

Have the Berne Convention's Moral Rights Provisions been Accurately Implemented in National Laws? A Comparative Study of the United Kingdom, India, and the United States

Abstract

Historically, in civil law jurisdictions, an attack on a creator's work was deemed to be an attack on the creator's personality. Hence, in such jurisdictions, copyright law aims to protect a creator from attacks to their personhood. However, in common law jurisdictions, many academics argue that copyright law has been used as an incentive to urge creators to generate creative content. Hence, in contrast to the civil law custom, common law copyright customs primarily aimed to facilitate the dissemination of content to the public. This lack of focus on authors' rights in common law jurisdictions has witnessed change over the past century. Notably, during the development of the Berne Convention, starting in 1886, followed by successive amendments, common law jurisdictions have absorbed the focus on authors from civil law sources. These have later morphed into the modern law of moral rights.

Moral rights have been broadly described as the legal link that allows authors to retain control over the integrity of their work. The moral rights provisions of the Berne Convention 1886 have been repeatedly noted in academia for its improper harmonisation in national laws. While the Convention establishes a standard of minimum rights, it is visible that the threshold for moral rights in some key common law jurisdictions is disproportionately high. This results in greater obstacles for authors/creators to claim moral rights, notably that of integrity and paternity. This paper notes these shortcomings with special reference to some key common law jurisdictions and advocates the only solution to a discrepant national systems — greater harmonisation at a local level.

Introduction

The Berne Convention 1886 (the Convention)¹ is one of the core international agreements relating to copyright law. The instrument requires member states to establish minimum standards of copyright locally. However, the moral right provisions contained in Article *6bis* of the Convention have been noted in academia for its inconsistent implementation amongst

¹ The Berne Convention (the Convention) for the Protection of Literary and Artistic Works 1886.

member states. Among others, this directly creates legal issues relating to cross-border recognition and enforcement.

In this context, this paper will analyse the degree the implementation of the Convention's moral rights provisions in India, the US, and the UK. It will first define the provisions of Article *6bis* on the matter. This will be followed by an analysis of the discrepancies between the member states' national laws and the Convention. It will conclude by supporting a shift towards greater harmonisation of national law with the Convention in order to achieve the substantive protection of moral rights.

What Does Article *6bis* Provide?

Since moral rights protect the reflection of an author's personality in their work, Davies and Garnett² note that it is "self-evident that these rights belong to the author." Article *6bis* echoes this notion by providing that this right exists "independently" of the author's economic rights in a work and will survive if it is transferred. The Article also provides that the right must last at least as long as the economic right. There is also no restriction on the right lasting beyond the economic right or in perpetuity. Lastly, the Article provides for the right to be "safeguarded" as per the laws of whichever country a claim pursuant to it is made.

Discrepancies in National Law Regimes

For the purposes of this paper, the national law regimes on moral rights of the UK, India, and the United States shall be analysed. Accordingly, it can be argued that none of these regimes have fully realised the Convention's provisions in its national law.

UK Law

Under the UK system, the Copyright, Designs, and Patents Act 1988 (CDPA) notes four circumstances under which an author can claim moral rights on the "integrity" of a piece of work. These are due to the work being "distorted" or "mutilated" when there is "addition to, deletion from, alteration to, or adaption of" the same.³ However, the Convention's text forbids "distortion, mutilation, or other modification of, or other derogatory action in relation to" the work. The UK CDPA seems to ignore the final element of "other derogatory action." Hence,

² GILLIAN DAVIES & KEVIN GARNETT, MORAL RIGHTS, (2nd Edition, Sweet and Maxwell 2016).

³ Copyright, Designs, and Patents Act 1988, s 80(2).

any treatment that does not fall into its four pre-defined categories would not violate moral rights. For instance, there would be no violation of moral rights if a work is physically relocated or if the structure containing the work negatively affects its integrity.⁴ Hence, UK law contracts the reach of the Convention with regards to integrity.

