the freedom of expression) against the other (e.g. a moral rights prerogative) in horizontal relationships in private law contexts.

At present, the dominant copyright law doctrine, generally speaking, perceives moral rights as human rights, adhering to the second school of thought. Indeed, since the second half of the 20th century, which saw the spread of international human rights instruments, it has been increasingly advocated that these instruments not only charge contracting states with duties of care to ensure adequate protection of, for example, material and immaterial property, but that some of these instruments, if not explicitly then implicitly, express the view that, even in the absence of existing domestic national law, individuals are given a direct claim against government authorities so as to grant them (and against fellow citizens to ensure respect for) a right to create in relation to the already existing right in the created work. If this is true, denying a person the right to create violates his human right to do so. To that end, reference is made to such international law provisions as Article 27 Universal Declaration of Human Rights 1948 (UDHR); Article 15(1c) International Convenant on Economic, Social and Cultural Rights 1966 (ICESCR); Article 19 International Convenant on Civil and Political Rights 1976 (ICCPR); Article 1 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 1952 (ECHR); and Article 17(2) Charter of Fundamental Rights of the European Union 2000 (EU Charter). An important reference can also be found in the Solemn Declaration by the BC member states in 1986 asserting that

copyright is based on human rights and justice and that authors, as creators of beauty, entertainment and learning, deserve that their rights in their creations be recognized and effectively protected both in their country and in all other countries of the world.15

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15 The individual approach, however, leaves unanswered the question of how to harmonize, on the one hand, the characterization of moral rights as private law rights and, on the other, making moral rights part of public law by characterizing them as human rights. Comp. Daniel Friedmann and Daphne Barak-Erez, Human Rights in Private Law (Hart Publishing, Oxford, 2001); Kirsten Sellars, The Rise and Rise of Human Rights (Sutton Publishing, London, 2002). Human rights thinking in copyright law has been favoured by international developments in the field of human rights generally as will be seen in Section 2.2.
Somewhat confusing nowadays is the fact that moral rights, particularly in civil law terminology, are also called personality rights. This is confusing since in human rights doctrine the notion of personality is not easy to pin down. In relation to copyright law the best approach seems to be, however, to refer to the cluster of human rights and other legal measures for the promotion and protection of personality. In that approach the maximizing of human potential and self-fulfilment is central.

Finally, it should be noted, from a dogmatic point of view, that with respect to the legal nature of moral rights in copyright law doctrine a significant distinction is made between the so-called dualist view and the monist view. In the dualist view economic rights and moral rights are qualified differently, economic rights being seen as property rights, moral rights as personality rights. In the monist view, although economic rights and moral rights are considered to refer to different aspects of a copyright, the ultimate inseparability of the two sets of prerogatives is assumed.16

2. The development of international moral rights protection

2.1 The Berne Convention
Throughout the 19th century and into the 20th century both in France and in Germany the foundations were laid for what would become a more or less coherent doctrine of moral rights. It is of note that this development did not take place in doctrinal isolation, but in close harmony with the protection that the courts were prepared to give to authorial interests. Even the legislator was ready to act in this respect. So in the indicated period a phalanx of moral interests were acknowledged as being protectable rights, for example, the right of disclosure, the right of withdrawal, the identification right, the right of integrity and the right of preventing misuse. However, contrary to the developments in France and Germany, in the United Kingdom, after the House of Lords scuppered the author’s common law copyright, the idea that an author, having assigned the economic rights to an exploiter, might then override the exploiter’s proprietary right with one moral right or another in order to protect one of his moral interests was wholly foreign to the common law way of thinking.

Interestingly, whereas the developments described in France and Germany did not immediately arrive at full-blown legislative protection for moral rights in the respective countries, some other countries, both within and outside Europe, had already enacted basic statutory moral rights provisions at an early

