

THE (LOCAL) POLITICS AND CULTURE OF MORAL RIGHTS  
IN FRANCE, THE U.S., AND KOREA

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*This portion of the panel session will discuss moral rights protections in three jurisdictions: France, the U.S., and (South) Korea. A comparative examination invites discussion of the extent to which moral rights protections in each country reflect the politics, culture, and priorities of the respective national society.*

I. Introduction to Moral Rights

Implicit in the recognition of “moral rights” in copyright is that an author has certain personal rights that stem from being the creator of a work. Such rights are independent of pecuniary or economic interests in the tangible work product and remain with the author even after any transfer of ownership. The notion of moral rights presumes that the resulting tangible product of a creative effort reflects the personality and the “self” of the author, indeed, her creative soul. The specific substantive protections under the moral rights rubric differ from jurisdiction to jurisdiction, but are generally understood to include, chiefly and most simply, the rights of disclosure, attribution, and integrity.<sup>2</sup>

Moral rights are most prominent in the continental countries, especially in France, which is home to the *droit moral* and the most extensive protections for authors’ personality rights.<sup>3</sup> Moral rights protections in the U.S. setting are far more limited.

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<sup>1</sup> Portions of this abstract are taken from the presenter’s *Toward an American Moral Rights in Copyright*, 58 WASHINGTON AND LEE LAW REVIEW 795 (2001); and *Culturally-based Copyright Systems?: The United States and Korea in Conflict*, 79 WASHINGTON UNIVERSITY LAW QUARTERLY 1103 (2001). Citations have been omitted, except to quoted material.

<sup>2</sup> The disclosure right provides that, as the master of the work, only the author can determine when her work is complete and when it is ready for publication and public review. Once the work is published, the right of attribution ensures that the author (and no one else) will receive attribution as its creator. (Related to the right of attribution is the protection from misattribution, which protects authors against attribution to works they did not create, and the right to demand anonymous or pseudonymous authorship.) The right of integrity, which most underscores the personality interest of the author, protects against significant alteration of the work or such derogatory use of it that is contrary to the author’s intentions.

<sup>3</sup> Moral rights gained international acceptance in 1928, when the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) added to its provisions the rights of attribution and integrity. Still the most influential international copyright treaty, article *6bis* of the current Berne Convention provides:

Korea is a civil law jurisdiction whose approach to moral rights (*in-gyuk-gwon*) appears to resemble the French version.

## II. The Three Jurisdictions

### A. France

Within the international community, France is the undisputed champion of the author's moral rights. French authors receive the full panoply of moral rights protections. In addition to the rights of disclosure, attribution, and integrity, French law recognizes the right to create and not to create, and the right to withdraw the work from the public; the jurisdiction also provides for protection from excessive criticism, and less frequently, protection against destruction of the created work. Moral rights in France are inalienable and perpetual.

### B. U.S.

Moral rights protections in the U.S. are provided for in the federal Visual Artists Rights Act (VARA), equivalent state statutes, and (arguably) by a variety of state law theories. Yet VARA (whose provisions do not refer to the "moral rights" phrase) provides for the rights of attribution and integrity only to "work[s] of visual art."<sup>4</sup> Such rights may not be transferred, may be waived with consent of the author, and exist only for the duration of the author's life. In addition to the limited categories of works and authors that receive moral rights protection under the law, the rights are subject to fair use, and violations of moral rights (unlike violations of authors' economic rights) are not subject to penal sanction.

Before VARA's enactment, American courts had ample opportunity to address the matter of authors' non-economic rights in a number of cases. The case law clearly reflects two judicial positions: the refusal to adopt the moral rights doctrine seen in civil law jurisdiction; and reliance on American analogues to provide for equivalent rights. As to the former, some courts characterize the moral rights claim as one under foreign law, and reject its applicability stateside.<sup>5</sup> Regarding the latter position, commentators have pointed out that moral rights, particularly the right of integrity, receive protection under American analogues of unfair competition (including Section 43(a) of the Lanham Act),

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Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

<sup>4</sup> 17 U.S.C. §106A (1994).