This contraction is also apparent in the UK case law's on what constitutes "derogatory." Ricketson and Ginsburg⁵ note that this term might have an objective and subjective element. For instance, the former would refer to the reasonableness of the author's claim, while the latter would refer to the argument of the author. However, UK courts have tended to limit the possibility of even considering an argument of subjectivity. In *Tidy*,⁶ the High Court held that the test "inevitably" requires the use of an "objective test of reasonableness" of the author's claim. Similarly, *Pasterfield*⁷ held that the author's grief at the alleged infringement of their right is not sufficient to establish the same. This approach was reaffirmed in *Confetti Records*,⁸ where the Court refused to classify a treatment as "derogatory" if the claimant did not show any "objective" evidence of the same. Hence, the scope of the Convention's "other derogatory action" criterion is once again compromised.

Lastly, Section 78 of the CDPA states that the paternity right is not violated unless the right is asserted by the author. This right allows the author to ensure that their work is recognised as theirs without ambiguity. For instance, it can be ensured by printing the author's name on each copy of the work. While the CDPA seems to implement the paternity right in a fair manner here, there seems to be a contradiction to Article 5.2 of the Convention. This states that "enjoyment and exercise" of the Convention rights cannot be subject to any "formality."

However, Lord Beaverbrook in parliamentary debates on the CDPA⁹ had argued that the assertion requirement is consistent with the Convention as paternity is simply a "right to claim authorship," and not an "unqualified right to be identified." On the contrary, Ginsburg notes that the requirement is a "perverse" reading of Article 6*bis*.¹⁰ Given that the Vienna Convention

⁴ D Flynn, A Comparative Analysis of the Moral Right of Integrity in the UK, Ireland, and France, 7 KING's Inn Student Law Review 108 (2017).

⁵ S RICKETSON & J GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS – THE BERNE CONVENTION AND BEYOND (2nd Edition, OUP 2006).

⁶ *Tidy v Trustees of the Natural History Museum* [1996] 39 IPR 501.

⁷ *Pasterfield v Denham* [1999] FSR 168.

⁸ *Confetti Records v Warner Music UK Limited* [2003] EWHC 1274.

⁹ 491 Parl. Deb HL, (5TH Ser) 352 (1987).

¹⁰ J Ginsburg, Moral Rights in a Common Law System, ELR 121,128 (1990).

on the Law of Treaties requires a treaty to be interpreted with their “ordinary meaning,” it is arguably difficult to reconcile Beaverbrook’s argument. This is so as he attempts to apply his own interpretation of the Convention’s words rather than use their ordinary meaning. Logically, the assertion right is likely incompatible with the Convention as well.

Based on these inconsistencies, it can be reasonably argued that there exist multiple exceptions to full harmonisation of the Convention under UK law.

Indian Law

Under Indian law, Section 57 of the Copyright Act 1957 protects creative works by having the effect of lifting the author’s rights beyond the material gains of copyright.¹¹ In this regard, it arguably emulates the effect of Article 6bis existing “independently” of the author’s economic rights. The text of the Act allows an author to claim the right if there is “distortion, mutilation, modification, or other act” that is prejudicial to their “honour or reputation.” The legislation by itself does not go to the extent of the UK’s CDPA of defining “distortions” as additions or deletions,¹² but it ensures greater compliance to Article 6bis by allowing “other acts” as valid grounds for a claim. It does not restrict the scope of the Convention’s provision of “other derogatory action” that way the CDPA does.

Due to the lack of definition of what constitutes a “distortion” or “mutilation,” the criterion of what is “prejudicial” to an author’s reputation has been left to the courts.¹³ Similar to the UK, Indian courts have to make a decision between opting for an objective or subjective test to determine the validity of the author’s claim of distortion. However, in landmark cases like *Mannu Bhandari* and *Amar Nath Sehgal*,¹⁴ the Court prioritised the author’s perception of what they considered a “distortion.” Hence, there is a leaning towards a subjective test. This is a marked difference from UK case law, which almost explicitly prefers an objective test. Logically, the Indian approach seems to be of greater compliance with the Convention.

However, the restrictive nature of the Indian approach becomes apparent in the limited remedies offered by Section 57 and certain exceptions it lays down. For instance, the Section states that authors can only claim damages or seek an order of restraint in response to a

¹¹ *Mannu Bhandari v Kala Vikas Pictures Private Limited and Ors*, AIR 1987 Delhi 13.

¹² *Noah v Shuba*, (1991) FSR 14.

¹³ MT Sundarajan, *Moral Rights in Developing Countries: The Example of India*, Part I-8 IPLR 357 (2003).

