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The Public Interest in Moral Rights Protection

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INTRODUCTION

This Paper will explore two separate, but interrelated, themes. First, the Paper will advance an explanation for the fact that the adoption of moral rights regimes has tended to lag behind the adoption of economic copyright regimes. And, secondly, it will be argued that moral rights can serve an important, but overlooked, social function in the emerging global information economy.

While it is true that, by the early twentieth century, a new set of rights had been firmly introduced into the copyright world,[1] the concept of the

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1. From France, which recognized the right of divulgation or disclosure (when the author will publish the work), the right of paternity or attribution (the author's right to be

author's moral rights,[2] it is equally true that the appearance of the concept of moral rights lagged significantly behind the introduction of the economic rights regime of copyright and *droit d'auteur*. It is also true that the United States has consistently resisted the explicit introduction of this set of rights into the copyright environment[3] and that many theorists have clearly regarded moral rights as something separate and apart from the rights historically attached to the copyright.[4]

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identified with the work, also known as the right of association), the right of integrity (the work to remain as the author expressed it), and also the right of withdrawal or repentance (an author can withdraw a work from public circulation). *See, e.g.*, JOHN S. MCKEOWN, FOX CANADIAN LAW OF COPYRIGHT AND INDUSTRIAL DESIGNS 248 (3d ed. 2000). J.A.L. Sterling also describes these rights as much younger than the concept of copyright–that moral rights developed only in the early nineteenth centuries in France and in Germany. Sterling groups these rights generally as the author's rights to integrity and reputation. J.A.L. STERLING, WORLD COPYRIGHT LAW 280 (1999). As discussed below, neither the right of divulgation or disclosure, nor the right of withdrawal or repentance, appears explicitly in the Berne Convention for the Protection of Literary and Artistic Works art. 6*bis*, Sept. 9, 1886, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 [hereinafter Berne Convention].

2. Moral rights were not a part of the original Berne Convention in 1886, but were added by the Rome Convention of 1928. Britain agreed to the obligations of the Berne Convention immediately, in the International Copyright Act, 1886, 49 & 50 Vict., c. 33 (Eng.) (which applied to Canada as a Dominion) and ratified the Convention with effect from December 5, 1887. However, Britain only explicitly included moral rights in its statute in the Copyright, Designs, and Patents Act, 1988, c. 48 (Eng.).

3. Sterling recounts that the inclusion of moral rights protection in the Berne Convention was one of the stumbling blocks for many years to the accession of the United States to the Convention. STERLING, *supra* note 1, at 280. Brian E. Koeberle describes how eventually, just prior to 1989, the American Congress was persuaded that American law generally already provided sufficient protection for moral rights such that the United States need make no explicit changes to its copyright legislation in order to comply with the moral rights provisions of the Berne Convention once the United States became signatory to the Convention in 1989. *See* Brian E. Koeberle, Comment, *Play It Again Samantha? Another Argument for U.S. Adherence to Article 6*bis *of the Berne Convention*, 27 DUQ. L. REV. 609 (1989). Both Edward Damich and David Grant, for example, provide arguments that American law does not provide moral rights protection sufficient to satisfy the United States's Berne Convention obligations. *See* Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of Moral Rights of Authors*, 23 GA. L. REV. 1 (1988); R. David Grant, *Rights of Privacy–An Analytical Model for the Negative Rights of Attribution*, 1992 UTAH L. REV. 529 (1992). However, the U.S. government has passed a statute providing integrity rights to defined visual artists. Visual Artists Rights Act, Pub. L. No. 101-650, 104 Stat. 5128 (1990). However, in this connection, it must be noted that, through the express influence of the United States, the moral rights obligations of the Berne Convention have not been incorporated by the Trade-Related Aspects of Intellectual Property Rights (TRIPS).

4. Even in the early English decision *Millar v. Taylor*, based on the common law, Lord Yates appears to regard the claim to copyright as an entirely different sort of claim than any right to attribution:

Moral rights conceptions have spread into many copyright environments from France and Germany, which, early in the nineteenth century, recognized rights such as the right of divulgation or disclosure (the author's right to control if and when the work will be published), the right of paternity or attribution (the author's right to be identified with the work, also known as the right of association), the right of integrity (the work must remain as expressed by the author), and the right of withdrawal or repentance (the author's right to withdraw a work from public circulation).[5]

It was at the 1928 Berne Conference in Rome that the Italian delegation drafted the most comprehensive proposal for inclusion of moral rights in the Berne Convention.[6] In so doing, they described these rights as follows:

> It should be mentioned that the shift of focus that has occurred in legal doctrine in favour of the protection of personal copyright has recently taken on a more general, more uniform and more precise character, in spite of the divergent theories on the nature of copyright. For, regardless of whether this right is assimilated to the right of physical ownership, or conceived as a new economic right in immaterial or intellectual property, or if the opposite view is held to the effect that the right represents no more than a branch of the group of rights of the private person, or, finally, if the right is conceived as being a *sui generis* right which, in the course of its development and according to various prerogatives that make up its content, operates as a personal right and as an economic right by turns, it is agreed today that, independently of the exclusive rights of economic character, which are essentially temporary and transferable, the author does own one right, or a set of rights strictly inherent in his person, that are intransferable and without limitation in time, and which mainly concern the absolute right to publish or not to publish the work, to recognition of authorship and finally to the protection of the integrity in the work.
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> . . . .
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> [T]he proposed new article should have the number *6bis*, as it should occupy an intermediate position in the sequence of articles after the first six, which contain

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> On the other hand, if the author's name was omitted in the title-page[, which would involve the right to attribution, a moral right], he might equally insist on the [copyright] claim: for, if the property be absolutely his, he has no occasion to add his name to the title-page. How is it to be known, when such a sort of property [copyright] is abandoned? [I]n all abandonments, two circumstances are necessary; an actual relinquishing the possession, and an intention to relinquish it. But in what manner is the possession of intellectual ideas to be relinquished? [O]r how is the intention of relinquishing them to be manifested? [M]ere mental ideas admit of no actual or visible possession; and consequently are capable of no signs or tokens of abandonment.

Millar v. Taylor, (1769) 4 Burr. 2303, 2366, 98 Eng. Rep. 201 (K.B.).

5. This spread has been aided immeasurably by the inclusion of aspects of the European moral rights in the Berne Convention in 1928, further described below.

6. A number of other delegations made initial proposals of this sort. *See* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 102, 460 (1987).

