

MORAL RIGHTS AND HUMAN RIGHTS:
A NEW INTERNATIONAL MODEL

The “Information Age” has brought a new importance to copyright law.

Underlying copyright’s new-found pre-eminence are two factors. First, copyright serves to regulate the transformation of information and culture through information technology. Secondly, copyright protects investment into the development of new technologies themselves, as, for example, in the case of computer programs.

The current status of copyright law reflects the new economic realities of the Information Age. Recent technological developments have initiated a revolution in the economics of industrialized countries. Economic growth and prosperity in the industrialized world is increasingly dependent on “intangible” products – knowledge, information, technology, and culture in a variety of forms. The natural tendency of these “intangibles” is to circulate freely, and the unprecedented ease of reproducing and disseminating them through digital technology and the Internet accentuates this characteristic feature. Realizing the economic potential of intangible products depends on controlling their circulation through suitable rules and effective mechanisms of enforcement. Copyright law, which has historically been concerned with the regulation of knowledge and culture, has become the primary legal instrument for accomplishing this purpose.

In the process of adapting to the economic realities of the Information Age, copyright law, itself, has undergone a profound transformation. While copyright has traditionally served a variety of economic and cultural policies, its focus is increasingly commercial, and practically eclipses other objectives that were important in the past. International developments reflect the intensive commercialization of copyright. At the

international level, copyright law has been fully integrated into the international trade regime, through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the dispute-settlement mechanism of the World Trade Organization (WTO),¹ reflecting its importance in maintaining the competitive advantage of industrialized countries in international trade. At the same time, international copyright standards set the norm for national copyright laws, so that domestic copyright law in most countries, in form and content, closely reflects the commercial focus of the international regime.

The new character of copyright law has serious implications for knowledge and culture, the great majority of which have yet to be adequately explored. This paper is concerned with one of the most important of these issues: the consequences of commercial copyright law for creativity. The authors and artists who create knowledge and culture provide much of the “raw material” for the engine of international economic exchange. The economic value of their work has brought them unprecedented recognition. At the same time, focussing on the economic aspects of creativity has occurred at the expense of its non-economic rationale. In particular, the need to protect culture and creativity for their broader contribution to society has not been a prominent theme of international copyright discourse. Yet copyright law potentially offers a powerful means of bringing recognition and protection to the non-commercial values represented by human creativity. Through moral rights, copyright presents an

¹*Agreement on Trade-Related Aspects of Intellectual Property Rights* [TRIPs Agreement], Annex 1C, and Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 to the *Agreement Establishing 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> (entered into force 1 January 1995).

opportunity to recognize the personal rights of authors, and emphasizes the importance of preserving the integrity of creative work.

The economic importance of culture and creativity calls for a model of copyright that achieves an appropriate balance between the protection of economic interests and the encouragement of culture. In the light of these concerns, this paper will propose a “new” conceptual model of copyright – one that is based on the connection between authors’ rights and human rights. In particular, the moral rights of authors, which seek to protect the personal interests of authors in their work, will be a focus of this model: they should enjoy a more prominent place in copyright law, policy, and practice at the international level. Moreover, moral rights in the international copyright regime may have become an important human rights issue, a reality that should gain appropriate recognition in copyright circles.

The legal doctrine of moral rights is closely implicated in the technological, social and cultural developments of the Digital Age. Moral rights are usually associated with the culture of Western European Romanticism, and the doctrine closely reflects the concepts of the age: individual genius, the work as a self-contained literary, musical or artistic document, an indissoluble relationship between the author and his own work, and, equally important, a hierarchical relationship between the author and his public, mediated by the work.² In the “Digital Age” – an appropriate term of art that captures the essence

²Martha Woodmansee’s study particularly emphasises the shift from a concept of genius based on divine inspiration, to one that reflected the idea of genius originating in an individual author. Her seminal interpretation is helpful, though not uncontroversial: see M Woodmansee “The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author’” (1984) 17 *Eighteenth-Century Studies* 425. The breakdown of a long-established hierarchy of culture and its consequences are considered in MT Sundara Rajan “Moral Rights in the Digital Age: New Possibilities for the Democratisation of

of the technological revolution of the 1990s and early 2000s – all of these premises, in one form or another, are called into question. The implementation and enforcement of authors' moral rights has become problematic; in addition, the validity of moral rights concepts, based on the idea of a personal and unbreakable connection between the author and his work, has also come into doubt. A distinct area of concern arises in relation to the application of copyright principles to works whose main purpose may be technological rather than artistic, such as computer programs, leading to the awkward question of what should be done about the moral rights that are ordinarily protected as part of copyright.

As these examples show, there are a number of reasons why the doctrine of moral rights and its place in copyright law deserve to be re-examined. If moral rights are to be protected as part of a human rights regime, what are the legal and conceptual bases for such a model? This paper examines a number of policy arguments for linking authors' moral rights with human rights, and suggests a legal framework within which this connection can be attempted.

1. Intellectual Property and Human Rights

It is possible to identify a number of intuitive connections between intellectual property rights and human rights. The connections between intellectual property and human rights may manifest themselves in a direct or an indirect relationship. The two may be directly connected, in the sense that intellectual property rights and human rights offer themselves as two different kinds of language and analytical framework for describing the same concept. This situation arises in relation to the right of publication,

which can be seen as an issue of freedom of expression, on the one hand, and as a moral right of the author, on the other.

An indirect relationship between the two domains means that a single situation may give rise to both human rights and intellectual property concerns. An example that has been much in the public eye in recent times is the issue of patents for medications in developing countries, for example, in relation to the spread of AIDS. Many activists have become concerned that the high price of patented medications has effectively led to the denial of treatment for third-world patients suffering from this disease, and indeed, their efforts have led to a reduction in the cost of AIDS drugs in the developing world.³ This is clearly a human rights issue. On the other hand, the rights of pharmaceutical companies to recover their investment in the development of drugs is an intellectual property issue that clashes with human rights.

Another problem involving medical knowledge arises in relation to the appropriation of the traditional knowledge of aboriginal peoples to create patented drugs. The use of their knowledge, generally without the consent of the people involved, is perceived to be a violation of their human rights.⁴ Here, however, the prospect of these

³The issue is discussed in “Hope for the best. Prepare for the worst” *The Economist*, Jul 11th 2002. The *Economist* article mentions “tiered pricing,” relatively cheaper drugs for Third World countries, as part of progress in the treatment of the disease – though even inexpensive drugs may be beyond the reach of poor populations.

⁴See the discussion in P Drahos “Intellectual Property and Human Rights” [1999] IPQ 349, 364 on the protection of “traditional resources,” including “biological resources.”

groups being able to use intellectual property rights to protect their own knowledge is one that supports their human rights interests.⁵

If we consider copyright essentially as an author's right, the direct connection between copyright law and human rights becomes apparent. In practice, the role of copyright in protecting the individual rights of authors may be obscured by the fact that copyright law does not focus exclusively on the protection of the author. Rather, copyright law protects the "owner" of the copyright in a work – the person who has acquired the right to reproduce and disseminate the work by purchasing it from the author. The owner of copyright may or may not be the same person as the author; in practice, it is most often the publisher. The idea of copyright ownership is fundamentally built into the common-law model of copyright law – originating in England and prevailing in all former British colonies, including the United States – although rights of ownership are less prominent in the author-centred copyright legislation of Continental Europe.⁶ However, international copyright law, especially in the TRIPs Agreement, is

⁵This is a theme of the interesting article by J Tunney "E.U., I.P., Indigenous People and the Digital Age: Intersecting Circles?" (1998) 20(9) EIPR 335.

⁶The philosophical differences between the common law and civil law concepts are evident in the terminology: "copyright" is a right to "copy" or reproduce works, while European systems are known as the law of "authors' rights" – *droit d'auteur* or *Urheberrecht*, to cite the French and German examples. A consideration of the relevant provisions in France – for example, Chapter III of the *Loi no 57-298 du 11 mars 1957 sur la propriété littéraire et artistique*, JO, 14 March, p 2723 (as am JO, 19 April 1957, p 4131) later incorporated into the *Code de la propriété intellectuelle du 1er juillet 1992*, JO, 3 juillet 1992, suggests that the terminology of ownership has not really found its way into French law.

based on the protection of the copyright-owner, who occupies a position that is at least as important as that of the author.⁷

The tension between “authors” and “owners” in copyright law may lead to the ironic situation where authors actually become the victims of copyright legislation that is supposed to protect their rights. Indeed, an awareness of the potentially conflicting interests of author and publisher informed Russian law from the earliest times. It was a feature of Russia’s first modern copyright legislation, the Copyright Act of 1911, and this principle was retained in the primary legislation on copyright under the Bolsheviks, the Law of 1928.⁸ According to the Russian provisions, the author’s right to the integrity of his work was intended to protect him from the activities of his publisher. The range of activities prohibited by the right was therefore very broad, but it could only be asserted against the publisher.⁹

⁷The substantive provisions on copyright in the Agreement refer to the “right holder”: for example, see Article 8.2 on “Principles,” or Article 13 on “Limitations and Exceptions.” The personal right of the author is the only aspect of copyright law that is excluded from the dispute-settlement and enforcement measures of TRIPs: see Article 9.1 of the TRIPs Agreement, which provides that the rights in Article 6*bis* of the Berne Convention cannot be enforced under the TRIPs Agreement. Interestingly, Article 14*ter* of the Berne Convention, on the visual artist’s *droit de suite* is not excluded from the TRIPs Agreement: in part, this may be due to the weak status of the right even in the Berne Convention. See Ricketson’s discussion of the *droit de suite* in Berne; he concludes that “there is no obligation on member states to accord...protection [to it].” S Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Centre for Commercial Law Studies, Queen Mary College Kluwer London 1987) paras 8.49-8.60, para 8.55.

