

MORAL RIGHTS IN PRACTICE: A COMPARATIVE STUDY OF THE UK AND INDIAN COPYRIGHT LAW

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Oftentimes, the value of a work goes beyond any potential financial rewards from commercially exploiting it. The work holds a unique meaning for the individual who created it because it represents a significant emotional and/or intellectual investment, and this investment is afforded protection through copyright law. While the economic interests of authors are protected by copyright, moral rights safeguard their non-economic interests.

The idea of 'moral rights' comes from the idea of 'author's right' upon which Continental Europe's copyright is constructed. These rights continue to vest with author despite the fact that he has assigned his copyright to another. These rights are based on author's inherent personhood and translate that personhood into a creative work. As a result, it is difficult to separate authors from their works.

In keeping with Kant's theory of private property rights, intellectual property theorists contend that copyright laws should regard creative works as extensions of an individual's identity and expression. In doing so, it acknowledges how closely these works are linked to the identity as well as the personality of their authors. Theorists assert that fostering a culture of intellectual innovation in society requires the supremacy of the author's personhood. These rights gained worldwide recognition in 1886 with the adoption of the Berne Convention for the Protection of Literary and Artistic Works. Although moral rights pertain to authors, they have effects that go well beyond them.

This paper attempts to conduct a comparative analysis of the moral right protection afforded to the authors under the copyright laws of UK and India and to evaluate whether they are in consonance with the international standards set out in the Berne Convention. The paper also aims to throw light on the extent to which the moral rights of the authors are protected within these two countries.

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I. DEFINING MORAL RIGHTS

Copyright Law recognises two distinct bundle of rights: *one*, the economic rights or more precisely, copyright protecting economic interests of author and *two*, non-economic rights or moral rights protecting author's special connection with his work.² These moral rights serve to safeguard non-economic and personal interests of authors by providing for their works to be handled with integrity and respect. The emergence of these rights dates to civil law systems, particularly French and German legal system.³ The French copyright system under its concept of moral rights, grants to authors the following rights: right of attribution, right of integrity, right of disclosure and right of withdrawal.⁴

While the right of attribution (hereinafter **RA**) provides for crediting the author as the author of his work, the right of integrity (hereinafter **RI**) enables him to retain control over such work following its sale, thereby requiring the new owner to obtain his permission in order to make any changes in the said work. The right of disclosure (hereinafter **RD**) leaves it to the author to decide the manner and the occasion of the work's publication. Lastly, the right of withdrawal (hereinafter **RW**) enables an author to withdraw his work from the public.⁵

While there is no doubt that economic rights incentivise the authors to devote their time and skills to enhance our cultural legacy, these rights cannot operate effectively in the absence of moral rights. Picture a scenario wherein X, a writer comes up with a new book which has become quite popular among the masses. However, another person Y claims that this book was written by him, and he is the real author. Or consider a situation wherein A, an artist renowned for her religious paintings, has one of her works being displayed in an art gallery and someone doodles something objectionable over her work. This would not only be unfair as it deprives the authors from being

² Jeffrey M. Dine, *Authors' Moral Rights in Non-European Nations: International Agreements, Economics, Mannu Bhandari, and the Dead Sea Scrolls*, 16 MICH. J. INT'L L. 545, 546 (1995).

³ Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 356 (2006).

⁴ Susan P. Liemer, *On the Origins of le Droit Moral: How Non-Economic Rights Came to be Protected in French IP Law*, 19 J. INTELL. PROP. L. 65, 69 (2011).

⁵ Kritika Kalra, *Moral Rights in India: A Means of Security beyond Economic Interest*, 2 JUS CORPUS L.J. 670, 671-672 (2022).

recognised as the author of their works but also demotivate them because others could profit from their work without any acknowledgment or compensation.⁶

Moral rights are fundamentally about recognising and respecting the close relationship that exists between an author and his work, recognising that he puts a portion of his soul into what he creates. This acknowledgement creates a strong author-work nexus solidifying the idea of moral rights as fundamental elements of creative and intellectual expression. These rights support an environment wherein authors feel comfortable in asserting authorship in their works and defend them from being distorted or mutilated. This fosters artistic freedom and innovations as authors no longer need to worry about their works being misappropriated or misused.

These rights gained international recognition at the Berne Convention for the Protection of Literary and Artistic Works, 1886 (hereinafter **The Convention**)⁷ when their importance was realized by the international community.

II. BERNE CONVENTION: MORAL RIGHTS OF THE AUTHOR

While the original text of Convention omitted to mention moral rights, the Rome Conference in 1928 witnessed the adoption of moral rights and established a framework for their protection by adding Article *6bis* to the text.⁸ The Convention lays down the following moral rights of authors: (1) the “right to claim authorship of the work” (**RA**) and (2) the “right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation” (**RI**).⁹

The Convention explicitly states that moral rights protected therein are unaffected by the economic rights held by authors; as a result, even upon transferring his economic rights, the author still retains these moral rights. Following the author’s demise, these rights continue to survive at the minimum until the end of the economic rights. Member Countries are allowed to extend the term of protection, letting them set their own policies. The Convention allows the member countries to

⁶ Javier André Murillo Chávez, *Copyright and the value of moral rights*, Wipo Magazine (August 2018, Peru) available at: https://www.wipo.int/wipo_magazine/en/2018/04/article_0003.html (last visited - Sep. 09, 2022).

⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979.

⁸ Mira T. Sundara Rajan, *Moral Rights and Copyright Harmonization: Prospects for an ‘International Moral Right’* 17th BILETA Annual Conference Proceedings, (2002) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809619.

⁹ *Supra* note 6, Art. *6bis*.

determine for themselves how these rights are to be exercised and the means for safeguarding them.¹⁰

Earlier only the authors of the works were entitled to moral rights protection and performers were excluded. It was in the year 1996, that **RA** and **RI** were afforded to performers in relation to their performances fixed in sound recordings.¹¹ Later on the Beijing Treaty in the year 2012 extended these rights to the audiovisual performances of the performers.¹²

[A] The Right of Attribution/Paternity:

This right, alternatively labelled as the ‘identification right’ falls under the French notion of ‘droit à la paternité.’. The author has the option of associating his name with the work, or he may choose to publish it anonymously or pseudonymously. The right puts a responsibility on publisher to ensure that the work relates to author only, even though the author has given the publisher his work without requesting that his name be associated with it. This right is particularly meaningful when the author has completely ceded all of his economic rights to a publisher or other party. The right to claim paternity will be especially relevant in those scenarios where there is a subsequent assignment because in such a situation, there won’t be any contractual connection between the second assignee and the author. As this right is directly related to the author’s identity, it is not available to the corporations and employers hiring others to produce a work for them despite the fact that they may technically be the original owners of copyright.¹³

[B] The Right of Integrity:

This protection against all forms of modification, distortion, and mutilation of the work stems from the French principle of ‘*droit au respect de l’oeuvre*’. Generally speaking, all public manifestations of the work must authentically reflect the ‘substance, character, and spirit’ of the work. An author’s

¹⁰ *Id.*

¹¹ Nicholas Stuart Wood, *Protecting Creativity: Why Moral Rights Should Be Extended To Sound Recordings Under New Zealand Copyright Law*, 8 VUW LAW REV. 163 (2001) available at: <http://www.nzlii.org/nz/journals/VUWLawRw/2001/8.html>.

¹² Beijing Treaty on Audiovisual Performances, June 24, 2012.

¹³ Elizabeth Schéré, *Where is the Morality? Moral Rights in International Intellectual Property and Trade Law*, 41 FORDHAM INT’L L.J. 773, 775 (2018).

personality, which is thought to be interwoven in the work, must be conveyed to the public in a way that is congruent with the artistic expression.¹⁴

An essential element of this right is a requirement of proof that the modifications to the work fundamentally compromised the author's honour and reputation. In contrast, some countries like France, allow the author to raise objections regarding any modification of a work that he finds personally repugnant.¹⁵

This right guarantees protection to the author by prohibiting modifications and amendments to the work that would prejudice his honour or reputation. If any modifications or amendments have been done to the work to disassociate the author from the said work, this too will be considered a breach of this right. Contravening this right will also raise a query while a work is being adapted from one form to another. For instance, consider a book-to-screen adaptation, the literary work should not be mutilated to the extent that it amounts to derogatory treatment of the author's work, even if it is aimed for effective commercial exploitation of work.

III. UK: MORAL RIGHTS UNDER THE CDPA, 1988

With the passage of the Copyright, Designs, and Patents Act, 1988 (hereinafter CDPA), the UK has made substantial progress from its initial scepticism of moral rights to its acknowledgment and defence of those rights considering its historical context.

The CDPA recognizes four moral rights. These include: a) right to be identified as the author/director of a work/film (**RA**/paternity) (ss. 77-79), b) right of an author/director to protest any derogatory treatment of their work/film (**RI**) (ss. 80-83), c) right available to everyone to avoid having a work being falsely attributed to them (s. 84) and d) privacy right accorded to a commissioner in relation to a photo/film taken for domestic and private use (s.85).¹⁶

[A] The right to be identified as author/director:

¹⁴ Timothy E. Nilander, *Reflections on a Gossamer Thread in the World Wide Web: Claims for Protection of the Droit Moral Right of Integrity in Digitally Distributed Works of Authorship*, 20 HASTINGS COMM. & ENT. L.J. 59, 71 (1997) available at: https://repository.uclawsf.edu/hastings_comm_ent_law_journal/vol20/iss1/3/.

¹⁵ *Id.*

¹⁶ Copyright, Designs, and Patents Act, 1988 (U.K.).

This right is the most widely accepted moral right in UK. In essence, it gives the authors of specific kind of works the ability to be recognised as such. This right has several cultural, economic, and symbolic repercussions. The justification for this is that the author's name serves a variety of functions. For instance, it makes it easier to handle intellectual works, interpret them, channel royalties, and reward, honour, and sustain authorial brilliance or genius, among other things. This right accrues on the fulfilment of two conditions.

