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## Authors' Moral Rights in Non-European Nations: International Agreements, Economics, *Mannu Bhandari*, and the Dead Sea Scrolls

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## STUDENT NOTES

# AUTHORS' MORAL RIGHTS IN NON-EUROPEAN NATIONS: INTERNATIONAL AGREEMENTS, ECONOMICS, MANNU BHANDARI, AND THE DEAD SEA SCROLLS

Jeffrey M. Dine\*

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## INTRODUCTION

Authors' rights as established in the copyright laws of most countries have two components. First, economic rights, rights to obtain remuneration in return for the right to publish the work, and second, moral rights, rights to prevent mutilation or distortion of the work, to receive authorial credit for the work, to decide when the work is complete and can be sent forth into the world, and, in some countries, the right to withdraw the work. The rights of authors to obtain redress from those who alter or mutilate their work or deny their authorship of it are, in particular, the subject of considerable controversy in the United States. These rights have received extensive treatment in scholarly legal journals in the United States.<sup>1</sup> Those articles have primarily discussed the nature of moral rights and their recognition or lack thereof in U.S. law, or the impact of the United States' accession to the Berne Convention<sup>2</sup> on the law of moral rights in the United States. When these scholars look to moral rights law abroad, they do so primarily with a

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1. Much, though by no means all, of the discussion arose during the debate over the United States' accession to the Berne Convention and drafting and passage of the Visual Artists Rights Act. An admittedly incomplete list of works includes: Ralph S. Brown, *Adherence to the Berne Copyright Convention: The Moral Rights Issue*, 35 J. COPYRIGHT SOC'Y U.S.A. 196 (1988); Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945 (1990); Edward J. Damich, *A Critique of the Visual Artists Rights Act of 1989*, 14 NOVA L. REV. 407 (1990); Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477 (1990); Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 NOVA L. REV. 422 (1990); Orrin G. Hatch, *Better Late than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171 (1989); John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); James M. Treece, *American Law Analogues of the Author's "Moral Right,"* 16 AM. J. COMP. L. 487 (1968); Carl H. Settlemeyer III, Note, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L.J. 2291 (1993).

2. Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, S. TREATY DOC. NO. 27, 99th Cong., 2d Sess. 1 (1986), 7 COPYRIGHT 135 (1971) (as revised at Paris, July 24, 1971) [hereinafter Berne Convention]. The Berne Convention is the charter of the International Union for the Protection of Literary and Artistic Works (the Berne Union). *State of the International Union on January 1, 1971*, 7 COPYRIGHT 6 (1971).

normative eye, seeking to consider foreign law as an example, positive or negative, in the debate over the reform of U.S. copyright law.<sup>3</sup>

With the United States' accession to the Berne Convention and the Uruguay Round of the General Agreement on Tariffs and Trade,<sup>4</sup> and thus to the Agreement on Trade-Related Aspects of International Property (TRIPS),<sup>5</sup> the issue of moral rights in foreign countries can no longer be viewed as a purely academic question of comparative law and American law reform. The TRIPS agreement requires that parties to the agreement provide protection equivalent to that of the Berne Convention.<sup>6</sup> While the moral rights guarantees of the Berne Convention<sup>7</sup> are specifically excluded from enforcement under TRIPS,<sup>8</sup> countries joining the Berne Union will have to meet the moral rights requirement of article 6bis, and these rights will be available to foreign authors under the national treatment requirements of Berne.<sup>9</sup> The issue of moral rights in non-European<sup>10</sup> countries will be increasingly important to authors, publishers, movie directors, and producers because many such countries have joined the GATT,<sup>11</sup> or already are Berne members.<sup>12</sup>

The United States has consistently objected to the express recognition of moral rights,<sup>13</sup> and moral rights were a longstanding reason that

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3. See, e.g., Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1 (1985) (discussing availability and reform of moral rights in U.S.; appendix provides a limited survey of foreign moral rights laws).

4. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, H.R. DOC. NO. 316, 103d Cong., 2d Sess., pt. 1, at 1318 (1994), *selected texts reprinted in* 33 I.L.M. 1143 (1994) [hereinafter GATT Uruguay Round] (citations to GATT Uruguay Round materials will be to I.L.M. when therein).

5. GATT Uruguay Round, annex 1C (Agreement on Trade Related Aspects of Intellectual Property Rights), 33 I.L.M. at 1197 [hereinafter TRIPS].

6. *Id.* art. 9, 33 I.L.M. at 1201.

7. Berne Convention, *supra* note 2, art. 6bis, 7 COPYRIGHT at 137.

8. TRIPS, *supra* note 5, art. 9, 33 I.L.M. at 1201.

9. Berne Convention, *supra* note 2, art. 5, 7 COPYRIGHT at 136.

10. This note will use the term "non-European" to refer generally to those countries outside Europe and North America. The term is intended to include, without careful distinction, "developing countries" and "newly-industrialized" countries, and, indeed, anything in between or beyond.

11. Some 88 nations. GATT Uruguay Round, *supra* note 4, H.R. DOC. NO. 316 at 1324.

12. As of January 1, 1994, 105 states had joined the Berne Union, although not all states were parties to all revisions of the treaty nor had the treaty entered into force as to all of them. Twenty-three states have joined the Berne Convention since the beginning of 1990. *Treaties in the Field of Copyright and Neighboring Rights Administered by WIPO: Berne Convention for the Protection of Literary and Artistic Works*, 30 COPYRIGHT 7 (1994) [hereinafter *Berne Members*]. As of November 1994, an additional 2 states had joined: Tanzania, *id.* at 123, and Lithuania, *id.* at 196.

13. See David Vaver, *The National Treatment Requirements of the Berne and Universal Copyright Conventions, Part Two*, 17 INT'L REV. INDUS. PROP. & COPYRIGHT L. 715, 731 & n.154 (1986) [hereinafter I.I.C.].

the United States did not join the Berne Convention until 1989.<sup>14</sup> U.S. common law and trademark causes of action do provide some analogous protections.<sup>15</sup> In addition, some individual states have enacted moral rights laws.<sup>16</sup> During the debate over the United States' accession to Berne, despite the inadequacy of moral rights protection noted by many observers, the United States declared that current U.S. law provided sufficient moral rights protection.<sup>17</sup> The 1990 passage of the Visual Artists Rights Act<sup>18</sup> perhaps gives the lie to this statement. The VARA extends moral rights protection to a very limited class of artistic creations.<sup>19</sup>

The movie industry appears to be the most vocal opponent of moral rights in the United States.<sup>20</sup> Movie producers are concerned about the divorce of copyright from moral right. In the United States, a movie's copyright lies in the producer.<sup>21</sup> In the now famous *Huston* case, the French Cour de Cassation<sup>22</sup> held that the heirs of John Huston, the director of the film *The Asphalt Jungle*, had standing to sue to prevent

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14. Hatch, *supra* note 1, at 184 (adoption of broad moral rights protection could "alter drastically current copyright relationships"); Brown, *supra* note 1, at 200, 205-06.

15. See generally Roeder, *supra* note 1; Treece, *supra* note 1. These causes of action include common law copyright, trademark law, and contract law, but they fall far short of the guarantees provided by the *droit moral*.

16. Joshua H. Brown, *Creators Caught in the Middle: Visual Artists Rights Act Preemption of State Moral Rights Laws*, 15 HASTINGS COMM. & ENT. L.J. 1003, 1004 (1993) (listing eleven states with moral rights protections).

17. See Berne Convention Implementation Act of 1988, § 2(3), Pub. L. No. 100-568, 102 Stat. 2853 (1988) (the BCIA and current law satisfy all U.S. obligations under the Berne Convention); Brown, *supra* note 1, at 204-05 (discussing legislative proposals for implementation); Hatch, *supra* note 1, at 186-90 (discussing legislative maneuvering over moral rights).

18. Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5128 (1990).

19. The extent of VARA preemption of state laws that may, in fact, have provided broader protection than VARA is uncertain, and will depend in part on the specific provisions of the state law. See Brown, *supra* note 16, at 1006-31.

20. During the Uruguay Round negotiations, the American movie industry was concerned about issues of moral rights and of a "cultural exemption," for films pressed particularly by France. See James Ulmer, *GATT Gap: Across the Great Divide*, HOLLYWOOD REP., Oct. 12, 1993, available in LEXIS, Entert Library, Holrep File. U.S. film directors and others urged inclusion of moral rights in TRIPS. See *GATT: European and U.S. Film Directors and Writers Urge Action on Copyright*, TECH EUROPE, June 3, 1993, available in LEXIS, News Library, Eurtch file; Deborah Young, *Venice Fest Session Seeks to Bridge U.S., Europe Gap*, DAILY VARIETY, Sept. 7, 1993, at 5, available in LEXIS, News Library, Dlyvty File. But see Jeffrey L. Graubart, *Industry Fails to Rally for Rights*, BILLBOARD, May 7, 1994, at 8.

21. Jane C. Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy*, 15 COLUM.-VLA J.L. & ARTS 135, 136 (1991).

22. France's highest court.

the French broadcast of the colorized version of the film.<sup>23</sup> This decision epitomized the danger to producers of acceptance of moral rights doctrine as a limitation on the ability to derive economic benefits from the copyrights they hold.<sup>24</sup> It also, of course, demonstrates the possible impact of foreign moral rights laws on United States copyright holders and authors. Another film controversy, over Terry Gilliam's film *Brazil*, may also have worried movie producers.<sup>25</sup> While it was no doubt bad enough that the director had the effrontery to publicize his disenchantment with the producer's desire to alter the film, providing him with a cause of action would appear intolerable.

This note undertakes to examine authors' moral rights in non-European countries. Section I will provide a brief comparative description of moral rights. Section II will discuss the treatment of moral rights in the Berne convention and the TRIPS agreement. Section III will then examine moral rights law in India and Israel, and two important cases from these nations, *Mannu Bhandari v. Kala Vikas Pictures*,<sup>26</sup> from India, and *Qimron v. Shanks*,<sup>27</sup> from Israel. *Mannu Bhandari* deals with an author's moral right in the film adaptation of her work, *Qimron* with the moral rights of a scholar in the reconstruction of one of the Dead Sea Scroll texts. Finally, Section IV will discuss the economic rationale for moral rights and the role of moral rights in non-European countries.

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23. Judgment of May 28, 1991, Cass. civ. 1re, 1991 Bull. Civ. I, No. 172 (Fr.) (Huston v. la Cinq). For thorough discussions of the case, see Ginsburg & Sirinelli, *supra* note 21; Paul E. Geller, *French High Court Remands Huston Colorization Case*, 39 J. COPYRIGHT Soc'y U.S.A. 252 (1992).

24. See Ginsburg & Sirinelli, *supra* note 21, at 151-57.

25. Terry Gilliam, director of the movie *Brazil*, fought a public battle to prevent the producers of the film from changing the unhappy ending of the film to one that they felt would have greater audience acceptance. The story is told in detail in Rudolph Carmenaty, *Terry Gilliam's Brazil: A Film Director's Quest for Artistic Integrity in a Moral Rights Vacuum*, 14 COLUM.-VLA J.L. & ARTS 91. The relation of the controversy to the divulgation right is discussed in Settlemeyer, *supra* note 1, at 2294-95.

26. *Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*, 1987 A.I.R. (Del.) 13 (1986). An edited version is reprinted in 20 I.I.C. 109 (1989).

27. *Qimron v. Shanks*, 3 [5753-1993] Pesakim shel Bete ha-Mishpat ha-Mehoziyim be Yisrael [Judgments of the District Courts of Israel] [P.M.] 10 (D. Jerusalem 1993) (Copies of the official report and of an unofficial translation of the slip opinion on file with the *Michigan Journal of International Law*. The translation will be cited in parallel with the official reporter.). The decision is currently on appeal to the Israeli Supreme Court; the appeals will probably not be heard before 1996 or 1997. Letter from Shanah Glick, Clerk to Justice Dalia Dorner, Israeli Supreme Court, to Jeffrey Dine, Note Editor, *Michigan Journal of International Law* (received Mar. 15, 1995) (on file with the *Michigan Journal of International Law*).

