Morality of Copyright – A Critique in view of the ‘3 Idiots’ Controversy

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This article seeks to examine debatable issues that have arisen following the controversy involving author’s rights after the release of the film ‘3 Idiots’ based on Chetan Bhagat’s novel ‘5 Point Someone’. The fact that Bhagat failed to get due recognition in the credits of movie along with alleged mutilation of the original work raises the question of recognition of moral rights in India. Following the 1994 amendment, copyright law has drifted away from the objective of viewing a work as an integral expression of the author’s personality – probably reason why contracts continue to dictate the rights and obligations of parties in such transactions. This article throws light on the need to restore focus on these legitimate concerns by undertaking a critical comparison of the position under foreign laws. The difference in the perspectives of common law and civil law countries in treating the issue of morality of copyright has been marked. A number of illustrative case laws and international conventions have been discussed under various jurisdictions to cull out the basic tenets of moral nature of copyright. The article also puts forth certain suggestions to address the legal concerns.

Keywords: Copyright, morality, author, moral rights

The primary purpose of a copyright grant is to provide economic incentive to authors to create and disseminate their works for the benefit of the public. Copyright grants the authors exclusive rights over their works, which stimulates artistic creativity thereby increasing the number of artistic works available to the public. Copyright also limits an author's control over a work, however, because the author's creativity must ultimately serve the public interest in having broad availability of literature, music, and other forms of art.

Common law countries, such as the United States, adhere to a legal tradition that champions economic rights in art, which copyright aims to protect. As a result, an artist has essentially no opportunity to claim an intellectual or moral right in their work. In contrast, civil law nations, such as France and Germany, accord moral rights paramount importance and treat them as inalienable rights of authors in their work. In theory, moral rights elevate the artistic above the proprietary, thereby allowing authors to protect their work against the alteration, misattribution and mutilation of the creative aspects.

However, it must be borne in mind that moral rights are perpetual in character in most jurisdictions including France and Italy, whereas, they expire 70 years after the death of author in Germany. Authors may transmit their moral rights to their heirs and third parties by will or other testamentary devices. The personal nature of moral rights, however, prevents an author’s heirs from inheriting the actual right rather; an heir only inherits the right to exercise a certain moral right. Moral rights therefore cannot be transferred inter vivos but can be transferred mortis causa. Another interesting aspect is the waiver of moral rights, which is allowed in most jurisdictions across the world, though the right may be qualified at times. For instance, in India, this waiver must be specific – the same requirement, on the other hand, not being present in United Kingdom. Commentators suggest that contracts with clauses requiring authors to transfer or assign their moral rights are unenforceable, and as a result, authors have turned to tort, contract, and trademark law to assert and protect their moral rights.

The Berne Convention requires member nations to recognize the moral rights of attribution and integrity...
as defined in the treaty’s Article 6bis. It requires member nations to recognize the right of an author to claim authorship, and the right of the author to protect the integrity of a work. In USA for instance, directors and screenwriters receive little solace from copyright law’s numerous protections as copyright primarily benefits the copyright owner. Lacking a means to preserve and protect the artistic integrity of a film, filmmakers have sought and continue to seek moral rights protection for motion pictures. Filmmakers have had to rely on their power within the industry, which depends largely on the commercial success of their films, to obtain some measure of protection for the artistic integrity of their work. Legislative action would provide the most effective means for filmmakers to protect the artistic integrity of their films.

In the Indian context, the issue has been brought to the forefront following the controversy regarding the film ‘3 Idiots’. Chetan Bhagat, the author of the original novel, on which the film was based, claimed prominent acknowledgement of his authorship during the display of credits. The director of the film, who was also one of the screenplay writers, however, dismissed his assertion saying that Bhagat’s economic rights as the copyright owner had been taken care of, pursuant to the contract entered between him and the producer. So any additional claim based on morality of copyright was rendered a nullity. The parties were on the verge of initiating legal action when everything was hushed up through an evident out of court settlement. The issue however raised some stirring questions regarding moral copyright protection afforded to authors under common law IP regimes. The Copyright Act, 1957 was found to be inadequate in addressing this concern resulting in intense deliberations within the academic community.