Firstly, it must be shown that the work under consideration falls into the category of works to which this right applies to. This right is only extended to the authors of a select few works. The right is exclusively acknowledged in respect to original literary, dramatic, musical, and artistic works (hereinafter **LDMA works**) as well as in films. In case of **LDMA works**, the right is conferred on the author while in case of cinematographic films, the director has the right. However, the CDPA specifies certain categories of works that are exceptions to this **RA**. Among these are works produced with the intention of reporting current events, contributions to newspapers, magazines, periodicals, encyclopaedias or similar works,¹⁷ computer programmes, computer-generated works (hereinafter **CGW**), typefaces or other works covered by Crown or similar copyright.¹⁸ There has been no convincing policy-based argument to support the denial of the **RA** to authors of typefaces or computer programmes.

Secondly, it is also incumbent that this right has been asserted. The **RA** does not come into existence until it has been asserted.¹⁹ This means that before this right can take effect, the CDPA imposes an obligation upon authors to assert authorship. This appears to contradict the provision under the Convention stipulating that 'the enjoyment and exercise' of authors' rights, including moral rights, is independent of any formalities.²⁰

There are generally two ways to assert **RA**. Firstly, the author/director must give a declaration stating their right to be acknowledged whenever there is an assignment of copyright subsisting in a work. Secondly, through a written document bearing the author/director's signature. The manner of assertion significantly affects how much third parties are required to abide by the right.²¹ The

¹⁷ *Id.*, S. 79(6).

¹⁸ *Id.*, S. 79(7).

¹⁹ *Id.*, S. 78(1).

²⁰ *Supra* note 6, Art. 5.2.

²¹ *Supra* note 15, S. 78(2).

CDPA also provides that any delay in claiming this right must be factored in by the courts when determining remedies to be granted in an infringement action.²²

Also merely naming the author is insufficient to uphold this right, the author must be clearly designated as *the author*. So, if the author/director specifies any pseudonym, initials or other form of identity then under sec. 77(8), the CDPA requires that the identification be in such form.²³

In *Sawkins v. Hyperion Records*,²⁴ Sawkins had come up with new performing versions of four compositions of Lalande, a famous composer. These versions were performed on a CD released by Hyperion Records. Hyperion Records refused to identify Sawkins as the author stating that editor is not entitled to copyright in works not protected by copyright. Sawkins filed a suit claiming violation of his paternity right. The court found that by failing to credit Sawkins as the author there was an infringement of his moral rights under sec. 77 of the Act.

[B] The right to object to derogatory treatment:

The 1988 Act made some significant reforms, one of which is the right to object to derogatory treatment of work also called the **RI**. It is the right to object to the portrayal of a work or any part of it in a derogatory manner. The underlying basis for this is that, in the process of creating the work, the author infuses a part of his/her soul in that work, which requires shielding from alteration or mutilation. Occasionally, this has the implication that the author of the piece owes something to such work. Another point in its favour was the need to protect authors' reputation.

This right is conferred on the author in works falling within LDMA works and to the film director.²⁵ Just like **RA**, specific classes of works such as computer programmes and **CGW** are excluded from the scope of this right. Works created for reporting current events, newspaper publications, and collective works of reference like encyclopaedias are exceptions to this right.²⁶

In general, whenever any LDMA works/film is treated in a derogatory manner, the author of such work, as well as the film director, has the right to protest such treatment. The Act defines

²² Jane C. Ginsburg, *The Right To Claim Authorship In U.S. Copyright And Trademarks Law*, 41 HOUS. L. REV. 263, 291 (2004).

²³ David I. Bainbridge, INTELLECTUAL PROPERTY 126 (2010).

²⁴ *Sawkins v. Hyperion Records Ltd.* [2004] 4 All E.R. 418.

²⁵ Copyright, Designs, and Patents Act, 1988, S. 80(1) (U.K.).

²⁶ *Id.*, S. 81.

‘treatment’ as “any addition to, deletion from, alteration to, or adaptation of the work, other than translations and arrangements of dramatic or literary works or transcriptions of musical works that encompass minor changes”.²⁷ A treatment is considered ‘derogatory’ if it “amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director.”²⁸ The standard of objective reasonableness is used to ascertain if treatment is ‘prejudicial to the honour or reputation of the author,’ and it is not sufficient if the author himself is the only one to hold this belief, meaning, that the work will be appraised through the lens of a reasonable and informed observer, instead of relying on the author’s belief alone.²⁹ This is to ensure that there exists an equilibrium between authorial interests and the freedom of expression and creativity. It is contended that the UK Parliament ignored the language of A. 6bis of the Berne Convention when it defined the term ‘treatment’ in sec. 80(2)(a) and gave the term a narrow meaning.

The Berne Convention adopts a different approach in regards to defining what constitutes derogatory treatment and states that the author has the moral right “to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.”³⁰ A few nations interpret this liberally and apply this right to any modification of the work. This was also seen in the case of *Google Inc. v. Copiepresse*,³¹ wherein the Court ruled that Google News had infringed the author’s moral rights in newspaper articles by posting their extracts online on Google News. According to the court, authors are entitled to protest any alteration to their work, even if there is no evidence of harm, as it can alter the author’s intent. This includes alterations to the work’s setting, title, or classification.³²

It is to be noted that while describing the right to integrity, A. 6bis(1) uses the language ‘or other derogatory action in relation to the work.’ The obvious reason for doing this was to include actions that might not strictly be considered as physical alterations within the work but could nonetheless

²⁷ *Id.*, S. 80(2).

²⁸ *Id.*

²⁹ *Pasterfield v. Denham* [1999] F.S.R. 168.