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16 French copyright law followed the dualist view, German copyright law the monist view. See on that distinction H.J. Ahrens et al., Festschrift Willi Erdmann (Carl Heymans, Verlag Koln, 2002).
period in time. Such was the case, for instance, in Colombia (1885), French Morocco (1916), Lebanon (1921), Syria (1921), Switzerland (1922), Romania (1923), Italy (1925), Poland (1926), Czechoslovakia (1926), Portugal (1927), Finland (1927) Russia (1928), China (1928), Yugoslavia (1929) and Norway (1930). Obviously, these moral rights regimes were at least in part borrowed from French and German ideas. Understandably, the clear importance of this legislative effort was that when it came to intensive debates in 1928 about the adjustment of the BC in order to incorporate moral rights, there were some member states of the Berne Union that could put forward concrete suggestions in that respect. It should be underlined, however, that the introduction of moral rights in whatever form in the BC had already been discussed at successive congresses following the establishment of the Convention in 1886. So, for example, in 1900 the ALAI was already working on a model copyright law containing moral rights provisions with regard to a right of paternity, a right to oppose modification, and a right to oppose a public exposition of a modified work. And in 1927 the ALAI recommended that BC members should enact formal dispositions on moral rights. In fact, moral rights thinking in the context of the BC manifested itself particularly between the two world wars. Interestingly, at the time this thinking merged with the communal approach that was apparent in the same period in German copyright law doctrine. So the German author Hoffmann reported as follows on the Rome BC revision conference of 1928:

At the Rome conference, for the first time, and indeed most decisively, the view was put forward that the interests of the collectivity in the published work were of equal status with the right of the author, so that, according to this view, the balancing of the two sets of interests is, and must be, the task of the legislator and the aim of the Berne Convention.

Be that as it may, at the 1928 revision conference the promotion of moral rights was instigated entirely by member states promoting the approach of the individual author’s rights. Further, those countries representing the common law tradition were initially implacably opposed to this. However, at the end of the deliberations a compromise was reached due to the fact that all member states came to agree that the common law, particularly the English legal tradition, had always protected the human personality with regard to its dignity,

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17 See generally Ricketson and Ginsburg, supra, note 4, vol. 1, ch. 10.
18 Ricketson and Ginsburg, supra, note 4, paras 10.02–10.13; Adeney, supra, note 1, pp. 98–100 (nos 504–9).
honour and reputation, a compromise which was furthered since the civil law countries were not seriously concerned with the common law countries’ compliance with the moral rights regime. And so Article 6bis was introduced into the BC, reading as follows:

(1) Independently of the author’s copyright, and even after the transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.

(2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed.

All member states present at the conference, including the common law countries, ratified this amendment, the latter on the apparent assumption that their laws were already in compliance and needed no implementation as such. This was due to the fact that it had been accepted from the start that the Union countries were not obliged to protect moral rights within the framework of copyright, leaving it up to countries such as the United Kingdom to adopt and/or apply other means of protection, for example the action of defamation.

Moral rights now being part and parcel of the BC, this is not to say that every aspect thereof was covered by Article 6bis. For instance, the Convention was still silent about the duration of the right (perpetual or fixed term), its exercise post mortem auctoris, and remedies for infringement. All this was reserved for the national legislation of the countries of the Union. Interestingly, no further mention was made of the notion or concept of the beneficiary of moral rights. It was, however, the implicit understanding that only natural persons, that is, physical authors in the real sense, could be the beneficiaries.

The text of Article 6bis, as introduced in 1928, would stand for 20 years. It was at the next BC revision conference in 1948, held in Brussels, that the moral rights issue again appeared on the agenda. At that time the common law countries’ approach to moral rights was even more hostile than 20 years previously. Again the United Kingdom acted as the spokesman for these reluctant

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20 Actes de la conférence réunie à Rome du 7 mai au 2 juin 1928 (Romes Actes) (Bureau de l’Union Internationale pour la Protection des Œuvres Littéraires et Artistiques 1929), pp. 291–2; Adeney, supra, note 1, p. 111 (nos. 6.53–6.54).
22 Ricketson and Ginsburg, supra, note 4, ibidem; Adeney, supra, note 1, p. 115 (no. 6.33).
countries, claiming that copyright law solely concerned the economic interests of authors. Consequently, not much was changed in Brussels. Added to Article 6bis was the *post mortem auctoris* (*p.m.a.*) effect (no longer than until the expiry of the copyright, that is, the economic right (50 years)), to be exercised by the above-mentioned limited representatives according to the conditions to be determined by national law.

More interesting was the fact that the inter-war debate on moral rights protecting the cultural interests of a country was reopened at the Brussels conference. This was interesting, since at the same time – as will be seen in Section 2.2 – an individualist tendency was spreading internationally in the post-war period. Due, however, to the following arguments: (a) it is not possible unambiguously to designate what is culturally protectable, and (b) such protection is not a matter of private law but of public law, the debate again failed to make the BC also *the preserver of cultural masterpieces.*

The final attempt to achieve an expansion of Article 6bis was made in 1967 at the revision conference in Stockholm, almost another 20 years after the Brussels conference. The same arguments were made with regard to the duration and protection of cultural objects, but without bringing any substantial change to what was already law. As a consequence, Article 6bis has read as follows since 1948:

(1) Independently of the author’s copyright, and even after the transfer of the said copyright, the author shall have the right, during his lifetime, to claim authorship of the work and to object to any distortion, mutilation or other alteration thereof, or any other action in relation to the said work which would be prejudicial to his honour or reputation.