**Perspectives under International Law**

**General Character of Moral Rights**

The two most widely recognized moral rights are the right of attribution, ensuring that the author is acknowledged as the creator of his own work, and the right of integrity, which allows an author to protest mistreatment or abuse of his work. A third right that is not codified in the Berne Convention, but which is fundamental to the theory of moral rights, is the author’s right to determine the circumstances in which his work is first presented to the public, known as the right of ‘divulgation’.

**WIPO Treaties**

Although moral rights were introduced into the Berne Convention in 1928, they have not subsequently been dealt with directly in any international processes for harmonizing or standardizing copyright law. An agreement between the WIPO and the WTO, concluded in 1995, emphasized the importance of a ‘mutually supportive relationship’, based on ‘cooperation’. It suggested that the future role of WIPO in the international intellectual property arena will mainly involve research, provision of information on intellectual property law, and technical assistance for law reform in the developing world.

In 1996, WIPO finalized two important treaties, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. Although, the WIPO Copyright Treaty does not deal explicitly with moral rights, the preamble points out that it is, in part, a response to ‘the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works’. Among the measures that address this particular issue is Article 8, which protects a ‘right of communication to the public’. It has traditionally served to protect works that are disseminated to the public through non-material representations, such as dramatic or musical performances. The character of the right is reflected in its French name, the right of ‘représentation’. At the same time, it is disappointing that the right of divulgation should not have found expression alongside the right of communication.

**Civil Law Jurisdictions**

The moral-rights doctrine, or *droit moral* as it is known in France, developed within the continental civil-law tradition in France and elsewhere in Europe during the early nineteenth century. The first French codification of moral-rights doctrine reflected the triumph of the dualist theory which influenced by the writings of Hegel, argued that authors had two distinct interests in their works, one personal and the other economic. Each of these interests was protected by a legally distinct set of rights. That law codified judge-made moral-rights doctrine to provide authors with an ‘exclusive incorporeal property right in the work’ that included attributes ‘of an intellectual and moral nature as well as attributes of an economic nature’.

Unlike the Berne Convention, civil law jurisdictions like France provide protection to several categories of moral rights including the right of...
 attribution, the right of integrity, the right of divulgation, and the rights of withdrawal and modification. The rights of withdrawal (droit de retrait) and modification (droit de repentir) give the author the right to correct or retract an artwork even after publication. In essence, the author has the right to purchase any copy of his work made by others under licence from him. By exercising the withdrawal and modification rights, the author can monitor the presentation of his works to the public.

Traditionally, moral rights are concerned with and protect the author’s personality. While the rights of integrity, attribution, and withdrawal protect personality after publication, the right of divulgation protects the personality before publication of the artist creating the artwork. The French believe that when an author creates and publishes a work, he submits himself to the criticism of the world. As a result of this philosophy, French law assures that moral rights ‘shall be attached to the author’s person’. Indeed, moral rights are so personal that they remain vested in the artist’s person regardless of whether the art object has left his possession.

French law specifically provides that the moral rights of integrity and attribution are inalienable. Thus, when a tangible work of art is transferred, as when a sculptor sells his sculpture, the artist does not alienate his moral rights in the work; nor does transfer of the copyright in a work effect a transfer of the author’s moral rights in the work.

Common Law Jurisdictions

The common law approach to morality of copyright is epitomized in the manner the law has evolved in the USA through numerous judicial precedents. The Berne Convention Implementation Act, 1988 contained a declaration that ‘the amendments made by this Act, together with the laws that exist on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention’ with respect to moral rights.

The legislation confers rights of paternity and integrity, right against false attribution, etc., upon authors of works of visual art. A qualifying work consists of a ‘painting, drawing, print, or sculpture existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author’ or a photograph if it is ‘a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author’ or issued in a similarly limited edition (17 USC Section 101). Most works of fine art which are used in commerce are excluded, as also is the very broad category of ‘works made for hire’.