> general provisions applicable to the regulation of copyright in its double, personal and economic content, and before the subsequent articles which deal with exclusive economic rights.[7]

The Subcommittee on Moral Rights for the 1928 Conference reported and recommended adoption of much of the Italian delegation's memorandum, but only incorporated two rights, the right of paternity or attribution and the right of integrity,[8] into its proposed text for Article 6*bis*. The Report noted:

> [T]he principle is fully established, and that it is henceforth beyond doubt that the creator of a literary and artistic work retains rights in the product of his intellectual effort that are above and outside all agreements on disposal. Those rights, *which for want of a more adequate expression are called moral rights*, are distinguished from economic rights, and assignment of the latter leaves the former intact.[9]

Thus was the relatively new European notion of certain inalienable rights of the author brought into the global conversation about copyright. These rights were considered to be connected to the environment of copyright through their attachment to the works which also formed the basis of copyright interests, but were also recognized as having an inherently different nature than the copyright interests.

The authors of the 1928 Report declared that the rights that have become known as moral rights were then "fully established" and "beyond doubt" but, as is often the case, their rhetoric appears to have been more a statement of future aspirations than of historical reality at the time. Moreover, the international community that were then members of the Berne Convention adopted only two of the various rights that were proposed as part of the bundle of rights that have become known as moral rights: the right of paternity and the right of integrity.

This Paper argues that the slow emergence of the modern information society and the inherent features of the information technology that lies behind that emergence provide explanations both for the late adoption of moral rights

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7. Memorandum from the Italian Delegation Concerning the Protection of the Personal (Moral) Rights of the Author to the Diplomatic Conference Convened in Rome (May 7-June 2, 1928), *available at* http://www.oup.com/uk/booksites/content/9780198259446/15550027.

8. It did not include the right of divulgation or disclosure, the right to publish or not to publish. However, Sam Ricketson demonstrates the argument that this right may be implicit in the Berne Convention. RICKETSON, *supra* note 6, at 476. I take the position that this right is not necessary to the social function described below that the moral rights of paternity and integrity (which the Berne Convention countries did explicitly adopt) perform.

9. Memorandum from the Belgian Delegation on Moral Rights (1928) (Conference in Rome). However, the articulation of this theoretical distinction between copyrights and moral rights has since frequently been less than distinct in the sense that the connection between the two systems has lacked theoretical explanation. The thesis advanced herein attempts to address this problem.

into the international environment and the inclusion of these two particular rights from amongst the wider group of rights that were proposed.

I. EXPLORING WHY THE CONCEPT OF MORAL RIGHTS EMERGED MORE SLOWLY THAN THE CONCEPT OF ECONOMIC RIGHTS IN COPYRIGHT

A. The Emergence of the Economic Right

As has been widely described, copyright, in terms of the rights that have become known as the economic rights (as opposed to the moral rights) in copyright, has its origins centuries ago as a legal response to changing economies in Europe.[10] The immediate economic stimuli for creation of copyright and patent are generally considered to be the print revolution and the industrial revolution, respectively.[11] Indeed, the two revolutions were inextricably connected and the printing press was as much an artifact of industrialization in its revolutionary impact on text as any other invention of the industrial revolution was in its economic sector.[12]

The radical effects of the printing press on European society have been noted[13] and it is certainly true that the international character of information transfer[14] became increasingly apparent after the invention of the printing press, particularly in regions influenced by Europe. It is also true that the vehicle of copyright was proven over time to be suited to the advancement of national economies that were information producers[15] and hence began to be

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10. Ronald Bettig traces roots of copyright back to the Roman publishing system, but agrees that the role of copyright in the European context was an advent of the invention of the printing press in 1450. *See* RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY 11, 16 (1996).

11. While it may be true that the Statute of Monopolies of 1624 was enacted in response to the King's power to grant monopolies, the exception permitting the creation of patent rights was a recognition of the value of invention to the process of industrialization.

12. *See* MARILYN RANDALL, PRAGMATIC PLAGARISM: AUTHORSHIP, PROFIT, AND POWER 65 (2001). Our current economic environment has similarly been termed both the post-industrial age and the information age.

13. *See* 1 & 2 ELIZABETH L. EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE: COMMUNICATIONS AND CULTURAL TRANSFORMATIONS IN EARLY MODERN EUROPE (1979).

14. Fritz Machlup first articulated the distinction between information as implying an objective transfer process whereas knowledge implies a subjective state. *See* Fritz Machlup, *Semantic Quirks in Studies of Information*, *in* THE STUDY OF INFORMATION: INTERDISCIPLINARY MESSAGES 641-72 (Fritz Machlup & Una Mansfield eds., 1983).

15. *See* RICKETSON, *supra* note 6, at liii. The latest information-exporting country to become aware of this advantage is the United States. *See* EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 7 (2000); *see also* Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM. J.L. & ARTS 17, 39 (2002) (observing that the U.S.

adopted by numbers of nations.[16] Indeed, eventually, in the late nineteenth century, the dominance of copyright as an effective vehicle for advancing national economic agendas was signaled by the creation in 1886 of the *Berne Convention* itself.[17]

However, it is less clear why the *economic* rights, rather than the *moral* rights, originally emerged in response to the changing economies of Europe. Attention to this question, it is argued here, will provide evidence on which both to demonstrate the current relevance of moral rights in ongoing national and international copyright environments and also to limit the ambit of those rights lying within the sphere of copyright to rights appropriately linked to copyright.

In order to understand why the regime of economic rights emerged before moral rights, we must step back and ask about the conditions which spawned the economic rights regimes in copyright. While, in the Anglo-American context, copyright may be argued to have arisen as an economic measure,[18] just as patent did,[19] the means by which copyright achieves the

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Constitution is a "piracy promoting" one). The United States has been instrumental, of late, in encouraging full implementation by all World Trade Organization (WTO) member states of the TRIPS obligations for copyright protection.

16. Further evidence that copyright was meant to be a national economic tool is the fact that the United States, originally an information-importing country, created a form of copyright very early in its history, 1790, but did not extend that protection to foreign works until 1954 (and even works by foreigners manufactured in the United States were not protected in copyright in the United States until 1891).

17. As Sam Ricketson points out, "Despite [its] relatively limited membership, the geographical sweep of the new Union was considerable when account is taken of the colonial possessions of France, Germany, Italy, Belgium, Spain and the U.K. . . . [As late as 1987,] it still . . . retains clear evidence of its Old World origins and orientations." RICKETSON, *supra* note 6, at 79-80. Significantly, the United States, which was, at that time, still an information-importing nation, did not join the Berne Convention. Indeed, as pointed out above, the United States did not join the "Berne community" until it realized, in the last quarter of the twentieth century, that it had become a net exporter of information.