<sup>5</sup> Illustrative is the decision in *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947). In *Vargas*, the court stated that "what are called 'moral rights' of the author, said to be those necessary for the protection of his honor and integrity" is "the law of foreign countries." *Id.* at 526.

contract, defamation, and privacy. But other reviewers strongly reject this view.<sup>6</sup> Thus, presently, unless an author's right of integrity falls within the narrow strictures of VARA or an applicable state statute, or within contract terms that give the author significant protection against alteration without consent, the author must mold her allegation of a violation of integrity into some recognizable claim within the melange or patchwork of theories. Unfair competition claims, which provide varying levels of protection, all far less favorable to authors than protective measures seen in civil law countries, are probably the most common such attempts.

### C. Korea

Moral rights protections in Korea are a core component of the author's protections in the jurisdiction's Copyright Act. Korean moral rights provide for the triangular rights of disclosure, attribution, and integrity, without limitation to any category of authors. The rights belong exclusively to the author, even after the ownership of copyrighted work transfers hands, and are perpetual, surviving the death of the author and passing to her estate. Importantly, the Korean copyright law explicitly provides that moral rights are not subject to fair use, and infringements of such rights are subject to criminal sanction.

With respect to the standard for assessing infringement of moral rights, although the Korean statute refers to the Berne Convention's standard of prejudice to the author's honor or reputation, some provisions of the statute equate violation of the author's moral rights with defamation of the author. Under the Korean law, an author whose moral rights are violated has an assortment of "preventive measures and restorative actions"<sup>7</sup> that she may seek. In addition to compensation for damages, she may seek criminal punishment and "measures necessary for the restoration of [her] reputation."<sup>8</sup>

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<sup>6</sup> Nimmer in particular cites to "certain early decisions that an author has the right to prevent distortion or truncation of his work," which right "matured to full copyright status in the landmark case of *Gilliam v. American Broadcasting Companies*." 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.04[A][1], at 8D-49 (1999). Yet one commentator has noted that *Gilliam* "has not been widely followed," and that subsequent judicial references to it are "not for the proposition that a cause of action can be based on violation of the author's moral rights." Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 3 n.7 (1988). And as Professor Roberta Kwall observed, an integrity right is not enforced unless the mutilation is substantial, Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 21 (1985).

<sup>7</sup> Kyu Ho Youm, *Copyright Law in the Republic of Korea*, 17 UCLA PAC. BASIN L.J. 276, 294 (1999) (describing court's characterization of remedies available under Copyright Act in *Korean Broadcasting Corp. v. Han*, 92 Na 35846 (Seoul High Ct. 1994)).

<sup>8</sup> Korean Copyright Act, 103, art. 95.

### III. What Moral Rights in France, the U.S. and Korea Say (About France, the U.S. and Korea)

At the risk of oversimplification (and stereotyping): the French law regarding moral rights reflects a primary regard for the author; the limited protections in the U.S. indicate that moral rights are secondary to the copyright law's emphasis on economic and proprietary rights of the created work. Although a shorthand description of the Korean setting is difficult (since meaningful application of the copyright law in the republic is relatively new), there are indications that moral rights protections in Korea reflect a Confucian regard for the creator of an intellectual work.

Art is “one of the glories of France.”<sup>9</sup> The *droit moral* commands respect for the *auteur*, the artist's work, and the creative process. Moral rights in France would place the individual author at the center, and are not subject to the interests of the public. The situation is quite different in the U.S.