³⁰ *Supra* note 6, at Art. 6bis.

³¹ *Google Inc. v. Copiepresse SCRL* [2007] 5 E.C.D.R. 125.

³² *Supra* note 22, David I. Bainbridge, at 130.

impact the work's integrity. Such actions would fall beyond the ambit of CDPA's **RI**.³³ The protection provided by UK has drawn criticism on this ground owing to its failure to fulfil responsibilities laid down under Berne Convention.³⁴

[C] The right to object to false attribution:

This right is the longest-standing moral right in UK law and has been borrowed from the 1956 Act.³⁵ This right is, in essence, the opposite of the **RA**. Authors' have the right to have their names on works created by them, whereas 'People' have the right to object to false attribution, which prevents them from being named on works that haven't been created by them. In *Clarke v. Associated Newspapers*,³⁶ the court noted this right applies regardless of whether the claimant is an author. The right applies to persons who have been erroneously assigned authorship in LDMA works.

Like the two moral rights discussed above, this right too applies to the same category of works. However, there are no exceptions and therefore, the right extends to computer programmes, typefaces, CGW as well. In general, a person has the right to object to his name being falsely attributed as the author of LDMA works or as the director of a film.³⁷ This privilege is extended to both authors and non-authors, however it is more common for such claims to be made about those who have a well-established reputation, whether as writers, dramatists, composers, or artists. The right is applicable to the entire work or any portion of it and not simply a substantial portion. The Berne Convention does not prescribe this right. A person may also have a claim for passing off or defamation in connection to such activities in addition to this statutory right.

The section stipulates that there must be a fraudulent attribution of authorship or directorship. When referring to a relevant work, attribution is making an explicit or tacit claim about the author or director of the work.³⁸ The work in question involves the whole work attributed to the

³³ Jonas Brown-Pedersen, *The Inadequacy of UK Moral Rights Protection: A Comparative Study on the Waivability of Rights and Recontextualisation of Works in Copyright and Droit D'auteurs Systems* 3 LSE LAW REVIEW, 115, 126 (2018), available at: <https://eprints.lse.ac.uk/88098/>.

³⁴ *Id.*

³⁵ *Supra* note 22, David I. Bainbridge, at 134.

³⁶ *Clarke v. Associated Newspapers* [1998] 1 All E.R. 959, 964.

³⁷ Copyright, Designs, and Patents Act, 1988, S. 84(1) (U.K.).

³⁸ *Id.*

claimant. Therefore, when some content is added to the claimant's original work and the entire work is wrongly attributed to them, it would amount to an infringement of this right.³⁹

The following acts infringe a person's rights when a false attribution is made: *firstly*, by issuing copies to public of LDMA works or film that bears the false attribution.⁴⁰ *Secondly*, by exhibiting in public an artwork or a copy of such an artwork that bears a false attribution.⁴¹ *Thirdly*, it prohibits falsely attributing the public performance or communication of LDM work or film to a person who did not create or direct it. The infringement, however, only happens where that person is aware of or has grounds to suspect that the attribution is false.⁴² *Fourthly*, materials with false attributions in relation to the aforementioned acts that are distributed to the public or shown in public.⁴³ *Fifthly*, a person who, while conducting business, owns or deals with a copy of LDMA works or a film with a false attribution, violates the right. Or, in the case of a creative work, where there is a fraudulent attribution in or on it, owns or deals with the work itself. In order to be held accountable, a person must be aware of or have cause to suspect that a false attribution has been made.⁴⁴

[D] The right of privacy in certain photographs or films:

This right can be claimed by a person who has commissioned photos or films for private or domestic use if the resultant photo or film has copyright subsisting in it.⁴⁵ The commissioner has the prerogative to refuse to have copies printed, distributed, or made publicly available, including through broadcast or cable services. Such actions constitute a breach of right to privacy in the photos or films. The Act provides that it would not amount to infringement if the photo/film is accidentally or unintentionally used in a broadcast or film.

English law did not recognise a general right to privacy prior to the Human Rights Act of 1998. Prior to the 1988 Act, only the use of economic rights, such as seeking an injunction to prevent publication, could be used to protect one's right to privacy with regard to images or films. An injunction was obtained in *Mail Newspapers*⁴⁶ to stop the publication of a married couple's

³⁹ *Noah v Shuba* [1991] F.S.R. 14.

⁴⁰ *Supra* note 36, S. 84(2)(a).

⁴¹ *Id.*, S. 84(2)(b).

⁴² *Id.*

⁴³ *Id.*, S. 84(4).

⁴⁴ Copyright, Designs, and Patents Act, 1988, S. 84(3) (U.K.).

⁴⁵ *Id.*, S. 85.

⁴⁶ *Mail Newspapers plc v. Express Newspapers plc* [1987] F.S.R. 90.

wedding photos. The wife sustained brain haemorrhage when she was 24 weeks pregnant and was kept alive by life support system in the hopes that the child would be born alive. In addition to promising to take photos with the new-born within 24 hours of its birth, the husband had granted the claimant sole rights to the photographs. The defendants had hinted that copies of the wedding photos of the couple would also be published.

