

ORPHAN WORKS AND MORAL RIGHTS: A VIEW FROM THE UK

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“Further, in relation to the work of an author, subject to the work attaining the status of a modern national treasure, the right would include an action to protect the integrity of the work in relation to the cultural heritage of the nation.” – Justice P. Nandrajog of the Delhi High Court, 2005¹

I. Introduction: Google Books Opens the Floodgates

When it comes to orphan works, the world undoubtedly owes a word of thanks – however enthusiastic, however reluctant – to Google. Back in 2004, Google had, not only the technical resources, but also, the imagination to undertake the digitization of library collections. It began to do so in collaboration with some of the world’s major research libraries.²

The Google Books project was based on a simple insight: books deteriorate over time, but digital files do not. Many of the books in the library collections that were opened to Google were in danger of destruction by time. Digitization preserves them, in effect, for eternity – or, at least, for as long as the file can be preserved, its integrity intact. As Sergey Brin, one of Google’s co-founders, wrote in an editorial for the New York Times:

...[T]he vast majority of books ever written are not accessible to anyone except the most tenacious researchers at premier academic libraries. Books written after 1923 quickly disappear into a literary black hole. With rare exceptions, one can buy them only for the small number of years they are in print. After that, they are found only in a vanishing number of libraries and used book stores. As the years pass, contracts get lost and forgotten, authors and publishers disappear, the rights holders become impossible to track down.

¹ *Amar Nath Sehgal vs Union Of India (Uoi) And Anr.* on 21 February, 2005, 2005 (30) PTC 253 Del, available at <http://indiankanoon.org/doc/1990275/>.

² Now Hathitrust...

Inevitably, the few remaining copies of the books are left to deteriorate slowly or are lost to fires, floods and other disasters.³

Google being Google, a collision with copyright law was probably inevitable.⁴ Google's aim was, after all, a technological and practical one – to digitize works, and, in keeping with the pace of technology, itself, Google moved swiftly. Books were scanned. But no permission was sought from the authors or publishers of the books, and this violated the most fundamental of rights protected by copyright law: the right to make the work available to the public, and the right to control the reproduction of the work.

Why is this issue so significant in relation to orphan works? In fact, copyright collides with “orphaned” knowledge on three levels. First, as noted above, while a work is still protected by copyright, uses of that work must generally be authorized by the holder of the copyright. The copyright holder may be either the author or the owner of the copyright work; it will often be an owner who has acquired copyright through contractual negotiations with the creator of the work, and the owner will likely be a corporate entity rather than an individual. But, secondly, the authorization requirement endures for a very long period: copyright term now lasts for seventy years after the life of the author in most jurisdictions. Moreover, thirdly, copyright protection is acquired automatically, and, as a result, no work will be exempt from copyright for the full duration of the term. Previously, this was not the case in the United States, where the law prior to joining the Berne Convention required that a copyright had to be registered to be protected.

³ Sergey Brin, “A Library to Last Forever,” 8 Oct 2009, Op-Ed Contributor, New York Times, *available at* http://www.nytimes.com/2009/10/09/opinion/09brin.html?pagewanted=all&_r=0.

⁴ Technology is always ahead of the law, and observing copyright reform in the digital period shows this to be a rule more or less without exception; and Google is in the forefront of technology. Copyright law struggles to keep pace!

The Google Books scheme only went part of the way towards reconciling copyright with digitization, as it sat awkwardly with both authorship and copyright term of protection.

It is worth noting that the orphan works problem did not emerge suddenly. In fact, the problem is as old as copyright itself,⁵ and a small number of countries have adopted legislation to facilitate the use of orphan works well before the onset of the digital age – India, with the adoption of its first independent copyright law in 1957,⁶ and Canada, in 1985.⁷ However, the problem has taken on new dimensions in the digital era, due to two factors: changing methods of using works in the digital environment, and, less widely considered but of great significance, the potential for the increased creation of orphaned works through the processes of transformation and communication online.⁸

When Google Books raised the ire of authors and publishers, Google responded with a provision that scanning would proceed *unless the owners of works came forward to object* – what came to be called its “opt-out” policy. And what would Google do about the surprisingly large numbers of works whose copyright owners could not be located, known as “orphan” works? The answer was to go ahead with digitization all the same.

Google’s audacity – or, depending on one’s point of view, courage – led to a swift awakening. In 2005, the first of a series of lawsuits against Google was launched in the United

⁵ To be more precise, the possibility of a work being “orphaned” can be said to date from the time when copyright protection was first extended beyond the lifetime of the author: Berne Convention.

⁶ See <http://www.ipo.gov.uk/ipresearch-orphan-overseas-201307.pdf> at 18.

⁷ Cited in <http://www.ipo.gov.uk/ipresearch-orphan-overseas-201307.pdf> at 17. A comprehensive overview of the Canadian regime is provided by Mario Bouchard, head of the Canadian Copyright Board and Jeremy DeBeer, Associate Professor at the University of Ottawa law school: <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences-e.html>. For an update on Canadian debates of the scheme, see Bob Tarantino’s blog post, available at <http://www.entertainmentmedialawsignal.com/the-challenge-of-the-unlocatable-copyright-owner-the-return>.

⁸ But technology can also help to fight the creation of orphans, as noted in the discussion of the Joyce Hatto case, below.

States, with authors and publishers arguing that Google’s opt-out scheme “turned copyright law on its head”⁹ by dispensing with consent requirements. Where orphan works were concerned, and authors or publishers could not be found for the purpose of seeking their consent, these objections led Google to attempt to formulate what was, in effect, the first comprehensive policy to deal with *orphan* works in the digital environment. Google’s proposed opt-out scheme would allow authors or right-holders who resurfaced within 10 years after the digitization of their works, to receive compensation and, possibly, withdraw their works from circulation. Despite their initial lack of success, these very arrangements were ultimately accepted in a modified form by book publishers, who, with the passage of time and the corresponding progress of technology, came to see the value of Google’s technology and advertising resources as more than sufficient compensation for the loss of copyright prerogatives.¹⁰ In contrast, at least one group of authors, represented by the American Authors’ Guild, remained dissatisfied and continued their action against Google on these very grounds until it was finally dismissed – by Justice Chin.¹¹

Google’s digitization efforts placed it in an interesting and complex situation, and one in which vital social interests were at stake. Profit, preservation, and the dissemination of culture all intersect in the issue of digitization; when it comes to orphan works, which have no author or owner to intervene on their behalf, they present stark challenges.