Also, no rights are conferred in connection with reproductions, depictions, portrayals or other use of a protected work in connection with any excluded items. In short, the Act was designed to grant additional rights to artists who create works of fine art in single copies or limited editions, but not to change the present legal treatment in the US, of films, news photographs and similar types of works which are generally produced and commercially exploited in multiple copies and physically reconfigured for different markets.

Indian Approach

Copyright in India is governed by the Indian Copyright Act of 1957. However, leading up to the international implementation of the TRIPS Agreement, a new series of major amendments to the Copyright Act was undertaken in an attempt to tune the legislation in line with the Berne Convention. Among the most important of these changes were the introduction of performers’ rights and the creation of a droit de suite, which allows authors to share the proceeds from re-sale of original objects and manuscripts. The 1994 amendment reduced the scope of protection previously enjoyed by way of ‘moral rights’. According to Section 57 (1) (a) of the Copyright Act, an author shall have a right of attribution which includes both the right to assert authorship and the right to object to the false attribution of others’ works to him, or of his works to others. The author has the right to restrain, or to claim damages in respect of any distortion, mutilation, modification or other act affecting the work, and which would be prejudicial to his honour or reputation [Section 57 (1) (b)]. The moral rights continue to rest with the author even if he has assigned the copyright either in part or in its entirety. However, moral rights may be waived in certain circumstances by the author.

The amended Section 57 limits moral rights claims based on the distortion, mutilation, or modification of works to cases where the author’s honour or reputation are deemed to be prejudiced in line with Berne Convention. The change is probably a reflection of fears about the commercial consequences of a broad integrity right, or even a concern that authors might abuse the moral right of integrity for
their economic advantage. For example, an author who claims that a film adaptation of his novel distorts his work might be entitled to a damages award which greatly exceeds the copyright fee paid to him by the producer.\textsuperscript{21}

**Morality of Copyright – Understanding Through Case Studies**

Although the author of a work is defined as the person who created it, protection is not always provided to the creator.\textsuperscript{22} There are rights that exist independently of copyright, as the copyright is concerned primarily with economic interest.\textsuperscript{23} The moral right allows an author to have a say regarding his/her work, even after the copyright ownership has passed to a third party.\textsuperscript{24} Keeping this in mind, a brief perusal of some of the important case laws under different civil and common law jurisdictions may be undertaken.

In *Du Buffet v Fersing*,\textsuperscript{25} a French artist created a work involving six painted panels affixed to a refrigerator which was auctioned. Subsequently just one of the panels reappeared in a catalogue. Du Buffet sued the owner of the refrigerator to prevent the forthcoming sale of a fragment of the original work. The Court granted the injunction, and on appeal further stated that private alterations were prohibited.\textsuperscript{26} This case illustrates the lengths to which French courts are prepared to go in order to protect the artist’s *droit moral*. The *Court De Cassation* in another case held that the organizer of an exhibition of artistic book covers violated the author’s right of attribution, when the organizer casually placed his business cards next to the book covers, creating fake impression that he was the originator of the book covers displayed.\textsuperscript{26} The right to claim authorship, in fact, also includes the right to insist that the work be released under the name of the author. Therefore, it will be a violation of the right of attribution, for instance, to omit the photographer’s name on the dust jacket of a book that prominently displayed one of his photographs.\textsuperscript{27}

Similarly, a German court found that it was a violation of the author’s right of attribution when the German Department of Defense used a poster it had commissioned in magazine advertisements without including the artist’s signature, which had been part of the original poster.\textsuperscript{28} In addition to the right to claim authorship, authors also have a right not to claim authorship in the sense that they may elect to remain anonymous or to use pseudonyms instead of using their real names.\textsuperscript{29}