A copyrighted photograph or film ordered for private and domestic purpose is subject to the right to privacy under the CDPA. This includes the right to prevent any public distribution, exhibition and communication of the work.⁴⁷

It is necessary that the commissioning is done for 'private and domestic' purposes. Despite the fact that the limit of this expression is unclear, it is to be noted that it qualifies the purposes of the commission and not the subject matter of the photographs. A wedding may, to some extent, be a public affair and not domestic. However, there are certain reasons why wedding images commissioned are typically both private and domestic, i.e., to preserve the memory of the occasion for family and friends. The words private and domestic are conjunctive: a photograph which is commissioned for private but not domestic purposes, for example for purposes relating to a person's private business affairs, will not fall within the section.

There is no necessity that the act of infringement be an intrusion into a person's domestic or private affairs, even though the photo or film must have been ordered for private and domestic use. When the private and domestic purpose requirement is met in connection to the commissioning, the right granted is equivalent to a copyright right: the commissioner may refuse to provide his assent to any of the listed uses for any reason. The right pertains to the entire work or any substantial portion of it.⁴⁸

There are certain exceptions to this right. These include incidental inclusion of the work in an artistic work/film/broadcast, parliamentary and judicial proceedings, royal commissions and statutory inquiries, acts carried out in accordance with statutory authority, anonymous and pseudonymous works, and acts permitted under the assumption that the author has passed away or

⁴⁷ *Supra* note 43.

⁴⁸ Copyright, Designs, and Patents Act, 1988, S. 89(1) (U.K.).

that the copyright has expired.⁴⁹ There is no exception for any type of fair dealing, especially when it comes to using a photo or a film to report on current events.

In case where the work is created under a joint commission, this right belongs to each commissioning party.⁵⁰ Thus, each of their rights are satisfied if one person gives his consent to the act in question and if the second person waives it, it won't affect the other's rights.⁵¹ As a result, if one of two joint commissioners' consents to the publication of a photo, the other commissioner's right to object remains unaffected.

This right seeks to shield subjects from unauthorised exploitation, theoretically balancing authorial interests and subject interests. However, because the rights vests in the commissioner, making the subject's privacy contingent on third party, this right diverges from the traditional definition of moral right. Instead, it deals with a scenario wherein the interests of commissioner rather than photographer (author in this case) will supersede the right of photographer. Even though the commissioner may be the owner of the concerned photograph and holds a copyright in it; a moral right depends upon authorship and not the ownership.

Duration:

The CDPA provides that the **RA, RI** and the right of privacy of certain photographs and films continues till the copyright in the work subsists whereas in case of right to object to false attribution remains in effect for 20 years following a person's passing.⁵²

Consent and Waiver:

The main weakness in the UK's defence of moral rights is that the author or director who holds the moral rights may choose to forgo them. The requirement that the waiver be made in a written document and bear the signature of the person making the waiver is to safeguard the interests of the author or director. The waiver may be described as being subject to cancellation and may be conditional or unconditional.⁵³

⁴⁹ *Id.*, S. 85(2).

⁵⁰ *Id.*, S. 88(6).

⁵¹ *Id.*

⁵² Copyright, Designs, and Patents Act, 1988, S. 86 (U.K.).

⁵³ *Id.*, S. 87.

In addition to a formal waiver, the CDPA also provides for an informal waiver of moral rights. It provides that nothing contained in Chapter IV shall preclude the application of general law of contract or estoppel to an informal waiver.⁵⁴

The waiver effectively prevents authors/directors from exercising their moral rights in situations where they have weak bargaining power in a business relationship. This is often the case where the author of a literary work is a newbie and desires to have his work published, and the publishing company pressurizes him to give up his rights.⁵⁵ Despite the fact that the waiver under sec. 87 is not always violative of Berne Convention, the statutory safeguard for moral rights is substantively thin. It has been said that this frustrates the underlying purpose of the Berne Convention'.⁵⁶

IV. INDIA: MORAL RIGHTS UNDER COPYRIGHT ACT, 1957

Before independence, India being a British-ruled province, copyright laws in India were largely based on the copyright law of UK. The first copyright legislation was introduced in India in 1857 and was based on UK's Copyright Act, 1842. In 1914, India came up with a follow-up law that, with some revisions, incorporated the UK's Copyright Act, 1911.⁵⁷ India updated its copyright legislation in 1957 to meet the demands of Berne and the Universal Copyright Convention and passed the nation's first comprehensive copyright legislation, The Copyright Act, 1957 (hereinafter 1957 Act),⁵⁸ which is still in effect today.⁵⁹

In a broad interpretation reminiscent of France, the 1957 Act includes protection for the author's moral rights to attribution and integrity. However, film directors have been left out from the definition of author under the aforesaid Act and as such are not entitled to any moral rights, unlike UK which has duly acknowledged film directors under the category of authors.

Section 57 of the 1957 Act titled 'Special Rights of the Author' safeguards the author's right to attribution and integrity. In accordance with the Berne Convention's guidelines, moral rights are

⁵⁴ *Id.*, S. 87(4).

⁵⁵ *Supra* note 32, Jonas Brown-Pederson, at 122.

⁵⁶ *Id.*

⁵⁷ *Supra* note 1, Jeffrey M. Dine, at 559.

⁵⁸ The Copyright Act, 1957, (India).