(2) In so far as the legislation of the countries of the Union permits, 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 copyright, and shall be exercisable by the persons or institutions authorised by the said legislation. The determination of the conditions under which the rights mentioned in this paragraph shall be exercised shall be governed by the legislation of the countries of the Union.

(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.

Nevertheless, it may be said that since 1967 this stance has been contested by the fact that over the years a degree of international consensus had been reached that moral rights should be protected. Indeed, moral rights provisions have been adopted in the copyright legislation of most countries in the world, including common law-influenced jurisdictions in developing countries in

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Africa and Asia, as well as civil law-influenced jurisdictions in formerly socialist countries in Central and Eastern Europe. However, as will be seen in Sections 2.2 to 2.3, major obstacles have so far stood in the way of a true harmonization of moral rights not only in the BC but also in other international legal instruments.24

2.2 The Universal Declaration of Human Rights with appendices

In the same year that the Brussels conference to revise the BC took place (1948), the Universal Declaration of Human Rights (UDHR) was drafted and adopted by the United Nations in Washington. The first draft of the UDHR (the so-called Humphrey Draft) did not include the right to have interests of intellectual products protected. It was not until a subsequent draft (the so-called Cassin Draft) was agreed upon that a new provision was proposed stating that the authors of all artistic, literary, scientific works and inventors would retain, in addition to just remuneration for their labour, a moral right to their work and/or discovery which would not disappear, even after such a work or discovery had become the common property of mankind. This last text would eventually lead to Article 27(2) UDHR proclaiming that

2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.25

For some, the reference to the protection of moral interests is a clear reference to interests protected by moral rights. However, any human rights connotation – persistently promoted by France – was repeatedly rejected at the conference. Copyright was seen by the majority of the member states as a private law economic right, not as a public law human right. Besides, since such an economic right could be considered as a form of property, it was considered to be already covered by the provisions on property rights.26

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24 It is of note that in both 1948 and 1967 two provisions were introduced in the BC: Article 10(3) and Article 10bis(1), which can be said to have moral rights implications. However, as has been noted by Ricketson and Ginsburg, supra, note 4, para. 10.46, it may be contended that these provisions are distinct, rather than derivative of Article 6bis.

25 Article 27(2) should be read in conjunction with paragraph 1 of the same provision on participation in cultural life, and with Article 17(1)(2) on the protection of property. The Universal Declaration of Human Rights, GA Res 217A, 3UN GAOR (183rd plen mtg), UN DOC A/Res/217A (1948).

26 Adeney, supra, note 1, pp. 132–3 (nos 7.08–7.12). As is well known, the wording of Article 27(2) is directly derived from the American Declaration of the Rights and the Duties of Man, made by the Ninth International Conference of American States, OAS Res XXX, OAS Official Record, OEA/Ser L/V/II 23, doc 21 rev 6 (1948).
Possibly, however, things may have changed since the establishment of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.27 According to Chapman, since then intellectual property rights in general and copyright in particular should be viewed as human rights because the three provisions of Article 15(1) ICESCR were considered by the drafters as being intrinsically interrelated with one another. The rights of creators (authors and inventors) were understood as essential preconditions for cultural freedom and participation and scientific progress, not just as values in themselves. Interestingly, Chapman also takes a stance with regard to the function of copyright law as preserving the cultural domain. In her view copyright should facilitate cultural participation. As a consequence, she objects to the idea of copyright law as solely individualist. In her view it is not meant to further communal interests any less. It follows that she sees copyright not as an absolute right but as a conditional right that contributes to the common welfare of society.28

For a more reserved view of the human rights implications for intellectual property law, particularly copyright law, reference can be made to the 2001 report by the UN High Commissioner on Human Rights on the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights.29 In sum, the report recognizes, with reference also to Article 27 UDHR, that the ICESCR binds member states to design intellectual property law systems that strike a balance between promoting general public interests and protecting the interests of authors and inventors with regard to informational products. The question, however, is where to strike the right balance.30 The answer to that question may be found in General Comment 17 (GC) with regard to Article 15(1c) ICESCR of 2005.31 The indicated docu-
ment notes that the reference to the inherent dignity and worth of persons in the said article distinguishes the rights of creators (and other human rights) from most legal entitlements recognizable under intellectual property law. Amongst other things, it states that contrary to intellectual property rights human rights are fundamental, inalienable and universal belonging to individuals or groups of individuals, whereas intellectual property rights are, first and foremost, means by which states seek to provide incentives for creativity and inventiveness. Moreover, the GC underlines that the scope of protection given to the moral and material interests of creators by Article 15(1c) does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.