In an old Swiss case, the plaintiff was an architect who had entered a competition for the design of a building by submitting two distinct proposals. One of the key features of one of his proposals, however, was ultimately incorporated into the winner’s proposal at the owner’s request. The plaintiff initially filed a complaint with the prosecutor alleging criminal copyright infringement, but the courts adjudicating the matter ultimately decided in favour of the defendant on the basis that the copyright in the plans had been transferred to the defendant. The plaintiff then filed a civil suit for copyright infringement and the matter went up to the Federal Supreme Court. The Apex Court also ruled that the copyright had been transferred and dismissed the claim, but then it clarified that authors have (i) a right to insist that their names be affixed to their works and that nobody else’s name appears on their works, and (ii) a right to object to any deformation, mutilation, or other modification of their works that is prejudicial to their honour or reputation—all based on the general rules governing the right of personality.\textsuperscript{30} The Court then held that while the architect did not have any cause of action based on the combination of his work with that of a third party because the final product actually improved his work, he was, nevertheless, entitled to monetary compensation for not being credited for his contribution.\textsuperscript{31} The principles owe their foundation to Articles 27 and 28 of the Swiss Code of 1912. While Article 28 deals with the right of personality in a tort scenario, Article 27 addresses the contract scenario by protecting individuals against self-imposed contractual restraints on the basis that no one may alienate or limit his or her personal liberty to a degree that would be contrary to the law or morality.\textsuperscript{32}

The common law approach, however, stands in sharp contrast to the civil law perspective. If an artist parts with his copyright, he or she will lose all control over the work in the absence of a contractual provision to the contrary. In *Autry v Republic Productions*,\textsuperscript{32} and *Goodis v United Artists Television*,\textsuperscript{33} attempts were made to prevent the alteration and subsequent exhibition of feature films on broadcast television. Although these two examples are slightly different in their respective facts, the Courts maintained a stronghold on contract interpretation in reaching a verdict. The *Autry* Court denied a request by the famous actor to prohibit the producer from editing films which contained his performance. This decision was predictable in the
light of a contract which entitled the producer to make alterations with impunity.

The Goodis case, on the other hand, demonstrated the willingness of US courts to interpret a contract to the benefit of an author. In this instance, Warner Brothers unsuccessfully argued that the motion picture and television exhibition rights in the plaintiff's novel entitled it to commission a full-scale TV series. In spite of the lack of moral rights, this case demonstrated that a well-drafted contract can prevent an author from being taken advantage of.

In 1966, Columbia Pictures Corporation was called upon to defend its right to edit a film. Columbia's alterations were made for the purpose of conforming to the film to the needs of television transmission. Preminger argued that minor cuts would effectively mutilate the film and harm the film-maker's reputation, thereby reducing the likelihood of future film commissions. The issue of mutilation was not dismissed, as the Court expressed willingness to entertain an action for harm done to the film, should such editing be taken outside the ambit of what it and the industry considered as minor changes.

In Gilliam v American Broadcasting, plaintiffs, the famous British Comedy team 'Monty Python' sued ABC seeking an injunction enjoining ABC from airing three separate programs of the team's comedy show. Monty Python claimed that by excessively editing their work, ABC had mutilated it. Granting the injunction, the Second Circuit held, inter alia, that the edits constituted an actionable mutilation of Monty Python's work. The Court based its decision on Section 43 of the Lanham Act, the federal trademark and unfair competition statute. It reasoned that the edits ABC performed, altered the nature and content of the programs such that they caused a false designation of the show's origin, an express violation of the Lanham Act. The holding in Gilliam, thus, represented an implicit recognition of the moral rights of attribution and integrity.

In the Indian context, however, where the mass-market film industry is an economic and political force to be reckoned with, it seems far more likely that authors may become victims of misrepresentation, particularly through film adaptations of their work. In the seminal moral rights case of Mannu Bhandari v Kala Vikas Pictures, the Delhi court openly voiced its determination to protect the interests of creative authors against the film industry. Mannu Bhandari, an eminent writer in Hindi sold her rights to Kala Vikas Pictures to make a film adaptation of 'Aap Ka Bunty', one of her novels. The contract that was signed between the parties allowed the director and screenwriter to make changes considered necessary for successful production. Ms Bhandari, however, had to be given credit as the author of the original literary work. Subsequently, Ms Bhandari raised objections against the impugned adaptation-the title of the film, the way the characters were portrayed, the script and climax. A complaint against Kala Vikas was filed based on allegations that the alterations amounted to violation of Section 57 of the Copyright Act. Though the matter was ultimately settled on request from the parties, it enunciated a detailed set of guidelines pertaining to this area of controversy. Two principles may be culled out from the court's observations of the matter:

1 Moral rights are generally inalienable under the Copyright Act. Every contract of assignment of copyright therefore has to be subject to Section 57 of the Act.
2 'Modifications' under Section 57 (a) (a) must be read ejusdem generis with the terms 'distortion' and 'mutilation' appearing in the same provision.