18. Prior to the Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), previous statutes had created licensing regimes for printers and publishers which the copyright of the statute replaced. Although a common law right of authors was subsequently recognized in *Millar v. Taylor* in 1769, shortly thereafter the House of Lords, in a six-to-five decision, later recognized that the statutory right created by the Statute of Anne overrode any common law right which had existed. *See* Donaldson v. Beckett, (1774) 1 Eng. Rep. 837 (H.L.); Millar v. Taylor, (1769) 98 Eng. Rep. 257 (K.B.). This history supports the argument that copyright is not a codified species of common law property but is rather a novel statutory creation. As Lyman Ray Patterson so fully documents:

> The Statute of Anne was not primarily a copyright statute. Rather, just as prior acts involving copyright were basically censorship acts, the Statute of Anne was basically a trade-regulation statute. It was designed to insure order in the book trade while at the same time preventing monopoly. In one respect, the statutory copyright [of the

monopolies it was designed to permit has inevitably affected communication in society and the flow of information within nations ever since.[20] Thus, in seeking explanations concerning the order of the appearance of copyright and moral rights in history, it may be useful to briefly situate the development of copyright in the history of certain aspects of communication.[21]

It is certainly the case that, long prior to the industrial and print revolutions in Europe (and the advent of either copyright or moral rights), there was a rich representational culture in the world. One may say that there were many varied modes of expression of ideas,[22] and yet there was no obvious demand that the law control the expression of ideas in the ways which emerged after the fifteenth century.

Turning to the long history of cultural development among humans, it may be noted that the impulse to capture an exact image and communicate it from one individual to another has been demonstrated to be a very ancient one in human cultures. Art flourished among humans from pre-history onward; a communication of images from one individual to others. Nonetheless, until the late nineteenth century, it was an inexact process, resting entirely upon the

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> Statute of Anne] was to share a fate similar to that of [its predecessor] the stationer's copyright . . . . The irony is . . . that . . . copyright should have come to be known as an author's right.
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> The purpose of the Statute of Anne, then, was to provide a copyright that would function primarily as a trade regulation device–acting in the interests of society by preventing monopoly, and in the interest of the publisher by protecting published works from piracy, as did the stationer's copyright.

LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 14 (1968).

19. *See* RANDALL, *supra* note 12.

20. *See* David Vaver, *Some Agnostic Observations on Intellectual Property*, 6 INTELL. PROP. J. 126 (1991) (pointing out the censoring potential of copyright).

21. While exploring intellectual property, including copyright, from the perspective of property theory, exploration of intellectual property from the perspective of communications theory or information science is rare. In the property tradition, see ADAM MOORE, INTELLECTUAL PROPERTY AND INFORMATION CONTROL (2001); Andrew A. Keyes & C. Brunet, *A Rejoinder to 'Canadian Copyright: Natural Property or Mere Monopoly?,'* 40 C.P.R. (2d) 54 (1979); Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 CHI.-KENT L. REV. 609, 629 (1993); Stephen L. Carter, *Does it Matter Whether Intellectual Property is Property?*, 68 CHI.-KENT L. REV. 715 (1993); Frank Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108 (1990); William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987). There is also an important series of essays from this perspective. *See* James Child, *The Moral Foundations of Intangible Property*, *in* INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS 81 (Adam Moore ed., 1997); Edward C. Hettinger, *Justifying Intellectual Property*, *in* INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS 17 (Adam Moore ed., 1997); Justin Hughes, *The Philosophy of Intellectual Property*, *in* INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS 107, 135 (Adam Moore ed., 1997).

22. Anachronistically considering this cultural diversity in copyright terms.

creativity of artists.[23] At the end of the late nineteenth century, photography irrevocably changed this experience of communicating imagery.

Looking at a different aspect of sensory perception–sound–it appears that while the impulse to transmit a visual image (the experience of sight) had at least partially been satisfied by the development of art in even pre-historic cultures, no similar direct progress had ever been made toward satisfying the impulse to capture auditory content. While very early in human history, the direct, albeit inexact, capture of the visual image was accomplished by humans through the development of art, it was only possible, to accomplish the *indirect* capture of audio content, some time later, by using visual images to represent certain audio content: the development of writing, or text, to represent human speech. Much, much later, a standard form of representation of other auditory content in visual symbols occurred–the development of a standard notation of music.[24]

At the time of the invention of the printing press in the fifteenth century, the content of communication was limited to *visual* representations of meaning, whether visual or auditory in original experience–art, or text or musical notation, as described above. Much was recorded in the form of text because text was the most efficient and effective representation available for maximum information content. Although production was slow,[25] artwork, text, and musical notation always had the potential, even before the industrialization of these processes through the invention of the printing press, to be a "one-to-many" communication. Unlike non-representational communication (speech and music performance, for example), artworks, text, and musical notation did not require immediacy to effect an information transaction; the sender and receiver(s)[26] did not have to be either contiguous geographically or contemporary in time.[27]

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23. History might have been quite different, for example, if Henry VIII of England had seen, in the portrait of Anne of Cleves (his intended fourth wife) by Hans Holbein, an exact image of the woman he eventually met in person and rejected as a spouse!

24. Music notation in the Western tradition is not really present before the ninth century C.E. and does not begin to represent pitch until after the eleventh century C.E. *See* LAROUSSE ENCYCLOPEDIA OF MUSIC 52 (Geoffrey Hindley ed., The Hamlyn Publ'g Group Ltd. 1971).

25. In addition to being slow, of course, there were many opportunities for this form of communication to be blocked altogether by those who controlled its processes, as discussed below.

26. Models of information flow have been developed that focus on the relationship of the "senders" of information and the "receivers" of that information. These models descend from Claude E. Shannon, an engineer at Bell Labs, and Warren Weaver, a physicist. *See* CLAUDE E. SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION (1963).

27. *See* ANNE WELLS BRANSCOMB, WHO OWNS INFORMATION?: FROM PRIVACY TO PUBLIC ACCESS 2-3 (1994) (for a discussion along a very similar vein).

Because art was very expensive to produce (labour intensive, materials intensive, and time-consuming), the "channels"[28] for its distribution were, in fact, controlled by elites.[29] Artists had to rely upon these elites, if not for the materials for production themselves, certainly for the opportunities to communicate their artwork to others. Prior to the invention of the print techniques, each piece of artwork was an original; control of the artwork meant control of the channel of distribution that the art would take en route to its communication to any given audience.[30]

Similarly, each (primarily text) manuscript was, although relatively less expensive than a piece of larger scale artwork, still labour intensive and time-consuming and, again, though less materials intensive than artwork, still required materials which were themselves relatively labour intensive to produce and limited in quantity. Since the manuscripts were necessarily more representational than art often was, it was, at least in theory, more reasonable to expect that more exact copies of texts could be achieved.[31] Although a text could be disseminated through more than one channel, because other copies of the text could exist, control of each manuscript meant control of that given channel of communication for the text–and, again, the limited production of manuscripts meant that relatively few channels existed at any one time for any particular text. Moreover, the audience for the distribution of text was much narrower than the potential audience for art because the representational nature of text means that the receiver of the message must be educated to understand the symbols in which the content is encoded in order to receive the message. Literacy, and therefore the ability to receive information encoded in text, was limited.

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28. That is, the path from its creator to audiences. One audience member might then become a retransmitter, eventually to another receiver, and so on, along a continuing path that a particular piece of content may take to its eventual and final audience. The terminology of "channel" as distinct from "content," taken from communications and library and information science literature, will be used throughout this discussion to assist in discerning aspects of the social conditions in which copyright and moral rights regimes function.