It is of note, however, that the GC appears to make an exception as to the human rights qualification with regard to moral rights in copyright law regulations. Indeed, for moral rights as well as for human rights, it is the case that they can be considered as fundamental entitlements of the human person.

2.3 The TRIPS Agreement and the WIPO Copyright Treaty
Despite the international consensus on the protectability of moral rights under copyright law as indicated in Section 2.2, they have not been an area of active development in the WTO and the WIPO. Mentioning the WTO first and the WIPO second follows from the fact that the WTO’s TRIPS Agreement (TRIPS) of 1994 precedes the WIPO’s Copyright Treaty (WCT) of 1996. However, this ordering is not self-evident since the WTO’s interference with intellectual property rights is of recent date. It illustrates the WTO’s interest in incorporating intellectual property rights, including copyright, in the international trading system. As observed by Adeney, TRIPS might have been expected to incorporate moral rights because of their apparent economic consequences, but this is not the case. Although TRIPS requires compliance

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32 GC, supra, note 31, part 1; para. 6. See for an analysis of the different properties of human rights and intellectual property rights. General Comment 17.
33 GC, supra, note 31, para. 2.
34 Ibid.
36 Adeney, supra, note 1, pp. 150–151 (no. 760). See for a different reading of Article 9(1) TRIPS Mira T. Sundara Rajan, “Moral Rights and Copyright Harmonisation: Prospects for an “International Moral Right”? 17th BILETA Annual Conference (Amsterdam, 2002) p. 6, http://www.bileta.ac.uk/02papers/sundarajan.html, stating that the effect of that provision is only to exclude the application of the TRIPS dispute settlement mechanism on moral rights issues. Be that as it
with most of the BC, Article 9 TRIPS expressly excludes from its application rights conferred by or derived from Article 6bis BC. This may well be caused by a fundamental incompatibility between TRIPS facilitating and accelerating the commodification of information products in order to improve the cross-border trade in cultural industries, and moral rights interfering with the unhindered course of international commerce. Ricketson and Ginsburg question whether Article 9 contains effectively more moral rights than the attribution and paternity rights mentioned in Article 6bis BC. For example, they suggest that if the right of disclosure or that of divulgation is not comprehended in Article 6bis, but finds its basis elsewhere in the BC, a member state’s failure to apply that right might give rise to a dispute settlement under TRIPS.37

In spite of the WTO taking the lead in issues of international intellectual property law over the last decade, the WIPO has nevertheless continued to generate new rules on particular copyright law. In 1996 it therefore promulgated two important new treaties, the already-mentioned WCT and the related WIPO Performances and Phonograms Treaty (WPPT).38 Whereas Article 5(1) WPPT can be read as granting a moral right of identification to performers, the WCT is silent on this issue. Some claim, however, as does Sundara Rajan, that Article 8 WCT, providing for a right of communication, hints at the recognition of moral rights. Apparently, this claim refers to the fact that the right to divulge or disseminate in some legislations, like the French, qualifies as a moral right (Article L 121-1 Intellectual Property Code).


3.1 The acquis communautaire

Today, there is no full acquis communautaire with respect to copyright law. This follows in the first place from the fact that the EU has not produced a Community-wide copyright law due to the lack of direct competence in this domain. In fact, the seven Directives that harmonize certain aspects of copy-

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37 An agreement between the WIPO and WTO, concluded in 1995, underlines the importance of a mutually supportive relationship based on cooperation. WIPO Collection of Laws, note 36.

38 The WPPT will not be further discussed. It is of note that WIPO treaties do not have the same authority or force as WTO instruments such as TRIPS, but they can provide influential guidelines on international and national legal reform in matters of intellectual property law.