## I. MORAL RIGHTS DEFINED

### A. *The Nature and Forms of Moral Rights*

The rationale that underlies moral rights is that the rights of an author, in the broad sense of a creator of an original work, in her work include not only rights required to derive financial benefit from it, but also rights to protect the author's investment of her own creative energy and personality in her work. In a classic American exposition on moral rights, one author states that:

The copyright law, of course, protects the economic exploitation of the fruits of artistic creation; but the economic, exploitive aspect of the problem is only one of its many facets. . . . When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones; these the copyright statute does not protect. Nor is the interest of society in the integrity of its cultural heritage protected by the copyright statute.<sup>28</sup>

France is normally held up as the model for moral rights law,<sup>29</sup> but many Western European civil law countries espouse the doctrine, with some variation.<sup>30</sup> The doctrine's origin is entirely judicial, perhaps unusual in a legal system that stresses legislative over judicial lawmaking.<sup>31</sup>

There are four basic rights that constitute the *droit moral*; not all systems recognize all of them. They are: the right of publication (*droit de divulgation*), the right of paternity (*droit de paternité* or *droit au respect du nom*), the right of integrity (*droit de respect de l'oeuvre*), and the right of withdrawal (*droit de repentir* or *de retrait*).<sup>32</sup> Each of these

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28. Roeder, *supra* note 1, at 557. As an example of protection against the "ravages of public use," an Israeli court recognized the right of a sculptor to enforce the maintenance of his work in *Tumarkin v. Municipality of Tel Aviv-Jaffa*, summarized in *News Section: National Reports*, 14 EUR. INTELL. PROP. REV. D-67 (1992) [hereinafter E.I.P.R.].

29. See, e.g., Merryman, *supra* note 1; Raymond Sarrate, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968).

30. See Kwall, *supra* note 3, at 3; Merryman, *supra* note 1, at 1025.

31. Merryman, *supra* note 1, at 1026.

32. CLAUDE COLOMBET, *GRANDS PRINCIPES DU DROIT D'AUTEUR ET DES DROITS VOISINS DANS LE MONDE: APPROCHE DE DROIT COMPARÉ* 42-51 (2d ed. 1992); Sarrate, *supra* note 29, at 467; see also STEPHEN STEWART, *INTERNATIONAL COPYRIGHT AND*

rights is compound, each consisting itself of a small bundle of rights.

The right of publication is the right of the author to choose whether or not to present her work to the public.<sup>33</sup> As one author notes, it protects the artist from having her "lack of inspiration . . . considered to be a breach of contract."<sup>34</sup>

The right of paternity is the right to claim authorship of one's work, to prevent others from unjustly claiming authorship, and to prevent having one's name falsely associated with another's work.<sup>35</sup> The right of paternity includes the right to publish pseudonymously.<sup>36</sup>

The right of integrity includes the "right to authorize or prohibit any modification of [the author's] work,"<sup>37</sup> and to protect against distortion of the work.<sup>38</sup> It also includes the right to prevent mutilation of or derogatory action toward the work.<sup>39</sup> This was the right at issue in the *Buffet* case, where the buyer of a refrigerator painted by Bernard Buffet attempted to sell the individual painted panels of the refrigerator separately; the court enjoined the sale.<sup>40</sup>

The right of withdrawal is the least exercised moral right. Its formal existence is rare outside France and countries that derive their law from France.<sup>41</sup> There is wider recognition of a right to make corrections, particularly in later editions.<sup>42</sup> The author may be required to pay damages when he withdraws a work from circulation, as is clearly the case in Spain.<sup>43</sup> The right of withdrawal may exist in common law countries, but only under compelling circumstances and in very limited cases.<sup>44</sup>

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NEIGHBOURING RIGHTS 73 (2d ed. 1989) (omits the right of retraction).

33. Sarraute, *supra* note 29, at 467. The archetypal right of publication case is the French case *Whistler v. Eden*; the painter Whistler had painted on commission a portrait of Lord Eden's wife. After brief public display, he refused to deliver the painting and erased the subject's face. *Id.*; Merryman, *supra* note 1, at 1024. For the subtle distinctions between publication, placing in public view, disseminating, and other terms, see COLOMBET, *supra* note 32, at 42.

34. Sarraute, *supra* note 29, at 468.

35. STEWART, *supra* note 32, at 73.

36. *WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights* 161, WIPO Publ. No. 827 (EFR) (Jan. 1981) [hereinafter *Glossary*]; COLOMBET, *supra* note 32, at 45.

37. STEWART, *supra* note 32, at 73-74.

38. *Id.*

39. *Glossary*, *supra* note 36, at 161.

40. Merryman, *supra* note 1, at 1023.

41. COLOMBET, *supra* note 32, at 50.

42. *Id.*

43. *Id.* at 51.

44. STEWART, *supra* note 32, at 73.



Even French commentators question the efficacy of the right of withdrawal.<sup>45</sup>

### B. Duration And Alienation of Moral Rights

The duration of moral rights varies significantly among nations. In a minority of states, moral rights either have the same duration as the copyright,<sup>46</sup> or endure for a different term of years after the death of the author.<sup>47</sup> Many nations, however, recognize moral rights generally in perpetuity without distinction among works by individual authors or collective works,<sup>48</sup> including France and many Francophone countries.<sup>49</sup> Other countries recognize the perpetuity only of certain rights, primarily the rights of integrity and attribution.<sup>50</sup> According to one commentator, the need for a perpetual moral right is "justif[ied] by the longevity of the work, which survives the extinction of the monopoly and continues to carry the expression of the author's personality."<sup>51</sup> One French author thus finds the idea of temporal limitation of the rights of integrity and attribution "shocking."<sup>52</sup>

The ability to transfer moral rights varies from country to country. The World Intellectual Property Organization's definition of moral rights states that "[m]ost of the copyright laws recognize moral rights as an inalienable part of the copyright, distinct from the so-called 'economic rights.'"<sup>53</sup> The Berne Convention apparently does not require inalienability, however. While Berne requires that moral rights not pass as part of copyright, it does not expressly require that the rights be inalienable; indeed, a French proposal to introduce inalienability was defeated.<sup>54</sup>

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45. Sarraute, *supra* note 29, at 477.

46. COLOMBET, *supra* note 32, at 51 (states include Barbados, Guatemala, Luxembourg, and the Low Countries).

47. *Id.*; W.R. Cornish, *Moral Rights Under the 1988 Act*, 12 E.I.P.R. 449, 449, 451 (1989) (new English Copyright Act provides protection only while work remains in copyright); Robyn Durie, *UK Copyright, Designs and Patents Act 1988*, 20 I.I.C. 637, 650 (1989). The Berne Convention generally prescribes a copyright term of at least 50 years after the death of the author; special rules apply to motion pictures, anonymous or pseudonymous works, and photographs. Berne Convention, *supra* note 2, art. 7, 7 COPYRIGHT at 137.

48. COLOMBET, *supra* note 32, at 52. Note, however, that the right of retraction is generally viewed as exercisable only by the author. *Id.*

49. *Id.*

50. *Id.*

51. H. DESBOIS, *LE DROIT D'AUTEUR EN FRANCE* 470 (3d ed. 1978).

52. COLOMBET, *supra* note 32, at 52.

53. *Glossary*, *supra* note 36, at 161. Desbois states that "the author cannot renounce the defense of his personality, under pain of committing 'moral suicide.'" DESBOIS, *supra* note 51, at 470.

54. STEWART, *supra* note 32, at 74.

### C. Moral Rights Laws Outside Europe

While there is universal recognition of the author's right "to affirm his paternity in a work, or to defend his integrity in it," there are two approaches to enforcement of these rights.<sup>55</sup> The civil law countries of Latin America, Africa, and East Asia spell out the right with particularity in their copyright laws,<sup>56</sup> while the common law countries generally leave moral rights to the protection of the courts.<sup>57</sup> Statutory recognition of moral rights has grown, however, in common law countries.<sup>58</sup> For example, India,<sup>59</sup> Israel,<sup>60</sup> and other nations have adopted moral rights legislation within their copyright law, while the United States has adopted the Visual Artists Rights Act,<sup>61</sup> and Australia has undertaken consideration of moral rights.<sup>62</sup>

The countries that protect the right of divulgation as part of copyright law are civil law countries and countries whose law derives from the civil law. The right is apparently widely respected, with variation as to extent and statutory wording.<sup>63</sup> Common law countries provide such protection under the law of privacy or secrecy,<sup>64</sup> and through the refusal to specifically enforce personal service contracts.<sup>65</sup>

Fewer countries, as noted above, recognize the right of withdrawal.<sup>66</sup> Only France and countries deriving their law from France protect it extensively.<sup>67</sup> Some other countries, including Spain, which historically

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55. COLOMBET, *supra* note 32, at 40; see also Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law: A Comparative Approach*, 25 I.I.C. 177 (1994) (discussing nature and recognition of the right of integrity in a number of countries).

56. COLOMBET, *supra* note 32, at 40.

57. *Id.*

58. England adopted moral rights provisions in 1988. See Copyright, Designs and Patents Act, 1988, ch. 48, §§ 77-89 (Eng.).

59. See *infra* text accompanying notes 106-12.

60. See *infra* text accompanying notes 113-15.

61. Visual Artists Rights Act, Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101, 106A, and other sections) [hereinafter VARA]. For a critical examination of the VARA, see Peter H. Karlen, *What's Wrong with VARA: A Critique of Federal Moral Rights*, 15 HASTINGS COMM. ENT. L.J. 905 (1993).

62. *Australia*, 16 E.I.P.R. D-194 (1994).

63. COLOMBET, *supra* note 32, at 42-43.

64. *Id.* at 43.

65. Roeder, *supra* note 1, at 559 (equity would not enforce contract to produce painting, but would award damages for breach of contract).

66. See *supra* text accompanying note 28.

67. COLOMBET, *supra* note 32, at 50. France has passed a new copyright law. Law No. 92-597 relative au code de la propriété intellectuelle, 124 J.O. 8801 (July 3, 1992), amended by Law No. 92-1336 relative à l'entrée en vigueur du nouveau code pénal, arts. 203-04, 124

adopted the French model in many respects,<sup>68</sup> adopt a more limited right to make changes or corrections. Moreover, some countries only require the publisher to make such changes on publication of a new edition.<sup>69</sup>

The right of retraction, to fully cancel an assignment of rights to publish, is the least recognized of the four moral rights. The method of executing the right is seldom detailed in statutory law.<sup>70</sup> In all countries recognizing the right, the author must pay full compensation. Indeed, in Spain, for example, if the author later decides to publish the work, she must offer it to the original assignee on the original terms.<sup>71</sup>

The precise terms of the moral rights statutes are probably less important than several other characteristics in determining the actual efficacy of moral rights in any country. Widespread adherence to the Berne Convention means that most countries have had to provide moral rights protection to meet its minimum standard protecting the rights of integrity and paternity. However, the existence of substantial industries dependent in some measure on copyright and authorial originality, and the existence of a legal system that provides effective (though not necessarily speedy) protection are better indicators of the availability of substantive remedies and the development of a significant jurisprudence of moral rights than membership in the Berne Union.

Indeed, the cases examined in this article were the only major non-European moral rights cases reported in Western topical journals.<sup>72</sup> These cases come from two countries that draw their copyright laws from the English model, but joined the Berne Union shortly after independence and provide statutory protection of the rights of paternity and integrity. The Indian case comes out of the Indian film industry, a substantial industry producing some 900 films each year;<sup>73</sup> the Israeli case comes from Biblical scholarship and archaeology, fields whose significance in Israel cannot be doubted. It is the twin factors of an effective legal system and substantial economic interests that motivated

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J.O. 17568, 17583 (Dec. 23, 1992). For an English translation, see 29 COPYRIGHT at France-Text 3-01 (July-Aug. 1993).