This presentation encourages an examination of U.S. copyright law and policy (past and present) through a property-based lens. It has been said that the property right is sacred in American society.<sup>10</sup> (Indeed, one author goes so far as to state that the American reverence for property is not only a matter of American culture, but also a result of an American “biological predisposition.”<sup>11</sup>) If indeed copyright is a form of property, then the American desire to specify and protect economic and proprietary interests is also seen in the copyright setting.<sup>12</sup> The contents of the current federal

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<sup>9</sup> *Tyson & Brother-United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 447 (1927) (Holmes, J., dissenting).

<sup>10</sup> See Andrew Beckerman-Rodau, *A Jurisprudential Approach to Common Law Legal Analysis*, 52 RUTGERS L. REV. 269, 284 (1999); Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. PA. J. CONST. L. 20, 69 (1998); Paul Finkelman, *Civil Liberties and Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353, 1368 (1993) (reviewing MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991)); Maya Grosz, *To Have and To Hold: Property and State Regulation of Sexuality and Marriage*, 24 N.Y.U. REV. L. & SOC. CHANGE 235, 237 (1998).

<sup>11</sup> Coletta, *supra* note 10, at 23, 24.

<sup>12</sup> Historically, the U.S. had declined to join the original Berne Convention when it was formed in 1886, and the treaty's inclusion of moral rights further discouraged American acquiescence. The convention as a whole was seen as incompatible with the U.S. copyright scheme, and article 6bis became a “major new obstacle” to American approval. Orrin G. Hatch, *Better Late than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 175 (1989); see *id.* at 184 (“At the outset of the 100th Congress, the 'moral rights' obstacle remained in the path of legislation to implement the [Berne] Convention.”). It is a fair statement that those who commercially exploit the works of authors (e.g., publishers and motion picture producers and distributors), all of whom would be economically disadvantaged by enforcement of extensive moral rights protections, were successful in their lobbying efforts. It was not until 1988 that the United States, under some international pressure and seeking to protect American authors'

copyright act reflect a property-based theme, with specific provisions devoted to ownership, division of property rights, and remedies. Moral rights protections in the federal statute appear to be an after-thought, a begrudging accommodation to the supporters of authors' rights who long clamored for formal recognition of the personality rights.

One might say that Korean moral rights law reflects only the culture of a former colony of Japan (and less of a *Korean* socio-legal culture), since much of Korean law is based on the Japanese version implemented during the decades of colonial occupation. Although many Korean statutes generally are based on the German civil code (with Japanese modification), and the Korean moral rights provisions resemble those of the German and Japanese counterpart, this particular Korean law is not a matter of mere transplantation. Indeed, Professor Kyu Ho Youm states, "Koreans might have created their own version of moral rights as part of copyright regardless of whether their law was transplanted from Europe. This is culturally and legally in tune with Korean society."<sup>13</sup> The extent of the moral rights protections is a cultural relic of the traditional reverence for the scholar-author, which has extended to contemporary musicians and movie producers.

Korean authors are said to prefer respect for authorial personality over economic profit and see criminal sanctions as the better form of punishment for those who infringe their moral rights.<sup>14</sup> This preference is another carry-over from the era when scholar-authors favored confirmation of their status through proper publication over economic benefit. In any case, a review of the cases decided by the Korean courts indicates that litigation involving the author's moral rights comprises a significant portion of the decisional law.

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interests abroad, agreed to join the international treaty, initially through the Berne Convention Implementation Act of 1988.

<sup>13</sup> Youm, *supra* note 7, at 299.

<sup>14</sup> Of interest is the relief sought in *Han v. Korean Broadcasting Corp.*, 90 Kaham 1404 (Seoul District Court 1992), *aff'd*, 92 Na 35846 (Seoul High Court 1994). In *Han*, a television company had broadcast an edited version of a sociology professor's lecture, deleting one-third of the original one-hour lecture. The professor alleged that the "unreasonably" edited broadcast damaged his scholarly reputation, and sought a rebroadcast of the original lecture, broadcast of the trial court's decision ruling in favor of the professor, a public apology, but no money damages. The appellate court affirmed the lower court's order of broadcast of the judgment in favor of the professor.