⁸V Gsovski *Soviet Civil Law: Private Rights and their Background under the Soviet Regime*, HE Yntema (ed) Michigan Legal Studies Series (University of Michigan Law School Ann Arbor 1948) 610-11.

⁹Or theatre corporation: see s 18. The section does not allow “any additions, reductions or general changes during the author’s life... without the author’s consent,” and includes a list of what these activities might involve.

The protection of authors may arouse hostility because of the apparent restriction it imposes on the right of the public to use knowledge and information freely. Indeed, the idea of balancing copyright privileges against rights of use and access is fundamental to American copyright law: the US Constitution provides that the policy objective supporting copyright protection is to “promote the Progress of Science and useful Arts.”¹⁰ On this view, many human rights interests are said to weigh in the balance against unduly high copyright standards, including the freedom of speech and expression of individual members of the public, as well as the general right of the public to have access to information.

These arguments should be treated with care: they may be based on a mistaken understanding of what is signified in practice by free expression and access to information. From a legal point of view, neither aspect of freedom can be absolute; nor can the rights of authors. However, in relation to creative work, it is also important to recognise that the public is not dealing with expression and information in abstract or generic terms: rather, the work emanates from a particular individual, in a particular form, and it represents the culmination of an individual, creative process. The work is specifically a product of the labour and, in the case of artworks, the personality of its author. It could not have been produced by anyone else. Without the author, it would remain completely unrealised, and unavailable to society, perhaps representing a significant loss to culture. Protection of the author’s right in the work does restrict public access to information; but this right of access represents the interest of the public in an

¹⁰The Constitution of the United States, Article I, Section 8, Clause 8.

intangible product whose existence is utterly dependent on the individual circumstances of its author.

The idea that copyright restricts free expression most likely reflects a certain lack of clarity about the role of creative authorship in society and, in particular, the social value of creative works. Cultural trends in the Western world – as contemporary artistic expression toys with “commodification, provocation, charlatanry, fickleness, and vulgarity”¹¹ – only intensify this confusion. Interestingly, in the American example, arguments in favour of free expression have helped to justify US caution in relation to the protection of authors’ *moral* rights, but they appear to have had little impact on the *economic* aspects of copyright that protect the intellectual property of American copyright industries.¹²

Somewhat in contrast to the difficulty of recognising the human rights interests underlying certain aspects of intellectual property rights, the indirect impact of intellectual property rights on humanitarian issues has come to be widely acknowledged. These areas of concern often involve non-traditional human rights – rights such as literacy, education, and access to medication – known in international human rights parlance as “second-” or “third-generation” rights.¹³ For example, high standards of

¹¹E Dissanayake *Homo Aestheticus: Where Art Comes From and Why* (2d edn University of Washington Press Seattle 1995) xv.

¹²Attempts to restrict the power of these industries have occurred, rather, through competition law, but, in at least one prominent instance, the results of a judgment against anti-competitive behaviour has been mixed. See the discussion of the litigation involving Microsoft Corporation, in, “United they would stand” *The Economist*, Dec 13th 2001; and “Bill Gates, software saviour” *The Economist*, Apr 25th 2002.

¹³A useful discussion of the three “generations” of human rights may be found in C Wellman *The Proliferation of Rights: Moral Progress or Empty Rhetoric?*

copyright protection may restrict the ability of poor countries to provide their populations with access to foreign books: very often, they do not have the resources and foreign currency to pay for them. At the same time, restrictions on translation may restrict access to knowledge among the populations of less-developed jurisdictions..Considerations like these have traditionally been behind the principle of freedom of translation favoured in Russian copyright law. Indeed, Russia did not grant rights to translators of foreign works until Soviet accession to the Universal Copyright Convention in 1973.

From the intellectual property lawyer's point of view, a number of interesting points can be noted about the intersection of intellectual property rights with human rights. First, the overlap is extensive: intellectual property issues penetrate to the furthest depth of our evolving understanding of human rights. Secondly, there is a danger that intellectual property rights may actually become the means by which human rights violations occur. Finally, when intellectual property rights become implicated in human rights problems, the entanglement of intellectual property issues with questions of knowledge and culture, as a legal matter, can become quite complex. For example, appropriating indigenous knowledge to make patented pharmaceuticals is not only an issue involving "scientific" knowledge; knowledge about medicinal plants may be intimately linked to a traditional way of life, and patenting it may amount to cultural appropriation, as well as violating the community's right of access to its own culture. For non-Western peoples, "scientific" knowledge may equally be considered a cultural issue, although the law of patents is not normally considered to have anything much to do with culture.

(Westview Press Boulder 1999) 13-38. These issues are explored in some detail in Drahos (n 4) 361-65.

In relation to moral rights, their potential impact on cultural diversity and the human rights interests involved in culture is a subtle issue, but it merits attention. Moral rights are traditionally associated with an individualistic view of authorship, derived from European Romanticism of the nineteenth century. How does this model relate to non-Western cultures? Is it an obstacle to the universal development of moral rights protection for authors?

A brief consideration of some approaches to authors' personal interests in non-Western cultures shows how moral rights can be problematic. Certain cultures do not emphasise the identification of the artist with his work, preferring, instead, to value artworks for their own sake, or for their social significance. In ancient India, a high value was apparently placed on the artist's decision to remain anonymous – a tradition that also has political implications.¹⁴ A recent case involving a work of art by an aboriginal Australian artist illustrates the kind of dilemma that may arise between individual and community interests in another context. In *Yumbulul v Reserve Bank of Australia*,¹⁵ the artist sued for the infringement of his copyright in an Australian court; among the problems that he faced was criticism from his community for allowing the sacred knowledge of the clan to be exposed in an inappropriate context. From the clan's point of view, the portrayal of Yumbulul's artwork on a commemorative banknote issued by

¹⁴See S Pandit, *An Approach to the Indian Theory of Art and Aesthetics* (Sterling New Delhi 1977) 120, 134.

¹⁵(1991) 21 IPR 481.

the Australian government was more an issue of community authorship, than of Yumbulul's personal right in the work as its creator.¹⁶

In socialist society, there was a potential tension between individual and social interests; indeed, the state justified its extensive interference with individual rights on the basis that it was acting in the collective interest of society.¹⁷ However, Soviet Russia also included a number of traditional cultures that should be distinguished from the European-influenced culture of urban Russia – its own traditional folklore, as well as the diverse cultures of minorities, now represented in the CIS and in the countries of Eastern Europe, including Roma peoples and others. In many ways, these diverse cultures can be distinguished from Western cultural norms. Even the “European” pattern of urban Russia was superimposed onto a deeper, underlying culture – a point that is famously illustrated by a scene from Tolstoy's *War and Peace*, where Natasha Rostova, the aristocratic

¹⁶The case is discussed by M Blakeney “The Protection of Traditional Knowledge under Intellectual Property Law” (2000) 22(6) EIPR 251, 253; an interesting perspective is also provided by WV Tuomi “Protecting Aboriginal Folklore: Copyrights and Charter Rights” (Apr 2000) 16(2) Can IP Rev 403, 411-12. It should be noted that Yumbulul sued for infringement of his copyright; the case was not dealt with as a moral rights problem, and indeed, Australia did not offer substantial protection for moral rights in its copyright legislation at the time. Australia has since adopted a comprehensive moral rights regime; for details, see E Adeney “Defining the Shape of Australia's Moral Rights: A Review of the New Laws” (2001) 4 IPQ 291.

¹⁷Of course, this is always the basis on which governments interfere with individual rights – but, in the case of socialist countries, the idea of the rights of the collective may be said to have had a hegemonic quality. Indeed, social, or “second-generation,” human rights were much emphasised in the ideological rhetoric that socialist countries presented to the international community.

heroine, shows her untaught ability to dance to traditional Russian folk-music, a part of Russian culture that she has inexplicably absorbed from her environment.¹⁸

Clearly, moral rights in a non-Western context must be reconciled with highly complex social and cultural systems. The establishment of a universal standard of moral rights protection that will apply to diverse countries and cultures may appear to threaten cultural interests with the very homogeneity that these rights should seek to avoid. Developing the intuitive link between the protection of authors' moral rights and human rights may entail both helpful and harmful consequences for cultural diversity, and the legal treatment of moral rights should reflect an adequate awareness of both the possibilities and the dangers of the doctrine.

2. Moral Rights in International Human Rights Law

The intuitive relationship between intellectual property rights and human rights is recognised in international human rights law. The International Bill of Rights, constituted by the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights of 1976, forms the core of international human rights law, and includes a number of intellectual interests.¹⁹ International human rights law provided a

¹⁸*War and Peace* trans R Edmunds (Penguin London 1982) 604-05. Tolstoy asks, "Where, how and when could this young countess, who had a French *émigrée* for governess, have imbibed from the Russian air she breathed the spirit of that dance?...[T]he movements were... inimitable, unteachable, Russian..."