68. Patricia Rivera MacMurray, *Moral Rights in Puerto Rico: Spanish Tradition and the Federal System*, 57 REV. JUR. U.P.R. 297, 300-304 (1988).

69. COLOMBET, *supra* note 32, at 50.

70. *Id.* at 51.

71. *Id.*

72. The cases were selected from reports in *E.I.P.R.* and *I.I.C.*, from commencement of publication of *E.I.P.R.* and going back to 1979 for *I.I.C.*

73. Anita Ramasastry, Recent Development, *Cinematic Sex and Censorship in Indian Film*, 33 HARV. INT'L L.J. 205 (1992).

these suits and imbued them with enough significance to make litigation worthwhile.<sup>74</sup>

## II. MORAL RIGHTS IN INTERNATIONAL DOCUMENTS

### A. *The Berne Convention*

Paragraph 1 of Article 6bis of the Berne Convention protects the rights of paternity and integrity.<sup>75</sup> Moral rights protection was introduced into the Berne Convention in 1928, and was slightly amended in 1967.<sup>76</sup> While the rights are separate from and not transferred with the copyright, they are not clearly inalienable.<sup>77</sup> The rights of divulgation and withdrawal are not included in Berne.

Under the second paragraph of article 6bis, moral rights must last at least as long as the economic rights, but countries that did not provide moral rights protection prior to acceding to the Convention are excepted from this requirement. In those countries, protection need only last until the author's death.<sup>78</sup>

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74. Indeed, the court issued its decision in *Mannu Bhandari* after the parties had settled; the opinion was released notwithstanding, as the parties, an author and a film production company, recognized the need for precedent to guide behavior in this area of law. *Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*, 1987 A.I.R. (Del.) 13, 21 (1986).

75. The text of Article 6bis reads:

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

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Berne Convention, *supra* note 2, art. 6bis, 7 COPYRIGHT at 137.

76. SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 459-67 (1987). However, because of the bitter controversy over the Protocol to Berne adopted at Stockholm in 1967, the Stockholm amendments never went into effect. *Id.* at 124. The moral rights changes at Stockholm were incorporated at Paris in 1971. *See id.* at 631.

77. *See supra* text accompanying notes 53-54. At a 1990 meeting of the WIPO Committee of Experts on model copyright law the European countries objected to the terms allowing alienability, holding out instead for contractual "non-exercise clauses." Susan Wagner, *WIPO Committee of Experts Tackles Model Copyright Law*, 4 WORLD INTELL. PROP. REP. 215 (1990).

78. Berne Convention, *supra* note 2, art. 6bis, para. 2, 7 COPYRIGHT at 137. For a description of the various rules of duration, *see supra* text accompanying notes 46-52.

The third paragraph of the article provides that enforcement of the provision is to be through the national law "of the country where protection is claimed."<sup>79</sup> Thus, an American being sued for violation in Israel of moral rights should be subject to Israeli law. An American being sued in Israel for a violation of American copyright law should be subject to American law.<sup>80</sup>

One hundred seven countries have joined Berne; twenty-five have joined in the 1990s alone.<sup>81</sup> Eighty-six of the countries signing the Uruguay round final act are members of Berne.<sup>82</sup> There are a number of explanations for the recent rapid growth of the Berne Union. In the aftermath of the breakup of the Soviet Union, the newly independent states and former socialist nations have attempted to integrate rapidly into the Western economic system.<sup>83</sup> There also may be an increasing belief among countries that had previously eschewed intellectual property protection that such protection has come to be a requirement of foreign investment, or at least a requisite for other gains from the GATT.

## B. TRIPS

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is one of six major trade agreements of the GATT Uruguay round.<sup>84</sup> TRIPS requires, *inter alia*, that GATT members give protection to the intellectual property of other members that is equivalent to that of the Berne Convention,<sup>85</sup> the Paris Convention for

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79. Berne Convention, *supra* note 2, art. 6bis, para. 3, 7 COPYRIGHT at 137.

80. This is not necessarily the case, however. See *infra* Section III.C.3.a.

81. See *supra* note 12.

82. See the list of Uruguay Round signatories in GATT Uruguay Round, *supra* note 4, H.R. Doc. No. 316 at 1324. For a list of Berne members, see *Berne Members*, *supra* note 12, and accompanying additions listed in the same note.

83. Eight European formerly socialist states have joined Berne since 1990; a number of others joined the Berne Union before World War II. *Berne Members*, *supra* note 12.

84. The major agreements of the Uruguay Round are: the Agreement on Trade in Goods, the General Agreement on Trade in Services, TRIPS, the Understanding on Rules and Procedures Governing the Settlement of Disputes, and the Trade Policy Review Mechanism. There are a number of more specialized agreements and Ministerial Declarations as well. See GATT Uruguay Round, *supra* note 4. For a discussion of the provisions of TRIPS, see Ralph Oman, *Intellectual Property After the Uruguay Round*, 42 J. COPYRIGHT Soc'y U.S.A. 18 (1994) (discussing interaction of WIPO and GATT, and the provisions of TRIPS); J.H. Reichman, *The TRIPS Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 171 (1993) (describing draft TRIPS).

85. TRIPS, *supra* note 5, art. 9, 33 I.L.M. at 1201.

the Protection of Industrial Property;<sup>86</sup> the Rome Convention,<sup>87</sup> governing performers, record producers, and broadcasters; and the Treaty on Intellectual Property in Respect of Integrated Circuits.<sup>88</sup> Additionally, intellectual property must be granted most favored nation treatment, subject to certain exceptions.<sup>89</sup> Geographical indications, identifying the origin of a good, must also be protected.<sup>90</sup>

Although compliance with the general substance of the Berne Convention is mandatory under TRIPS,<sup>91</sup> compliance with article 6*bis* is specifically excepted,<sup>92</sup> at the insistence of the U.S. delegation.<sup>93</sup> The agreement instead incorporates the United States' proposed language *verbatim*.<sup>94</sup>

GATT members must guarantee that enforcement of rights guaranteed under TRIPS will be available to rights holders by "civil judicial procedures."<sup>95</sup> Criminal penalties must be applicable for "wilful trademark counterfeiting or copyright piracy on a commercial scale."<sup>96</sup>

From the standpoint of moral rights, it is perhaps most important that the GATT dispute resolution procedures apply to TRIPS.<sup>97</sup> The

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86. Paris Convention for the Protection of Industrial Property, *opened for signature* Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (revised at Stockholm, July 14, 1967).

87. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, *done* Oct. 26, 1961, 496 U.N.T.S. 43.

88. Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits, Feb. 12, 1987, 28 I.L.M. 1477 (1989), 25 COPYRIGHT at Multilateral Treaties-Text-2-01 (June 1989) (not in force).

89. TRIPS, *supra* note 5, art. 4, 33 I.L.M. at 1200.

90. *Id.* art. 22, 33 I.L.M. at 1205 (provides greater protection for indications of origin of wine and spirits).

91. *Id.* art. 9, 33 I.L.M. at 1201.

92. *Id.*

93. 2 TERENCE P. STEWART, *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992)* 2288-89 (1993).

94. *Id.* at 2289. In relevant part, the treaty states: "However, Members shall not have rights or obligations under this Agreement in respect of rights conferred under Article 6*bis* of [the Berne] Convention or of the rights derived therefrom." TRIPS, *supra* note 5, art. 9, para. 1, 33 I.L.M. at 1201.

95. TRIPS, *supra* note 5, art. 42, 33 I.L.M. at 1214.

96. *Id.*, art. 61, 33 I.L.M. at 1220.

97. *See id.*, art. 64, 33 I.L.M. at 1221 (making GATT dispute resolution procedures applicable to TRIPS). GATT Uruguay Round, annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes), 33 I.L.M. 1226 (1994) sets forth the dispute settlement procedure. For a general overview of dispute resolution under the World Trade Organization, see Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349 (1995). For an evaluation of dispute resolution under TRIPS, see Bal Gopal Das, *Intellectual Property Dispute, GATT, WIPO: Of Playing by the Game Rules and the Rules of the Game*, 35 IDEA 149 (1994); Oman, *supra* note 85, at 27-28.

dispute resolution procedures provide a way to make the Berne Convention powerfully enforceable. The only formal dispute resolution method provided in the Berne Convention is suit in the International Court of Justice.<sup>98</sup> This has never happened.<sup>99</sup> Allowing enforcement of moral rights through the GATT mechanism would thus create a risk that the United States would be penalized for inadequate recognition of moral rights.<sup>100</sup> The language excepting moral rights from TRIPS should fully remove complaints of both over-enforcement and under-enforcement of moral rights from TRIPS.

Members are to implement TRIPS within one year of accession.<sup>101</sup> The exceptions for developing countries, countries converting to a free market economy, and least-developed countries apply to the implementation of Berne standards.<sup>102</sup> A number of U.S. groups have complained that the delay in implementation of the Uruguay Round agreements by lesser developed countries is unfair to the U.S.<sup>103</sup>

Having examined the international framework of moral rights protection, this note will next turn to examples of the enforcement of moral rights within the national protections of non-European nations.

### III. MORAL RIGHTS IN NON-EUROPEAN COUNTRIES: TWO CASES

This section will discuss in detail two cases from non-European nations. The first, *Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*<sup>104</sup> is

98. Berne Convention, *supra* note 2, art. 33, 7 COPYRIGHT at 145.

99. Paul E. Geller, *Can the GATT Incorporate Berne Whole?*, 4 WORLD INTELL. PROP. REP. 193, 194 (1990).

100. During the debate on inclusion of Berne in TRIPS, Professor Geller pointed out the conflict over inclusion of moral rights in TRIPS. *Id.* If TRIPS included moral rights, countries that did not provide moral rights would be subject to complaints of violation of the GATT for distortion or obstruction of trade. *Id.* at 195-96. If moral rights were not included, those countries that vigorously enforce moral rights would risk complaints that their policy obstructed trade, for example by preventing the broadcast of a foreign film with commercial interruptions. *Id.* at 196.

101. TRIPS, *supra* note 5, art. 65, para. 1, 33 I.L.M. at 1222.

102. *Id.* art. 65, paras. 2-3, art. 66, para. 1, 33 I.L.M. at 1222. Developing and least-developed countries must provide national treatment within one year, but need not comply with the requirements of the Berne Convention and other conventions for five and eleven years, respectively. *Id.*

103. *GATT: The Impact on American Industries, 1994: Hearing and Markup on H. Res. 362 before the Subcomm. on Economic Policy, Trade and Environment of the House Comm. on Foreign Affairs*, 103d Cong., 2d Sess. 6 (1994), microformed on CIS No. 94-H381-86 (Congressional Info. Serv.). For a general discussion of the conflicts between Western industrialized countries on the one hand, and newly-industrialized countries and lesser-developed countries on the other, see Frank Emmert, *Intellectual Property in the Uruguay Round — Negotiating Strategies of the Western Industrialized Countries*, 11 MICH J. INT'L L. 1317 (1990).

104. *Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*, 1987 A.I.R. (Del.) 13 (1986).

an Indian High Court (Appellate Court) decision, finding that the makers of a poor film adaptation of a prominent Indian author's novel were liable for violation of the author's right of integrity. The second, *Qimron v. Shanks*,<sup>105</sup> is an Israeli trial court decision, finding violation of the rights of integrity and attribution by publication by the American defendants, in America, of the plaintiff's reconstruction of the text of one of the Dead Sea Scrolls. Both of these cases show a vigorous moral rights jurisprudence, and illustrate the potential effect of moral rights enforcement on American authors and publishers.