Moral rights were therefore viewed as a vital pre-requisite to ensure protection of integrity of author's work and his reputation.

Thus, while some jurisdictions allow moral rights to be sold along with copyright or waived when copyright is transferred from the author to a new owner, others restrict the transfer of moral rights. Limitations on the transferability of moral rights reflect an interest in maintaining the author's rights of personality, and practical concerns about the implications of waivers in a commercial transaction where the author has limited bargaining power-standard form artists' contracts being the classic example. The Copyright Act also supports the idea of the inalienability of moral rights to the extent that they are not transference under Section 57 although they may be waived by a specific agreement.

In Amar Nath Sehgal v Union of India, the Delhi High Court upheld the duty of the Indian government to maintain the integrity of artworks which it owns. The case involved an Indian sculptor, Amar Nath Sehgal, who created a mural cast in bronze which was considered to be a national treasure. In 1979, the government took down the mural and placed it in a storehouse. Due to carelessness in moving and neglect
in storage, the mural was seriously damaged. Sehgal filed for an injunction to prevent the government from causing further harm to the mural. The court granted the injunction, reiterating the stance taken in the *Mannu Bhandari* case. As a result, the possibility of waiving moral rights appeared to have been practically eliminated from Indian law as a matter of public policy.

In *Phoolan Devi v Shekar Kapoor*, the plaintiff claimed that the basis of the film, being a novel dictated by the plaintiff herself had been grossly mutilated by the film producer. A restraint order was sought against the defendant, from exhibiting, selling, promoting, advertising, producing in any format or medium the film ‘Bandit Queen’. Granting an injunction, the Delhi High Court held that the defendant had no right to exhibit the film as produced which violated the privacy of plaintiff’s body and person. No amount of money could compensate the indignities, torture, and feeling of guilt and shame ascribed to the plaintiff in the film. Therefore, the defendants were refrained from exhibiting the film till the conclusion of the proceedings.

In the Copyright Act prior to 1994, moral rights used to be effectively inalienable, similar to the perspective adopted under the French Law. The import of these decisions however has whittled down following the 1994 amendment in an attempt to bring the legislative scheme in accordance with Berne Convention. Section 57 (1) was modified by qualifying the distortion and mutilation of the work of authorship with the requirement of a prejudicial effect on the author’s honour and reputation.

### ‘3 Idiots’ Credit Controversy

#### Background

In 2004, Chetan Bhagat wrote the book ‘Five point someone’, which sold in millions in India, and remains to-date possibly one of the highest selling English books in India. He gave the book to director, Rajkumar Hirani to read, who in his own words ‘wanted to make a film on it’ after rewriting it in ‘a screenplay format’. The director subsequently in 2009 came out with the movie ‘3 Idiots’ whose screenplay he had written along with another writer. This was not the first time Chetan Bhagat’s work had been made into a movie adaptation. Another movie ‘Hello’ was based on one of his books, namely, ‘One night @ the call center’ in which he had been given an ‘opening credit in a big font’. ‘3 Idiots’ was released with Chetan Bhagat’s name in the closing credits rather than the opening credits, and that too allegedly in smaller fonts than contracted, despite the movie lifting major portions from his book including substantial dialogues rather than a mere inspiration as claimed by the director, he asserted his copyrights and their violation.

#### Aspects of the Controversy

**Inspiration versus Rip-off**

The author alleged that he had been told that the movie comprised only 2-5 per cent of his book, while, according to the general opinion, the movie comprised nearly 70 per cent of the book’s subject matter. Further, the author of the book had not been shown the final script of the movie despite him having requested several times. In addition, the makers had called him to their office and pressurized him to withdraw his ‘based on a novel by’ credit, as contracted, to be replaced by something like ‘initiated by’. There are arguments to support both sides. Those who read the book first tend to believe that the film is a copy; those who saw the movie first think it’s only inspired by the book and the credit at the end is good enough.