39 Sundara Rajan, supra, note 36, pp. 7–8.
right law in the EU are based on the EC Treaty provisions which authorize the EU to coordinate the relevant laws of the member states with regard to the free movement of goods and services (Articles 45, 47(2) and 55) as well as the establishment of the internal market (Article 95). As a consequence, copyright law in the EU is principally the national copyright law of the member states, based on the (inter)national principle of territoriality. At present the EC is of the opinion that practice does not indicate that the absence of harmonization is detrimental to the functioning of the internal market. This is equally true for economic rights and moral rights. Consequently, the EC is not planning any further harmonization, but is rather preparing to introduce adjustments to the existing Directives to improve the applicability of the *acquis communautaire*. With respect to the harmonization of moral rights the actual stance of the EC comes as a surprise. This is because in its 1995 Green Paper the EC, considering that moral rights particularly in an interactive environment such as that of the information society are of vital importance, had already argued that the question of moral rights was becoming more urgent. Taking account of the fact that none of the then six Directives dealt with moral rights the EC believed that ‘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’.41

Earlier, in its *Phil Collins* decision, the ECJ, in delineating the subject-matter of copyright and neighbouring rights, had reasoned as follows: ‘The specific subject-matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders.’ It continued by considering that:

> the exclusive rights conferred by literary and artistic property are by their nature such as to affect trade in goods and services and also competitive relationships within the Community. For that reason, and as the Court has consistently held, those

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41 EC, Green Paper, Copyright and Related Rights in the Information Society, Brussels, 19.07.1995, COM (95) 382 final, Section VII, Moral Rights, pp. 65–8 (67). This conclusion sharply contradicts the statement in the EU Commission Staff Working Paper on the review of the EC Legal Framework in the field of copyright and related rights, holding that at the time there was no apparent need to harmonize the protection of moral rights.
rights, although governed by national legislation, are subject to the requirements of the Treaty and therefore fall within its scope of application.42

However, in spite of its quoted commitment at the policy level, the EU has not made any progress in the harmonization of moral rights. Not only have none of the seven Directives addressed the issue, but the most appropriate one to do so, the InFoSoc Directive, refers only to moral rights in its Recital 19, providing:

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 Work and of the WIPO Copyright Treaty and of the WIPO Performance and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.43

Dietz, observing that the Preamble of the InFoSoc Directive contains ‘(. . .) a whole program for the essentials of a copyright law of the 21st Century’ makes no mention at all of Recital 19 in that respect. Despite this recital he reads into Recital 11

(. . .) the element of safeguarding the independence and dignity of the creative people which certainly has a moral touch even if moral rights as such are not covered by the Information Society Directive44

And Dietz continues:


44 Dietz, supra, note 2, p. 64.
By that way, moral rights protection would merit more explicit mentioning by these quasi-constitutional European clauses; such a statement is justified, in particular, by the fact that copyright or authors’ rights protection has become a human right in international public law.\textsuperscript{45}

Dietz’s observations, however, seem to be (still) wishful thinking and not grounded in the positive law as it stands. Even the recent constitutional instrument of the Charter of Fundamental Rights of the European Union 2006 contains no more than that in Article 17(2): ‘Intellectual property shall be protected’.\textsuperscript{46} So it appears that the regulation of moral rights does not belong to the areas covered by the \textit{acquis communautaire}. In sum, the actual situation is accurately described by Dreier and Hugenholtz as follows:

\textit{(\ldots)} Apart from harmonizing the protection for certain subject matter – notably computer programs and databases – the aim was to remove existing differences which adversely affected the functioning of the single market to a substantial degree, and to prevent new differences from arising. At the same time, a high level of protection should be maintained in order to protect investment and encourage innovation (\ldots).

Although other areas of copyright remain unharmonized, the Commission currently is of the opinion that in practice there are no indications of any problems with regard to the internal market. Consequently, with the exception of the points of attachment (i.e. the criteria used to determine the beneficiaries of protection in the field of related rights which, in addition to their impact on the internal market, are relevant to the adhesion of the Community and its Member States to the WPPT), the Commission does not at present envisage further harmonization measures. Rather, it plans to make some minor adjustments to the existing Directives in order to improve the operation and coherence of the \textit{acquis communautaire} in the field of copyright.\textsuperscript{47}

Not surprisingly for an alliance which concentrates on the promotion of its allies’ economic interests, EU copyright policy is apparently focused on the economic aspects.

\textbf{3.2 Moral rights in some major EU jurisdictions}

For a representative impression of the actual state of the EU’s moral rights regulation it may suffice in what follows to provide an overview of the main relevant issues according to the rules in three major EU jurisdictions: those of France, Germany and the United Kingdom.