### A. *Indian & Israeli Moral Rights Law*

India and Israel derive their copyright law from British copyright law. India, while a territory under British administration, adopted its first copyright law in 1847,<sup>106</sup> although the British Copyright Act of 1842 apparently applied to Indian territory. The British government of India adopted a succeeding act in 1914,<sup>107</sup> incorporating the British copyright Act of 1911 with some modifications.<sup>108</sup> India joined the Berne Convention in 1958.<sup>109</sup> In 1957, India adopted a new copyright law to comply with the requirements of Berne and the Universal Copyright Convention.<sup>110</sup> The moral rights provisions were introduced at this time.<sup>111</sup>

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105. *Qimron v. Shanks*, 3 [5753-1993] P.M. 10 (D. Jerusalem 1993); see *supra* note 14.

106. S. Ramaiah, *India*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE at IND-1, IND-13 (Paul E. Geller ed., Oct. 1994).

107. *Id.*

108. *Id.*

109. *Id.* at IND-46.

110. See *id.* at IND-14.

111. India's moral rights provision states:

57. Author's special rights. — (1) Independently of the author's copyright, and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right to claim the authorship of the work as well as the right to restrain, or claim damages in respect of —

(a) any distortion, mutilation or other modification of the said work; or

(b) any other action in relation to the said work which would be prejudicial to his honour or reputation.

(2) The right conferred upon an author of a work by sub-section (1), other than the right to claim authorship of the work, may be exercised by the legal representatives of the author.

The Copyright Act, 1957, ch. 12, § 57, 15 INDIA A.I.R. MANUAL 168, 234 (5th ed. 1989). Although the copyright law has since been amended, the moral rights provision has not changed. See The Copyright (Amendment) Ordinance, 1991, reprinted in India Text 1-01, 28 COPYRIGHT, at India Text 1-01 (Apr. 1992) (extending term of copyright protection to sixty years after death of author or publication of anonymous or pseudonymous work). The law was amended in May 1994 to provide stronger protection for computer software. See Rahul Sharma, INDIA'S NEW COPYRIGHT LAWS TO BOOST SOFTWARE FIRMS, REUTER ASIA-PAC.



Recent revision of the Indian copyright law strengthened protection of computer software.<sup>112</sup>

Israel's copyright law is also based on British law. The British Copyright Act of 1911 was applied to Palestine in 1924, along with Mandatory legislation.<sup>113</sup> Israel joined Berne in 1950. The most 1981 revision of the copyright law introduced protection for the rights of integrity and paternity.<sup>114</sup> Israel has rapidly developed a substantial jurisprudence of moral rights.<sup>115</sup>

### *B. Mannu Bhandari: Protection of the Author from Film Makers*

#### 1. The Case

Mannu Bhandari is a distinguished author of novels in Hindi. Her work is concerned with reconciling the modern with the trimillennial

BUS. REP., May 31, 1994 available in LEXIS, World Library, Reuapb File. For a critique of § 57, see Krishnaswami Ponnuswami, *Intellectual Property*, 23 ANN. SURVEY OF INDIAN L. 371, 372-74 (1987). The integrity language of § 57 is broader than art. 6bis as it links the requirement that the changes be prejudicial to the honor or reputation of the author to "other changes" only, broadening the effect of the "distortion" language. *Id.* at 377.

112. Ramaiah, *supra* note 106, at IND-10 to IND-13.

113. Joshua Weisman, *Israel*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra* note 110, at ISR-1, ISR-3.

114. Mayer Gabay, *Israel Adopts Moral Rights Law*, 29 J. COPYRIGHT SOC'Y U.S.A. 462 (1982). The law states:

- 4A.(1) The author shall have the right to have his name applied to the work in the accepted manner and to the accepted extent.
- (2) The author has the right to object to any distortion, mutilation or other modification of the work or to any other derogatory action in relation thereto which may be prejudicial to his honour or reputation.
- (3) The violation of a right under this section is a civil wrong, and the provisions of the Civil Wrongs Ordinance (New Version) shall apply thereto.
- (4) The right of the author under this section shall be independent of his economic right in the work and shall be available to the him even after such right has been transferred to another, wholly or in part.
- (5) In an action under this section, the author shall be entitled to compensation in an amount determined by the court in accordance with the circumstances of the case, even if no pecuniary damage has been proved. This provision shall not derogate from any other power of the court under Chapter Five of the Civil Wrongs Ordinance (New Version).

Copyright Ordinance (Amendment No. 4) Law, 5741-1981, § 3, 35 LAWS OF THE STATE OF ISRAEL 368 (May 20, 1981) (Isr.) (authorized translation from the Hebrew prepared at the Ministry of Justice). The copyright amendment in 1988 introduced protection of software and extended the prison terms and increased the fine for criminal copyright infringement. Copyright Ordinance (Amendment No. 5) Law 5748-1988 (Isr.), *translation reprinted in 25 COPYRIGHT*, Israel-Text 1-01, at 1 (Mar. 1989). For a discussion of the status of moral rights in Israel prior to adoption of article 4A, see Michael Ophir, *The Protection of Authors' Moral Rights in Israel*, 12 COPYRIGHT 209 (1976).

115. See Weisman, *supra* note 113, at ISR-19 to ISR-20 (citing cases).

Hindu tradition.<sup>116</sup> Kala Vikas Pictures, a motion picture production company, bought the rights, except the publication right, to her novel *Aap Ka Bunty*<sup>117</sup> for 15,001 rupees.<sup>118</sup> Ms. Bhandari agreed to permit the director and screenwriter, Shri Sirsir Mishra, to make "certain modifications in [her] novel for the film version, in discussion with [her] to make it suitable for a successful film."<sup>119</sup> The contract further specified that Ms. Bhandari would receive credit as author of the novel on which the movie was based.<sup>120</sup>

Sadly, all did not go well in this artistic endeavor. Ms. Bhandari became concerned by the extent of the changes made for the film, including the name of the film, characterization, "vulgar" dialogue, and the ending of the film.<sup>121</sup> After finding the director unresponsive to her complaints,<sup>122</sup> Ms. Bhandari sued for infringement of her moral rights in the novel, specifically for violation of her right of integrity; that the filmmakers had "mutilated and distorted" the novel.<sup>123</sup>

The district court in Delhi denied Ms. Bhandari an "ad-interim restraint order," holding that she had not shown prima facie mutilation or distortion, because she had authorized the producers "to make necessary changes in order to make a successful film."<sup>124</sup> In an odd holding, the district judge stated:

In my view, prima facie the film is not at all going to harm the reputation of the plaintiff in any manner. The plaintiff's reputation can be harmed in the eyes of those only who have read her novel and seen the film also. Those who have read her novel and seen the film may change their views about the producer, director of the film but not about the plaintiff."<sup>125</sup>

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116. Elizabeth Bumiller, *Letter from India: A Literary Who's Who of the Subcontinent*, WASH. POST, Feb. 2, 1986, (Book World), at 15. The court detailed her accomplishments. *Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*, 1987 A.I.R. (Del.) 13, 18 (1986).

117. "Your Bunty"; Bunty is the name of the protagonist. The work has been translated into English. MANNU BHANDARI, *BUNTY* (Jai Ratan trans., 1983).

118. 1987 A.I.R. (Del.) at 15. Fifteen thousand rupees would have been worth approximately \$1,500. *Foreign Exchange*, N.Y. TIMES, Apr. 22, 1983, at D5. The rights transferred included, *inter alia*, radio, television, "[v]ideo," and "[t]apes." 1987 A.I.R. (Del.) at 15.

119. 1987 A.I.R. (Del.) at 15.

120. *Id.*

121. *Id.* at 19-20.

122. *Id.* at 17-18.

123. *Id.* at 14.

124. *Id.*

125. *Id.*

The trial judge thus suggested that a bad film reflects poorly only on the filmmakers, not on the author of the adapted work. It is more likely, however, that those who know the author's work only through its film adaptation are unlikely to distinguish carefully between the film representation of the work and the work itself.<sup>126</sup> The lower court also found laches on Ms. Bhandari's part, arguing that she had waited until after the film had been completed to complain.<sup>127</sup>

On appeal, the High Court in Delhi modified the district court's denial of relief, directing that a number of changes be made to the film before release. The parties settled the case immediately before the High Court handed down its opinion. The filmmakers agreed to withdraw Ms. Bhandari's name and the name of her novel from the movie<sup>128</sup> and all attendant publicity, and released the copyright to her.<sup>129</sup> In return, Ms. Bhandari agreed not to "claim any right or interest" in the movie, and not to contest in any way the release of the movie (so long as neither her name nor the title of her novel were used).<sup>130</sup> The parties requested that judgment be pronounced notwithstanding the settlement and attendant dismissal of appeal, citing the complete lack of precedent in the area as the rationale.<sup>131</sup> The High Court did so with apparent glee.

## 2. The High Court Decision

The High Court cannot be accused of understating the breadth or significance of the questions on appeal:

How far law protects creative aesthetic expression of an artist?  
Is the intellectual property of an artist governed by the same norms  
as commercial property? Where does the freedom (of expression)  
of the author end, where does the director [sic] begin? What is the  
scope and width of S. 57 of the Copyright Act, 1957?<sup>132</sup>

The court's resolution of the issues is quite thorough. The decision covers three important concerns: whether an assignment of copyright also transfers the moral right and the interpretation of the copyright

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126. The appellate court took this view. *See id.* at 18.

127. *Id.* at 17-18.

128. The movie was titled *Samay Ki Dhara* ("The Flow of Time"); the title of the novel had apparently never been the title of the movie, and Ms. Bhandari had apparently opposed the movie's title. *Id.* at 19.

129. *Id.* at 20 (stating the terms of the settlement).

130. *Id.*

131. *Id.* The settlement, of course, renders the decision ineffective. Ponnuswami, *supra* note 111, at 374.

132. 1987 A.I.R. (Del.) at 13.

assignment in light of the moral right; what constitutes a "distortion, mutilation or other modification[]" of the work,<sup>133</sup> and what constitutes an "action . . . which would be prejudicial to [the author's] honour or reputation."<sup>134</sup>

#### a. Moral Right and Contract

The Indian copyright law makes the moral rights of paternity and integrity independent of the author's copyright, and provides that assignment of copyright does not assign the moral rights; the author may obtain injunctive relief or damages for infringement of moral rights.<sup>135</sup> The court stated that the moral rights provision overrode the terms of Bhandari's contract, that the contract could not negate the law's rights and remedies, and that "[t]he assignee of a copyright cannot claim any rights or immunities based on the contract which are inconsistent" with the law.<sup>136</sup> Taken literally, a filmmaker could never make a derivative work from a novel, for some modification, as broadly defined by the court, would be inevitable. The court, however, does not appear to take its statement quite so literally.

The court found that Bhandari's contract provided that she had agreed "to allow [the director/screenwriter] to make certain modifications in [her] novel for the film version in discussion with [her] to make it suitable for a successful film."<sup>137</sup> The court insisted that this language be read to *compliment*<sup>138</sup> the moral rights provisions.<sup>139</sup> The court defines the modifications permissible under the contract to include only those permissible under section 57.<sup>140</sup> The court finds it "obvious" that, under law and contract, the filmmakers had the right to make only the certain necessary modifications, and only upon consultation.<sup>141</sup>

Unfortunately, this answer is not obvious at all; the law says nothing about necessity as a justification for changes. If the law overrides the terms of the contract, then Ms. Bhandari's consent to certain changes should not save Kala Vikas. The court ultimately solved the problem through its definition of "modifications."

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133. Copyright Act of 1957 § 57(a), 15 INDIA A.I.R. MANUAL 234.

134. *Id.* § 57(b). The court also discusses the laches issue.

135. *Id.* § 57.

136. 1987 A.I.R. (Del.) at 16.