Because of Google’s activities, a number of key issues about the current state of human knowledge swiftly came to light. First among these was the realization that large quantities of knowledge were in danger of disappearing over time. Orphan works are believed to embody a

⁹ Justice Chin; he later ruled in favor of Google; see discussion *infra*.

¹⁰ Claire Cain Miller, “Google Deal Gives Publishers a Choice: Digitize or Not,” 4 Oct. 2012, *available at* <http://www.nytimes.com/2012/10/05/technology/google-and-publishers-settle-over-digital-books.html>.

¹¹ The book publishers agreed to allow Google to digitize their works

significant proportion of the world's knowledge. The number of "orphan" books in the world is estimated at 5 million;¹² apart from books, photographs,¹³ film, and sound recordings all face the same danger of deterioration over time.¹⁴ To some extent, the preservation of culture means, in effect, the preservation of "orphaned" knowledge.

Secondly, the potential of digitization as a form of *preservation* was realized. Digitization not only had the capacity to facilitate access to works that were buried deep in the heart of libraries, but it could also halt the process of deterioration. Digitization made it possible to reproduce a book in an exact, permanent, and indestructible form by scanning it. Moreover, access itself is a form of preservation: if readers begin to read works, scholars to cite them, writers to quote from them, and so on, works that were obscure are, in effect, reborn. They re-enter circulation and become relevant for a new audience.¹⁵

Finally, once this process of digitization was underway, it offered such powerful means of access to knowledge that physical access to books would become increasingly unimportant, while digital versions would be preferred.¹⁶ In this sense, digital versions would ultimately replace books entirely, and original versions could be allowed to disintegrate.

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¹³ Photographers are particularly vulnerable to the digital manipulation of their work; see discussion of the case of *Morel v. Agence France-Presse & Getty Images* (2012), below.

¹⁴ The British Library estimates that 40 percent of its collections, totaling 150 million items, are orphans; see EC Memo of 4 Oct 2012, available at http://europa.eu/rapid/press-release_MEMO-12-743_en.htm?locale=en. But these are estimates; Keith Porcaro rightly notes that "the number of orphan works is virtually indiscernable" (para. 8).

¹⁵ I am indebted to Professor Peter Mezei of Szeged University, Hungary for his eloquent discussion of this position in a forthcoming article, IP in the New Europe (Lexis-Nexis, forthcoming Fall 2014).

¹⁶ Ebooks seem likely to largely replace physical books. <http://bits.blogs.nytimes.com/2014/05/23/amazon-escalates-its-battle-against-hachette/>; see also http://www.nytimes.com/2012/04/22/opinion/sunday/sunday-dialogue-books-in-a-digital-age.html?pagewanted=all&_r=0 and http://www.nytimes.com/2013/12/02/technology/e-books-hold-tight-to-features-of-their-print-predecessors.html?pagewanted=all&_r=0. About Amazon (v. Hachette): http://www.nytimes.com/2014/05/29/technology/amazon-hachette-book-publisher-dispute.html?_r=0.

Given the obvious conflict between copyright and the use of orphan works, it is hardly surprising that efforts to legislate on orphan works have focused on the key issue of balancing copyright ownership with the need for access to works. Within the established parameters of copyright law, the use of orphan works can be made possible through at least three kinds of mechanisms: treating use as a fair use or fair dealing with the work, the argument initially advanced by Google and finally successful in its 2014 appeal;¹⁷ allowing the use of individual orphan works as a temporary exception to copyright law, generally by means of a non-exclusive licence granted to the user; and allowing extended collective licensing schemes, covering a group of works in a single exception through copyright collecting societies, to allow the works to be used.¹⁸

The regime adopted by the UK,¹⁹ as required by the European Union Directive on orphan works,²⁰ favors the creation of a temporary exception to copyright. The UK Enterprise and Regulatory Reform Act²¹ allows both individual licenses and extended collective licensing. Accordingly, these schemes are built on certain key features: the entity that wishes to use the work must undertake a “diligent search” for the copyright holder; if the search is unsuccessful, the granting of a license for the use with an associated royalty; and the collection of the royalty

¹⁷ A useful summary of the decision is provided by Corynne McSherry, “Court Upholds Legality of Google Books: Tremendous Victory for Fair Use and the Public Interest,” Electronic Frontier Foundation, *available at* <https://www.eff.org/deeplinks/2013/11/court-upholds-legality-google-books-tremendous-victory-fair-use-and-public>. The decision itself can be viewed here: <https://www.eff.org/document/opinion-granting-summary-judgment-fair-use>.

¹⁸ See Alain Strowel, “The European “Extended Collective Licensing” Model,” (2011) Columbia J. Law & Arts 665 (Symposium Paper), *available at* <http://academiccommons.columbia.edu/catalog/ac:149103>; he explains ECL and its history in the Scandinavian countries, and briefly considers its implications for the, then-pending, EU Directive on orphan works.

¹⁹ ERA, s. 77, *available at* <http://www.legislation.gov.uk/ukpga/2013/24/section/77/enacted> [am. of CDPA s. 116, by inserting s. 116A, B, C, and D; “Orphan works licensing and extended collective licensing].

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²¹ *Supra* note 18.

towards a possible compensatory payment for the right holder, should he or she ultimately come forward to claim the work as his or her own.

To an extent, the dissemination of orphan works supports preservation – works that are in circulation, known, read, and cited, are in far less danger of disappearing than those that remain locked away, whether they are physically stored in libraries, or languishing because of copyright restrictions.²² But dissemination, alone, is not enough. What happens to the goal of preservation *per se* – preserving works in an unadulterated form, maintaining authenticity, and supporting the survival of essential information about cultural works, including authorship and historical context?