29. Art patrons were found among the elites of every society, some of whom permitted the works they had sponsored to be widely viewed and others who did not. One mass distributor of art in the Middle Ages was the Roman Catholic Church, which used the decoration in its churches as a means of educating the faithful in the doctrines of the Church.

30. Michael Hutter, *Art Productivity in the Information Age*, *in* CULTURAL ECONOMICS 115, 120 (Ruth Towse & Abdul Khakee eds., 1992) (referring to the giving of certain fifteenth century art commissions as "the credit card of the elite" and quoting Robert S. Lopez, *Hard Times and Investment in Culture*, *in* THE RENAISSANCE: SIX ESSAYS 29 (Harper Torchbooks 1962)).

31. In fact, of course, each manuscript copyist invested his copy of a particular work with his own embellishments and emendations.

Therefore, while messages encoded as art could be received by anyone if the art was available to be seen, the expenses of creation meant that the channels of distribution were able to be strictly controlled. On the other hand, the efficiencies of the symbolism inherent in text meant that the expenses of production were lower than for art, and greater possibility existed for multiple copies and therefore multiple channels for distribution. However, the requirements for decoding upon receipt of the communication (literacy) meant that the audience for the communication was much narrower than in the case of art.

With the inventions of paper and the printing press, both the previous economics of the production of information containers (the texts, or manuscripts, and pieces of artwork) and the previous mechanisms for control of the channels of information changed. The containers–expressions reproduced now on paper–were faster and cheaper to create. The channels of communication were new–from artist or author to printer (and publisher) and on through to bookseller (and, increasingly, then on through libraries) and, eventually, to members of the public.

Early efforts to require printing presses to be licensed[32] were attempts to continue the control of the channels of communication of texts by the existing elites; to continue control of those communications that were not immediate in terms of time and place, that is, to continue to control communications that were not oral and aural, and to limit such communications to the existing elites.[33] This proved impossible, and, indeed, the contemporary economic revolutions, of which the print revolution was a part, ultimately ended up redefining the elites themselves throughout Europe. The new elites were

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32. William Caxton is commonly credited as the first to introduce the printing press into England in 1476 and, at first, foreign presses were encouraged. For example, between 1484 and 1533, a statute regulating and restricting foreign businesses in England had an exemption for printing and bookselling. *See* 1 Rich. 3, c. 9, § 12 (Eng.). However, this early encouragement of foreigners was shortly replaced by attempts to encourage and protect the indigenous press industry by licensing, beginning on November 16, 1538, under Henry VIII. In May 1557, the Stationers' Guild was given a royal charter and charged with maintaining the monopoly over printing and publishing in England. This system culminated in the Licensing Act, 1662, 13 & 14 Car. 2, c. 33 (Eng.).

33. *See* MCKEOWN, *supra* note 1, at 15-16.

> [I]n response to the divergence in religious belief during the Reformation, the clerics came to rely on printing as a means to control doctrine and prohibitions. In 1401 a statute was passed for the suppression and punishment of heretical writings and in 1529, Henry VIII published a list of prohibited books, followed by a proclamation relating to religious books the next year. . . . One of the first official acts of Elizabeth after her accession was the issue in 1558 of a proclamation requiring the burning of all heretical books.

Id.

based upon ownership and control of the engines of industrial production,[34] rather than, as formerly, upon ownership and control of agricultural production and land.[35] It is at this point in history that the copyright regime, which would eventually come to dominate the world stage,[36] emerged.

B. Analyzing the Effect of the Emergence of the Economic Right

Copyright did have a direct effect on the control of channels of communication: Each work's[37] channel was now to be controlled almost exclusively[38] by that work's copyright holder. However, since it was possible to have multiple expressions of any given idea or fact, there was no exclusive control over the channel for distribution of particular information.

On the other hand, the largest possible audience for texts and artwork, after the printing press was invented, was the audience that was available once the work was identically replicated through the printing press. The only way to fully exploit the creation of a work is to reach the largest possible market; most authors and artists have chosen to avail themselves of the possibilities created by the industrialization of the production of the containers of information. Certainly, with the demise of the old elites, the best access to support for the artists and writers was to access the new elites–the

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34. In 1642, the House of Commons ordered that printers should neither print nor reprint anything without the name and consent of the author. John S. McKeown comments that "in forbidding printing 'without the name and consent of the author' there was an implicit recognition of the author's rights." *Id.* at 21. But, in the previous sentence, McKeown makes the point that "it seems clear that [the order] was designed as a purely regulatory measure and not to protect the rights of authors." *Id.* This bolsters the point made below that the vehicle of author's rights was used in order to establish the regulation of the new print industry.

35. *See* THE STRUGGLE FOR POWER: ENGLISH HISTORY, 1550-1720 (John M. Beattie & Michael G. Finlayson eds., 2d ed. 1990); *see generally* LAWRENCE STONE, THE CAUSES OF THE ENGLISH REVOLUTION, 1529-1642 (3d ed. 2002) (discussing social origins of English Revolution).

36. The culmination of this process was the incorporation of copyright into the world trade agenda in the TRIPS agreement.

37. Or expression's or container's channel.

38. The right to lend was never a right held by the copyright holder. It was probably thought to be unnecessary given the contemporary understanding of the distribution of text in an environment where literacy was still limited to elites and the notion of libraries being publicly accessible was still centuries away. *See generally* MICHAEL H. HARRIS, HISTORY OF LIBRARIES IN THE WESTERN WORLD (4th ed. 1995) (discussing the history of libraries and the changes leading up to modern public libraries). However, recently, in the modern communications environment, a right to lend in certain circumstances has now been added to the taxonomy of copyright holders' rights. For example, in 1997, Canada added the rights to rent out computer programs and sound recordings. *See* Copyright Act, R.S.C., ch. C-42, §§ 2.5, 3(1)(h)-(i) (1985), amended by R.S.C., ch. 24, §§ 2-3 (1997) (Can.).

industrialists, who, in turn, recouped their investments in "their" artists and writers *and* in their publishing technology by accessing the new mass audiences available through publishing.[39] This, of course, meant most artists and writers chose to indirectly profit from the newly enlarged audiences for their work by, also indirectly, accessing the technology of publishing.[40]

Publishing technology became widespread in society because there was an incentive created through copyright for investing in it. The way that copyright created an incentive for the industrial production of text, and then, somewhat later, for production of musical scores and art reproductions, was to create a scarcity in the underlying work upon which the copyright holder could then capitalize. However, once an artist or writer who held the original copyright chose to access the industrial tools of publication, the artist or writer was almost invariably required by the new industrial elite to give up control of the original work.[41] As Lyman Ray Patterson so fully documents:

> The Statute of Anne was not primarily a copyright statute. Rather, just as prior acts involving copyright were basically censorship acts, the Statute of Anne was basically a trade-regulation statute. It was designed to insure order in the book trade while at the same time preventing monopoly. In one respect, the statutory copyright [of the Statute of Anne] was to share a fate similar to that of [its predecessor] the stationer's copyright . . . . The irony is . . . that . . . copyright should have come to be known as an author's right.
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> The purpose of the Statute of Anne, then, was to provide a copyright that would function primarily as a trade regulation device–acting in the interests of society

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39. Janet Minihan describes "[t]he transition from a select, largely aristocratic patronage to a middle-class, and finally a mass, audience"; she continues, "No longer dependent on commissions from individual patrons, artists could create freely for the public market." JANET MINIHAN, THE NATIONALIZATION OF CULTURE: THE DEVELOPMENT OF STATE SUBSIDIES TO THE ARTS IN GREAT BRITAIN xi (1977).