137. *Id.*

138. The court's term. *Id.*

139. *Id.*

140. *See id.*

141. *Id.*

### b. Distortion, Mutilation, and Modification

The court at first took an expansive view of the term modification, stating that:

The words "other modification" appearing in the sub-cl. (a) will have to be read *eiusdem generis* with the words "distortion" and "mutilation". The modification should not be so serious that the modified form of the work looks quite different from the original work. "Modification" in the sense of the perversion of the original, may amount to distortion or mutilation. But, there can be a modification simpliciter such as where "A" is changed to "B", both being quite distinct. Sub-clause (a) thus provides inviolability to an intellectual work.<sup>142</sup>

That is, any modification could be a violation of the author's moral right; the work is "inviolable" even as to apparently minor changes that are nonetheless "distinct." Taken literally, this would present a substantial problem for makers of motion pictures or other derivative works, as it appears to provide no protection for interpretive changes in making the film. If moral rights are entirely inalienable, no maker of a derivative work that modifies the original can be protected from an author's claim of moral rights infringement.

Near the end of the opinion, the court finds the necessary middle ground. In discussing the use of "brash sex" in the movie, the court stated that it did not sit as a censor or to impose its views on sex; its only concern was whether the derivative work is authentic and "what changes are necessary due to constraints of a medium."<sup>143</sup> The court appears to have made moral rights inalienable, while placing outside the prohibition on modifications such changes as are necessary to make the transition to a different medium. This standard seems very protective of the author; however, the court's resolution of specific fact issues in the picture is inconsistent at best.<sup>144</sup>

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142. 1987 A.I.R. (Del.) at 16. This reading is required by the law's deviation from the Berne moral requirements. See *supra* note 111.

143. *Id.* at 19. The blanket prohibition on distortion, discussed *supra* note 111, leaves a void in the arena of adaptations and necessitates some inference; the court's resolution is, at least theoretically, a sensible one.

144. For example, the court allowed substantial changes to the end of the film, where the director has Bunty die rather than simply leave home. *Id.* at 19-20. However, the court ordered the removal of the "crude, brash and nauseating" morgue scene, where Bunty's parents search for his body. *Id.* at 20. It does not seem that the change to the ending meets the strict standard of necessity any more than the morgue scene, and it may be that the judge's order was based instead on considerations of taste. The court directed that certain

### c. The Honor Or Reputation of the Author

The court found a close relationship between the right of integrity and the right of paternity in this case. The reason for not allowing modifications that distort or mutilate was that Ms. Bhandari was to receive authorial credit for the movie. The court found that the term "credit," as a term of art in show business, means recognition of the work of those who have made credit-worthy contributions to making the work a box-office success.<sup>145</sup> Box office success, however, does not imply that the work done will be a credit to the author's reputation. The court then interprets the contract term "'proper' publicity" as that which does not harm the author's honor and reputation.<sup>146</sup> The author, then, was promised that her reputation would at least not be harmed by the film.

The court takes into account the unique conditions of the Indian film business bearing upon the damage to the author's reputation. As the court explains, colorfully:

It is widely believed that there are investments and collections of crores of rupees in a successful Hindi movie and the heroes and heroines are paid fabulous amounts for their services. If the complaint of the author (of mutilation and distortion of the novel) is correct the lay public and her admirers are likely to conclude that she has fallen prey to big money in the film world and has consented to such mutilation and distortions. The apprehension of the author cannot be dismissed as imaginary. It is reasonable. Her admirers are likely to doubt her sincerity and commitment and she is likely to be placed in the category of cheap screenplay writers of the common run Bombay Hindi films.<sup>147</sup>

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suggestive dialogue be deleted, *id.* at 19, although certain changes to character were permitted, not because they were directly suggested by the novel, but rather because there were other, equally suggestive situations, that the director did not include, *id.* Finally, the court found that the movie title, *The Flow of Time*, was insufficiently specific, and ordered that the title include both *The Flow of Time* and *Your Bunty*. *Id.* For a discussion of whether a change in title can be a distortion or mutilation, see Ponnuswami, *supra* note 111, at 377.

145. 1987 A.I.R. (Del.) at 16-17.

146. *Id.* at 17.

147. *Id.* at 18. A *crore* is ten million, applied specifically to rupees. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 540 (Philip B. Gove ed., 1986). At the 1983 rate of exchange, ten million rupees would be worth approximately one million dollars. *Foreign Exchange*, *supra* note 118. Hindi films follow a highly standardized format:

Indian films have a special structure, essentially composed of a pastiche of genres mixed into a three-hour song-and-dance extravaganza, somewhat reminiscent of the Hollywood musical of the 1940s and intended for the whole family. For over forty

The author should be protected from appearing to have sold out in the production of a poor or even average quality film for its genre. The law's concerns about an author's honor and reputation are thus applied subjectively to the medium under consideration; one is forced to wonder if the court would have been so solicitous of the author's reputation had this been a Merchant-Ivory production.

*C. Qimron v. Shanks: An Expansive View  
of a Scholar's Moral Rights*

It seems likely that a publisher's worst nightmare would be to be hauled into a foreign court, sued for violation of his own country's copyright law, and have the far less favorable (for him) copyright law of the foreign country applied as if it were the law of his own country. The final end of such a nightmare, of course, would be an award of damages on a scale unprecedented in the foreign country. This nightmare came true for Hershel Shanks, the director of the Biblical Archaeology Society and publisher and writer of the foreword of a volume of photographs of the Dead Sea Scrolls.

1. The Controversy over the Scrolls

The Dead Sea Scrolls are a large collection of scrolls and scroll fragments dating from roughly 250 B.C. to A.D. 70<sup>148</sup> The scrolls are believed to shed light on the Judaism of the time, on the nature of some of the various Jewish sects, and the origins of Christianity.

The largest part of the scrolls were originally in Jordanian possession.<sup>149</sup> There were no Jewish scholars on the original team.<sup>150</sup> When the Israeli government took possession of the scrolls during the Six Day War in 1967, it continued the research project.<sup>151</sup> The small group of

years, Hindi-language movies have contained the same strange combination of "plastic," dream-like plots.

Ramasastri, *supra* note 73, at 206. In the last twenty-five years, stylized rape scenes have become increasingly common in Hindi films. *Id.* at 207.

148. Frank M. Cross, *The Historical Content of the Scrolls*, in UNDERSTANDING THE DEAD SEA SCROLLS 20, 23-24 (Hershel Shanks ed., 1992). Professor Carson ably explains the history of the Dead Sea Scrolls controversy in this issue of the *Michigan Journal of International Law*. Cindy A. Carson, *Raiders of the Lost Scrolls: The Right of Scholarly Access to the Content of Historic Documents*, 16 MICH. J. INT'L L. 299, 301-307 (1995).

149. The Scrolls were originally under the control of the Department of Antiquities for Transjordan and Arab Palestine and the École Biblique et Archéologique Française. Carson, *supra* note 148, at 302. Jordan nationalized the Scrolls in 1961, *id.* at 303.

150. *Id.* at 304.

151. *Id.*

scholars assigned to research the scrolls has proceeded with frustrating deliberation.<sup>152</sup> Until very recently, scholars not a part of this group had no access to a large part of the Scroll collection.<sup>153</sup> A number of scholars have sought release of Scroll texts for some time; a center of this dissent has been Mr. Shanks' Biblical Archaeology Review, a bimonthly publication that has long advocated greater access to the Scrolls. In 1991, the Huntington Library in Long Beach California made archival photographs of the scrolls in its possession available to scholars.<sup>154</sup> In late 1991, the Biblical Archaeology Society published a collection of photographic plates of the Dead Sea Scrolls; the source of the photographs reproduced in the volumes was not disclosed.<sup>155</sup> The work was edited by Professors Robert H. Eisenman and James M. Robinson. Mr. Shanks wrote the now-infamous foreword.

In the foreword, Shanks railed against the international team's withholding scroll texts, and included a reconstruction of one scroll text, the *Miqsat Ma'aseh Torah* (M.M.T.) done by Professor John Strugnell<sup>156</sup> of Harvard and Professor Elisha Qimron of Ben-Gurion University in Beersheva, Israel.<sup>157</sup> Prof. Qimron is an expert on Jewish traditional doctrine (*Halacha*); Strugnell brought him onto the research team for this reason.<sup>158</sup> In relevant part, the forward read:

The effort to prevent disclosure of the important text known as MMT (*miqsat ma'aseh ha-torah*) is illustrative. The text was assigned to John Strugnell for publication nearly 40 years ago. However, he did not even disclose its existence until 1984. Then, *with a colleague*, Strugnell proceeded to write a 500-page commentary on this 120-line text.<sup>159</sup>

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152. See *Leading Dead Sea Scroll Scholar Denounces Delay*, BIBLICAL ARCHAEOLOGY REV., Mar.-Apr. 1990, at 22; Carson, *supra* note 148, at 304.

153. Carson, *supra* note 148, at 304.

154. *Id.* at 306. The decision was contested, unsuccessfully, by the Israel Antiquities Authority. *Id.*

155. The editors stated that the source was unknown, but was not the Huntington or the Ancient Biblical Manuscript Center in Claremont, California. *The Dead Sea Scrolls Are Now Available to All!*, BIBLICAL ARCHAEOLOGY REV., Jan.-Feb. 1992, at 63. The work at issue is A FACSIMILE EDITION OF THE DEAD SEA SCROLLS (Robert H. Eisenman & James M. Robinson, eds., 1991).

156. See *MMT as the Maltese Falcon*, BIBLICAL ARCHAEOLOGY REV., Nov.-Dec. 1994, at 49 (describing history of work on MMT).

157. Qimron v. Shanks, 3 [5753-1993] P.M. 10, 15, trans. at 1-2 (D. Jerusalem 1993).

158. Carson, *supra* note 148, at 307.

159. Qimron v. Shanks, trans. at 6 (quotation not in official report) (emphasis added).



Professor Qimron, of course, is the "colleague" mentioned in the text. An appendix to the foreword included the reconstructed text.<sup>160</sup>

## 2. The Case

Professor Qimron lost little time in seeking redress. On January 14, 1992, he sued in the District Court of Jerusalem, seeking damages of NIS 472,500 (approximately \$250,000)<sup>161</sup> and an injunction against distribution of the book.<sup>162</sup> The court issued the injunction *ex parte* one week later.<sup>163</sup>

The matter was tried on February 1 and 2, 1993,<sup>164</sup> in the District Court of Jerusalem, before Judge Dalia Dorner,<sup>165</sup> with additional oral argument on February 25.<sup>166</sup> The court ruled emphatically for the plaintiff, awarding statutory damages of NIS 20,000 (\$7,407), damages of NIS 80,00 (\$29,630) for mental distress, and attorneys' fees of NIS 50,000 (\$18,519).<sup>167</sup> This was the largest amount ever awarded for mental distress and costs in a copyright case in an Israeli court.<sup>168</sup> The defendants have appealed the decision to the Israeli Supreme Court; that appeal is still pending.<sup>169</sup>

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160. *Id.* at 7.

161. 3 [5753-1993] P.M. at 19, trans. at 9. "NIS" stands for New Israeli Shekel.

162. *Id.* For dollar amounts, see *Qimron is Author of MMT Reconstruction, Jerusalem Court Holds*, BIBLICAL ARCHAEOLOGY REV., May-June 1993, at 69 [hereinafter *MMT Reconstruction*].

163. 3 [5753-1993] P.M. at 19, trans. at 9.

164. Hershel Shanks, *Lawsuit Diary*, BIBLICAL ARCHAEOLOGY REV., May-June 1993, at 69, 70. Shanks noted that the trial was squeezed into two days by working with only a brief dinner break over approximately twelve hours each day. *Id.* at 70-71.

165. Judge Dorner has since been elevated to the Israeli Supreme Court. *Supreme Court Gets 2 New Justices*, JERUSALEM POST, Mar. 14, 1994, at 2 (Justice Dorner permanently appointed to Supreme Court); Batsheva Tsur, *Herzog: Judiciary Must Be Wary of Excessive Use of Powers*, JERUSALEM POST, Mar. 17, 1993, available in LEXIS, News Library, Jpost File (not available on microform) (Judge Dorner appointed for limited term). The *Qimron* decision was handed down on March 30, 1993.