¹⁴ *Amar Nath Sehgal v Union of India*, 2005 (30) PTC 253 (Del).

distortion. There are no other remedies available to them. This Section goes as far as prohibiting inappropriate “display” as a valid ground to initiate a claim. This indicates that an artist cannot protest their work being displayed in an environment that is inappropriate or alien to what its originally intended environment of display was. For instance, the creator of a children’s literary character cannot protest to their work being used in or associated with a tobacco advertising campaign. Naturally, this restrictive approach of Article 57 has caused controversy amongst Indian artist forums and societies.¹⁵

This creates a paradox with its provision of allowing “other acts” of distortion as a ground to bring a claim, as inappropriate “display” is the only act that cannot strictly fall under “distortion, mutilation, or modification.” Logically, this strongly indicates an incomplete implementation of Article 6bis’ criterion of “other derogatory action.” Despite this restriction, Indian courts seem to acknowledge its obligations under the Convention while reasoning its decisions. For instance, in *Vishaka*,¹⁶ the Supreme Court admitted that international conventions were not “inconsistent” with Indian law when a Court is reasoning a decision. While this case was in the area of constitutional law, the *Amar Nath Sehgal* decision referenced this case, arguably as a means of reaffirming the applicability of the Berne Convention in its decision.¹⁷

These observations arguably lead towards the observation that Indian case law seems to adopt a much more expansive and liberal approach while protecting moral rights compared to the legislation. One of the most vocal defences of the legislature in adopting this approach has been the internal diversity of India.¹⁸ This position argues that when the work of one state is improperly displayed or translated in another, there exists a risk of opening a floodgate of litigation for minor moral rights violations due to differing cultural interpretations.¹⁹ While this position has the potential to be defended as logical, it is nonetheless a restriction in the eyes of the Convention.

¹⁵ P. NARAYANAN, LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS 36 (2nd Edition, ELH 1995).

¹⁶ *Vishaka v State of Rajasthan & Ors*, AIR 1997 SC 3011.

¹⁷ (n 14) *Amar Nath* 53.

¹⁸ N Agarwal & V Ojha, Moral Rights: International Framework and Indian Approach, 6 CULJ 1,13 (2017).

¹⁹ Z Thomas, Overview of Changes to Indian Copyright Law, 17 IPLR 324 (2012).

While Indian courts seem to be more conscious of their obligations under the Berne Convention compared to UK courts, the nature of the legislation is still not harmonised with it. Consequently, the scope of flexibility a court can achieve in its reasoning is limited as well.

US Law

When the US acceded to the Berne Convention, it did so through the specially implemented Berne Convention Implementation Act of 1988 (BCIA). However, it noted that “existing” US law was sufficient to satisfy Berne’s moral rights protections. Hence, on paper, it did not provide any moral rights and chose to rely on the rules of different state and national legislation instead. This premise itself is paradoxical as one of the reasons for the US’ accession to Berne was the lack of moral rights available in domestic law.²⁰

The Visual Artists Rights Act of 1990 (VARA) was one such piece of legislation that was passed in the US after the BCIA, which tried to satisfy Article *6bis*’ moral rights provisions. It provided similar rights as *6bis*, notably the right to prevent “distortion, mutilation, and modification” that is “prejudicial” to the creator’s reputation. However, VARA’s immediate fall back was its application being restricted to “works of visual art.” The US Copyright Act of 1976 characterises visual art as paintings, drawings, prints, sculptures, and still photographs which exist either in single copy or limited editions. Hence, any other non-visual form of creative work or even visual work falling beyond the defined list is not protected.²¹ This is automatically incompatible with *6bis* as the Convention does not differentiate between different types of creative work.

Furthermore, US courts have been reluctant to interpret the VARA with a wide margin. For instance, in *Pembroke Real Estate*,²² the Court held that the improper location or placement of a visual work could not be the basis for a claim of distortion or modification. The Court would only accept a modification claim if it was the result of gross negligence. Similarly, in *Lilley v Stout*,²³ a painter who painted a work based on photographs he had commissioned from a photographer successfully defended a moral rights claim from the photographer. The Court argued that being commissioned to supply photographs instead of exhibit them, negated his

²⁰ S Jacobs, The Effect of the 1886 Berne Convention on the US Copyright System’s Treatment of Moral Rights, 23(1) MTTLR 169 (2016).

²¹ J COHEN, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 10 (3rd Edition, 2010).