**Placement of Credit**

The author expected an opening credit in the movie rather than a closing one, claiming that it was not merely about the credits being there, but rather the placement and the prominence. The director’s defence was that he had officially bought the rights for the film and had fully complied with the terms of the contract. Further, the author had signed a non-disclosure agreement and was merely trying to raise a controversy to get the limelight.

**Implied Independent Moral Rights of the Author versus Express Contractual Stipulation**

The unresolved issue that arose was whether in accordance with the implied moral rights of the author, his name should have appeared in the opening credits rather than the closing ones as laid down in the contract. The principle of independence of an author’s moral rights from contractual terms is recognized worldwide as well as under Indian copyright law.

Thus, there are 3 core issues that emerge from the perspective of morality of copyright:

(i) Was the author entitled to be made aware (in precise terms) of the extent to which the film could be attributed to the contents of his novel?
(ii) Did the moral element of copyright confer a greater right of recognition of author through the opening credits of the movie?

(iii) Can the moral nature of copyright be superseded by a contractual relationship?

The Truce

Finally, the issue was resolved as the author called truce through his blog post. Though the matter never appeared before a judicial forum, it did end up raising some mind boggling questions for the academic community as to the scope and extent of moral nature of copyright under the legal regime, along with the protection afforded to authors with limited bargaining power in contractual relationships. On a careful appraisal, it becomes evident that the wide and sweeping import of moral rights that was once recognized under the Indian legal regime through a series of important judgments now faces the prospect of conceding ground to economic parameters of contracts. The 1994 amendment in effect has strengthened the exception of specific waiver of moral rights by a contract, something which the courts had earlier considered paramount and inalienable.

Faced with powerful production houses in the film industry and publication giants, it is important to analyse the contours of morality of copyright from an author’s perspective by relating it to the existing position of law and well settled principles. A solution may be sought by drawing a parallel between the factual matrix and the tenets of law.

Conclusion

The motion picture enjoys a dubious existence in the digital age. Directors and screenwriters, for instance, under American law receive little solace from copyright law’s numerous protections as copyright primarily benefits the copyright owner. Although filmmakers have lobbied for increased moral rights protection their efforts have proved futile over a period of time. As the digital era takes over, concerns of filmmakers over copyright law’s inadequacies have become more pronounced. Because of a significant disparity in bargaining power, directors and screenwriters are almost always employed or contracted for work with the motion picture studio standing alone as owner of copyright. Studios, as owners of the copyright in motion pictures, have a major say in deciding whether to modify the content of a film to suit its economic and political needs. In the absence of a contractual agreement to the contrary, filmmakers remain helpless spectators and cannot prevent a studio from making significant changes to a motion picture. Directors and screenwriters asserts, however, that filmmakers would choose their moral rights battles wisely because bringing a frivolous claim could significantly reduce a filmmaker’s prospects for future employment. To protect the artistic integrity of their films, filmmakers must seek judicial relief.

The above line of reasoning therefore raises some serious questions, in the light of Chetan Bhagat’s experience in the 3 Idiot’s controversy. How an author’s right to prominent on-screen recognition may be ensured, subject to a prior agreement between the production house and himself, still remains a puzzle. Perhaps, time is ripe for a reconsideration of Section 57 to throw some light on moral rights of recognition of every deserving author in case of a movie based on his work. The plight of screenwriters under the American IPR regime should serve as a stern lesson while looking into the future. It will also be foolish to overlook the miserable consequences on qualitative aspects of the work due to inadequate protection – the instance of the legendary Tamil Poet, Subramaniami Bharati, being a case in point. His works pursuant to release in public domain 30 years after his death has been the subject matter of rampant mutilation – far from a befitting tribute to the great man.

Though contradicted by the express letter of law, the spirit would always favour a beneficial interpretation to give the credit where it is due, as has been seen in most judicial rulings in the years preceding the 1994 amendment. A set of concrete and authoritative guidelines by the Honourable Supreme Court or a substantial legislative change in the copyright law represent the need of the hour.

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