¹⁹Universal Declaration of Human Rights, December 10, 1948; GA Res 217A (III), UN Doc A/810 at 71; International Covenant on Economic, Social and Cultural Rights, 16 Dec 1966, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316, 993 UNTS 3 (entered into force 3 Jan 1976); International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, (entered into force

valuable support for the Soviet dissident movement in the late 1960s. For example, they made Article 19 of the Declaration – which the Soviet Union had ratified – on freedom of expression, opinion, ideas, and information, their manifesto.²⁰ Indeed, the dissident movement came to known, quite simply, as the human rights movement, on the basis of its primary strategy of “urging the Soviet government to observe its own constitution.”²¹

Provisions relating to the moral rights of authors are dealt with in two out of the three documents, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.²² In the Universal Declaration of Human Rights, Article 27 is concerned with intellectual property, although the interests it protects are not identified as intellectual property rights *per se*. It is perhaps most accurate to refer to them simply as “creative rights.” Article 27(2) provides that an

Mar 23, 1976). For a discussion of the International Bill of Rights, and its place in international human rights law, see Drahos (n 4) 359.

²⁰G Hosking *A History of the Soviet Union 1917-1991* (Final Edn Fontana Press London 1992) points out that the first issue of an important *samizdat* journal, the Chronicle of Current Events, appeared in 1968 with Article 19 on its cover.

²¹Hosking (n 20) 419; see his interesting discussion at 419-22.

²²Interestingly, provisions on intellectual property are not featured in other international human rights documents, including the European Convention on Human Rights, Strasbourg, 20 Jan 1966, and the African [Banjul] Charter on Human and Peoples’ Rights, Jun 27 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 Oct 1986. The European Convention is highly focused on civil and political rights; in contrast, the African Charter explicitly rejects the distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. The African Charter includes a number of references to culture, including Article 17.2 on the right of “every individual...[to] take part in the cultural life of his community; Article 22 on the right of peoples to “cultural development with due regard to their freedom and identity and equal enjoyment of the common heritage of mankind”; and Article 20 on the right of states-parties to resist “foreign domination, be it political, economic or cultural.” A right to “receive information” is protected in Article 9, though rights of creation are not protected at all.

individual 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 [my italics].”²³ Article 27(1) provides for a right “freely to participate in the cultural life of the community,” including a right “to enjoy the arts.”

The creative rights in the Declaration are restated in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 15 of the ICESCR deals with rights relating to culture, creative expression, and intellectual property. Like the Declaration, Article 15.1 of the ICESCR provides for a right “to take part in cultural life,” as well as a right “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [one] is the author.” However, the ICESCR goes on to impose a number of duties on states parties to the Covenant. Article 15.2 provides that measures which are “necessary for the conservation, the development and the diffusion of science and culture” should be undertaken in order to ensure the protection of the rights in Article 15.1. Moreover, Article 15.3 imposes an obligation on member states to “undertake to respect the freedom indispensable for scientific research and creative activity.”

The treatment of intellectual rights in these foundational documents of international human rights law, including the moral rights of authors, raises some interesting questions. In the first instance, both the Declaration and the Covenant protect the moral right of the author as an individual right. However, in both instruments, the individual right of the author is protected in conjunction with a right of the public, or of the community, in art and culture: the two rights are developed as subsections of a single

²³The Declaration states that “everyone” has this right.

article. In the Declaration, the right of the public in culture is actually framed as a right of the individual to “enjoy” and “share in” the fruits of intellectual endeavour, and, in relation to creative expression, it may be understood primarily as a right of access to creative work. Article 15.1 of the Covenant takes the same approach; however, in Article 15.2 of the Covenant, the scope of the right of access is somewhat expanded by introducing the idea of measures for the “conservation, development and diffusion” of culture as part of the creative right. Article 15.3 introduces a completely new connotation to creative rights, by requiring states to respect political freedom as a required pre-condition for creative expression.

The question of protection versus access to intellectual works in the human rights documents seems like a restatement of the classic intellectual property problem of balancing the potentially contradictory principles of creation and use – what Drahos expresses as, “the tension between rules that protect the creators of information and those that ensure the use and diffusion of information.”²⁴ However, the idea of public rights in culture is something that is not usually included within the ambit of intellectual property law. Rather, “conservation, development and diffusion” – in other words, the preservation of cultural heritage, the development of cultural policy, and the dissemination of culture – are primarily dealt with through cultural property law, and related kinds of heritage regulation. The idea of freedom from state oppression is also not a typical component of intellectual property law; rather, international intellectual property law accepts the right of states to curtail intellectual property rights for political reasons, such as the maintenance of “public order” and “morality.” Article 17 of the

²⁴Drahos (n 4 above) 358.

Berne Convention is the classic example: it provides that “[t]he provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit... the circulation, presentation, or exhibition of any work.” Ricketson points out that the purpose of the provision is to accommodate state censorship.²⁵ Remarkably, the provision has stood unchanged since the adoption of the Convention in 1886.²⁶

The additional elements of intellectual property rights as they are framed in the human rights instruments demonstrate that, from a human rights perspective, the protection of authors’ interests will involve much more than the relatively narrow issue of balancing the rights of authors and users to exploit works. Even within this particular issue, the approach of intellectual property law is traditionally quite restrictive. Copyright law deals largely with the use of works for commercial purposes; it also includes some provisions confronting the issue of reuse for creative, intellectual or personal purposes, but these are typically framed as exceptions to copyright protection.²⁷ Indeed, in common-law jurisdictions, it may often be left to judges to clarify the exceptions to copyright law, with the consequence that the policies behind them may tend

²⁵S Ricketson “The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties” (1999) 1 IPQ 56, 73-76. For an interesting discussion of how the idea of Crown copyright has historically accomplished the same purpose in Britain and, later, Canada, see D Vaver *Intellectual Property Law and: Copyright, Patents, Trade-marks*, Essentials of Canadian Law Series (Irwin Law Toronto 1997) 58-60.

²⁶Ricketson (n 25) 74.

²⁷A well-known example is the “fair use” doctrine, which serves to limit the reach of copyright protection in the United States. Some of its implications are considered by PL Loughlan “Looking at the Matrix: Intellectual Property and Expressive Freedom” (2002) 24(1) EIPR 30, 36-38.

to remain unclear.²⁸ Copyright laws generally do not transcend this threshold determination, to develop a broader philosophy surrounding access to, and the use of, creative works.²⁹

It is interesting to note that the hybrid quality of the rights and interests involved in creative authorship is nearly as problematic for international human rights law as it is for traditional views of copyright law. International human rights law has developed in stages, with early acceptance for “civil and political” rights, known as “first-generation” rights, standing in contrast to the much slower and more problematic development of economic and social rights, known as “second-” and “third-generation” rights.³⁰ The development of community-based “rights” has been highly controversial: they present a challenge, both to traditional ways of understanding rights in the individualistic and politicised terms of Western countries, and in the practical obstacles to their realisation. The formulation of creative rights in the International Bill of Rights shows that they simultaneously include elements of all three generations of rights, and call for the simultaneous realisation of all levels of protection – a situation that is likely to present conceptual and practical obstacles to their implementation.

²⁸The importance of exceptions to copyright is emphasised in Hart’s article about European copyright harmonisation: he argues that the failure to harmonise exceptions to copyright law in the EU directives presents a serious impediment to the harmonisation process. See M Hart “The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions” 1998 20(5) EIPR 169.

²⁹For example, Loughlan (n 27) considers the issue of why a defence to First Amendment copyright challenges has not really developed in American case law.

³⁰See Drahos (n 4) 361: he refers to “classical” rights (negative), “welfare” rights and “peoples’ rights or solidarity rights.”

Indeed, the absence of clarity and the difficulty of enforcement are general problems that have plagued international human rights norms for decades. The expansion of human rights language to include a great variety of interests and concerns – areas as diverse as a right to food, a right to development, and a right not to be subjected to torture – has been highly controversial. Some scholars feel that this “proliferation of rights” has weakened the concept of human rights tremendously, robbing it of its forcefulness, and even threatening its validity.³¹ In view of these concerns, what does the presence of creative rights in international human rights law signify for the protection of authors’ moral rights? In particular, can it contribute anything of value to the law of moral rights?

In keeping with the general tone of human rights instruments, the way in which authors’ personal interests are dealt with in human rights law is general and rhetorical, rather than narrow and precise. In other words, the language of the human rights documents naturally tends to reflect the intuitive quality of the relationship between intellectual and human rights; it does not attempt to resolve the technical and practical issues of legislative drafting, implementation, and enforcement. As Peter Drahos observes, “[h]uman rights instruments tend to be drafted at the level of principle and in open textured ways. The precise content of these rights is difficult to formulate.”³²

³¹See P Alston “Conjuring Up New Human Rights: A Proposal for Quality Control” (1984) 78 AJIL 607. The issue is also addressed by Wellman (n 13) 1-11.

³²Drahos (n 4) 361.

However, the imprecise nature of international human rights norms does not necessarily create obstacles to their legal recognition and enforcement³³ Rather, the presence of moral rights in human rights documents raises the possibility of dealing with the personal interests of authors on some legal basis other than the commercial law framework into which copyright is usually placed. Understanding the moral rights of authors as human rights interests, rather than commercial or proprietary interests – indeed, as an afterthought to laws dealing with the property interests of authors – cannot fail to bring important new dimensions to the interpretation of moral rights. The answers to questions that typically arise in relation to moral rights, such as how to balance these rights against other social interests, will be different when considered from a human rights point of view.