⁵⁹ *Id.*

‘independent’ of economic rights and remain vested in the author regardless of assignment of copyright.⁶⁰

[A] Right of Attribution:

It should be noticed that the Act uses the words ‘the right to claim authorship’ as prescribed under the Convention instead of ‘the right to be identified’ as prescribed under the CDPA. The term ‘claiming authorship’ tends to imply that an author’s right to recognition is a given and that sec. 57(1)’s right to claim authorship only applies in the event that recognition is not accorded (as the statute implies it should be). Thus, under this view, if an author waives his moral rights, he would also be waiving his right to sue if he has not been properly attributed as the author of the work. In contrast to CDPA, there is no requirement of any assertion to be made in order to claim this right.

Emphasising the importance of right of attribution, the Delhi High Court in *Fox Star Studios v. Aparna Bhat*,⁶¹ held that “it is a well-settled position in law that in order for any person’s paternity rights in any work to be recognised, a written contract is not required. The right of paternity is an integral part of the moral rights of a person who makes any contribution.”

[B] Right of Integrity:

The Act provides that, an author can claim this right if there has been ‘distortion, mutilation, modification, or other act’ that is harmful to his honour or reputation.⁶² Although the law does not define ‘distortions’ as additions or deletions like the UK’s CDPA does, it is in greater compliance with Article 6bis by permitting ‘other acts’ to be a sufficient basis for a claim. In contrast to the CDPA, it does not limit the application of the Convention’s clause on ‘other derogatory action.’

The courts have been given the authority to determine what is ‘prejudicial’ to an author’s reputation since there is no definition of what constitutes a ‘distortion’ or ‘mutilation.’ Indian courts must choose between using an objective or subjective test to assess whether the author’s claim of distortion is true, much like the UK.

⁶⁰ *Supra* note 57, S. 57(1).

⁶¹ *Fox Star Studios vs. Aparna Bhat*, 2020 S.C.C. OnLine Del 36.

⁶² The Copyright Act, 1957, S. 57(1)(b) (India).

Departing from the objective test applied by the UK courts, the *Amarnath Sehgal*⁶³ case shows that Indian courts tacitly agree with the subjective test for moral rights. In this instance, the government had hidden Sehgal's artwork from view by storing it. Under the objective test, he couldn't have asserted infringement because there was no reputational harm. The Delhi High Court recognising his right to object based on the moral rights approach and highlighting the artist's personal anguish over the absence of his creation, did so. It observed that "moral rights of the author are the soul of his works" and concluded that moral rights of author include the ability to object to one's work being completely removed from public view because doing so would damage the artist's reputation.⁶⁴

That being said, the judiciary's stance on moral rights has not always been consistent. This was seen in *Raj Rewal v. UOI*,⁶⁵ wherein the court expressed a completely different opinion from the one in *Amarnath Sehgal*.

In the present case, the plaintiff was an architect who designed the Hall of Nations and Nehru Pavilion in Pragati Maidan, Delhi. In the year 2016, to make space for a new project, the ITPO decided to demolish this Hall. The plaintiff sued UOI and ITPO, claiming that demolition of Hall infringed his special rights under sec. 57(1) of the 1957 Act. The Court concluded that an author's right to stop distortion/mutilation of their work stops short of prohibiting its total demolition. The Court read the explanation to sec. 57(1) which reads 'failure to display a work' does not compromise author's **RI** because something that cannot be seen or heard, cannot be deemed to be flawed and hence cannot hurt author's reputation. The court also made a reference to sec. 52(1)(x) which allows "the reconstruction of a building/structure in accordance with the architectural drawings/plans by reference to which the building/structure was originally constructed" and is non-infringing. Thus, preventing demolition of work under sec. 57(1)(b) would then defeat sec. 52(1)(x). The Court ruled that urban planning takes precedence over an architect's moral rights and permitted the demolition of the Hall. Thus, the Court limited the extent of moral rights to exclude demolition by relying on sec. 57(1)(b) read with sec. 52(1)(x).⁶⁶

⁶³ *Amarnath Sehgal v. UOI*, 2005 (30) PTC 253 (Del).

⁶⁴ Manu Chaturvedi, *Moral Rights in India: A Call for Holistic Review*, 4 INDIAN J. INTELL. PROP. L. 52, 61-62 (2011).

⁶⁵ *Raj Rewal v. UOI*, CS(COMM) 3/2018.

⁶⁶ *Id.*

Legal representatives are authorised under the Act to exercise these rights on behalf of author.⁶⁷ Unavoidable as death is, there must be someone in place to safeguard the work after the author's passing because the bond between the author and the work is eternal. Indian Copyright law ensures the continued safeguarding of author's moral rights beyond their lifetime.

Unlike the CDPA, the 1957 Act, under sec. 57 does not expressly grant to authors the right to object to false attribution and the right of privacy in certain photographs and film. However, these two issues have been discussed by the courts in India.

False Attribution:

Generally, false attribution is bifurcated into two classes: a) concerning others and b) concerning authors. When it comes to false attribution concerning others, the author is the only one who is not being credited for his work. In this situation he has the right to prohibit or object to false attribution to others. False attribution destroys the ties that the author has with his creation. Consider the case of orphan works. There is a greater likelihood that the author of an orphan work won't receive credit for it. Without a doubt, the increase in the number of orphan works makes it more difficult to identify or locate the author of a copyrighted work when it is used, which results in false attribution of the author. The author may view the omission of his name as a violation of his right of attribution. Because of this, researchers and other users are often discouraged from making use of orphan works. Even though failing to credit the author is not always a malicious act, it nevertheless constitutes an infringement of their right of attribution.