40. The profits to the author are described here as indirect because once the author has assigned the copyright, the profits arising from subsequent activity involving that copyright do not accrue to the original author, except under the terms of the original assignment. Similarly, the access to the technology of publishing is directly controlled by the printers and publishers–authors have only indirect access, through the printers and publishers.

41. This petition presented to Parliament in 1709 echoed exactly this situation:

> It has been the constant usage for the writers of books to sell their copies to booksellers, or printers, to the end they [the printers and booksellers] might hold those copies as their property, and enjoy the property of making, and vending, impressions of them: yet divers persons have of late invaded the properties of others by reprinting several books, without the consent and to the great injury of the proprietors [again the booksellers and printers], even to their utter ruin, and the discouragement of all writers in any useful part of learning.

MCKEOWN, *supra* note 1, at 24 (quoting J. H.C., xvi, 240a).

> by preventing monopoly, and in the interest of the publisher by protecting published works from piracy, as did the stationer's copyright.[42]

It may be argued that copyright has survived precisely because it favors those who have become the dominant elite: the industrialists.[43] Production of text, musical scores, and artwork became industrialized just at the dawn of the period during which those who controlled industrial processes became the elite–and thus, it may be argued, copyright first ensured the transition of text production to an industrialized process and then has served to maintain the economic viability of that production.[44]

This history informs the dominant theoretical approach to copyright,[45]– the bargain widely recognized as the wellspring of copyright–the awarding of an exclusive, limited term interest in a work, upon creation, to the author, in return for the contribution made by that author to the national stock of ideas and facts.[46]

The identity of the author is central to the operation of the copyright regime. The concept of an author, however–that an expression could or should be attributed to an individual–is one that has waxed and waned over the centuries and in different cultures.[47] At the time of the inception of copyright in the Statute of Anne in 1710, if copyright had been invested just in the printer or publisher, without recourse back to the identity of the original author of a work, that printer or publisher could not have defeated the claim

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42. PATTERSON, *supra* note 18, at 14.

43. As Pam Samuelson points out in the American context, "[C]opyright industry groups have cultivated relationships with policymakers in the executive and legislative branches over a long period of time. They have built up trust with these actors and they know how to get their messages across to these audiences effectively." PAMELA SAMUELSON, 44 COMMUNICATIONS OF THE ACM 98 (2001).

44. For example, in the art world, regarding "reproduced works such as a lithograph, photograph and sculpture, scarcity on the market is artificially created because today the limitation of the number of copies has no longer any technical justification." D. Sagot-Duvauroux et al., *The Contemporary Art Market*, *in* CULTURAL ECONOMICS, *supra* note 30, at 95.

45. Justice Binnie, writing for the majority of the Supreme Court of Canada, recently commented:

> The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).

Théberge v. Galerie d'Art du Petit Champlain Inc., [2002] 2 S.C.R. 336, 355.

46. *See* R.J. Roberts, *Canadian Copyright: Natural Property or Mere Monopoly*, 40 C.P.R. (2d) 33, 36 (1979); Abraham Drassinower, *A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law*, 16 CAN. J.L. JURISPRUDENCE 3 (2003) (demonstrating that it works for the continental system of authors' rights as well).

47. *See* RANDALL, *supra* note 12.

of a competitor to reproduction of that same work. The printers and publishers needed the unique identification of the work with an underlying author.[48] The alternative device of focusing upon whichever press registered the work first in a central registry would not have been far enough removed politically from the licensing of presses that had already been a demonstrable failure.

For the purposes of this analysis of the development of copyright, it is not particularly necessary to reconcile or resolve competing claims about the appeal in copyright to the author (as a romantic notion of rewarding authors or as a pragmatic notion of ensuring reward to those who invested in the industrialization of distribution).[49] It is sufficient to observe that the founding of copyright upon identification of the work with the author has functioned as a necessary concept ever since, one which uniquely commodifies a particular expression, or container of information, so that those investing either in the creation or the replication of that line of expression, or container of information, can be rewarded for their investment. Indeed, not only are copyrights assignable, but the ownership of copyright in employment situations arises in the employer rather than the employee whose creativity is the genesis of the work.[50] The rights that have attached to the copyright holder, once the particular container or expression has been uniquely identified, are all related to controlling that container or expression of information, whoever the author is, and thereafter have nothing to do with the identity of the author.

The implications of the bargain theory of copyright, combined with the full assignability of the economic rights in copyright, in terms of this communications analysis, are that the encouragement of multiple containers of information naturally has led to a wider dissemination of facts and ideas throughout society (since the new, more numerous containers would *each* carve out a distribution channel) than could have occured under the older, non-industrialized, craft production of manuscripts and works of art.[51] Copyright has thus functioned to enhance public *access* to ideas and facts.

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48. The original Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), specifically connects authors with their books, in the context of rights to printing and publishing.

49. Though in the United States, through the Constitution, and in Canada, as Mr. Justice Binnie of the Supreme Court of Canada recently confirmed in *Théberge v. Galerie d'Art du Petit Champlain Inc.* ([2002] 2 S.C.R. 336), the utilitarian perspective dominates.

50. The fact that copyright is owned initially by the employer is one that is frequently overlooked by those who argue for the romantic notion of the author's interests in copyright.

51. When re-interpreted as set out here, this "bargain" theory appears to fit the historical record. It therefore appears unnecessary to set it aside in favor of a new theory of the bargain involved. *See* David Vaver, *Intellectual Property Today: Of Myths and Paradoxes*, 69 CAN. BAR REV. 98 (1990).

Despite the ongoing influence of copyright on public access to works since the eighteenth century, the moral rights regime subsequently emerged. How does its emergence fit with this thesis concerning the place of the economic regime in copyright?

C. Changes in the Information Environment as Moral Rights Emerged

In the late nineteenth century, continuing advances in technology spawned information content "containers" never before seen; as mentioned above, for instance, the photograph replaced artwork as a more precise rendering of visual content and, as well, the sound recording was the first successful capturing of sound content.[52] Generally speaking, there are differences between scenes viewed in person and the paintings rendered by various artists from those scenes. For example, there have been occasions documented of real differences between the texts of speeches as reported and the words as delivered.[53] And before the photograph and sound recording, only these representations of text or art could be captured and conveyed to audiences distant in time or in space–not the actual speeches or images themselves.