\textsuperscript{45} Ibid.
\textsuperscript{46} Dietz, \textit{supra}, note 2, p. 65.
\textsuperscript{47} Dreier and Hugenholtz, \textit{supra}, note 40, pp. 2–3 (nos. 3, 4, 6).
FRANCE

As early as the 1992 *Code de la Propriété intellectuelle* (Intellectual Property Code) (CPI) the term *droits moraux* (moral rights) was used to describe the non-economic prerogatives of authors. The term refers to broad principles rather than offering specific rules. That is left to the courts under the guidance of legal doctrine. This actual stance, however, follows legal developments in doctrine and case law that had already begun in the revolutionary period of the 18th century and that found their first legislative recognition in some sparsely drafted prerogatives in the 1957 Copyright Act. It is of note that the moral rights development in France has not been much influenced by the establishment of the BC.

As to the nature of moral rights, their enactment in statutory provisions is not seen as a prerequisite for their validity but as mere recognition in and by the law on the protectability of authorial personality. As a consequence, moral rights are seen as human rights in the sense of the UDHR and the ICESCR. That is to say that moral rights should not be perceived as means for the protection of, for example, commercial or cultural interests, such a broad approach being incompatible with the nature of these rights. However, it is generally acknowledged that moral rights may be used (or rather mis-used) for commercial purposes etc. In addition, it can very well be argued that the indefinite term of their protection envisaged under French law goes beyond moral rights that solely protect the personality of authors and tend to spread their effects into the domain of culture.

From a dogmatic point of view, French copyright law adheres to the dualist approach. So moral rights (placed first in the statute; Chapter 1: Moral Rights – Articles L 121-1/L 121-9 CPI) are treated separately from economic rights. The former are – as already said – seen as personality rights, the latter as property rights. This dualism is evidenced particularly in the difference in the term of protection: perpetual and 70 years *p.m.a.*

Moral rights can be exercised with regard to works of authorship, not exhaustively enumerated and categorized in the CPI. Interestingly, while the statute (in Article L 121-1) conceptualizes the notion of the work as *toutes les oeuvres de l’esprit* (all works of the mind), it does not do so with respect to the notion of the author which is only dealt with from a procedural point of view. Successively dealt with by the CPI are the following four moral rights:

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• right of attribution (droit de paternité; Article L 121-2): the right to insist that the author’s name and his authorship are clearly stated;
• right of publication (droit de divulgation; Article L 121-2): the right to be the sole judge as to when the work may first be available;
• right of withdrawal and repentance (droit de retrait et de repentir; Article L 121-4): the right that allows the author to reconsider his work and his association with it, by preventing (further) reproduction, distribution and representation, even after the first publication of the work, but against compensation to be paid to the first distributor;
• right to respect (droit au respect; Article L 121-4): the right to claim respect for the author’s honour and reputation as well as for the work itself, making it possible to oppose and prevent any modification of the work.

Moral rights are inalienable and non-prescriptable (Article L 121-1). They pass to the author’s heirs or executor on his/her death but they cannot be transferred (by whatever legal instrument) by the author or his/her legal successor(s). Any agreement to waive a moral right is null and void.51

GERMANY

As in France, moral rights in Germany mainly stem from domestic doctrinal and case-law developments during the 19th and 20th centuries, exceeding the requirements of international legal instruments such as the BC. Unlike the French regulation, the German term Urheberpersönlichkeitsrecht (personal right of the author) is well defined and regulated in detail in the Urheberrechtsgezetz (UrhG: Copyright Act) of 1965, but is open to further judicial interpretation by the courts.52

Broad acceptance seems to exist as to copyright’s economic side being perceived as a national law notion of property in the sense of Article 14 of the German Constitution. Moral rights, however, are perceived as personality rights in the sense of Articles 1 and 2 of the German Constitution. Obviously, both the economic and moral prerogatives are viewed as human rights in the sense of the UDHR and the ICESCR. Despite their human rights nature, which makes their existence from a theoretical point of view not dependent

51 See for a general overview of moral rights protection in France, André Lucas and Pascal Kamina, ‘France’, in Geller, supra, note 2; Adeney, supra, note 1, pp. 163–215 (nos 8.01–8.178). In France, as in some other European countries, in addition to the traditional moral rights mentioned, the resale royalty right (droit de suite) is also recognized as a moral right.
52 Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgezetz) of 9 September 1965 which came into force on 1 January 1966 (UrhG).
on statutory enactment, the UrhG is generally treated as the source of moral rights. As in France, the commercial effects of the exercise of moral rights are recognized.\footnote{53 G. Schricker (ed.), Urheberrecht (2nd edn, Beck, Munich, 1998), p. 7 (Schricker); p. 254 (Dietz); p. 1255 (Vogel).}

From a dogmatic point of view, German copyright law follows the monist approach which assumes an intertwining of economic and moral prerogatives, that is, the ultimate inseparability of the two sets of prerogatives. This is all well expressed in Article 1 in conjunction with Article 2 UrhG: protection is granted to the author with regard to his intellectual and personal connections with the work and the use of that work.