Given the character of international human rights norms as general principles rather than legally-enforceable rights – what Drahos refers to as the “twilight zone of normativity known...as soft law”³⁴ – the value of international human rights as a source of law on authors’ moral rights is limited. However, human rights law can make an invaluable contribution at the level of moral rights doctrine and its interpretation in the legal systems of the world. It can do so in at least three concrete ways.

First, a human rights perspective can enlarge the conceptual basis of moral rights doctrine, making it possible for the legal treatment of authors’ personal interests to

³³This issue receives a detailed consideration in M-B Dembour “Human Rights Talk and Anthropological Ambivalence: The Particular Contexts of Universal Claims” in O Harris (ed) *Inside and Outside the Law: Anthropological Studies of Authority and Ambiguity*, European Association of Social Anthropologists Series (Routledge London 1996) 19, 32-33.

³⁴Drahos (n 4) 361.

address a wide range of individual, community, and state interests implicated in moral rights. In particular, human rights law can provide an alternative to the prevailing, commercial-law model of copyright, into which moral rights inevitably fall, and which appears to be unable to accommodate many of their aspects. Secondly, human rights can provide criteria by which to implement and enforce moral rights for the greater benefit of authors and society. Human rights principles can help to determine how to balance the protection of moral rights with other aspects of authors' rights, and how they should interact with, or be balanced against, other individual rights and community interests. They can provide ways of assessing different aspects of moral rights protection against one another – for example, the relative importance or desirability of publication, attribution, and integrity interests in a given social context. Additionally, a human rights framework can assist in the administration of moral rights, for example, by making their enforcement a matter for specialised tribunals or constitutional courts. Thirdly and finally, expressing creative rights in human rights terms can contribute to the articulation of social aspirations: moral rights can help to express the desire to respect, recognise, and celebrate creativity and culture.

Notwithstanding the influence and inspiration of human rights language, the precise content of moral rights remains a complex legal question requiring distinctive solutions in different jurisdictions, and at the international level. However, it is clear that moral rights within a human rights framework are likely to differ substantially in form, content, and spirit from the narrow corner which they currently occupy in an international framework for copyright regulation dominated by commercial concerns. For example, a right of integrity that is based on human rights in creation and culture is likely to be

broader than the formulation in the Berne Convention: it may apply to any potential alteration of work, without imposing a burden on the author to prove that his reputation has been adversely affected. A “human right of attribution” might provide explicit protection for anonymity, or the protection of pseudonyms. A human rights approach to moral interests might also mean that any “interested person” should be able to assert moral rights after the death of the author.³⁵ This approach seems to recognise that the protection of moral rights should be a social concern – although the criteria for determining who is an “interested person” will certainly have an impact on the implementation of this right.

3. Moral Rights Doctrine and Human Rights

The presence of authors’ personal interests in international human rights discourse represents an opportunity to enrich the legal models for their protection. Due to formal limitations affecting both human rights law and intellectual property rights, this connection remains virtually unexplored. In relation to authors’ personal interests, at least, a closer consideration of the nature and purpose of moral rights should make a degree of *rapprochement* possible. However, the effective development of a human rights model of authors’ moral rights depends additionally on the clarification of a deeper issue: the conceptual compatibility of moral rights doctrine with the philosophy and rationale supporting human rights.

The edifice of international human rights law is constructed on two basic assumptions. The first is the “fundamental” nature of human rights; they are the epitome

³⁵For example, this is the case in the copyright provisions of the Draft Civil Code currently being considered by the Russian Federation: Draft Civil Code, November 30, 2001, Article 1228.2; translated into English by OM Kozyr and EV Luchits.

of “natural” rights, in the sense that they arise out of our “fundamental” human nature. The second premise flows naturally from the first: human rights, since they reflect our fundamental human nature, are “universally” applicable. Whatever the social context in which an individual may live, his fundamental human rights must be recognised and protected. At the same time, in order to qualify as a fundamental human right, one must be able to demonstrate that the right in question is linked to our “fundamental” nature as human beings, and is therefore equally valid in a variety of diverse social contexts.

The development of international human rights law along these lines seems inevitable. Human rights law is part of a long-established tradition in Western thought that attempts to provide a philosophical foundation for the just treatment of individuals in society based on a deeper understanding of man’s place in the universe. Thinkers as diverse as Rousseau, Hegel, and Locke have attempted to resolve the basic problem of what constitutes “human nature,” and how it is both preserved and transformed through the socialisation of man.³⁶ Twentieth-century history exposed as never before the extent to which Western culture could become brutalised, and brought a new intensity to questions of human nature and human dignity.³⁷ It is for this reason that the modern

³⁶Rousseau’s discourse on inequality is probably the most celebrated work of this kind: see J-J Rousseau *Discours sur l’origine et les fondements de l’inégalité parmi les hommes* ed J-L Lecercle (Editions sociales Paris 1983).

³⁷In some respects, European colonialism – for example, as it was pursued in the lands of the aboriginal peoples of North and South America – was perhaps as brutal in its own way as the Holocaust. An interesting discussion of the legal implications of these resemblances may be found in B Kingsbury “Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International And Comparative Law” (2001) 34 NYU J Intl L & Poly 189, 195. However, the treatment of the Jews has an immediacy for the European imagination unparalleled by any other historical event. This is hardly surprising, since the horrors of the Holocaust occurred on European soil, and in the heart of a society that was supposed to be the most advanced of its time.

concept of human rights, though it has a long philosophical pedigree, is truly a child of the post-World War II era. Its legal foundations can be traced to the post-War trials of German “war criminals” at Nuremberg, where, for the first time in international law, a state was held responsible for the mistreatment of its own citizens, and military personnel faced judgment for their conduct in the line of duty.³⁸

While it is not difficult to understand how human rights law developed as the protection of “fundamental” and “universal” values, the language of universality has greatly impeded the subsequent development of human rights. It has led to inconsistencies and failures, both in theory and in practice. Two examples will serve to illustrate the gravity of these concerns.

A notable conceptual inconsistency arises under human rights law in the distinction between political and economic “rights.” Civil rights and political freedoms are part of the “first generation” of human rights, and their protection forms the core of human rights statutes in the Western world. Economic rights are part of the second generation of “welfare” rights: the difficulty of guaranteeing the practical enforcement of these rights has interfered with their legal development in most Western countries. However, economic rights are clearly at least as “fundamental” as political rights: how can the right to food be less important than the right to freedom of speech?

When we consider the humanitarian law dealing with refugees, the differentiation of political and economic rights takes on a sinister character. While a political refugee is

³⁸War crimes trials were also held in Japan: see RH Minear *Victors' Justice: The Tokyo War Crimes Trial* (Ann Arbor Center for Japanese Studies, University Of Michigan 2001). The legal consequences of “victors’ justice” for Japan are described by R Teitel “Transitional Jurisprudence: The Role of Law in Political Transformation” (1997) 106 Yale LJ 2009, 2063-65.

generally entitled to seek asylum in a Western country, an economic refugee is not considered to be a refugee at all. It would hardly be an exaggeration to say that a person who seeks to migrate to another country for economic reasons is scorned by the international community, and has no recourse to international law to protect him from deportation.³⁹ Yet, if a person seeks to migrate to another country to improve the protection of his economic rights, is he not doing what is normal and natural, and indeed, according to international human rights principles, what he should be entitled to do?

The language of universality has led to practical failures to confront overt violations of human rights in the international community. Practices that almost certainly should be deemed contrary to international human rights law are tolerated on the grounds that they represent the cultural traditions of different countries, peoples or religions. In this kind of discourse, “culture” becomes the overriding value, and attempts to improve “cultural” behaviours on human rights grounds carry an unacceptable flavour of “Western imperialism.” Yet, how can the international community tolerate, for example, the physical abuse and violent repression of women on the grounds of culture or

³⁹Economic necessity is not an accepted basis, either for immigration, or for granting refugee status. Note the recent proposals of some European countries, including Britain and Spain, to impose economic penalties on countries whose nationals migrate illegally to wealthier nations: see “Immigration tops EU summit agenda” June 20, 2002, CNN online: <[http://europe.cnn.com/2002/WORLD/europe/06/20/spain.summit/? related](http://europe.cnn.com/2002/WORLD/europe/06/20/spain.summit/?related)>; and P Reynolds and “Seville summit – what did it achieve?” BBC News online: <http://news/bbc/co/uk/hi/english/world/europe/newsid_2062000/2062661.stm>. Interestingly, in voicing its objections, French President Jacques Chirac’s spokeswoman, Catherine Colonna, commented that “[e]xacerbating the economic situation of the country sanctioned would risk severely aggravating migratory flows and not diminish them. It would be particularly counterproductive”: see CNN online. The “right to asylum” receives a detailed treatment in Wellman (n 13 above) 16-19.

religion?⁴⁰ And how can this all-accepting and uncritical view of cultural traditions, itself, be healthy or desirable for cultural growth, particularly in underprivileged regions? This situation suggests that there is something fundamentally wrong with the way in which international human rights norms are conceptualised and articulated.