It may be that the advent of the photograph and of sound recording were even more pivotal events than the subsequent development of broadcast, but their import seems to have been widely overlooked.[54] This may have occurred in part because the audio or aural information which was selected for containment in the new sound recordings originally was largely cultural and not directly factual or informational in content.[55] Similarly, the earliest photographers often focused in large part upon formal portraits,[56] and early photographs were neither seen exclusively as a source of information or facts, nor as *the* exclusive source of visual information or facts.[57]

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52. It may be noted that the telephone, while it transmitted sound content, did not capture or contain it.

53. Evidenced by multiple accounts of the speeches, with variations between them.

54. So called "primitive" cultures seem to have grasped the revolutionary nature of this technology far better than the culture that developed it. Many disparate "primitive" cultures distrust and even fear photography (probably precisely because it captures the reality of its subject, leaving no interpretive ambiguity), whereas they embrace various forms of representational communication, such as art.

55. This point will be further elaborated below.

56. *See, e.g.*, BRIAN COE, THE BIRTH OF PHOTOGRAPHY: THE STORY OF THE FORMATIVE YEARS 1800-1900 35 (1977).

57. Canada sent artists to capture the experience of Canada at war in the First World War. *See* CHARLES C. HILL, THE GROUP OF SEVEN: ART FOR A NATION 63-73 (1995) (discussing the Canadian War Memorials Fund Project).

It is possible that existing publishing industries did not immediately grasp the implications of the fact that, technologically, there was now a larger universe of subject matter available that could be published than copyright covered. In addition to the representations of knowledge heretofore available–literary and artistic works as then defined and included in copyright–there were now exact replications of reality that could be technologically created and could also be published.[58]

Certainly there was early controversy over the inclusion of the photograph in copyright.[59] Underlying this controversy was the sense that this was a departure from the traditional history of copyright. The rhetoric in which the unease was couched was the concept of originality and the role of the author or creator.[60] The unease was a reflection of a new challenge: In the photograph it is possible, arguably for the first time (as discussed above) to exactly capture an image of reality, of the idea or fact, and thus the container of the information is no longer representational in the same way as previous containers or expressions had to be.[61] It is possible that in a photograph the

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58. The recent report COPYRIGHT POL'Y BRANCH OF THE DEP'T OF CAN. HERITAGE, SUPPORTING CULTURE AND INNOVATION: REPORT ON THE PROVISIONS AND OPERATION OF THE COPYRIGHT ACT (2002), picks up this point:

> [In Canada, w]here the work is a photograph, . . . the owner of the initial negative or photograph (if there is no negative) is deemed to be the photograph's author. This rule of authorship of photographs . . . [or] deviation dates back to when photography was commonly regarded as an industrial operation rather than a potential art form, and when the inadequacy of early photographic equipment restricted a photographer from expressing "originality" in his or her work. Photographers argue that the deviation is no longer justifiable and seek an amendment to the Act. The copyright regimes of most of Canada's international partners generally treat photographs in the same way as other artistic works.

Id. at 14-15. The photographers are also lobbying for abolition of the Canadian provision that currently makes the first owner of a commissioned photograph, where payment for the commission has been received, the person commissioning, rather than the photographer. *See id.* at 18; Copyright Act, R.S.C., ch. C-42, § 13(2) (1985) (Can.).

59. Tremblay v. La Cie d-imprimerie de Quebec, [1900] 6 R.J. 312.

60. They were not originally included as fully protectable works under the Berne Convention, although France proposed them several times, in large part because Germany was opposed since it did not domestically recognize them as artistic works. At the later conference some recognition of them was included, but deep divisions between countries about "the intrinsic nature of photographs" continued. LOUIS RENAULT, REPORT, Presented to the Conference on Behalf of Its Committe, Conference Convened in Berlin (Oct. 14-Nov. 14, 1908), *available at* http://www.oup.com/uk/booksites/content/9780198259466/15550026.

61. Leaving aside, for the moment, the possibility of manipulation of the image once captured–a matter which will be dealt with further below.

idea/expression dichotomy may be blended;[62] they can be said to be one and the same.[63]

The technology of sound recordings developed as an off-shoot of music performance and therefore the copyrights in the underlying representations of the music, the musical scores, were early involved in the emerging industry of sound recording.[64] Other early recordings captured formal speech delivered from prepared texts, which also involved representations of speech already covered by copyright as literary texts. Since the technology of sound recordings thus largely developed into an industry related to entertainment rather than information[65]–and since this entertainment industry was largely based on traditional copyrighted works–the potential competition to copyrighted works from direct auditory input, unmediated by the traditional representational symbols (lyrics and musical notation) that were protected by copyright, was not immediately important or obvious.[66]

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62. This is not an attempt to address the doctrine of merger, although there may be some theoretical linkages that could explain the initial reluctance in the international copyright community to include photographs as works protected under the copyright regime.

63. Drassinower first appears to demonstrate that there is a separation between the internal, subjective workings of the mind and the external, objective expressions of the mind but then admits that "the distinction between 'idea' and 'expression' in copyright law is not simply a distinction between 'internal' and 'external' . . . . The idea/expression dichotomy bifurcates the external field of communications between people into aspects that are not subject to legal protection–i.e., idea–and aspects that are–i.e., expression." Drassinower, *supra* note 46, at 16. He then makes the rather circular point that the single conceptual point of copyright is as "a relation between persons considered in their equality as authors: it is the intersubjective relation between plaintiff and defendant with respect to the plaintiff's copyrightable work." *Id.* at 19. He continues, "The idea/expression dichotomy is neither on the side of the plaintiff nor on that of the defendant because it is rather the instantiation of their equality." *Id.* On this theory, it would seem that the photograph should be considered as having a greater possibility of removing subject matter from the "domain of the defendant's authorship" than would be the case with other representations of images, and thus could be argued to be less deserving of copyright protection. *Id.*

64. For instance, in the Report of the Conference in Berlin, 1908, by Louis Renault, one finds a section on Mechanical Musical Instruments where the earlier history of the 1885 Convention is recited: "In view of the difficulty of settling the question of sound reproduction, the Committee proposes that the Conference should not pronounce on whether the public performance of any musical work . . . ." This serves as evidence of the early link between musical works and the technology of sound recordings in the minds of the copyright authorities. RENAULT, *supra* note 60.

65. Libraries, for example, have seldom held even a tiny fraction of the resources provided to meet the reference needs of patrons in the form of sound recordings rather than text.

66. This was at least in part because the receivers of audio messages encoded in sound recordings needed the technology to decode the sound recordings in order to hear the message–initially, the record-player.