The concept of the work is regulated in Part 1, § 2 UrhG. This paragraph contains a non-exhaustive list of possible works (Werke). In order to qualify as a work it needs to concern personal intellectual creations (persönliche geistige Schöpfungen). § 2 and § 11 UrhG make it clear that there should be an author/work connection which will then be protected with regard to the author’s intellectual and personal interests. The requirement of work to be personal underlines that only human beings can qualify as authors with regard to moral rights protection. This criterion of personhood concurs with the definition of the concept of an author in Part 1, § 7 UrhG as the creator of the work (der Schöpfer des Werkes): only natural persons can be authors.

In the UrhG the following moral rights are successively listed, the central provisions being enacted in Part 1, §§ 12–14, supplemented by §§ 25, 39 and 42:

- right of disclosure (Veröffentlichungsrecht; § 12 (1)): the right to disclose the work to the public;
- right of attribution (Recht auf Anerkennung; § 13, jo § 107): the right of attribution first ensures that the author’s name will appear in association with all forms of the work; second, it allows the author to choose an artistic name or sign, a pseudonym, or to remain unnamed;
- rights against distortion and impairment (Recht gegen Entstellung oder Beeinträchtigung; § 14): the right to oppose distortions or alterations of either the work itself or its physical embodiment;
- right of access (Zugänglichkeitsrecht; § 25): the right of access allows the author to demand that the person in possession of the original or a reproduction of the work makes it available to him (which does not mean handing it over to the author) for reproduction and similar activities;
- rights against alteration (Änderungsverbot; § 39): the right against alteration applies to alterations by holders of exploitation rights;
• rights of withdrawal (Zurückrufrecht, § 42): the right to withdraw a work for changed opinions to be used against any person who is exercising exploitation rights but not against persons possessing physical embodiments of the work or against users under statutory licences and the like.

Moral rights lapse 70 years after the author’s death. Whether these rights are (in)alienable is under discussion. Under Part 1, § 29(1) the copyright per se, including the moral rights, is not transferable. However, the granting of a (commercial) licence, including at least certain moral rights, for example, against alteration, is possible. Moral rights do, however, pass by way of inheritance.\(^{54}\)\(^{55}\)

UNITED KINGDOM

The United Kingdom introduced moral rights provisions in the Copyright, Designs and Patents Act (CDPA) of 1988. Although early continental moral rights thinking during the 18th and 19th centuries was greatly influenced by English philosophy, and personal rights of authors were recognized under the common law of copyright, moral rights as a concept did not take off in Britain until late in the 20th century. British law referred authors for the protection of their moral interests to contract law or common law remedies such as torts (for example, disclosure of confidential information, defamation and the like).

Whereas it was taken for granted during the 1928 Rome revision of the BC that British common law copyright was in compliance with the then introduced Article 6bis, there are no signs in doctrine or court decisions of any further interest in moral rights issues since then\(^{56}\) let alone any activity by the legislator that introduced the 1956 Copyright Act without reference to moral rights. Moral rights were covered for the first time in the 1986 White Paper. The paper would lead eventually to the 1988 CDPA, Chapter IV, Subsections 77–89.

The CDPA follows the monist approach. Its protection is severely limited so as not to interfere with the dominance of economic rights. Moral rights are conceptually not characterized as property, but purely as statutory rights. Their


\(^{56}\) This is in contrast to legal developments in other common law jurisdictions such as Australia, Canada and the United States. See Adeney, supra, note 1, pp. 375–85 (nos 13.27–13.65).
infringement is classified as the tort of breaching a statutory duty (Section 103(1) CDPA). Neither human rights thinking nor (inter)national cultural or consumer interests have contributed in any obvious way to moral rights enactment in the United Kingdom.

The following moral rights were introduced in Sections 77–89 CDPA:

- right of identification (Sections 77–9): this right (also called paternity right and attribution right) grants the prerogative to be identified upon the publication of the work as its author or director;
- right of integrity (Sections 80–83): this right ensures that objections can be made to any derogatory treatment, that is, changes whether by editing, adding or subtracting material or placing it without alteration in juxtaposition to other materials that the author might find objectionable;
- right against false attribution (Section 84): the right to object against being recognized as the author;
- right of privacy (Section 85): this right solely concerns the use of photographs or films – it should be ensured that use is not only authorized by the copyright owner but also by the portrayed artist. This right was already in place under the 1956 Copyright Act.