II. Preservation of Cultural Heritage: A Legal Perspective

The meaning of preservation is a complex issue with deeply philosophical implications. As noted above, access implies preservation, both directly – by making it possible to copy and, thereby, create digital versions of works – and indirectly – by making works available for use by the public. But there is another aspect to preservation: what happens to the work *after* it has been transformed into a digital format? This question is particularly important in light of the fact, noted above, that digital versions are ultimately likely to replace many, or most, originals in their entirety.

Fortunately, where cultural works are concerned, looking at preservation from a *legal* perspective can yield a meaningful and interesting response. In this regard, and in the specific context of orphan works, copyright law, itself, deserves a second look. In particular, the aspect of

²² Mezei; Grad-Gyenge, *forthcoming IP in the New Europe* (Lexis-Nexis)

copyright law known as the moral rights of authors could lend powerful support to the preservation of cultural heritage.

A. Moral Rights: From Authorship to the Public Domain

Moral rights are an under-exploited avenue for the protection of orphan works; nevertheless, they have tremendous potential. At first glance, this argument presents a curious paradox, because moral rights are, fundamentally, rights of personal authorship. Their immediate purpose is to protect an author's interests in his or her work beyond purely economic considerations. The origin of moral rights lies, most substantially, in the idea of a human right arising out of an individual's labour and creative activity; and this connection is apparent, both in the automatic protection granted to copyright under international laws, and in the recognition of authors' rights in international human rights instruments.²³ The doctrine is a correspondingly broad one; but the non-economic interests that are widely expressed in moral rights legislation tend to be fairly circumscribed, and relate closely to the protection of the author's professional reputation.

Moral rights originate in Continental European copyright traditions – the term “moral rights,” itself, is an awkward translation from the French *droit moral*, signifying personal, intellectual, or even spiritual rights.²⁴ In most jurisdictions of the world, moral rights are an integral part of national copyright laws, generally set out in separate sections of the copyright act. The United States remains an exception to this rule, with moral rights limited to the bare

²³ For example, see Art. 27 of the UN declaration of human rights and ICESCR ... African (Banjul) Charter of Human and Peoples' rights. The multiple theories behind moral rights were explored by German legal theorists at the time of their origin, in the early nineteenth century, and can be reviewed in French in the pioneering work of Stig Strömholm on moral rights (cited in my book). It is worth noting that these instruments typically protect the moral *and material* interests of authors. The subject of intellectual property and human rights is too broad to be adequately addressed in this paper, but see my earlier work on the subject: *Copyright & Creative Freedom*.

²⁴ Ginsburg, Ricketson. German *persönlichkeitsrecht*. Strömholm.

recognition of the rights of visual artists in a special act; but, when invoked, these limited rights have proven to be exceptionally powerful in practice.²⁵

The Berne Convention for the Protection of Literary and Artistic Works sets the international standard for moral rights protection in its Article *6bis*, first adopted in 1928, and subsequently modified in 1967; it was the reason behind the U.S. decision to legislate on artist's moral rights in 1990. Article *6bis* provides:

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.²⁶

Berne represents a compromise position between the broadest and most restrictive positions in moral rights doctrine. The rights recognized in Berne include the right of attribution and a right to the protection of the integrity of works, especially insofar as damage to a work may harm an author's reputation. More, and more powerful, rights are certainly possible, and, though they are not explicitly recognized in the Berne Convention, they can be found in the laws of particular jurisdictions and regions of the world.²⁷ Again, somewhat paradoxically, both of these personal rights of authorship are strongly relevant to the status of orphan works – works

²⁵ The United States, too, has moral rights, but in a limited form: the Visual Artists Rights Act of 1990 enacted moral rights for visual artists only, as s. 106A of the U.S. Copyright Act, soon after U.S. accession to the Berne Convention in 1989. VARA is an intricate statute with some limitations that are not characteristic of Berne; at the same time, it has proven to be an incredibly powerful piece of legislation in practice, leading to one of the largest monetary awards for moral rights violations anywhere in the world, in the case of a Los Angeles mural by Kent Twitchell, which was painted over in 2006, for \$1.1 million. See http://www.usip.com/pdf/Recent_Articles/Intellectual-Property-Today.pdf. For an overview of some of the issues, with a focus on the VARA approach to destruction of artworks, see <http://the1709blog.blogspot.co.uk/2014/06/saving-picassos-le-tricorne-and-other.html>.

²⁶ http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P123_20726.

²⁷ In fact, moral rights do have economic implications, and they have the potential to be quite serious. For example, allowing an author to withdraw his work from circulation because of a change of opinion is a recognized moral right in many jurisdictions (including France); but the right is generally accompanied by a proviso that the author must reimburse the publisher for losses incurred on account of this decision. See Sundara Rajan, *Moral Rights*.

without authors or, at least, without “locatable” authors²⁸ – and this realization leads to some fascinating questions about the nature of moral rights, and the extent to which the doctrine can, or should, be reconciled with the technological and social phenomena currently affecting copyright works.

Of special relevance to orphan works is the observation that the process of offering protection to authors’ interests often leads to something else: a more general, and significant, contribution to the broader protection of cultural heritage. Moral rights for orphan works should be shaped to reflect this potential, and to accomplish the important goal of protecting the interest of the public in its own, cultural, “property.”