After a while, with the fusion of sound and visual images in "moving pictures," the informational possibilities of the new technologies, in addition to the entertainment possibilities, became recognized.[67] Moreover, immediately after World War II, the possibility of broadcasting "moving pictures" to the public at locations of their choosing, instead of just projecting movies in particular venues to particular audiences (movie theatre–goers), became a reality in North America and Europe through the advent of television.

Broadcast technology, first radio and then, in the second half of the twentieth century, television, was a revolutionary new development in channel technology, with possibilities for reaching mass audiences, from each point of broadcast, in unprecedented ways. However, its history immediately became entwined with the influence of the content it distributed to the public.[68] Historically, although technically possible, broadcast technology was never used to transmit alpha-numeric text to the public. Radio, the original application for broadcast technology, transmitted only audio content.[69] When, the increasing mass audience potential of broadcast continued to be realized, with television added to the reach of radio, the audience appeal of sound recording technology and photography meant that broadcast was never used to transmit such content as text and musical scores.[70] The broadcast of "motion pictures" based on sound recordings and photographic images meant that no decoding of symbols such as text or musical notation was required to participate as an audience member. With such a mass appeal for this new one-to-many communication, there would be no return in broadcast to the symbolic representations of text or notation.[71] The particular mixture of sound recording and photography technology utilized by early radio and television broadcasting, following so closely upon the inventions of both of those technologies themselves, may have confounded perceptions of broadcast

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67. In this connection, one may note the widespread production and projection of newsreels as shorts before movies in movie theatres in the period between the two world wars, and continuing through the second.

68. *See generally* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964).

69. For an excellent history of these developments, see MARC RABOY, MISSED OPPORTUNITIES: THE STORY OF CANADA'S BROADCASTING POLICY (1990).

70. Although the particular appeal of the representational nature of art meant that artwork was recognized early on as a popular content for broadcast (Disney and Warner Brothers, for example), at least in the United States.

71. Interestingly, the limitations of emerging internet technology and early wireless in the very late twentieth century and early twenty-first signaled a return to text as a prominent vehicle for communication technology.

technology, rendering broadcast less clearly visible to observers as a purely channeling technology.[72]

Thus, while it has been amply demonstrated that the advent of broadcasting had a revolutionary impact on society,[73] it is important to recognize also that the social and economic potential of sound recording technology and photography really became manifest with the advent of broadcast.

The revolutionary impact of broadcasting may have been due, at least in part, to its mass reach but, of course, broadcasting was certainly not the first instance of one-to-many communication. The public lecture, for example, is a much older example of one-to-many communication. Book publishing was an earlier one-to-many industry that was able to span gaps in time and geography between people. The difference between broadcast and earlier mass audience technologies was that, up until very recently, the technology of broadcast had an inherent limitation or scarcity in that the possibilities for channels of distribution were fixed by the nature of the channels since bandwidth was finite. The control over the allocation of these new channels of communication was given to new government bodies in both the United States and Canada.[74]

While the allocation of bandwidths to broadcasters was completely independent of any copyright interests in the content of communications which might be distributed over the new channels, once these channels had been allocated, copyright owners who permitted the channel owners to distribute works through any one of the channels effectively controlled that entire distribution of the copyright work because originally there was no redistribution or re-channelling technically possible.[75] This then may have given copyright owners the illusion of exclusive channel control through

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72. As will be discussed below, initial legal responses to the new broadcast technology, on the other hand, clearly treated it as separate and apart from content.

73. *See* HAROLD INNIS, THE BIAS OF COMMUNICATION (1951); MCLUHAN, *supra* note 68.

74. See further RABOY, *supra* note 69, at 93, 144 (describing, for example, the licensing of private television broadcasting stations in the United States in 1946 by the Federal Communications Commission and the subsequent policy controversies in Canada culminating in the licensing of private television broadcasting stations in Canada by the Board of Broadcast Governors in 1958). As mentioned above, both governments originally focused on channel distribution in these new regulatory regimes. Subsequently, the Canadian government, in particular, vested its regulators with jurisdiction affecting content as well (Canadian content regulations, for example). This vesting of content jurisdiction, however, stopped short of interfering with intellectual property regimes directly.

75. Redistribution by cable or other retransmission was a later technical achievement.

copyright, whereas it was actually the technology of broadcast that was creating the exclusive channel control.[76]

However, the illusion of exclusive channel control by the owners of the original distribution right became a reality with subsequent extensions of the "copyright legislation," first to cable distribution[77] and then to broadcast rights themselves.[78] One may speculate that the extension of copyright control to the redistribution of broadcast onto cable[79] and then the extension of rights to the broadcasts themselves have added a new dimension to the nature of "copyright" control: adding, to a copyright holder's historic control over the reproduction of the containers of information, an exclusive ability to control certain channels of distribution of information.

II. THE IMPORTANCE OF MORAL RIGHTS

A. The Role of Moral Rights in the Context of the Public as Information-Seekers

Up until at least the last quarter of the twentieth century, the "information industry" was just one among many industries spawned by the industrial revolution, albeit one with a recognized interdependence with fundamental democratic principles such as the right to free speech.[80] More

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76. The relationship between a fixed infrastructure for network distribution and the private, competitive ownership of the content to be distributed over that network is currently one dominating a number of policy venues, such as the electricity industry, under the rubric "competitive network policy."

77. *See* BETTIG, *supra* note 10, at 117-50 (describing the fact that it took from 1965 to 1976 in the United States to settle the copyright issues around distribution of television programming by cable, particularly in light of the decision of the U.S. District Court for the Southern District of New York that retransmission by cable was a "multiple performance," and hence, an infringement of the copyright holders' rights in *United Television Artists Ltd. v. Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967)).

78. *See* Copyright Act, R.S.C., ch. C-42, § 21 (1985) (Can.).

79. BETTIG, *supra* note 10, at 200-07 (describing how Canada held out against the United States, and, eventually, against the dominant Berne Convention view, and kept cable retransmission out of copyright control until American influence had become irresistible by 1990).