The problem of “fundamental” and “universal” values also presents an impediment to the recognition of authors’ rights as human rights interests. In particular, the doctrine of moral rights is inconsistent with the language of universal rights in two important respects. First, in current historical scholarship, moral rights are generally associated with the birth of Western European Romanticism, and they are believed to be a product of the cultural and intellectual environment of nineteenth-century Europe.⁴¹ In this sense, the concept of moral rights may be a culturally-specific doctrine, with limited applicability to new cultural contexts, especially those countries and cultures that differ widely from the Western European model. Secondly, since moral rights deal with artistic creativity and culture, it will be difficult for them to claim a status as “fundamental” rights. After all, creativity and culture are “luxuries”: it is usually assumed that they can only be pursued and enjoyed once the “basic” needs of human beings have been satisfied.

These conceptual arguments must be addressed by looking at the validity of the premises on which they are based. It is perhaps unsurprising that the clues to resolving

⁴⁰The controversy surrounding “female circumcision,” a traditional practice in some African countries, is a case in point. For a discussion of this issue in the broader context of human rights violations against women, worldwide, see SP Subedi “Protection of Women Against Domestic Violence: the Response of International Law” (1997) 6 *Eur Hum Rts LR* 587, 592-93.

⁴¹Woodmansee’s study attempts to show, in particular, how authors’ rights developed in eighteenth- and nineteenth-century Germany: see Woodmansee (n 2 above).

them may be found, not primarily in legal scholarship, but in anthropological literature.

In an illuminating discussion on the substantive content of human rights norms, Marie-

Bénédicte Dembour points out:

The expression “human rights” is...ambiguous with regard to the meaning of the term “right” which it contains. Although it sometimes refers to enforceable legal rights, it arguably refers more often to moral rights which have not found their way in[to] legally binding provisions, but hopefully will....

In my view, human rights are (predominantly) extralegal not because they correspond to “natural” moral rights but because they serve to articulate political claims which make sense in a particular social context...⁴²

Dembour contends that asserting the “universality” of human rights norms may not be the key to understanding what they actually signify. Indeed, as her discussion emphasises, there is something about the very concept of a “right” that distinguishes it both from the possibility of realisation outside a specific legal framework, and from the idea of “natural” law that exists apart from any specific legal framework. A “right” is a legal construct. What, then, is a human “right” that exists apart from law?

Dembour suggests that the language of human rights is, above all, a tool of empowerment. Human rights law allows humanitarian interests to find a form of expression that helps to create an awareness of their importance, and of the need to ensure that they are protected. Dembour cites the example of a “right to credit,” which, in the context in which it is articulated, can be shown to represent humanitarian concerns. Moreover, she emphasises the aspirational aspect of human rights, which may in itself make an important contribution to the realisation of more humane conditions of life. She argues:

⁴²Dembour (n 33 above). 32-33. It should be noted that Dembour uses the expression “moral rights” in the general sense of non-legal or extralegal “entitlements” based on the universal characteristics of “human nature” – a line of inquiry that she finds deeply problematic.

What interests me... [about] the Grameen Bank [, a bank in Bangladesh which only lends to the poor,] is not so much the unusual conditions under which...[it] works... as the fact that the man behind it, Professor Muhammad Yunus, uses the language of human rights to describe the idea behind the successful project. He is quoted as saying that the Bank thinks that credit should not be the privilege of the fortunate few, and that it sees credit as a human right. Referring to human rights in this particular context makes sense....[H]uman rights are first and foremost political aspirations. They embody claims for a more egalitarian world, and these claims draw their strength and legitimacy precisely from the fact that they are cast in the language of “human rights”.⁴³

Dembour’s ambivalence about human rights is at least partially a reflection of her anthropological background, which leads her to be deeply hesitant about the very idea of a fundamental “human nature” underlying a universalist approach to human rights.⁴⁴

From a legal point of view, while recognising the limitations of a universalist model of human rights, it may not be feasible to abandon altogether the hope of achieving a coherent conceptual rationale for human rights protection. This is not so much the case because legal thinking prefers to deal with precise issues rather than ambiguous ones, as because law inevitably involves an element of coercion. Human rights may represent the political language of self-assertion. When this language is ultimately translated into a legal norm, however, its significance is altered. It becomes a way of protecting one interest against infringement by another, and in doing so, it may have far-reaching consequences for society. Since legal norms involve coercion, there must be a sound policy justification for the legalisation of a human rights interest.

In relation to moral rights, the idea of creative authors making a political claim for the recognition of their rights on humanitarian grounds is easy to accept in terms of a

⁴³Dembour (n 33 above) 19. Dembour does not fail to note the “tautological” quality of this view of human rights – although, if anything, the circular nature of the arguments in support of human rights strongly seems to support her thesis about their context-specific and malleable nature.

⁴⁴For example, see Dembour’s discussion of scholarship on this issue: Dembour (n 33) 32-33.

struggle for the recognition of their “human rights.” When we consider the cultural concepts built into the doctrine of moral rights, however, and it becomes apparent that the introduction of human rights-based protection for these rights along “universalist” lines may have unintended, negative consequences for cultural diversity. By offering legal status and protection to individual creation and creativity, moral rights may implicitly discourage other cultural patterns. The doctrine may be hostile to group or community involvement with the arts, and it may simply be unable to protect certain kinds of artistic or cultural works. For example, moral rights are not ordinarily applicable to anonymous works of folklore; however, these kinds of works may have a much greater importance in other cultures than they would in the West.⁴⁵

Similar problems may be posed by the concept of “originality” underlying moral rights doctrine. What would the strict application of Western criteria of originality mean in a culture where reusing or adapting pre-existing works may be an important part of the creative process? For example, William Alford’s analysis of copyright law in the Chinese context suggests that the connotations of copying in China are totally different from what they are in the West.⁴⁶ India provides another example of a culture where tradition has seen the adaptation of literary works from one language to another as an important artistic activity – and, of course, an important source of cultural cohesion in

⁴⁵The difficulties of legal protection for folklore under Western legal models are discussed by CA Berryman “Toward More Universal Protection of Intangible Cultural Property” (1994) 1 *J IPL* 293, 309-33.

⁴⁶See WP Alford “Don’t Stop Thinking About... Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China” (1993) 7:3 *J Chinese L* 3, 29-34. Alford shows that the Chinese attitude towards copying has much to do with the importance of the past as a source of knowledge, moral guidance and creative expression in Chinese culture. His ideas are developed further in a book-length study of Chinese copyright, WP Alford *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, Studies in East Asian Law, Harvard University (Stanford University Press Stanford 1995).

this vast and diverse land.⁴⁷ Indeed, it is worth noting that modern concepts of originality, like authorship, are relatively new even to the Western world, which, as recently as the Renaissance, had a somewhat more flexible approach to creativity.

These arguments raise legitimate concerns about the justice of developing the author's moral right as a human right. However, a practical investigation of where moral rights stand internationally suggests that fears like these are largely unfounded. Of any aspect of copyright law, moral rights have undoubtedly achieved the widest international acceptance. In particular, they enjoy virtually universal recognition in developing countries, whose culture and traditions have developed along such different lines from the Western model. Developing countries have seen moral rights as a way of bringing much-needed prestige and protection to national creativity, especially after colonial experiences.⁴⁸ Moreover, legislators and, especially, judges in developing countries have often developed innovative ways of dealing with moral rights, shaping their legal treatment to reflect different cultural needs and priorities. Moral rights have become

⁴⁷An example of the importance of translation and adaptation in Indian culture is provided by the Ramayana, one of two celebrated ancient epics in Sanskrit. It is ascribed to the authorship of the ancient sage, Valmiki; the original Sanskrit text has been adapted into most Indian languages by leading classical poets. These adaptations are not "mere" translations, but they actually attempt to recreate the story of Rama in the cultural and historical context of the region. Examples include the Ramayanam of Kamban in Tamil, and Tulsidas' Ramayan Mana arita Manas in Hindi. The diffusion of the Ramayana throughout India was also associated with the *bhakti* movement, which represented a revolutionary new understanding of spirituality in terms of a direct relationship between the individual and the Divine Being. The ideal of *bhakti* was at the heart of a creative explosion in literature and the arts. The movement is described in detail by noted Indian historian, Romila Thapar: see R Thapar *A History of India* vol 1 (Penguin Books Baltimore 1966) 185-93, 304-10.

⁴⁸See the discussion of the rationales supporting copyright in developing countries, in EW Ploman & LC Hamilton *Copyright: Intellectual Property and Information Age* (Routledge & Kegan Paul London 1980) 23-25.

applicable to works of folklore;⁴⁹ they can apply to any form of the mistreatment of a work, whether or not an author's reputation is damaged;⁵⁰ they can protect an artwork against destruction,⁵¹ and they can be vindicated by members of the general public.⁵²

The question of whether creative expression represents a “fundamental” human value is one that is much more difficult to assess on the basis of empirical evidence. Any consideration of this issue must be undertaken in a spirit of humility: the complexity of legal regulation dealing with creative expression presents a most stark contrast with the limits on our knowledge about the phenomenon of creativity, itself. The creative process is mysterious and so, too, is the meaning and importance of culture in human life and society.

In view of this mystery at the core of copyright protection, it is perhaps reasonable to turn to the true “experts” on creative matters, authors and artists, and consider the nature of their involvement with their work. Why, for example, did creative writers continue to write under the oppressive Soviet regime? Was it out of a sense of duty to their oppressed societies – in itself, an extraordinary idea? Was it out of some deeper personal need? Was their perception that they had no alternative, whether for professional or personal reasons? Whatever the answers to these questions may be, the

⁴⁹Tunisia was the first country to provide copyright protection for folklore: see the discussion in Ploman & Hamilton (above) 129-31.