The contribution of moral rights to cultural heritage occurs at multiple levels. Two areas call for closer examination: the specific interests protected by moral rights legislation, and the practical implications of the moral rights concept, itself. The second of these two factors, though it may sound abstract, is simple enough to describe: the doctrine of moral rights is based on the idea that the act of creating a work leads to a special relationship between the author or artist and the work. This relationship has two fundamental characteristics. First, it is personal to the author; it cannot, therefore, be exercised by someone other than the author during his or her lifetime. A publisher, for example, cannot acquire the moral rights of an author whose work it has published. For the same reason, the author’s moral rights are generally inalienable, although some

²⁸ Canada’s legislation of long standing on orphan works, dating from 1985, establishes the category of “unlocatable authors.” For a review of the terminology and some of the controversy it has generated, see Toronto lawyer Bob Tarantino’s informative blog post of 15th May 2014, available at <http://www.entertainmentmedialawsignal.com/the-challenge-of-the-unlocatable-copyright-owner-the-return>. The orphan works scheme is reviewed in detail by the chairman of Canada’s copyright board, Mario Bouchard, with Jeremy de Beer of the University of Ottawa, in “Canada’s ‘Orphan Works’ Regime: Unlocatable Copyright Owners and the Copyright Board” (2009).

exceptions are made, in certain jurisdictions, that allow for waiving the right.²⁹ The second fundamental feature of moral rights arises out of the perception of the relationship between author and work as permanent: Dickens' *Great Expectations* will always be the work of Dickens. Accordingly, moral rights can potentially last forever – and, indeed, they are protected in perpetuity in a number of jurisdictions, including France³⁰ and India.³¹

Perpetual protection of the attribution and integrity of works, particularly those that are culturally important, may make sense.³² But, in practice, how can a right that is personal to an individual last forever? Reconciling these principles is achieved in two ways – by allowing the heirs of the author to assert moral rights, after the author's death, on his or her behalf,³³ or, more creatively, by allowing a third party to exercise them, again, on the author's behalf. This third party could be a person appointed by the author, somewhat akin to the executor of an estate, or, alternately, a public body such as a museum or art gallery. This public interest right is recognized

²⁹ Eg. Canada; even Germany, in some circumstances.

³⁰ But the limits of perpetual protection were tested in the recent case of *Hugo*, where it was found that the rights may last forever, but they will still have to be balanced against the rights of the public to use the work. The court did not explicitly say that the relative antiquity of Victor Hugo's works tilted the balance in favour of a modern author who wrote a sequel to *Les Misérables*, but the application of a balancing concept represented an important shift in French thinking on moral rights.

³¹ Note changes in copyright policy in India; see Sundara Rajan, *Moral Rights*. The law has been reformed again in 2012 to broaden the rights, for reasons of cultural policy: Mr. G.R. Raghavender, Indian Copyright Registrar.

³² The principle was recognized in the Indian case of *Amar Nath Sehgal v. Union of India* (2005) as protection for works that have "attained the status of national treasures" – a term that is reminiscent of works of "recognized stature" under VARA. An interesting controversy arose with the Italian government's reaction to an advertisement for an Illinois company building firearms that featured Michaelangelo's David: see the blog post and comments at <http://ipkitten.blogspot.co.uk/2014/03/exclusive-rights-in-classical-art-works.html>.

³³ India; but, for a long time, Indian legislation included an obscure provision, to the effect that attribution could only be exercised by descendant's on an author's behalf and not their own, perhaps reflecting some discomfort about the tension between the concepts of personal and perpetual protection.

in broad terms in Russian law, as a right of “any interested party” to assert moral rights;³⁴ it is also expressed in the California Art Protection Act, in relation to works of visual art.³⁵

What is accomplished by such protection is the preservation of key features of cultural heritage. Many works that are culturally important begin life as a work of authorship, and often as the work of a single creator or a small number of collaborators. While their creators are alive, they have a spokesperson, and, in some cases, the descendants of the creators continue to act effectively in this role.³⁶ In the later life of a work, however, it quite literally becomes the property of the public, and the obligation to protect it arguably falls on the public, as well. By finding methods of empowering the public to act for the protection of cultural works, the preservation of the heritage belonging to society can be favored. Clearly, the achievement of this goal depends on shaping moral rights effectively, and on achieving a fine balance between the protection of heritage and the ongoing encouragement of creativity.

This takes us directly to the question of how the specific interests of attribution and integrity relate to broader issues of cultural preservation.

Attribution is a fairly straightforward concept, signifying an author’s right to be recognized as the author of his own work.³⁷ The formula for integrity is more complex: the integrity of a work is to be preserved, but, as specified in the Berne formula, only to the extent that the treatment of the work should not damage the reputation of its author, an important

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³⁶ Cases where the families of authors cause harm to the works of their ancestors are widely documented, including Wagner, Faulkner, and Sir Arthur Conan Doyle as possible examples; but there are also families who make tremendous sacrifices for the preservation of those works, as in Tamil poet Subramania Bharati’s case. See my earlier work on this...

³⁷ Detailed discussion in my book. Integrity can also mean protection from false attribution (passing off), explicitly protected in UK CDPA, Chapter IV.

limitation on the integrity principle and an attempt at balancing the right against the interests of those who use the work – arguably, publishers, rather than the public.³⁸ In keeping with the notion that the Berne Convention sets out minimum standards of protection, a number of countries implement a higher level of protection for the right of integrity, by choosing not to impose the burden of proving damage to reputation upon the plaintiff author.³⁹

Common-law countries, on the other hand – apart from the notable exception of common-law countries that are also developing countries, like India – universally adopt the Berne formula.⁴⁰ Indeed, the effective implementation of moral rights by the advanced common-law countries has been slow,⁴¹ but it has increased dramatically in recent years. At this point in time, virtually every country in the world has adopted some provisions on moral rights in its copyright law, and most common-law countries have done so in the post-TRIPs era.⁴²

The interests protected by moral rights hold obvious relevance for orphan works. They respond directly to the problem of preserving knowledge, and, in particular, address the important issue of maintaining the integrity of knowledge *after* it is digitized. The two fundamental moral rights of attribution and integrity reflect two important features of preservation. Attribution preserves the connection between a work and the name, or identity, of

³⁸ Russian law quote.

³⁹ France. See also variation in German law, Art. 14, http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0058.

⁴⁰ In *Confetti Records*, the first case on the moral right of integrity under the UK CDPA of 1988, a creative argument was made that the British provisions were meant to be open-ended; unsurprisingly, the judge rejected the argument, stating that any misapprehensions were due to the “compressed drafting style of the UK legislature.”