166. Shanks, *supra* note 164, at 71.

167. 3 [5753-1993] P.M. at 39-41, trans. at 42, 44-45. For dollar equivalents, see *MMT Reconstruction, supra* note 162, at 69.

168. Abraham Rabinovich, *Court Awards Dead Sea Scrolls Translator NIS 100,000*, JERUSALEM POST, Mar. 31, 1993, available in LEXIS, News Library, Jpost File (not available on microform).

169. The Notice of Appeal notes some 73 disputed issues, including, *inter alia*, improper choice of law and improper application of moral rights law. Appellants Notice of Appeal, *Qimron v. Shanks* (Isr. filed Nov. 28, 1993) (in Hebrew) (copy on file with the *Michigan Journal of International Law*). The defendants decided to appeal in part because other lawsuits related to MMT and the scrolls are pending. *BAR Decides to Appeal Qimron Decision, After All*, BIBLICAL ARCHAEOLOGY REV., Nov.-Dec. 1993, at 66.

The court found that the reconstruction was copyrightable,<sup>170</sup> that Professor Qimron owned the copyright in the MMT reconstruction,<sup>171</sup> that publication of the reconstruction willfully infringed the copyright,<sup>172</sup> and that publication without using Qimron's name was a violation of his moral right.<sup>173</sup> The application of copyright to a reconstructed ancient text is very controversial; if the reconstruction is correct, it is merely the restoration of the author's original words without the addition of any new quantum of creativity to the work.<sup>174</sup>

### 3. The Court's Decision

There are three areas of particular relevance to this note in the decision. First is the court's decision to apply Israeli law as the equivalent of American law. This is at least ironic if not problematic; although the Israeli standards for copyrightability appear to be the same as American law,<sup>175</sup> there is a significant disparity in protection of moral rights. The Israeli court steadfastly refused to believe that protection of moral rights might not be comparable.<sup>176</sup> The second issue of importance is the application of moral rights to the specific issues in the case. The third is the calculation of damages for infringement of moral rights.

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170. 3 [5753-1993] P.M. at 24, trans. at 17.

171. *Id.* at 25-26, trans. at 18-21. Unfortunately, the court never states clearly whether Prof. Strugnell also had part of the copyright; it is not clear whether the court considers the reconstruction a "common work," where each author holds the copyright, or a "collective work consisting of discrete parts," in which "each author is entitled to copyright on his part only. *Id.* at 25, trans. at 18. However, it seems most likely that the court found that only Qimron held the copyright. The resolution of this issue is important in considering the right of paternity; see *infra* text accompanying notes 210-12.

172. *Id.* at 40, trans. at 43.

173. *Id.* at 33, trans. at 31. The court did not find infringement of moral rights by publication of only 120 lines of the 132-line text. See Carson, *supra* note 148, at 330, for reasons why the incomplete reproduction here would not infringe the moral right.

174. The court applied the reasoning of *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 111 S. Ct. 1282 (1991), and found that the reconstruction was an original work, as it "included creative and original elements" in piecing together scroll fragments and using research in and knowledge of Hebrew and *Halacha*. 3 [5753-1993] P.M. at 22, trans. at 14. For a discussion of the availability of copyright for reconstructions of historic documents, see Carson, *supra* note 148, at 323-41.

175. As noted, the court based its reasoning on *Feist*, and other American cases, and *Nimmer on Copyright*. *Id.* at 22, trans. at 15. One American commentator on the work suggests that the Israeli standard for originality is not the same as the American. Lisa M. Weinstein, Comment, *Ancient Works, Modern Dilemmas: The Dead Sea Scrolls Copyright Case*, 43 AM. U.L. REV. 1637, 1649-51 (1994). Given the Israeli court's clear acceptance of the *Feist* standard for originality in compilations, this seems insupportable.

176. 3 [5753-1993] P.M. at 22, trans. at 14.

## a. Choice of Law

*Qimron* presents an unusual set of circumstances for choice of law. Professor Qimron did not seek protection in Israel for infringement in Israel of his rights in an American work. Nor did he seek relief in the United States for infringement of an Israeli work in the United States. These would presumably require typical and straightforward applications of the national treatment provisions of the national law of Israel and the United States. In the unusual posture of the case, Qimron sought redress for infringement of what was probably an Israeli work in the United States by Americans occurring in the United States — but he sought the relief in Israeli court.<sup>177</sup> The Israeli court applied local rules, both as to the substantive issues of choice of law,<sup>178</sup> and to procedural issues such as proof of foreign law.<sup>179</sup>

In its discussion of choice of law and proof of foreign law, the court notes that Israeli copyright law derives from English copyright law and the requirements of the Berne Convention.<sup>180</sup> The court then states that the law of the place of infringement applies; here, that would be the United States.<sup>181</sup> Under “the presumption of equal laws,” however, Israeli law would be applied unless foreign law were proved by the defendants.<sup>182</sup>

The presumption of equal laws in England states that, subject to limited exceptions (Scottish law, EU law, Irish law), and in the absence of proof in the form of expert testimony to the contrary, the court will assume that foreign law is the same as English law.<sup>183</sup>

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177. For a discussion of the application of *lex loci protectionis* and *lex fori*, see György Boytha, *Some Private International Law Aspects of the Protection of Authors' Rights*, 24 *COPYRIGHT* 399, 409–10 (1988) (validity of copyright determined in country where infringing act takes place, not that of the forum).

178. 3 [5753-1993] P.M. at 21, trans. at 12 (“Everybody agrees that the laws of the place where [a copyright] infringement has been committed apply to the [pertinent] action, i.e., in this case, the laws of the United States.” (citations omitted, alterations in original)).

179. *Id.*

180. *Id.* at 21–22, trans. at 13.

181. *Id.* at 21, trans. at 12.

182. *Id.* Compare this approach with FED. R. CIV. P. 44.1 (allowing court discretion in questions of judicial notice and proof of foreign law). See generally Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 *U. CHI. L. REV.* 1301, 1305 (1989) (disputing need for presumption of forum law in choice of law).

183. PRIVATE INTERNATIONAL LITIGATION 436 (Jack I. H. Jacob, ed. 1988), see also 1 DICEY AND MORRIS ON THE CONFLICT OF LAWS 226–38 (Lawrence Collins, ed., 12th ed. 1993); P.M. NORTH & J.J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* 107–12 (12th ed. 1992). As described by the court, the Israeli version of the principle is slightly different, as it includes exceptions for personal status that are not encompassed by the English version. 3 [5753-1993] P.M. at 21, trans. at 12.

The defendants argued that, since copyright is grounded in a property right, the presumption as understood in Israel should not apply.<sup>184</sup> Copyright is a property right created by national legislation, and rights thus vary from place to place; fair determination of the rights of the parties requires application of the law where the right is contested rather than the possibly differing law of some other place. The court rejected this argument. Although the court conceded that "copyright is a proprietary issue," Israeli Supreme Court precedent had applied the presumption of equal laws to proprietary rights.<sup>185</sup> Further, according to the court, in Israeli law, a claim for copyright infringement sounds in tort.<sup>186</sup> The problem in this case is that the existence of copyright is the root issue in the case and the existence of moral rights an important corollary.<sup>187</sup> Both of these should be treated as property rights.<sup>188</sup>

The court then states an additional rationale for application of the presumption:

At any rate, the presumption of equal laws is not fictitious at all in our matter. As aforesaid, the English law — on which American law is also based — has been adopted in Israel. On a particular matter (statutory damages), procedure in Israel follows in the steps

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184. The court's statement of the issue is worth reproducing:

The presumption of equal laws, which is recognized by international private law, is based on the presumption that the laws of enlightened countries are identical. This presumption does not apply to all branches of law. Thus, judicial interpretation tends to maintain that, in light of the special characteristics of Israeli personal status laws, the presumption of equal laws should not be relied upon on personal status matters. Defendants tried to rely upon a text proposed by Professor Levontin, namely, that on local issues (status and property) grounded on a particular jurisprudence, the claimant should prove the foreign law, while on transitory actions (contracts and torts), there should be no deviation from the laws of the venue, except if the counterpart pleads a defense based on the foreign law. According to Defendants, the action against them is a proprietary one, and therefore Claimant should have proven the foreign law.

*Id.* (citations omitted). See also Menashe Shava, *Proof of Foreign Law in Israel: A Comparative Study*, 16 N.Y.U. J. INT'L L. & POL. 211 (1984). Shava criticizes the requirement of proof of foreign law in cases involving status and property, *id.* at 233, but states that Israeli courts require proof of foreign law even as to status, *id.* at 226. In general, however, the burden of proof of foreign law should fall on the party pleading it. *Id.* at 225. It is an open question in *Qimron* as to who needs to plead foreign law — Professor Qimron, who is seeking to recover under United States law and should have to prove that U.S. law permits recovery, or Shanks, who is pleading defenses based on U.S. law and its nonrecognition of moral rights.

185. 3 [5753-1993] P.M. at 21, trans. at 12-13.

186. *Id.* at 21, trans. at 13.

187. See *id.* at 22-24, trans. at 14-17 (discussing existence of copyright in the reconstructed text).

188. For choice of law in moral rights, see *infra* text accompanying notes 195-202.

of the procedure of the American Law. The entire legislation has been adapted to an international treaty.<sup>189</sup>

As to copyright generally, this statement is essentially correct. The Israeli court uses the *Feist*<sup>190</sup> criteria and rationale as the basis for its discussion of the existence of copyright. In the end, in deciding on the existence of a copyright, the Israeli court analyzes and applies United States law as the Israeli law that it is applying as if it were United States law. Thus the court, in the end and by an unnecessarily meandering course, applies the appropriate law.<sup>191</sup>

The court incorrectly assumes that the moral rights laws of Israel and the United States are actually equivalent and that U.S. moral rights law conforms to Berne, however. The Berne Convention requires that the United States protect moral rights. However, the treaty is not regarded as self-executing by the United States.<sup>192</sup> Thus moral rights would have to be enacted by Congressional lawmaking; this was done to a limited extent in the VARA. Failure to protect moral rights sufficiently would place the United States in breach of its obligations under the Berne Convention. Accession to the Convention does not, in and of itself, protect individual authors.<sup>193</sup> The assumption that United States and Israeli moral rights law are equivalent is, without more evidence, unfounded.

The court, in deciding on application of the presumption of equal laws, stated that the presumption of equal laws should apply even under the defendants' proposed approach,<sup>194</sup> which would limit application the presumption to transitory issues (i.e. tort and contract) but not to property issues.<sup>195</sup> The defendants' approach, however, does not address

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189. *Id.* at 21-22, trans. at 13.

190. *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 111 S. Ct. 1282 (1991).

191. The soundness of the decision, however, is open to question. See Carson, *supra* note 148, at 324-335 (evaluating the copyrightability of the Dead Sea Scrolls text).

192. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 2, 102 Stat. 2853 (1988).

193. WILHELM NORDEMANN ET AL., INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW 16 (Dr. Gerald Meyer, Eng. ed., R. Livingston, trans., 1990).

194. See *supra* note 186.

195. In reply to the defendants' argument, the court stated that:

At any rate, the main point is that, even according to Professor Levontin's method, the presumption of equal laws applies to the matter before me.

First, even though copyright is a proprietary issue, a claim for copyright infringement is by nature tortious. The Torts Ordinance supplements the special copyright provisions established by the Copyright Law.