False attribution with respect to an author denotes the wrong of forging a connection between a piece of work and an author, hence establishing a false claim of authorship over the work. Here, a work is wrongly attributed to a specific individual or entity who in reality did not create it (passing off the work as of someone else). For instance, an academic paper may wrongly attribute a finding to a popular scientist, when in reality, it was written by someone else. This gives the 'non-author' a false identity. This is generally done with a malicious intent and the work is attributed to a renowned author in order to gain profits. Additionally, it has another detrimental effect. By

⁶⁷ The Copyright Act, 1957, S. 57(2) (India).

fostering a market for counterfeit works that are sold as genuine, it gives the public access to unauthentic works.

Furthermore, attributing the author's name to a work that does not adhere to the notions, style, or standard the author established as the norm for his creative activity can be done in a careless or malicious fashion, resulting in an affront to his honour, dignity, or reputation. In this instance, the rights to attribution and to integrity are both violated.

The Indian Copyright Act provides no textual support for this right as a moral right under sec. 57. However, the Indian courts have recognized this right through a number of decisions.

In *Neha Bhasin v. Anand Raaj Anand*,⁶⁸ the plaintiff made certain claims: firstly, she was the lead singer on all three versions of the song; secondly, it was her voice that was recorded, and lastly, upon playing the song, the voice that can be heard is hers. In addition, the plaintiff claimed that Poonam Khubani (second defendant) was not the lead singer and that the voice used was not her own. The plaintiff contested the credits, claiming her lead vocals were misappropriated and falsely attributed to second defendant, reducing her own contribution to that of a backup singer.

Relying upon the judgement in *Suresh Jindal v. Rizoli Corriere Della Sera Prodzioni T.V., S.P.A.*⁶⁹, the Delhi High Court held that the plaintiff sang the song in all three of its renditions on the Original CD. Knowing this to be the case, the defendants deceitfully made second defendant the lead/main female singer while relegating the plaintiff to the position of just a backup singer. The second defendant was shown as lead vocalist, relegating the plaintiff (the actual lead singer) to the role of backup singer. Court found that this results in great harm to the plaintiff's reputation as a vocalist. If she is seen as only a backup singer rather than a lead/main singer in the industry, her dreams to become a successful female vocalist will be severely set back. Thus, while there is no such right expressly available under the Indian Copyright Act, the courts through several judgements have acknowledged and upheld this right.

Privacy in certain photos and films:

The Copyright Act, 1957 does not provide any moral right protection as to privacy in photographs and films but does provide copyright protection to photographs covered under original artistic

⁶⁸ 2006 SCC OnLine Del 440.

⁶⁹ 1991 Supp (2) SCC 3.

works.⁷⁰ Without the copyright owner's permission, sec. 4 forbids publishing copyrighted works. Copyright owner can deploy the photos for commercial gain as well. Sec. 17 of the Act provides that the first ownership of the work rests with the author of the work. Except in cases of express written agreement to the contrary, the author in instances involving photographs is the person taking the photographs.

The Act provides that when an author produces a work during the term of his employment, the employer holds the copyright in such work.⁷¹ For instance, if a photographer is recruited under a contract of service, unless otherwise stipulated, the newspaper/newspaper owner—will possess the copyright in the images taken by photographer while he was employed.

Under the 1957 Act, when at the instance of a person any photograph, painting, portrait, engraving or cinematograph film has been made for valuable consideration, then save where otherwise agreed, the first owner of the copyright in such works is the said person.⁷²

The issue of ownership was clarified in the case of *V. T. Thomas v. Manorama*.⁷³ Thomas was a cartoonist of the popular cartoon series 'Boban and Molly' for Malayala Manorama. He began creating the same characters for other magazines after leaving Malayala Manorama. The court found that when an employee's employment comes to an end for any reason, he or she retains ownership of the copyright for any later works they produce. This would apply even if their themes were similar to those produced while they were still employed. The employer owns the copyrights in only those works that the author produced while employed. In case of works produced on personal time, the employee owns the copyright.

Consider a wedding as an example. Unless there is a specific agreement assigning the copyright to the photographer, the copyright in the wedding photos is owned by the person who hired the photographer to shoot the pictures. However, the photographer holds the copyright for photos clicked beyond contractual terms. For instance, if the agreement is to take 75 photos, the owner of the copyright in those 75 photos is the one who paid for them however, the photographer will own the rights to the additional 25 pictures he captures.

⁷⁰ The Copyright Act, 1957, S. 13 (India).

⁷¹ *Id.*, S. 17(a).

⁷² The Copyright Act, 1957, S. 17(b) (India).

⁷³ AIR 1989 Ker 49.

In such a scenario, there are two questions that need to be dealt with: Firstly, is the photographer allowed to publish photos on social media and other platforms, or maintain a portfolio, the copyright in which belongs to some other person. And the second question pertains to the issue whether the photographer is entitled to take photos outside a contract. The first question can be answered through fair use whereas the second one through the issue of privacy.