⁴¹ Eg. UK situation. Canada, with moral rights since 1931, is an apparent exception, but, apart from one ruling, the provisions have had no success in litigation: *Snow*.

⁴² Moral rights are officially excluded from the operation of the TRIPs system, meaning that the dispute-settlement system does not apply to moral rights. Australia, Ireland; the UK concurrent with TRIPs; VARA motivated by Uruguay Round/TRIPs.

its author. By doing so, it preserves many other things, as well – context, in every sense, including historical, political, social, and cultural context, and, correspondingly, truth. Integrity can help to preserve the quality of the digital information, discouraging the adulteration of text, sound, and images by the deletions, alterations, and additions that can be made, with relative ease, in the digital context. Indeed, if the integrity right is drafted in such a way that it is separated from the requirement of showing damage to reputation, as is the case in the French context, it can play an even stronger role in preserving the integrity of works by shifting the focus away from the author and towards the work, itself.⁴³

In view of these connections, how can moral rights help to address the situation of orphan works? Unlocking the potential of moral rights in this area depends on the ability to frame the rights in such a way that they function in an environment where the author is absent, while retaining their doctrinal integrity. This latter point is an important one, because, without it, moral rights can be co-opted by persons other than the author, acting on behalf of partisan interests – corporations, for example, engaged in publishing or entertainment, who already hold extensive rights through economic copyright law and contract provisions, and to whom, the extension of additional rights must be examined through the lens of public policy. The goal of cultural preservation is, however, to protect the public interest, and in no context is it more important to keep this goal in focus than in relation to orphan works. At the same time, preservation must work in tandem with access, keeping in mind that one of the best forms of preservation is the dissemination of a work.

B. UK and European Approaches

⁴³ Integrity and reputation are perhaps best understood as two distinct rights; the Berne Convention builds a bridge between them. Note Canadian example, which waives the requirement of proof of damage to reputation in the case of artworks only.

Since Continental Europe is the heartland of the moral rights concept, it would be reasonable to expect to see moral rights addressed in European legislation on copyright. The European Union Directives on copyright set the parameters of copyright protection for all European jurisdictions, which must enact the provisions of the directive into their legislation within a specified time-frame. Through the harmonization process, the EU has exercised significant leadership at the international level – for example, spearheading the movement towards a longer term of copyright protection that has now been followed in most jurisdictions.⁴⁴

However, where moral rights are concerned, this is not the case; and the reality is complicated. In its extensive, more than two decades-long experience of developing directives on copyright, the EU has not addressed the issue of harmonizing moral rights. Beyond a smattering of references to moral rights in directives concerned with other issues, mostly to state that moral rights are “beyond the scope” of a given directive,⁴⁵ the question has never been dealt with. No doubt, this situation reflects a tacit compromise with the UK, a latecomer to moral rights protection, and a jurisdiction where the rights have been viewed with considerable hesitation and, indeed, suspicion.⁴⁶

As far as the orphan works directive is concerned, the European legislation makes no mention of moral rights. However, EU member countries are not precluded from addressing

⁴⁴ The extension of copyright term was highly controversial in the United States, and was contested, on Constitutional grounds, before the Supreme Court in the *Eldred v. Ashcroft* case. The case failed, since the extension was not so long as to constitute the perpetual protection forbidden by the constitutional clause (“for limited times”).

⁴⁵ The most extensive statement, to date, occurs in the Information Society directive, also known as the Copyright directive. Recital 19 states: “The moral rights of right holders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.” See “Moral Rights and Copyright Harmonization: Prospects for an 'International Moral Right,'” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809619.

⁴⁶ See William Cornish’s early comments, where he points out that the moral rights adopted in the UK copyright revisions of 1988 amounted to a political compromise that represented considerable pressure from the various interest groups implicated in copyright reform.

moral rights in their frameworks for orphan works.⁴⁷ Indeed, since every European jurisdiction now includes provisions on moral rights in its copyright law, a proper framework for moral rights must address the moral rights implications of proposed schemes for facilitating the use of the work. In this regard, the UK, as a jurisdiction with reservations about the rights, offers an interesting framework for exploring the possibilities of moral rights in the regulation of orphan works.

As noted above, there is something a bit strange about examining moral rights in orphan works. The entire problem with orphan works is the absence of the author. But what are moral rights? Indeed, they are rights of the author, and depend upon an author's ability to act. Without an author to assert moral rights, who can act on behalf of moral rights? How can attribution and integrity be invoked?

The new UK orphan works framework does attempt to address this issue overtly, but it does so for an unusual, and purely legislative, reason. In keeping with the requirements of the Berne Convention, the UK Copyright, Designs and Patents Act of 1988 does protect an author's right of attribution. However, in order to benefit from the provision, the author must "assert" that right at the time of first publication of the work.⁴⁸ The purpose of the provision seems clear – to establish greater legal certainty, for those who use works, about the legal obligation to attribute the author – but the provision is controversial. It seems to go directly against the naturalistic

⁴⁷ See Aniko Grad-Gyenge's article on reconciling national schemes with the requirements of the Directive; she describes the example of Hungary, a country with an advanced framework for dealing with orphan works.

⁴⁸ Arguably, this requirement may violate Berne, which provides, in Article 5 (2) that copyright "shall not be subject to any formality."

approach of the Berne Convention, which clearly says that copyright must be enjoyed without any requirement of formalities.⁴⁹

In relation to orphan works, the author most probably would not have had any opportunity to assert his or her right of attribution. UK legislation on orphan works addresses this issue, by creating a presumption that the absent author has asserted attribution.⁵⁰

However, the type of attribution recognized by the act is quite specific: it requires that the *right holder* be “credited” “whenever the work is used.” The purpose of the provision is, evidently, to support the diligent search requirements on which the UK orphan works scheme is based, by helping to identify the right holder. Indeed, this point is well worth noting, because it points to a general benefit of recognizing moral rights in orphan works – reinforcing the ability to maintain knowledge about the identity of the right holder and, ultimately, to locate him or her. Nevertheless, right holder and author will not always be the same person; and, in contrast to the typical approach to balancing rights against use in the orphan works context, the true purpose of the attribution right is to maintain the connection between work and *author*, rather than owner. Even here, though, it is fair to say that attributing the author can ultimately support efforts to locate the right holder, because, presumably, the author and the right holder will have a defined, or ongoing, relationship. An additional requirement to credit the author would therefore be the proper manifestation of the UK attribution right in relation to the new rules on orphan works. Despite the reference to moral rights, and to attribution, the UK orphan works scheme does not

⁴⁹ Of course, this requirement was the reason for the United States’ shift from a registration based system of copyright to one based on automatic protection.