Second, the test proposed by Professor Levontin is not based on a mechanical classification of law by branches. The determinant factor is whether a local, particular law of the venue is involved or not. Property and status laws have been

the question whether *moral* rights are property rights or transitory rights. One commentator notes that, at least in the civil law, moral rights are classified as a right of personality (and thus transitory rights), unlike copyright, which is a property right.<sup>196</sup> In this view, violation of the moral right would seem more like a tort, and the presumption as defined by the court thus applicable. However, to the extent that Berne applies its national treatment requirement to both moral rights and economic rights, it would seem that moral rights should be seen as functionally as property.<sup>197</sup> Moral rights are created under the national law of the protecting country; the extent of the rights and their duration varies.<sup>198</sup>

An alternative rationale to the court's presumption of equal laws is the reasoning of the French Cour de Cassation in the *Huston* case. In *Huston*, the court found that application of American law, which makes the producer of a film the author for copyright purposes, would be an affront to the "laws of immediate application" of France.<sup>199</sup> After *Huston*, "the 'author' of a foreign work is the person French law would deem the author, whatever her status at home."<sup>200</sup> While the wisdom and propriety of the decision is debatable,<sup>201</sup> its rationale is direct.<sup>202</sup>

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mentioned as par excellence locality examples. Israeli copyright laws are not local, and similar laws are accepted everywhere in the enlightened world.

3 [5753-1993] P.M. at 21, trans. at 13 (citation omitted). The court attempted to show that the defense could not meet the requirements of its own argument without actually adopting the argument. However, the court's acceptance of the idea that copyright is a proprietary issue is problematic, as there can be no infringement if there is no copyright. The court should have addressed the substance of Levontin's argument, but did not.

196. Merryman, *supra* note 1, at 1025 & n.5 (noting that a minority of states treat moral rights as property rights).

197. Compare Berne Convention arts. 5(3) and 6bis(3); the language requires application of the law of the country where protection is claimed in either circumstance. Berne Convention, *supra* note 2, 7 COPYRIGHT at 136, 137. See generally Georges Koumantos, *Private Law and the Berne Convention*, 24 COPYRIGHT 415, 427 (1988) (discussing views of moral rights as personal or property). The decision of the French Cour de Cassation in the *Huston* case represents a triumph of the personality right conception; the author's moral right, however it may be defined outside France, will always be judged by French law when in France. See Ginsburg & Sirinelli, *supra* note 21, at 141.

198. National protection makes sense so long as the place of infringement is carefully defined; it has to be where the infringing work is created or the destructive act takes place. If, for example, a colorized film is taken from the place where it was legally made to a jurisdiction where colorization is an infringement, the law of the second jurisdiction should not apply.

199. Ginsburg & Sirinelli, *supra* note 21, at 139-40.

200. *Id.* at 141.

201. *Id.* at 141-42.

202. An exception of the same sort is available in English law. See NORTH & FAWCETT, *supra* note 183, at 128 (arguing that the public policy exception to recognition of foreign law should be narrowly construed). It might be hard for the Israeli court to justify such a drastic measure when the ordinance creating the right at issue is only seven years old. Of course, the

In what Judge Dorner apparently saw as a last-ditch effort to avoid application of Israeli moral rights law, the defendants presented authorities stating that "no *droit moral* applies according to the laws of the United States (except for six states)."<sup>203</sup> The court found this immaterial, noting first, that foreign law would have to be proven by expert testimony, and second, by stating that it was not conclusively shown that Washington, D.C.<sup>204</sup> does not provide explicit moral rights protection.<sup>205</sup>

The court thus manages to assume, for failure by the defendants to prove otherwise to its satisfaction, a proposition that has been the subject of a large number of differing views since the 1940s, and that has been more or less eschewed by most United States governmental authorities. This case may well be unique in its application of the moral rights law of the forum country, where the infringing acts occurred entirely in the United States.<sup>206</sup> Surely this sequence of events was wholly unexpected by the American publisher.

#### b. Application of Moral Rights Law

Israeli law protects the rights of integrity and paternity; violation is expressly made a tort.<sup>207</sup> The right of paternity is expressed as follows: "[a]n author is entitled to his creation being credited to his name in the usual extent and measure." In Israeli law, as opposed to English law, moral rights are not "dependent upon 'assertion' of identity of a work's author."<sup>208</sup> Instead, the right of paternity arises whenever the "work is publicly presented or mentioned"<sup>209</sup>

In this case, it is unclear whether the court found that Qimron was the sole owner of the copyright or whether he shared it with Prof.

decision in *Huston* creates exactly the problem contemplated *supra* note 198. The United States producers of the colored film now possess a product, legally made, that they cannot take where they choose; this is disruptive, to say the least, of good order and certainty of ownership.

203. 3 [5753-1993] P.M. at 22, trans. at 13.

204. The place of publication of the book, which the judge classes as a state. *Id.* at 22, trans. at 14.

205. *Id.*

206. Compare *Gilliam v. American Broadcasting Corp.*, 538 F.2d 14 (2d Cir. 1976), which applied American copyright and trademark law to acts taking place in America, to the *Huston* case, where the court applied French law to the existence and ownership of moral rights in an American film where the infringing act took place in France, *Ginsburg & Sirinelli*, *supra* note 21, at 137-38.

207. See *supra* note 117.

208. 3 [5753-1993] P.M. at 32, trans. at 30 (citing Copyright, Designs and Patents Act, 1988, ch. 48, arts. 77(1), 78 (Eng.)).

209. 3 [5753-1993] P.M. at 33, trans at 31 (quoting G. Tadesky).

Strugnell.<sup>210</sup> If the copyright was shared, it is harder to see that attribution to Strugnell "with a colleague"<sup>211</sup> would be unacceptable.<sup>212</sup>

As noted, the foreword stated that the work had been done by Prof. Strugnell and a colleague. The court found that this was insufficient credit; apparently, any person who makes sufficient contribution to a work to claim copyright as part of the common must be listed individually whenever the work is printed. This is probably excessive. Strugnell was the person to whom the scroll had been assigned, and it seems excessive to have to mention the names of all the members of a research team who share the copyright every time a work is reproduced, even in part. The case is murkier if Qimron is the only copyright holder. Even in that case, however, in the absence of knowledge to the contrary, it should still be sufficient to name the lead researcher, particularly where, as here, the identity of the copyright holder is unclear even after adjudication.

### c. Damages

The court awarded the maximum available statutory damages for infringement of copyright.<sup>213</sup> The court found that Qimron had not proven pecuniary damages, and therefore awarded him statutory damages.<sup>214</sup> The court awarded the maximum in part because it found that the defendants willfully infringed the copyright.<sup>215</sup>

The court then proceeded to award damages in tort for infringement of the moral right. This award was based on the plaintiff's claim of mental distress,<sup>216</sup> rather than pecuniary loss. The court's stated goal was to restore the status quo ante. However, the court said that:

At the same time, the Theory of Torts also recognizes consideration for the conduct of the tortfeasor: First, in estimating non pecuniary damages for a moral injury, increased damages can be imposed according to the gravity of tortfeasor's conduct; second, damages are imposed in pertinent cases, to punish the tortfeasor for his behavior (exemplary damages[]). In spite that imposition of exemplary damages is a controversial matter, it has been pointed

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210. See *supra* note 175.

211. Qimron v. Shanks, trans. at 10 (material omitted from official report of decision).

212. See Carson, *supra* note 148, at 330-31.

213. 3 [5753-1993] P.M. at 39, trans at 42.

214. *Id.* at 37-39, trans. at 39-41.

215. *Id.* at 39, trans. at 41-42.

216. "[Qimron] has explained in his testimony that he had felt that his world had crumbled and his dream to achieve fame had vanished." *Id.* at 39, trans. at 42.



out [in another case], that this controversy has become an academic one, because increased damages include almost all the elements of exemplary damages.<sup>217</sup>

The court does not differentiate between mental distress worsened by willful conduct and thus more highly compensable, and punitive damages intended to punish the willful conduct itself.

The court also awarded, as earlier noted, substantial attorney's fees. The entire award was made subject to "indexation differentials," pegging the value of the award in shekels to its dollar value at the time of the award, so that, as the shekel's exchange value changes, the size of the award in shekels will change proportionately.<sup>218</sup>

#### IV. THE ECONOMICS OF MORAL RIGHTS AND NON-EUROPEAN COUNTRIES.

Having examined these two cases in detail, it is now worth stepping back and examining why newly-industrialized and developing countries might find it worthwhile to enforce moral rights. As noted, many non-European nations are members of Berne; many are also members of or will soon join the GATT, requiring muscular enforcement of their Berne-compliant copyright laws. These countries have apparently adopted moral rights provisions without a qualm. There is little doubt that the importance of intellectual property law is increasing. Yet the concerns that developing countries raise about patents and even copyright generally, do not seem to exist for moral rights. Indeed, many non-European nations favor strong moral rights protection.<sup>219</sup> The reasons for their advocacy are not entirely clear, in part because the economic impact of moral rights has not been thoroughly examined.

A full discussion of the economics of moral rights is well beyond the scope of this note. This section will, however, briefly discuss some possible economic effects of moral rights, and then suggest some reasons why developing nations would not object to moral rights.

##### A. *The Economic Effects of Moral Rights*

Among the numerous articles written in the United States about moral rights, none apparently deal in detail with the economic impact of

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217. *Id.* at 40, trans. at 43-44 (citations omitted).

218. *Id.* at 41, trans. at 44-45.

219. For example, several South American countries put forward a proposal to include moral rights in TRIPS. STEWART, *supra* note 93, at 2279. Mexico and Uruguay opposed the Stockholm Protocol to the Berne Convention, which reduced developing nations' obligations under the treaty. RICKETSON, *supra* note 76, at 620.

moral rights.<sup>220</sup> Instead, they either advocate the morality of the rights, or make dire predictions about the economic ruin of publishers and movie makers from giving authors an inalienable and capricious right.<sup>221</sup>

This dearth of serious contemplation of the economic rationale and impact of moral rights results, one suspects, from the misleading nature of the term itself. Moral rights are so named to distinguish them from remunerative, "economic," rights. But both moral and remunerative rights are legal rights, and, as legal rights, have economic consequences. Hershel Shanks' testimony at the trial aptly demonstrates the problem. When asked if Professor Qimron had a right to have his name associated with the MMT reconstruction, Mr. Shanks stated that "[h]e has a moral right to credit, but no legal rights."<sup>222</sup> Mr. Shanks is a lawyer. His statement shows the gulf in the American mind between moral rights and legally cognizable ones, not recognizing that in many countries they are identical.

### B. *The Economic Effects of Moral Rights on Authors and Users of Copyright*

The principal American concerns with moral rights appear to deal with the unsettling possibility that, for example, a novelist will complain

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220. Landes and Posner do not deal with the moral rights in their seminal article.

For example, do such principles as *droit moral*, entitling authors to reclaim copyright from assignees after a fixed period of years or entitling artists to royalties on resales of their art by initial (or subsequent) purchasers, increase or reduce the incentive to create new works? The answer suggested by economic analysis is that, contrary to intuition, such principles reduce the incentive to create by preventing the author or artist from shifting risk to the publisher or dealer. A publisher (say) who must share any future speculative gains with the author will pay the author less for the work, so the risky component of the author's expected remuneration will increase relative to the certain component. If the author is risk averse, he will be worse off as a result. However, we do not explore such matters in this article.

William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL. STUD. 325, 327 (1989) (footnote omitted). Landes and Posner are not evaluating moral rights at all, their statement to the contrary notwithstanding, but rather the *droit de suite*, the author's right to remuneration on transfer of the copyright subsequent to the first, which is an economic right. Compare Berne Convention arts. 14<sup>ter</sup> and 6<sup>bis</sup>: the *droit de suite* is a remunerative right, though inalienable; moral rights are non-remunerative, although the ability to transfer or waive is uncertain. Berne Convention, *supra* note 2, arts. 6<sup>bis</sup>, 14<sup>ter</sup>, 7 *Copyright* at 137, 139. As a deeper issue, Landes and Posner do not attempt to deal in detail with cost and risk allocation between the author and the user. Landes & Posner, *supra*, at 327. However, moral rights are a problem of risk allocation between these parties.