⁵⁰Until recently, this was a feature of Indian law: see MT Sundara Rajan “Moral Rights in the Public Domain: Copyright Matters in the Works of Indian National Poet C Subramania Bharati” [2001] Singapore J Legal Stud 161, 175-76.

⁵¹This, too, was the case in Indian law: see MT Sundara Rajan “Moral Rights and the Protection of Cultural Heritage: *Amar Nath Sehgal v Union of India*” (2001) 10:1 Intl J Cult Prop 79, 84-87. Protection for the moral right of integrity that is not based on the protection of the author's reputation, or which acts to prohibit the outright destruction of her work, are not yet an accepted part of international copyright law. See the discussion in S Ricketson *The Law of Intellectual Property* (The Law Book Company Melbourne 1984) para 15.57, n 48.

⁵²See Draft Civil Code of the Russian Federation (n 35), Article 1287.4.

fact remains that many writers were prepared to risk all that was dear to them, including their own lives, to continue writing. A letter from Zamyatin, the Russian pioneer of satire, to Stalin provides an extraordinarily moving illustration of what Baudelaire may have meant when he referred to a “besoin d’art,” a “nécessité de poésie.”⁵³ The incident is recounted by Hosking:

In 1931 Zamyatin wrote directly to Stalin, declaring that for him being deprived of the opportunity to write was equivalent to “the death penalty”. He admitted “that I have the very inconvenient habit of saying not what is expedient, but what seems to me the truth. In particular, I have never made a secret of my attitude towards literary servility, careerism and apostasy: I have always thought, and still think, that they are demeaning both for the writer and for the revolution.” He asked to be allowed to emigrate in order to continue writing. Stalin granted him an exit visa.⁵⁴

A historical consideration of the attitudes of authors towards their own creative work suggests that, for creative people, there is something quite essential about their activity, and that its importance transcends the professional significance of their work. A great deal has been written about the pros and cons of legal protection for authors’ rights, but very little of this literature seems to look at the phenomenon of authorship from the author’s perspective. An interesting addition to this line of discussion is developed in a fascinating study by Ellen Dissanayake, which considers human creativity from the perspective of evolutionary biology. Dissanayake concludes that art, far from being a luxury, is a fundamental human need. Her contention is all the more striking in view of her tremendous skepticism and dissatisfaction in the face of modern artistic trends. She argues:

⁵³See Y Abe “Besoin d’art, necessite de poesie,” Introduction to C Baudelaire *Les Fleurs du mal* (Orphee/La difference 1989). As Abe observes, the “besoin d’art” is envisioned as a “besoin fondamental” by the poet.

⁵⁴G Hosking *A History of the Soviet Union 1917-1991* (Final Ed Fontana Press London 1992) 181-82.

Yet acquaintance with the arts in other times and other places reminds us that they have been overwhelmingly integral to people's lives. Far from being peripheral, dysfunctional, trivial, or illusory, the arts have been part of human beings' most serious and vital concerns. If they are not so today, we should perhaps look for the reason not simply in some flawed metaphysical status of the concept of art but rather in the way we live.... I am convinced that contemporary art and contemporary life can best be regarded not from the perspective of philosophy, sociology, history, anthropology, psychology, or psychoanalysis – in their modern or postmodern forms – but within the long view of human biological evolution....

My readers should note that I am not arguing that biological understanding automatically rules out the other perspectives I mentioned above. It does, however, precede these and provides a broader justification than other views for reclaiming the arts, humanizing them, giving them once more the relevance they originally possessed in human existence.⁵⁵

It is apparent that moral rights can lay claim to the protection of human interests that are, in all relevant respects, both universal and fundamental. They also represent an aspiration towards more humane conditions of social life. Moral rights protect the creative activity of authors and artists; they also represent a political and social commitment to the protection of creative expression and culture. A consideration of both historical and current situations – whether in the case of authoritarian regimes like Soviet Russia, or more recently oppressive states in Nigeria, Afghanistan, or elsewhere – reveals anew the precious fragility of creative freedom.

4. Moral Rights and Cultural Heritage

Much scholarship on moral rights is concerned with their role in protecting the reputation of an author. This emphasis is a natural reflection of the way in which moral rights are typically drafted: the right of integrity is considered to be the moral right with greatest practical significance, and it is usually limited, as in the international model provided by Article 6*bis* of the Berne Convention, to actions that prejudice the “honor or reputation” of the author.

⁵⁵See Dissanayake (n 11 above) xvi-xvii.

However, this interpretation of moral rights theory is unnecessarily narrow. The reputation of the author can as well be protected by defamation law – a point alluded to by Pierre Recht in his interesting, if rather unsympathetic, analysis of *droit moral*⁵⁶ – and does not really account for the development of a specialised doctrine of moral rights. Moreover, the fact that the most important moral right is directly concerned with the treatment of artworks – the effect of the treatment on the author’s reputation acting as a legal device limiting the reach of the right – makes the emphasis on reputation seem slightly artificial.

On closer examination, it is clear that moral rights reflect social attitudes about creativity and creative work. The connection between an author and his work represents a socially important relationship, and it has therefore come to enjoy protection through this specialised branch of law. Moral rights contribute, each in its own way, to the individual author, and to the status of his work. However, moral rights also make a larger contribution to culture – one that tends to pass unremarked. Moral rights contribute to a public interest in culture in at least three, important ways: they help to generate respect for creativity, which leads to the creation of culture and encourages the maintenance of cultural heritage; the preservation of the existing cultural patrimony; and respect for historical truth.⁵⁷ The public interest in culture that moral rights protect finds expression in the provisions of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights; they appear in the form of rights in culture, and public access to culture.⁵⁸

⁵⁶P Recht *Le Droit d’Auteur, une nouvelle forme de propriété: histoire et théorie* (Editions J Duculot Gembloux 1969) 278.

⁵⁷See the interesting discussion of a public interest in moral rights, with special attention to its significance for the common-law countries, in D Vaver “Moral Rights Yesterday, Today and Tomorrow” (1999) 7(3) *Intl J Tech & L* 270.

⁵⁸See Article 27 of the Universal Declaration, and Article 15 of the ICESCR (n 36).

The contribution of the right of integrity to culture is perhaps the most obvious of all the moral rights, and is worthy of close consideration. It is clear that the protection of the integrity of creative works contributes to the general status of the cultural domain. In many countries, works of individual authorship constitute an important part of the cultural heritage. By protecting existing works of art, the right of integrity can thereby help to maintain cultural heritage. Its contribution to maintaining the quality of the cultural domain, from which current authors who are presently active draw their knowledge and inspiration, also encourages creativity.

As it is recognised in international copyright law, however, the integrity right is subject to a number of limitations. In Article 6*bis* of the Berne Convention, the integrity right only allows an author to protest against changes to his work that may affect his “honour or reputation” – in other words, his personal or professional standing. This legal limitation may unduly restrict the reach of the right of integrity, since it would impose a burden on the author to prove that his reputation has been negatively affected, before the artwork could be protected. An integrity right that was independent of the author’s reputation would place the burden of proof on the person dealing with the artwork to show that his actions were not damaging to culture. This kind of integrity right could have much broader repercussions for culture, and for this reason, it is favoured by a number of jurisdictions who are concerned about the status of their cultural heritage. These include developing countries as diverse as Mali and India.⁵⁹ This

⁵⁹ Until recently, such a right existed in Indian law, where moral rights provisions were used successfully to impose a duty on the government to protect works of art in its possession. The case was *Amar Nath Sehgal v Union of India* (1992), Suit No 2074 (Delhi HC), (1994) 19 Indl Prop L Repts 160. Subsequent amendments to the Indian Copyright Act – a result of the government’s fears about the consequences of the decision – have scaled the provisions back, bringing them within the limits established by Article 6*bis*. The case is discussed in P Anand P Anand “The Concept of Moral Rights under Indian Copyright Law” (1993) 27 Copyright World 35. See also Sundara Rajan (n 51).

formulation of the integrity right was also historically favoured by Russia, which placed great importance on the “right of inviolability of the work,” and Russian moral rights legislation has become significantly more conservative in preferring the Berne standard.⁶⁰

A second limitation on the right of integrity arises out of the fact that, in the formula of Article 6*bis*, it cannot protect a work of art from outright destruction. The logic of this restriction is that a work which no longer exists cannot affect its author’s reputation negatively.⁶¹ It is true that the destruction of a work may damage the author’s reputation by reducing the quantity and quality of his body of work as a whole, but this argument has not been widely persuasive.⁶² This, too, is a limitation that restricts the potential contribution of the right of integrity to culture.