⁵⁰ ERRAs s. 116C (6) (d); see IPO Fact Sheet on “Orphan Works Licensing Scheme and Extended Collective Licensing,” para. 5, available at <http://www.ipso.gov.uk/orphanworks-licensing.pdf>.

actually recognize the absent *author's* right to attribution; it recognizes the owner's attribution right, which is important from the perspective of copyright policy.

But the strategy of removing the author's requirement to act is pursued in a more effective way in the UK approach to the integrity right. The UK orphan works regime is based on the assignment of the author's right to a neutral body charged with responsibility for administering the orphan works scheme. Accordingly, if potential users seek licenses for uses of works that are likely to violate their integrity, the responsible body is charged with refusing those licenses.

C. Moral Rights and Orphan Works: Challenges and Opportunities

This brief survey of the UK landscape regarding moral rights and orphan works opens a window onto the possibilities that moral rights may have for protecting orphan works, as well as bringing to light some of the challenges of implementation. Both practical effectiveness and doctrinal coherence are implicated in these attempts, and one of the interesting questions that arises is how far the doctrinal basis of moral rights needs to be maintained in a digital environment – and how much adaptation can occur without distorting the doctrine or making it vulnerable to abuse.⁵¹ The latter consideration is especially important because of the power of the rights – as noted above, they are potentially inalienable and protected in perpetuity – and poor adaptation or misapplication of the rights could place considerable power in the hands of the favored parties.

1. Attribution

The usefulness of attribution is apparent in relation to orphan works, and the situation is one of happy serendipity between two key objectives: the preservation of cultural interests by

⁵¹ The flexibility of moral rights doctrine is apparent in the astonishing range of jurisdictions in which the rights have been implemented, and the variety of public interest purposes that they fulfil in, for example, Central and Eastern European, Asian, and African countries. See Sundara Rajan, *Moral Rights*, Chapter 3.

maintaining a record of authorship in works, and balancing the use of works against copyright prerogatives by encouraging the identity of the author to be maintained. However, the very definition of the orphan problem is that, even when the name of the author is known, that information has proven to be insufficient to locate the person named. For this reason, maintaining attribution of authorship may best be understood as only the first step in the proper attribution of orphan works. In fact, as much information as possible about the origin of an orphan work should be maintained, as this will help to preserve the integrity of the author's or owner's copyright, while also providing a broad range of information related to the historical and cultural context of the work. In this sense, the UK approach to attribution of orphan works, which focuses on the need to attribute the right owner makes sense. Depending on the nature of the work, information other than authorship, or beyond authorship alone, may need to be preserved.

Two examples can be considered. First, in the case of a work whose authorship is unknown, it would be particularly appropriate to preserve information about the publisher; in addition to information about the publisher, it may also make sense to preserve details of the provenance of the work, such as the library records indicating where the work was originally found for digitization. Clearly, these types of attribution do not represent an author's moral right of attribution in the ordinary sense. However, they serve two objectives – one, the public interest goal of preserving information about the nature of the work, and, two, the copyright goal of supporting a diligent search for the right holder.

In the case of a work whose authorship is known, but where the right holder cannot be located, the preservation of the author's attribution can be matched by the inclusion of additional

information on provenance or the origin of a work. Arguably, expanding the moral right of attribution to include a requirement to preserve such information, wherever it is available, would not violate the principle of the attribution right, since attribution of authorship will never be superseded by the alternate kinds of attribution suggested. In the case of works of unknown authorship, the right would effectively have to be exercised in the absence of the author, and this new form of the attribution right would be considerably broader than what an author's moral right of attribution traditionally signifies.

This expansive right of attribution could be framed as a special attribution right for orphan works. It would not need to be extended, for practical or theoretical reasons, to works whose authors or owners can be located for the purpose of recognizing copyright consent to the use of the work. However, it is worth considering the possibility of a general expansion of the attribution right, in the digital environment, because of the ease with which works can be manipulated and, accordingly, the relatively high risk of losing information about authorship. Again, this has both cultural and copyright implications—signifying the loss of cultural heritage, in the form of information about the authorship and origin of works, but also, leading to the problem that works may become “orphaned” as a result of the process of digitization. But technology cuts both ways: digitization and mass dissemination may also make it more difficult to anonymize works, if at least one properly attributed version is in existence, somewhere in cyberspace. This is how Joyce Hatto's recordings of classical piano music were discovered to be

frauds: a listener who placed a CD into his computer was startled when iTunes identified one of the tracks as a recording made by another pianist.⁵²

To reframe the attribution principle in more technocratic terms, the proper form for a digital attribution right may be to address two aspects of rights information in the digital context – content and form, curiously mirroring the idea-expression dichotomy in copyright law. In the digital environment, content often *is* form. A digital attribution right for orphan works should require the provision of the most comprehensive information about source that is available; and indeed, it would make sense to recognize such a right for all works that are digitized. This information could be partly or entirely contained in metadata, and, recognizing this fact, the removal of metadata, whether willfully or negligently, should be prohibited as part of a digital