Fair Use: The 1957 Act allows the use of copyrighted works for private or individual purposes, such as research, criticism, or review.⁷⁴ This exemption permits photographer to retain personal portfolio of the pictures he has captured for other people. This does not, however, imply that he is free to use his portfolio for commercial purposes or to sell photos from the portfolio to 3rd parties. The wedding photo may be freely used and distributed if it serves as a clue at a crime scene or during divorce procedures and this will not constitute an infringement.⁷⁵

Privacy: A majority of countries' legal systems have made the right to privacy a fundamental freedom. Concerning privacy, the case of *Justice K.S. Puttaswami & Anr. v. Union of India*⁷⁶ is a landmark case wherein the right to privacy was recognised as a fundamental right under A. 21 of the Constitution. The court stated that every person should have the freedom to decide how their identity is used for commercial purposes and this freedom includes an individual's exclusive right to use his identity and personal information for commercial gain, to manage what information is made publicly available online, and to share certain personal information for limited purposes only.

This implies that an individual may be able to stop others from using their name, image, or other aspects of their personal lives and identities for profit without their permission. In addition to the economic arguments in favour of such a right, it is also justified by the need to preserve personal dignity and autonomy.

So, the pictures taken in a private setting showing people who have not given permission can only be used for the purpose for which it was taken. A wedding photographer is thus prohibited from using the wedding photos for profit. By participating in the event, the visitors have implicitly given permission to be photographed. Such images may only be used for the intended reason for which they were taken, to preserve the memories of the wedding and to circulate among a select, private

⁷⁴ The Copyright Act, 1957, S. 52(1)(a) (India).

⁷⁵ *Id.*, S. 52(1)(d).

⁷⁶ (2017) 10 SCC 1.

group of friends and family. The right to use these pictures for commercial purposes does not belong to the photographer or the individual who officiated the wedding and owns the rights to them.

So, while the 1957 Act, does not grant moral right protection when it comes to certain photographs as is done by CDPA, the Indian courts have recognised the importance of an individual's right to privacy, especially when it comes to certain photos. This is essential in a world where privacy issues are becoming more and more important as a result of the widespread use of photography, especially through social media. The Act essentially acknowledges that people should have discretion over how their photos are used and transmitted, especially in circumstances when their privacy may be jeopardised.

Duration:

The 1957 Act does not specifically mention the duration of moral rights. Prior to 2012 Amendment, the Act provided that **RI** can be asserted only if the act causing the distortion/mutilation/modification was harming the reputation or honor of the author and occurred while the copyright in such work was subsisting. The 2012 Amendment brought back the idea of perpetual moral rights and also recognised the moral rights of performers by inserting sec. 38B in the Act.⁷⁷

Consent and Waiver:

Compared to its global counterparts, copyright law in India has developed significantly later. Sec. 57 grants the authors special rights, though it does specifically forbid their waiver. However, upon examining the case of Amarnath Sehgal, it becomes clear that the Indian courts have given Section 57 and the rights embodied in it enormous weight.

The waiver of copyright laws is not specifically addressed in Indian law, but in *Sartaj Singh Pannuv Gurbani Media Pvt. Ltd. & Anr*⁷⁸ it was stated that a voluntary waiver does not contravene public policy if voluntariness is established through available evidence. Some academics contend that Indian law may allow the waiver if moral rights conflict with public policy. The opposing

⁷⁷ <https://singhania.in/blog/moral-rights-under-copyright-law>

⁷⁸ 220 (2015) DLT 527.

claim is that since moral rights are essentially innate to the author, they are akin to fundamental rights guaranteed by the Indian Constitution and cannot be relinquished.

To conclude, it can be said that the legislation and case laws have not yet provided a solid response to the question of moral rights waiver. On the one hand, there are no restrictions on waiving these rights; on the other hand, the case law is not in favour of waiving these rights. Although authors may surrender their moral rights if they sign a contract doing so.

V. CONCLUSION

Besides granting the moral rights prescribed under the Berne Convention, namely the **RA** and **RI** to the authors and directors, the CDPA, 1988 also grants two additional moral rights: the right against false attribution and the right of privacy in certain photographs and films. While this may seem like an additional protection, in practice, however, the UK moral right framework appears to have a restricted scope than the protection outlined under A. 6bis of Berne Convention in certain aspects. While the CDPA does recognise both the **RA** and **RI**, the manner in which they have been described under the Act, it appears that they lack the necessary force.

In a traditional sense, moral rights protect the unique author-work nexus. However, when it comes to the right of privacy in certain photographs and films, here the dynamic is quite different as the emphasis is put upon the interest of the commissioner instead of photographer (author in this case). This means that the ability of the subject to safeguard their privacy would depend on the intention of the commissioner. Thus, the CDPA stresses that the commissioner's interest would supersede the right of the photographer. Authors often have a deep personal connection with their creations, and it is this unique connection that moral rights actually serve to safeguard. By granting this right to authors, directors as well as commissioners, it seems that moral rights under the CDPA are more concerned with the interests of various parties involved and somehow the whole point of protecting this special author-work nexus is at the risk of being lost. Thus, the wording of the Act is misleading in the sense that it might fail to effectively convey the true nature of moral rights when the rights of subject and commissioner are involved.