The contribution of the attribution right to cultural heritage is subtler, but no less important. The right of attribution supports an accurate view of cultural history: by recognising the true author of a work, a truthful understanding of history becomes possible. A cultural environment that is correctly attuned to historical fact will be more compatible with creativity and development. The importance of the attribution right in preserving historical truth becomes clearly apparent when we consider the contribution of creative authors to the maintenance of truth and history in oppressive regimes. For

⁶⁰The right of inviolability can be traced back to the Russian copyright statute of 1911: Russian Copyright Law of 20 March 1911, *Polnoe Sobranie Zakonov Rossiiskoi Imperii* (Sob III) (Third Complete Collection of Laws of the Russian Empire), Sanktpeterburg 1914, Vol XXXI, Item No 34, 935. Incorporated into the Civil Code (*Svod Zakonov*) as ss 695(1)-695(15) of the Civil Laws (Volume X, Part 1, 1914 ed); *Sobranie Uzakonenii i Rasporyazhenii Pravitel’sstva*, (Collection of Regulations and Government Decrees), 30 March 1911, No 61, Item 560. It was part of Russian legislation until the adoption of the Copyright Act of 1993.

⁶¹See Ricketson (n 51) para 15.57, n 48.

⁶²See Sundara Rajan (n 51) 84. Destruction, too, has been deemed to be forbidden by Indian moral rights provisions, though recent amendments to Indian copyright legislation make the present status of a moral right against the destruction of a work somewhat ambiguous.

example, a characteristic feature of government in Soviet Russia was the systematic attempt to distort, or to destroy outright, historical fact. The writings of Soviet-era authors, which were circulated in secret and preserved in spite of government policy, contain truths about history that, in a regime specialising in the creation of “memory holes,” may not be available in any other credible form.

Interestingly, Russian copyright history also serves to illustrate the importance of the right of disclosure for culture. Without the recognition of a right to publish, the development of culture could be utterly stifled -- a problem confronted by Russian intellectuals, because of the government’s policy of attempting to control and monopolize virtually all forms of publication. Respect for a creator’s right to publish his work is an essential pre-condition for ensuring the availability of important works of culture to the public, and to the community of intellectuals whose ability to make a contribution to society depends on their own access to culture.

The exercise of these moral rights depends on the initiative of the author of the work, the person who may well have the strongest motivation to intervene on its behalf. However, it is not at all clear that the cultural interests protected by moral rights lose their value when the author dies. If anything, moral rights interests may actually acquire greater urgency when the author is no longer present to clarify doubts about his work, or to protect it from damage. The work endures beyond the author’s time. The issue of protecting its integrity therefore persists, and becomes part of the general need to protect the integrity of cultural heritage. According to international legal convention, the integrity right may be considered to serve the primary purpose of protecting a living author’s reputation, and offering protection to the integrity of his work as a purely secondary function. However, upon the death of the author, at the very least, this order of priorities should be reassessed.

In order to realise fully the cultural benefits to be gained from protecting authors’ personal interests, the issue of what happens to moral rights after the death of the author

must be considered. During the period of copyright protection *post mortem auctoris*, the author's heirs are usually charged with the responsibility of protecting his moral rights. However, the exercise of moral rights by the author's descendants may not always produce the most desirable results for culture. For example, descendants may wish to suppress knowledge about certain aspects of the author's life or work for a number of reasons, including privacy and, less sympathetically, propriety, or an intent to exploit the information later on. Solutions to these problems are suggested by provisions in the Draft Civil Code of Russia: allowing the author to designate a person who will be responsible for exercising his moral rights after his death, or, more controversially, making them the responsibility of the state.⁶³

Moral rights in the public domain present a similar problem. Should the moral rights of the author continued to be protected in relation to works that have fallen into the public domain? This question leads to the additional difficulty of whether moral rights are relevant to works that automatically fall into the public domain, such as so-called works of "folklore," or cultural property.⁶⁴ In fact, moral rights, and the right of integrity, in particular, may make an important contribution to the preservation of cultural heritage that is part of the public domain. One solution to the integrity issue in public domain works is to create a moral right that can be vindicated by any "interested" member of the public on behalf of the author – whether he is known or unknown, an individual creator or a community. The definition of who will have *locus standi* to bring such claim must be broad enough to make the right meaningful in the eyes of the public, but narrow enough to prevent "busybodies" from embarking upon wasteful litigation.

⁶³N 35.

⁶⁴Berryman is in support of widening the application of authors' moral rights to the public domain; she points out that "[t]he rights of paternity and integrity denote a collective cultural interest in preserving the work itself..." See Berryman (n 45) 318-20.

Public domain measures involving moral rights can work in conjunction with other legal and administrative provisions for safeguarding culture. By entrusting “interested persons” to assert them, as in the Draft Civil Code provisions on copyright in the Russian Federation,⁶⁵ they may also further the broader cause of public education about culture. Moral rights in the public domain may be of special value in developing and oppressed societies, where the obstacles to respecting and valuing culture are, in a sense, at the very heart of development problems.⁶⁶ Unfortunately, many of these measures remain speculative, as they represent relatively unusual features of moral rights legislation, and are largely untested in court proceedings. However, recognition of this aspect of moral rights doctrine – the importance of protecting the personality interests of authors for culture and development, as a whole – helps to clarify why these rights should be understood as humanitarian interests, rather than exclusively individual or commercial concerns.

5. Moral Rights and Free Creative Expression

Having considered the complex issues at stake in a human rights model of moral rights, it now remains to deal with the problem in its narrowest, most fundamental, and final dimension: moral rights as a form of protection for the individual right of the author. A study of moral rights in Soviet Russia shows a clear incongruity at the intuitive level between the protection of authors’ moral rights and the repression of creative expression. This intuitive malaise is borne out in moral rights theory, which is premised upon a privileged relationship between creator and work, and the social importance of maintaining the integrity of this relationship. If this relationship can be vindicated

⁶⁵See Draft Civil Code (n 71) Article 1287.4

⁶⁶See LV Prott & PJ O’Keefe *Law and the Cultural Heritage*, Vol 3, *Movement* (Professional Books Oxford 1984) 14: they point out that the commercialisation of cultural objects leads to a loss of respect for cultural values in source countries and, “in many cases,... engenders a contempt for one’s own cultural traditions.”

against private interests, potentially even curtailing the free expression of members of the public who use or exploit creative works, it would seem to be important enough to offer it an appropriate level of protection from the arbitrary interference of the state.

An initial approach to the relationship between moral rights and free expression immediately raises the spectre of an opposition between copyright and freedom of expression. As discussed above, moral rights may, indeed, have the effect of imposing restrictions on public access to information. Nevertheless, it is a mistake to suggest that they oppose freedom of speech values. Not only are moral rights compatible with freedom of speech, but, as this discussion will seek to demonstrate, they should actually be understood, in their own right, as a legal instrument for the recognition and protection of free expression.

In order to understand the close relationship between authors' moral rights and free expression, it is necessary to consider copyright from the perspective of the author. Indeed, in the debates surrounding copyright policy, the absence of individual authors is striking. Rather, copyright – as is generally the case in relation to intellectual property rights – has come to be perceived primarily as a property right that serves the interests of corporate owners. This is the case for two reasons. First, copyright has gained prominence as a form of legal protection for new communications and information technologies, whose creation and development is often associated with corporate investment and team labour. Secondly, the view of authorship as being composed of groups of people, possibly working in a business environment, rather than an independent, individual creator, probably reflects a growing social reality. At least in Western countries, the entertainment “industries” and, ultimately, the arts, often seem to be infiltrated by a corporate presence, at the level of funding and beyond. The widespread and growing understanding of copyright as a form of corporate property is also reflected in the relative neglect of moral rights in international copyright

developments. Moral rights are, by definition, rights of personal authorship: as a rule, they cannot be exercised by corporations, bought by them, transferred or sold to them.⁶⁷

In a regulatory environment that is defined by technology and corporate involvement, copyright is typically analysed from the perspective of social policy, rather than individual rights. Copyright is a form of protection for the investment of corporations into innovation; it also acts as the main system of incentives for innovative and creative activity. When individual-rights interests are discussed within a copyright context, it is usually to show how copyright acts to their detriment. As Jeremy Waldron observes:

[I]n our legal culture, the defense of intellectual property is seldom cast in purely individualistic terms. Officially, the justification is supposed to have more to do with the social good than with the individual natural rights of authors. The U.S. Constitution empowers Congress “[t]o 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.” The clause emphasises that copyright is purely a matter of positive law; it is to be a creature of statute, in contrast to the rights which are recognised in the Bill of Rights. Moreover the clause insists that the

⁶⁷It would be incorrect to present this as an absolute rule: rather, the moral right is an individual right of the author that can only be transferred in certain circumstances. The circumstances will vary among jurisdictions; in strong moral rights countries such as France, it would be difficult to transfer or waive moral rights, but it is much easier to do so in common law countries. On the inalienability of moral rights in French law, see A Strowel *Droit d’auteur et copyright: Divergences et convergences, Etude de droit comparé* (Bruylant Bruxelles 1993) 497-99; the issue of waivers in common-law countries is discussed by G Dworkin "The Moral Right of the Author: Moral Rights and the Common Law Countries" (1995) *Colum-VLA J L & Arts* 229, 244-66. A possible exception to this point that would be more general, is the recognition of joint authorship – but it is usually dealt with in copyright law as two individual copyrights in a single work. The phenomenon of corporate authorship is considered by P Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity" (1992) *10 Cardozo Arts & Ent LJ* 293, 294-99; he is primarily concerned with the potential incompatibility between copyright theory and what he terms “contemporary polyvocal writing practice – which increasingly is collective, corporate, and collaborative.”

positive law of intellectual property is incipient to a specific policy goal: it is a means to an end...⁶⁸

Concerning freedom of expression, in particular, the usual view is that it is limited by copyright, because copyright restricts what can be done with creative works. In particular, moral rights may limit how a creative work is displayed, used, or even criticised. Most obviously, moral rights may potentially clash with parody, an art form in its own right, but one that depends on using original material and satirising original works in ways that may not always find the approval of the author.