⁵² In a fascinating story for the Economist's Intelligent Life magazine online, Rod Williams describes the discovery: "But in February this year, when Distler loaded Hatto's CD of Liszt's "Transcendental Studies" into his computer, he noticed something peculiar. The iTunes database recognised the disc as a recording by the Hungarian pianist, Laszlo Simon. Gramophone asked Andrew Rose, an audio expert, to investigate and by comparing the waveforms of the two recordings he could see instantly that ten out of 12 tracks were identical to Simon's performances. Rose then discovered that Hatto's version of the fifth Liszt study, "Feux Follets", was indistinguishable from a recording by a Japanese pianist called Minoru Nojima. What is more, the performance had been speeded up, but digitally manipulated to remain at the same pitch. "That rang alarm bells," Rose told me. "When you speed up recordings, you change the pitch—unless you have set out deliberately to mislead."” Rod Williams, "Joyce Hatto: The Great Piano Swindle," Sept. 2007; with a postscript; available at <http://www.moreintelligentlife.com/story/joyce-hatto-the-great-piano-swindle>.

attribution right.⁵³ And, once again, copyright objectives are supported, since the search for right holders is facilitated, and, to some extent, piracy is inhibited. But, though powerful and perhaps desirable, it must be emphasized that these are side effects of the attribution principle. From a public interest point of view, the preservation of authorship is a question of preserving heritage. This perspective necessarily transcends the more immediate and instrumental purposes of copyright law.

2. Integrity

Shaping the integrity right, as always, is a more complex process, since differences of opinion will frequently arise in relation to what constitutes distortion of a work. For this reason, moral rights legislation and case law in a number of countries exempts specific types of activities from being considered violations of the author's integrity right. Notably, conservation efforts to protect

⁵³ This issue is one of intense interest to photographers, and an important case on this issue arose in the United States, over Getty's use of images of the Haitian earthquake taken by photographer, Daniel Morel. The photographs lost attribution when posted on Twitter by Mr. Morel, and reused by another Twitter user who claimed them as his own; the photographs were then appropriated by Agence France-Presse and taken and distributed in the United States by Getty. The suit, pursued as one of copyright infringement, clearly involved several violations of the moment of attribution, as well, highlighting the way in which economic and moral rights often function as 2 sides of a single coin, which could simply be called the right of authorship (aka copyright!). The case is also a fascinating study in corporate strategy, and psychology, as in Agence France-Presse initially sued Mr. Morrel for, in the words of New York Times Lens reporter, James Estrin, "interfering with its business practices." Mr. Morel commented, "someone had to fight for photographers"; he ultimately won \$1.2 million in damages. See James Estrin, "Haitian Photographer Wins Major U.S. Copyright Victory," The New York Times Lens blog, 23 November 2013, available at http://lens.blogs.nytimes.com/2013/11/23/haitian-photographer-wins-major-u-s-copyright-victory/?_php=true&_type=blogs&_r=0. Agence France-Presse and Getty are suing to have the damages award reduced to \$200,000, arguing that their actions were not "willful," and should not, therefore, have attracted maximum statutory damages under U.S. copyright law for this reason; see "Getty, AFP Appeal \$1.2 Million Jury Verdict in Daniel Morel Case," Photo District News, 13th Jan. 2014, <http://pdnpulse.pdnonline.com/2014/01/getty-afp-appeal-1-2-million-jury-verdict-in-daniel-morel-case.html>.

The British Journal of Photography discusses the status of metadata at Facebook, Twitter, and Google + (the only social networking site studied that consistently maintains metadata in photographs), as of 2013: <http://www.bjp-online.com/2013/03/study-exposes-social-media-sites-that-delete-photographs-metadata/>; for a quick summary of pre-2010 cases on this issue, see <http://www.photoattorney.com/three-more-dmca-cases-of-note-for-photographers/>.

artworks are generally exempt from liability;⁵⁴ and modifications of the work for reasons of “technological necessity” are also beyond the reach of the moral right of integrity.⁵⁵

Both of these exceptions are directly relevant to the orphan works problem. Once again, the purpose of introducing a moral right of integrity and orphan works is to preserve the cultural heritage embodied in those works. Preservation of the text or images in their original form is important, so that literary works, for example, do not become isolated from their context and, thereby, come to misrepresent the thoughts, ideals, language, or style of the original work (or, in other words, those of the original author). At the same time, such precautions should not prevent the creative use of existing cultural heritage. On the contrary, without the possibility of reuse, a museum of culture is created, but the prospect of adding new works to that museum becomes remote. As noted earlier, the issue is, first of all, one of maintaining access to the original work, and this can be facilitated by moral rights of both attribution and integrity. The second aspect of integrity in the digital environment, that of using existing works in a way that respects them, is a much subtler issue, though it also requires some recognition in order to support the status of cultural heritage.

The UK approach manages partly to circumvent the problem of judging whether uses of works violate their integrity, by placing such determinations on a case-by-case basis. This approach recognizes the difficulty of formulating rules to cover circumstances that may be highly individual to each work of art. At the same time, the UK scheme also charges an independent body with determining whether or not to use is likely to violate the integrity of the work. While it is fairly clear how the author of a work might be qualified to make such a judgment – although it

⁵⁴ Australian, Canadian, & Indian copyright laws.

⁵⁵ German mobile ringtones case.

is quite conceivable that an author might think the treatment of his work is negative, whereas the public might see it in a positive light – expecting someone other than the author to make this judgment is a difficult proposition. It raises the issue to a new level: the judgment should be made on the basis of what is in the public interest. But, again, who is qualified to judge? The problem is difficult enough to resolve where the authors' heirs might be acting on his or her behalf, or where a moral rights executor has been appointed by the author; but what is to be done when the body making the judgments has no personal connection with the author at all?

On the other hand, if the body charged with protecting the integrity of the work is clearly constitute the public interest, the situation may actually present some advantages. Similar approaches have been taken in relation to works that have fallen into the public domain, notably, artworks. California's art protection legislation allows museums, art galleries, and other public organizations to act on behalf of works of art, and assert their integrity⁵⁶ – an approach that has not been mirrored by the Visual Artists Rights Act of 1990, and should be considered in possible VARA reform.⁵⁷

The integrity right that protects orphan works would have to be framed in a fairly radical terms. The balanced approach in the Berne Convention is insufficient, because it does not deal with the protection of the integrity of a work in the absence of its author. Rather, mistreatment of the work must show damage to the author's reputation, and attempting to show this where the author is either absent or unidentified, and the details of his or her reputation either insignificant or unknown, makes little sense. Indeed, this situation highlights the fact that the integrity right in

⁵⁶ CAPA, *supra*.