²² *Phillips v. Pembroke Real Estate*, 459 F.3d 128 (1st Cir. 2006).

²³ *Lilley v. Stout*, 384 F. Supp. 2d 83, 84 (D.D.C. 2005).

right to claim for a distortion of work. In *Kelley*,²⁴ the Court refused to recognise a 66,000 square foot wildflower display as a work of visual art because it did not meet the authorship and fixation requirements of the Copyright Act. This arguably indicates a strong violation of Article 5.2's rule against requiring "formalities" to exercise rights.

Another piece of key legislation that the US considered a part of their apparent moral rights regime was the Lanham Act of 1946,²⁵ which dealt with trademarks. However, courts' interpretation of the Lanham Act strongly departs from the judicial treatment of moral rights in India or the UK. This is so as it does not even aim to apply the moral rights provisions of the Convention or acknowledge it. For instance, in the landmark *Dastar* decision,²⁶ there was a license to the copyright of a book given to a publisher by the author, who then licensed it to a film company for production. When the initial copyright expired, the publisher renewed their copyright, but the film company did not. The film company's produced works on the book were then rebranded by a third party disc seller and sold as a new product without attributing the author. Surprisingly, the Court refused to restrict the disc seller's right to not attribute the author, simply because the film company's copyright had expired on paper. This is arguably another clear violation of the Convention's requirement against formalities restricting rights. The most concerning part of this decision was the Court not taking into account the renewed copyright of the publisher, indicating such non-attribution was legal even in the presence of a valid copyright.²⁷

US law's treatment of moral rights maintains this degree of restrictive interpretation even in local state laws. Hence, despite having the BCIA, the US' real enforcement of moral rights is likely not harmonised with the actual Berne Convention. This is due to excessive reliance on formalities and narrow definitions that exclude very common creative works.

Consequence of Inconsistences in National Law

The analysis up to this point indicates varying degrees of implementation of the Convention in the three jurisdictions. The immediate negative outcome of having such inconsistencies is the inconsistent protection of rights across borders. This is best evidenced in the case of

²⁴ *Kelley v. Chicago Park Dist.*, 635 F.3d (7th Cir. 2011).

²⁵ Section 43(a).

²⁶ *Dastar v. Twentieth Century Fox*, 539 U.S. 23 (2003).

²⁷ (n 20) Jacobs 179.

Shostakovich.²⁸ In this case, Russian composers claimed their moral rights against an anti-Soviet film that had used their music. This claim failed in the US but succeeded in France. If analysed from the context of this paper, it could be argued that the claim would fail in the UK as well since there was no addition or deletion to the work. Hence, there would be no “distortion.” However, it could be argued that Indian courts, which prioritise the subjective test, could benefit the claimants of this case in a hypothetical scenario.

While it may be argued that this status quo of success rates only in some jurisdictions is a commercial and legal reality to bear in mind, it is not what the Berne Convention had intended to achieve.²⁹ Its aim was to ensure a consistent application of the law across all countries. This is even more relevant in a digital world, where determining where an “online” infringement of moral rights took place is hard to pin point.³⁰ Furthermore, some jurisdictions being inherent lax on their commitment to the Convention could create a safe haven for repeated moral rights violations and piracy. Hence, the party worst affected by such inconsistencies is the creator themselves.

Conclusion

As demonstrated throughout this paper, there are large divergences in how each of these jurisdictions enforce the Berne Convention. The very fact these inconsistencies exist — indicate the failure of the Convention’s central aim of consistent cross-border legal interpretation. The unfortunate outcome of these inconsistencies is the burden imposed on the creator. States with weak protection are bound to become hotbeds of moral rights infringements.

Hence, the repeated argument of harmonisation of laws expressed throughout this paper is likely the only solution to these inconsistencies. This is especially relevant in a dynamic online environment where borders are blurred, and infringements are more difficult to pinpoint. Logically, there has to be a degree of understanding demonstrated by courts, if not the legislation, to give practical effect to the aims of the Convention. Otherwise, the aims of the Berne Convention will inevitably remain a legal utopia of cross-border co-operation.

²⁸ *Shostakovich v Twentieth Century Fox Film Corp*, NYS2d 575 (Sup CT 1948).

²⁹ (n 2) Davies 35.

³⁰ (n 4) Flynn 124.