However, the fact that moral rights may interfere with parody is not an especially strong reason to conclude that they interfere with free expression values, overall. For example, defamation law may also interfere with parody, and indeed, with the free expression of opinions in a much wider sense. Why is it acceptable to protect an individual through defamation law, potentially at the expense of free speech, while it is not acceptable to protect a creative work, or an author whose livelihood may be ruined if his reputation is destroyed? The real difficulty is not that authors' rights and free expression are incompatible: rather, there is a fundamental lack of clarity, both about what freedom of expression means, and about the purpose of legal protection for authors' rights. If a clearer understanding of the relationship between freedom of expression and authors' rights could be achieved, it might become possible to resolve collisions between these two domains. Guiding principles of public policy could help to determine which interests should prevail in different circumstances.

Freedom of expression is a very important value in democratic societies: the idea that an individual has the right to express his thoughts and opinions freely is at the heart

⁶⁸J Waldron "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) 68 Chicago-Kent L Rev 841, 848. Waldron is actually arguing that copyright should be considered more from the "copier's" point of view, but his analysis holds good for the argument developed here, as well.

of our political system. It is also the essence of our society and culture, making diversity of expression not only a reality of social life, but an ideal of what our culture aspires to be. However, freedom of expression does not mean that “anything” can, or should, be tolerated. Rather, even in the freest society, there is a sense of balancing different kinds of expression. The idea of socially-important expression – in contrast to the idea of socially-useful or socially-valuable expression – defines both what is allowed and what is prohibited in free societies. For example, in the United States, the jurisprudence of the Supreme Court would define socially-important expression in terms of protected categories of speech.⁶⁹

Authorship rights are designed to protect creative works, a socially-important form of expression. Moral rights protect creative works by preserving a special relationship between an author and his work that allows an author to undertake legal action for its protection, and on his own behalf, as its creator. He is legally entitled to seek the protection of the work from damage. Arguments that the right of the author interferes with freedom of expression are based on the false notion that creative work is by nature a “public good,” freely available to all. Whatever theory of authorship one may choose to espouse, it remains a matter of fact that a work comes into existence only because of the author’s existence, and his investment of himself, his labour and his life, into the work. When a member of the public “uses” the work, his actions constitute the treatment meted out to someone else’s work – “free expression” that may have a profound, personal impact on the reputation, work, and psyche of the author.

On the other hand, authors, too, can potentially exercise their moral rights for less than noble motives of censorship – for example, in the case of works of parody, or in

⁶⁹The approach of the United States Supreme Court to categories of speech and speech of “social importance” is discussed – among other characteristic features of copyright jurisprudence in the US – by S Fraser “The Conflict between the First Amendment and Copyright Law and Its Impact on the Internet” (1998) 16 *Cardozo Arts & Ent LJ* 1, 4-19.

circumstances where he wants to avoid the appearance of unfavourable publicity. In circumstances like these, the author's moral right could actually harm cultural heritage, rather than protecting it. Rather than making this argument a reason to avoid exploring the benefits of moral rights for culture, it may be better to generate special legislative provisions dealing with parody, and to allow courts to mediate in the relationship between author and parodist with a view to achieving an acceptable balance of social interests.

Moral rights protect the author's ability to see the creative process through to its desired end, by publishing the work, by putting his name to it, and by preserving it from distortions, mutilation, or modification. Without the substantial protection of these interests, the author will be unable to achieve the fulfilment of his need, as one who professes a creative vocation, to express himself and his best abilities to his society, through his work. In this way, the moral right of the author is closely associated with his need for, and right to, free creative expression. At the same time, the social importance of creative work must be recognised. The public has a strong and deeply-ingrained interest in the preservation and growth of culture. From the perspective of both the author and society, therefore, there is a clear basis on which creative work is entitled to protection as a socially-important type of human expression. Of course, this does not mean that moral rights are entitled to absolute protection, any more than any other right in a free society. Insofar as they are associated with creative expression, however, they merit an adequate and appropriate standard of protection. This means that legislative protection should be granted to the basic rights of disclosure – including withdrawal – attribution, and integrity, and that judges should be empowered to use these rights to protect authors from both private and public censorship. At a minimum, the legal protection of moral rights in free societies should reflect an awareness of their importance for the human rights of authors and, through them, a recognition of their contribution to the creative and cultural rights of all human beings.

6. Political Constraints on Moral Rights

Considering the range of humanitarian concerns implicated in moral rights doctrine – issues involving both individual creative rights and the public interest in culture – it is apparent that recognition of moral rights will be an important part of the legal framework in societies that aspire to creative freedom. Indeed, the connection between moral rights and creative freedom is perhaps most clearly apparent when we look at the situation of moral rights in politically oppressive environments. A study of moral rights in the Soviet Union, which could once claim to be the world’s most fully realised totalitarian society, shows that moral rights are fundamentally incompatible with ideological oppression. Respect for authors’ rights to choose the conditions in which they release their work to the public, to maintain the attribution of their work to themselves by name – or to the protection of a pseudonym or anonymity – and to protect their work from harm, all imply a deep deference towards individual expression. In particular, respect for moral rights arises out of a deeper regard for free creative expression as a socially-important form of human speech. In a society that cannot tolerate ideological diversity and freedom of the imagination, moral rights will not be respected. They may be protected for those authors who successfully manage to walk the tightrope between political acceptance and dissent – and for those who do not try – but such severe limitations on the circumstances in which moral rights will be recognised, protected and enforced begs the question of whether such “rights” are, *de jure*, moral rights at all.

The moral right of the author should remain his personal prerogative, to avoid the danger of being pressured into asserting it for political reasons.⁷⁰ After his death, it

⁷⁰For example, in the *Shostokovich* case, the use of music by four Russian composers in a film about Soviet espionage in Canada was brought forward as a moral rights case by the Soviet government; due to the relatively short duration of copyright protection under Soviet law, the compositions had fallen into the public domain, and the state claimed to be acting “on behalf of” the composers. The case was tried both in the US, as a defamation suit, and in France, as a moral rights

should fall to appropriate agencies to protect the moral right of the author; the assertion of moral rights should perhaps not be entrusted exclusively to the personal heirs of the author, who may not be in the best position to vindicate these rights with the public interest in mind, but also, to “interest” members of the public, or appropriate cultural agencies.

Since moral rights are part of copyright law, they typically fall within the domain of private law, which is supposed to regulate relationships among private entities, and not public law that deals with the relationship between the state and individuals. However, copyright law is a hybrid area that includes both private and public elements, and these hybrid qualities are especially pronounced in the area of moral rights.

The protection of authors’ moral rights involves the creation of a relationship of legal privilege between the author and his work: it may be protected against infringement even at the expense of other, important social interests, such as public access to knowledge and information. The legal protection of moral rights affirms the importance of this relationship, of the creative activity that it represents, and of the cultural sphere, to which it contributes. In view of these rationales underlying moral rights doctrine, it seems conceptually inconsistent to argue in favour of protecting authors’ personal rights from infringement by private parties, while allowing the state to interfere with them on an indiscriminate or arbitrary basis. Of course, it is true that the state is charged with larger duties to the public which are not normally associated with private entities, and which might require it to undertake action for the protection of public security.⁷¹ However, in relation to authors’ moral rights, as with all rights that are recognised in free societies, the action of the state must be constrained, by custom and by law. The threshold at which

case: for the US decision, see *Dmitry Shostakovich et al v Twentieth Century-Fox Film Corporation* (June 7, 1948), 196 Misc 67; 80 NYS 2d 575, 77 USPQ 647.

⁷¹A poignant illustration of this problem is the fate of privacy regulation in Western countries following the terrorist incidents of September 11, 2001.

moral rights can be set aside by the state should be defined in careful legal terms, and it should not be set so low that the integrity of the doctrine is compromised. Quite simply, a meaningful framework for the protection of moral rights must be based on respect for fundamental human rights, and for the principle of the rule of law.

7. Conclusion

Despite the presence of moral rights in copyright law, an area of primarily commercial regulation, moral rights doctrine has far-reaching implications for creativity, culture, and freedom. These aspects of authors' moral rights transcend the conventional limits of copyright law, and should be recognised as involving important humanitarian interests. It is difficult to frame moral rights precisely in the language of human rights law. This limitation is as much a product of confusion and absence of clarity in the human rights arena – to some extent, an inevitable feature of human rights discourse – as a lack of vision about moral rights doctrine. However, it is possible to identify and analyse a number of aspects of moral rights doctrine that are concerned with human rights. Doing so leads to a deeper understanding of the conceptual basis of this doctrine and what it signifies in practice for the protection of the cultural sphere.

A human rights model of moral rights may raise nearly as many questions as it answers about the future of this personal and intimate doctrine in a global, technological society. Nevertheless, it points the way towards a more comprehensive and intellectually fulfilling vision of moral rights for the international legal community. The language of human rights has its limitations; but, if moral rights are enmeshed within this web of words, their contribution to restraining the abuse of human creativity may be greatly enhanced. The revolutionary power of words should not be underestimated. It is an idea for which writers in many countries and cultures have been prepared to make great and irrevocable sacrifices.