⁵⁷ Sundara Rajan, blog on VARA, *available at* <http://the1709blog.blogspot.com/2014/06/saving-picassos-le-tricorne-and-other.html>.

the Berne Convention is, perhaps, more properly considered a blended right, comprising elements of both protection of integrity and protection for the author's reputation. A true integrity right would aim at protecting the integrity of the work, and the reason to do so is, above all, a public interest rationale.

If we consider integrity from a public interest perspective, it becomes evident that two adjustments to the integrity right would be required. First, the requirement of damage to the author's reputation should be removed, since this is neither in tune with the goal of protecting works, *per se*, nor realistic in relation to works of unknown, or untraceable ("unlocatable"), authorship. Secondly, a true integrity right geared towards the protection of the public interest in cultural heritage should last forever, since the interest is one that is, as far as anything human can be, "eternal." This perspective probably explains why the judge in the *Shostakovich* case was willing to consider a moral right of integrity in works in the public domain, when it was not (yet) recognized for works within copyright term.⁵⁸ But it is important to emphasize that such a right is different from a moral right of the author in the ordinary sense of the term; rather, this is a moral right of the public in its own heritage.

⁵⁸ Koch J. noted: "Conceivably, under the doctrine of moral right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well-established rights of others to use such works (*Clemens v. Belford, Clark & Co., supra*). So, too,

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there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined. Quite obviously therefore, in the absence of any clear showing of the infliction of a willful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked on either theory. The motion is accordingly denied in all respects." Available at http://www.leagle.com/decision/1948263196Misc67_1247.xml/SHOSTAKOVICH%20v.%20TWENTIETH%20CENTURY-FOX%20FILM%20CORP.

And, finally, an interesting example to consider: what happens to Michaelangelo’s David when his image appears bearing a rifle? ⁵⁹ Many spokespersons for the Italian government condemned the act, and threatened to take action, since Italy has perpetual protection for moral rights.⁶⁰ While some observers see this as stifling creativity, the main point in this case appears to be the *commercial* use of the image to promote a (controversial) product; if this were a provocative artwork, would it also amount to a potential violation of the integrity right? Where should the line be drawn?

III. Conclusion: Moral Rights are different from economic rights

This overview of moral rights in the context of orphan works suggest that much can be done to make use of this doctrine to improve the landscape. In the absence of harmonized EU rules on integrating moral rights into regimes dealing with orphan works – partly a reflection of the unharmonized status of moral rights across EU copyright as a whole – member countries have developed their own, individual but limited, approaches to moral rights in orphan works. The UK example, considered in this paper, shows some of these limitations; but it also begins to suggest a few possibilities for how the doctrine can be shaped to address orphan works issues.

Given the sheer volume of human knowledge that may be captured within the “orphan” trap, it seems clear that the policies surrounding orphan works must make the preservation of cultural heritage a focus. Policies that balance concerns about the use of orphan works against the prerogatives of copyright owners can help to achieve this goal; but, on their own, they will

⁵⁹ See <http://www.telegraph.co.uk/news/worldnews/europe/italy/10686292/Italy-tells-US-gun-firm-to-remove-Michelangelos-David-from-advert.html>; for a critique, with some amusing comments, see <http://ipkitten.blogspot.com/2014/03/exclusive-rights-in-classical-art-works.html>.

⁶⁰ Article 23 protects moral rights “without limitation in time”; the government may eventually act in the public interest, in consultation with appropriate professional associations. Available at http://portal.unesco.org/culture/en/files/30289/11419173013it_copyright_2003_en.pdf/it_copyright_2003_en.pdf.

almost certainly prove to be inadequate to meet the challenge. The moral rights aspect of copyright law can help policymakers to address the situation of orphan works with greater comprehensiveness. By exploiting the malleability of the doctrine, important objectives for cultural heritage can be achieved. Moral rights can be shaped according to the various possibilities of interpretation that have appeared in different jurisdictions; their form can be explored and developed against the realities of the technological environment.

The orphan works problem raises, yet again, the question of whether copyright law in its current form is providing the social benefits that we need and expect from it. A dramatic, yet simple, solution to the orphan works problem would be to reduce the term of copyright protection, as Bill Patry suggests,⁶¹ while bowing to the human rights rationale underlying copyright law by retaining the principle of automatic protection in preference to a registration-based system like the US copyright law of old. And yet, when viewed in historical perspective, the logic behind the extension of copyright term has also been to protect justice for authors, and to promote the public interest in its own cultural heritage – allowing the families of authors to survive after the author’s death, and putting measures in place that could help to protect valuable works after their authors are deceased. Copyright term was extended in nineteenth-century Russia to support Pushkin’s widow after the poet’s death;⁶² it was extended in 1992, in India, to support the further protection of Rabindranath Tagore’s works;⁶³ it was also drastically reduced in the early years of post-Independence India, specifically in relation to the poet Subramania

⁶¹ *How to Fix Copyright*.

⁶² *Copyright & Creative Freedom*.

⁶³ *Moral Rights*.

Bharati's copyright, to support dissemination of his works;⁶⁴ and a further extension for the protection of Gandhi's works was debated and then rejected in India, on grounds of public policy, in 2008.⁶⁵

Whatever the future of copyright may hold, moral rights should have a place in our dealings with orphan works. The benefits that are to be gained will be felt whether the rights continue to be exercised within the framework of copyright law, or they are incorporated into a new framework for the protection of cultural heritage that reaches beyond the limits of copyright as we currently know it.

⁶⁴ SJLS article.

⁶⁵ Sundara Rajan, WIPO J 2012; Balganeshe?