221. E.g. Hatch, *supra* note 1, at 184 (adoption of broad moral rights protection could "alter drastically current domestic copyright relationships"); Gorman, *supra* note 1, at 423-24.

222. Hershel Shanks, *supra* note 164, at 71. It is not clear whether the court assigned this statement any weight in its decision.

about the quality and casting of the film adaptation of her work,<sup>223</sup> or that the director of a film will later complain over the final cut of the work, or of its adaptation for television. Essentially, the concerns relate to a prospective inability to reassign contract risks; that a warranty of paternity and integrity will be inferred into all copyright-related contracts, and that those rights will be exercisable for the term of copyright or even longer. Thus moral rights impose a cost on users<sup>224</sup> of copyright that, in their view, did not exist before.

In fact, however, moral rights represent a means of allocating costs between authors and users. The cost to authors does exist, although it may be hidden in a system that does fails to provide or provides only limited moral rights protection. The costs to authors are emotional, as in the mental distress that comes from seeing one's work mutilated,<sup>225</sup> as well as economic, in the reduction in value of one's work caused by the misattribution or the false depiction of the mutilated or distorted work.<sup>226</sup> *Qimron* and *Mannu Bhandari* aptly present each form of damage. There are costs to users in complying with the requirements of moral rights. The users may lose some part of their audience, as in *Mannu Bhandari*, where the filmmakers recast the film into the mold of the traditional Hindi film,<sup>227</sup> or may have to invest more time and money into creating a better work.<sup>228</sup> The loss to the user may be more personal as well, as the maker of the derivative work is forced to forego some of her own creativity in modifying the work in favor of respecting the author's integrity. It is hard, and may be impossible, to make axiomatic assumptions about the balance between the author's costs and the user's costs; no doubt part of the user's calculus in a system that enforces moral

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223. Anne Rice complained of the movie adaptation of her novel *Interview with the Vampire*, concerned that the producers and the lead actor were "butchering her script, sanitizing the sexual content to accommodate [Tom Cruise's] clean-cut image, and perpetrating the worst crime in the name of casting since *The Bonfire of the Vanities*." Jennet Conant, *Lestat, C'est Moi*, *ESQUIRE*, Mar. 1994, at 71, 72. Rice later recanted. Rachel Abramowitz, *Young Blood: Filming of 'Interview With the Vampire'*, *PREMIERE*, Nov. 1994, at 62 (quoting Anne Rice: "They got it! I was swept away. Neil [Jordan, the director,] kept the heart and soul of the book.").

224. The term is used here to include, for example, publishers, and filmmakers, as well as those who pirate copyrighted works. Piracy represents the ultimate free ride, taking both the economic rights in the copyrighted work and, in the event of distortion or misattribution, the moral rights as well.

225. See *Qimron v. Shanks*, 3 [5753-1993] P.M. 10, 39-40, trans. at 42-44 (discussing and awarding substantial damages for mental distress).

226. See *Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*, 1987 A.I.R. (Del.) 13, 18 (1986) (discussing damage to reputation from a poor movie).

227. *Id.*

228. A better scriptwriter or translator might be more expensive; it might take longer to produce the work or shoot the film.

rights is the cost, for example, of a better translator versus the possibility of being mulcted heavily in damages for publishing a poor translation.<sup>229</sup>

One can envision a number of moral rights regimes, each allocating the costs and risks differently. A system that does not recognize moral rights imposes the cost by default on the author, who takes the risk that an unscrupulous user will damage her reputation by misattribution or by distortion of her work. This does not allow risk-averse authors to accept lower sums for a guarantee of no infringement of moral rights. A system that provides uncertain recognition (as in the United States) allows some degree of bargaining over risk; but in all probability, except for authors with substantial bargaining power, the risk will nonetheless be placed on the author, who will be insufficiently compensated for accepting it. A system that allows for full-recognition of moral rights but also for assignment or waiver by contract would similarly keep risks on authors who lack sufficient bargaining power to refuse waiver or those who seek increased payment for shouldering the risk. However, the costs to the user, both in compensation to the author and transaction costs, will be somewhat higher, since such waiver must be bargained for expressly. Finally, a system that provides inalienable and unwaivable moral rights places the cost of violation squarely and solely on the user, but does not allow the possibility of increased rents for the risk-accepting author.

Where moral rights are a default rule subject to negotiation and the parties have equal bargaining power, the author will demand a higher price for assuming the risk of violation, or accept a lower one for placing the risk on the user. The price will reflect the cost of the possible damage and the degree of risk.

Most authors, however, probably do not possess bargaining power equal to that of the user. In that case, as also where such rights are uncertain, the user can force the author to bear a disproportionate part of the risk and cost of violation. Thus, it would seem that, in the absence of equal bargaining power between authors and users, inalienable and unwaivable moral rights are the only ones that fully prevent users from externalizing the costs of infringement. However, while inalienable and unwaivable rights protect the weak or risk-averse author, they reduce the

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229. Infringement of moral rights, for economic purposes rather than choice of law, may best be viewed as a form of intentional tort; the user decides to break an artwork into its component pieces and sell them individually, or the movie maker decides to change the ending of a book. For views of the economics of intentional torts in general, see William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127 (1981); Dorsey D. Ellis, Jr., *An Economic Theory of Intentional Torts: A Comment*, 3 INT'L REV. L. & ECON. 45 (1983).

possible return to the risk-accepting author. It may be that allowing waiver or alienation of the moral right would result in the greatest net gain over all authors, risk-accepting and risk-averse.

### C. Moral Rights and the Least-Cost Risk Avoider

The logical questions in debating moral rights, then, are what is the appropriate default rule for allocation of the costs of moral rights infringement, and to what degree may parties choose to reallocate the costs and risks by contract? Moral right infringement is analogous to defamation, a tort. The usual rule in tort law is that risks are most appropriately borne by the least-cost risk avoider.<sup>230</sup> The least-cost risk avoider in moral rights is the user of the copyright. The copyright owner has little direct control over the use made of her work once she has assigned it to another. For example, it may not be practical for a novelist to examine every revision of the screenplay of her novel, nor is she likely to possess the technical skill to determine whether the quality of the film shooting, editing, and acting will do justice to her work. The filmmaker in this case is more likely to have such knowledge.<sup>231</sup> The author likely is limited to making the assignment based only on her impression of the reputation of the assignee, an ephemeral and uncertain characteristic at best, particularly if the author has no control over subsequent assignment.

This line of argument suggests that the user is the least-cost risk avoider, and thus best suited to bear the cost of violation of moral rights. If the user does not want to pay the cost, she simply has to ensure that she works within the law's constraints.

### D. The Costs and Benefits of Moral Rights in Non-European Countries

Where, then, does this put non-European countries, developing or newly industrialized? Many of these countries joined the Berne Union shortly after gaining independence. Several commentators suggest, however, that the decision to accede to Berne was frequently the result of pressure to join from former colonial rulers.<sup>232</sup> These countries only belatedly realized that the high level of protection that the Berne Con-

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230. Israel's explicit treatment of moral rights violation as tort is particularly apposite. See *supra* text accompanying note 216.

231. And, as to the right of paternity, to have control over the credits to the film.

232. Nora Maija Tocups, *The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries*, 29 J. COPYRIGHT SOC'Y U.S.A. 402, 406-07 (1982).

vention required was ill-suited to their needs for, among others, inexpensive educational material.<sup>233</sup> Their concerns led to the negotiations that culminated in the Appendix to the Berne Convention adopted at Paris in 1971.<sup>234</sup> However, they apparently never objected to the moral rights provisions of the Berne Convention.<sup>235</sup>

Moral rights laws serve to protect national authors against damage by other nationals, as in *Mannu Bhandari*, and by foreigners, as in *Qimron*. Moral rights require indigenous industries to operate at a higher level of sophistication than would otherwise be the case. Although the cost of producing works thereby increases, suggesting lower production, the lower risks to authors might induce more to publish for reduced payment demands. In addition, some externalities might also be viewed as justification, such as improved reputation of indigenous authors and publishers outside the country. It seems likely that the importance of the indigenous protection rationale increases in proportion to the growth of copyright industries.<sup>236</sup> Again, it is no surprise that the cases discussed in this paper come from countries with such substantial industries.

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233. *Id.* at 409–10; RICKETSON, *supra* note 76, at 590–91.

234. The Appendix replaced the Protocol to the Berne Convention that had been adopted at Stockholm in 1967 but which never went into effect, and which proved to be highly controversial. RICKETSON, *supra* note 76, at 621. The Appendix represented a more measured approach to the problems of developing countries and was coordinated with revisions to the Universal Copyright Convention. *Id.* at 631–33. The Appendix provides for compulsory licensing of certain materials in countries that meet the United Nations definition of developing country.

235. Countries availing themselves of the provisions of the Appendix are not forgiven compliance with the requirements of article 6bis. See Tocups, *supra* note 232, at 417–18. The Appendix requires that “[d]ue provision shall be made by national legislation to ensure a correct translation of the work, or an accurate reproduction of the particular edition, as the case may be.” Berne Convention, *supra* note 2, Appendix, art. IV, para. 6(b), 7 COPYRIGHT at 148. One suspects that the developing nations did not object to retention of moral rights in part because of the cost-bearing issue discussed above. The compulsory licensing system allows users in developing countries to pay “just compensation,” which is presumably a smaller amount than had been demanded by the author. Developed countries would view it as unfair that the author’s “fee” could be reduced still further through forcing her to bear the risk costs of damage to reputation from infringement of moral rights. In addition these countries’ legal systems had recognized these rights, at least theoretically, from accession to Berne and, presumably for non-common law countries, prior to independence as well. It is easy to overstate the impact of the Appendix, as few countries have availed themselves of its provisions. RICKETSON, *supra* note 76, at 663. However, the Appendix may serve as a useful bargaining chip; the availability of the compulsory license may have induced authors to license voluntarily. *Id.*

236. A number of authors have examined the relationship between intellectual property protection and economic growth in developing countries. See Dru Brenner-Beck, *Do As I Say, Not As I Did*, 11 UCLA PAC. BASIN L.J. 84 (1992) (discussing threshold level of development at which protection benefits exceed costs); Richard T. Rapp & Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, J. WORLD TRADE, Oct. 1990, at 75 (finding that benefits substantially exceed costs).

Presumably, as other nations develop these industries, wider interest in and more frequent occasion for enforcement of moral rights will follow.

### CONCLUSION

Moral rights laws play an important role in the copyright systems of many countries outside Europe and North America. As the sophistication of copyright industries in these countries increases, so will active enforcement of moral rights. Moral rights, while infrequently litigated, perform an important cost- and risk-shifting function, reducing or preventing users of copyrighted materials from externalizing the costs of violating the integrity of the work or failing to credit the author.

As United States actors become more involved in activities in these countries, they will need to become more aware of and accommodating towards these laws in planning and contracting. Indeed, these rights may crop up in very unexpected places, as occurred in *Qimron*.<sup>237</sup> The unwary, then, proceed at their peril. But these rights can also be viewed as a valuable tool for foreign authors and publishers seeking to recover for piracy or to ensure that local assignees produce high quality translations, editions, or adaptations. The greater emphasis on intellectual property generally, heralded by TRIPS, may also produce an increased emphasis on these oft-neglected rights as well.

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237. "The *Huston* case thus reminds us that moral rights remain a wild card in international copyright commerce." Geller, *supra* note 73, at 256. On the other hand, as the Director General of WIPO once pointed out, "[m]any magazines are published in Europe, notwithstanding moral rights, so why the concern?" Brown, *supra* note 1, at 208 (quoting Arpad Bogsch). Brown continues by noting that authors are driven by economic concerns, and that moral rights cases come from broken relationships, not continuing ones. *Id.* at 208-09. However, moral rights do underlie continuing relationships, and those relationships are molded by the obligations of the user. And some relationships, such as Mannu Bhandari's break down, at least in part, because of infringement of moral rights.