The rights to object to derogatory treatment and not to be falsely attributed with a work operate automatically. However, the right to be identified as the author or director of a work must be asserted, which seems to be in contradiction with the interdiction of formalities under the BC.

Moral rights may not be assigned to another person, but they may be waived. Section 95 offers a detailed regulation of those who are authorized, and under what conditions, to exercise moral rights post mortem auctoris. The rights to be identified as author or director and to object to derogatory treatment will continue to exist for the copyright term of the work, that is, 70 years. The right to object to the false attribution of a work expires 20 years after a person’s death (Section 86).

3.3 Evaluation: from scattered principles to coherent doctrine and practice?

An evaluation of the actual state of moral rights protection in the EU may lead to the following observations. Actual EU moral rights law bears the traces of moral rights law developments during the 19th and the 20th centuries.

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Notwithstanding the establishment of the EU since then, it is clear that today’s moral rights law within the Community is still determined by the basic principles of the BC: accepting the co-existence of the civil law and common law copyright traditions, and establishment of the territoriality principle as to its implementation into national law. This has not been changed after the introduction of the TRIPS Agreement in 1994 and the WCT in 1996, since both international legal instruments abstain from regulating moral rights. The same is per saldo true for the relationship between moral rights and human rights. Despite the fact that moral rights appear to be considered as human rights by the UNHCR General Comment 17 referred to in note 31, and a majority in EU legal doctrine takes that stance, neither community legislative instruments nor case law by the ECJ treat moral rights like human rights. In fact, the most appropriate EU legal instrument to do so, the InfoSoc Directive of 2001, refers the issue to the national laws of the member states.

So it appears that moral rights regulation is still an issue for national law. However, national laws differ not only along the lines of the two existing copyright traditions, but also within one tradition or the other, differences do exist. So not only are moral rights differently regulated in France and Germany, on the one hand, and in the United Kingdom and Ireland, on the other, but also the respective regulations in France and Germany, and in the United Kingdom and Ireland, differ from each other.

Obviously, the main question here is – as already indicated by the EC – whether and, if so, how far these differences are relevant, that is, whether they hamper the course of the internal market in the EU. A first difference that can be indicated here concerns the paternity right. In the common law systems of the United Kingdom and Ireland this right must be asserted, whereas in the civil law systems of continental Europe this right originates with the creation of the work. Also differently regulated is the possibility of a waiver (and, related to that, the possibility of transferring the economic right) of moral rights. This is not possible in civil law systems, but is possible in common law countries. As a consequence, the right of integrity can be waived under British law, enabling, for instance, broadcasters, music producers or book publishers to insist on a waiver of this right as a condition for broadcasting, producing or publishing, selling the work to a third party without consulting the author, or in any modified way. Both differences give UK entrepreneurs an unfair advantage over their continental counterparts who are forced to respect the indicated rights.

Such an advantage distorts the internal market. An example may clarify this point. In 1988 a court in the Netherlands rejected Samuel Becket’s motion to prevent an all-female production of *Waiting for Godot*, whereas such a production was forbidden in France. Apparently, this situation leads to a clear form of restraint of intra-Community trade in the EU: either certain productions of
Becket plays may only be exported, or authors may wish to refuse all exports to countries with weaker moral rights regimes lest the integrity of the work be compromised. So it may be said that contrary to the EC Working Paper referred to in note 41, there is an apparent need to harmonize the protection of moral rights in the EU. Such harmonization would rectify a significant imbalance and might well enhance creativity and cultural diversity in society.

However, in addition it should be noted that, although it is true that in the area of moral rights there are certain legal barriers which may unduly interfere with industry’s ability to exploit copyright-protectable content within the internal market, it clearly depends on one’s perspective (and interest) what is seen as such a barrier. So, from the perspective of publishing, media and communications companies, it is just the absence of waivers in many EU jurisdictions which is seen as outdated, unnecessary and even counter-productive to the well-functioning of a healthy entertainment industry.

This last finding underlines – both for the EU as well as internationally – that the effects of a harmonized moral rights law, in whatever form, on culture and economy cannot be fully anticipated. Sundara Rajan quite rightly states the following in this respect:

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 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.

So it may be concluded that there is still a lot to be analysed and researched.

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60 Rajan, supra, note 36, pp. 7–8.