80. *See also* SAMUELSON, *supra* note 43. As such, the law surrounding the industrialization of text–copyright–received no special recognition in law school curricula. The foundational law courses other than the public criminal law course, since the end of the nineteenth century, have become the common law of torts, property, and contracts. In none of these courses were notions of intellectual property or, more specifically, copyrights introduced. *See* W.A. Adams, *Personal Property Law and Information Assets*, 36 CAN. BUS. L.J. 267, 267-70 (2002). Intellectual property courses, either as survey courses, or individually as specific courses in copyright, trademark, or patents, were often available in upper years in faculties of

recently, however, a new revolution in technology is again the engine driving a "new economy"–neither an industrial nor a print revolution but specifically now a communications and information technology-driven revolution. The new wealth is being created, not in the industrialized processes of the earlier revolutions,[81] but in the information flows of the new information society. Suddenly, ideas and facts are not only drivers permitting new wealth to be created, they *are* the new wealth. With these changes has come an unprecedented societal focus on intellectual property as a legal regime controlling information. As Bruce Doern and Markus Sharaput describe in their institutional analysis of the intellectual property policy environment in Canada, the Canadian Intellectual Property Office and the Commissioner of Patents and Registrar of Trademarks "have emerged in the 1990s from almost total obscurity as a technical operating agency [within government] to an agency now recognized as being very important to Canada's capacity to be both innovative and internationally competitive."[82]

The dual function in modern copyright, of both container and channel control, which has particularly emerged during this recent period, has created urgent problems with the emergence of the most recent technology of telecommunications–the Internet. As Thomas Drier has commented:

> In some ways . . . it is curious that these [current] debates are so intense. After all, copyright law has always proved able to adapt to new subject matter . . . and to new dissemination techniques. . . . Perhaps the problem is that this time, the changes are more far-reaching in nature. Digitization and networking affect both the subject matter of protection and the means of its dissemination.[83] They affect subject matter because all categories of protected works can be transformed into a digital format that permits the creation of new composite–often multimedia–works. . . . [R]ightsholders are caught in a bind. While they hope to benefit from the new markets that these technologies open, they also see the technologies as associated with a loss of

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law. They were most often taught by practitioners rather than full-time legal academics. These classes were not particularly popular, often attracting few students other than those with a technical background such as engineering.

81. There has always been value in the book trade, of course, but the contribution of information industries to the economies of countries has been dramatically increasing with the advent of the new information technologies.

82. G. BRUCE DOERN & MARKUS SHARAPUT, CANADIAN INTELLECTUAL PROPERTY: THE POLITICS OF INNOVATING INSTITUTIONS AND INTERESTS 99 (2000).

83. Drier's reference to "the subject matter of protection" may be otherwise termed a concern about content, and "the means of its dissemination" may be seen as a concern about the channels of communication.

> control.[84] Thus, they are left with a fear that the application of traditional copyright provisions to the digital and networking context will lead to severe underprotection.[85]

The concerns highlighted by Drier focus upon the perspective of the rightsholder, but there are also concerns about copyright being voiced from other perspectives.[86] These concerns focus on questions of access to information–a concern which is central to the balance which copyright policy seeks to achieve.

Multiplying the containers of information (works) through the creation of the economic rights of copyright certainly has advanced, and continues to advance, a social purpose in that, with the creation of more works, more possible sources of information to answer the information needs of an industrializing society will be present.[87] However, research establishes that individuals need more than *access* to various sources of information in order to have their information needs satisfied; they also need to be able to *select* between competing sources of information.[88] Individuals need to be satisfied about the authority behind a particular information source: Obviously where there *is* an information need, the ability to personally judge the accuracy of sources located will be lacking.[89] Moreover, it follows that the ability to

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84. That is, they will lack control over the channels of distribution in the digital, networked environment–a control over channels that had been a coincidental byproduct of the earlier technological environments in which they had enjoyed their monopoly copyrights.

85. Thomas Drier, *Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 295-96 (Rochelle Cooper Dreyfuss et al. eds., 2001) (footnotes added).

86. *See, e.g.*, IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW (Michael Geist ed., 2005) (containing nineteen essays).

87. This is despite the control given copyright holders that can permit copyright holders to act as censors by denying access to the particular channels of information represented by works they control, if they so wish. Generally, by creating value in works that can be maximized by widespread publication and dissemination, copyright acts encourage copyright holders to increase the availability of information sources.

88. *See* M.A. Wilkinson, *Information Sources Used by Lawyers in Problem-solving: An Empirical Exploration*, 23 LIBR. & INFO. SCI. RES. 257, 272-74 (2001) (commenting on Gloria Leckie et al., *Modeling the Information-Seeking of Professionals: A General Model Derived from Research on Engineers, Health-Care Professionals and Lawyers*, 66 LIBR. Q. 161 (1996)); *see also* Clifford A. Lynch, *When Documents Deceive: Trust and Provenance as New Factors for Information Retrieval in a Tangled Web*, 52 J. AM. SOC'Y FOR INFO. SCI. & TECH. 12, 16 (2001).

89. If you know that a piece of information in and of itself is true, then you do not have a need to know that piece of information; if you must rely on an external source to supply you with information, its accuracy must be unknown to you and therefore its source is important to you in order to judge its reliability. The development of the law of trademark in the commercial environment of goods is another development serving the same social purpose.

identify a source (and, therefore, to judge the authority of the source) will be a particularly important requirement in an era when the available containers of information are all representational–when there would necessarily be many differing aspects of an idea or fact presented through various different representations. As Heather MacNeil discusses in an archival context:

> Records are viewed as a source of information that permit us to make inferences about the real world. Because they are assumed to reflect events in the real world, records depend for their reliability on the claim of the recordkeeper to have been present at those events. Accordingly, the methods for assessing record trustworthiness aim to ensure that the record accurately reflects those events, and that it is uncontaminated by the distorting influence of bias, interpretation, or unwarranted opinion on the part of the recordkeeper.[90]

In a rigidly hierarchical society, where elites control the channels of information, the containers of information may not need to be identified individually by users in order to confirm their authority and be accepted as satisfying informational needs.[91] In the rapidly evolving information society created in the wake of the industrial and print revolutions, other indications of the authority of information which could minimize the possibilities of reliance upon misinformation for the public had to become established. Various indicators of authority developed such that the wider information dissemination achieved by the new technology of print also pushed forward the progress of society.[92]

It will be argued here that one of the mechanisms which developed to satisfy the public's need for indications of authority in the dissemination of information was the moral rights regime.[93] This argument will be based both on the history of the emergence of moral rights and on the essential features of moral rights.

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90. HEATHER MACNEIL, TRUSTING RECORDS: LEGAL, HISTORICAL, AND DIPLOMATIC PERSPECTIVES 115 (2000).

91. The Catholic Church in the Middle Ages, for example, controlled many of the distribution channels in Europe and thus could also control the containers of information being distributed on them. Users of information who questioned the veracity of the sources being distributed by the Church were charged with being unorthodox. *See* RANDALL, *supra* note 12, at 33 (discussing the perceived authorities involved here). Secular information was also controlled by elites, as mentioned above. Demonstration of the authority of the sources of information was part of the origin of documents "under seal." *See* MACNEIL, *supra* note 90, at 2, 5 (noting that archiving itself was also controlled and limited to those in authority).

92. Justin Hughes is really heading toward this point when he distinguishes between the public's need for information and the public's need for stability in the meaning of a work. *See* Justin Hughes, *Recoding of Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999); *see also* MACNEIL, *supra* note 90, at 18.

93. Another was the emergence of particular presses and publishers as prestigious and reliable indicators of information quality.

Both moral rights[94] and copyright[95] have been linked to the romantic conception of the author. However, for moral rights, while the identity of the author is as fundamental as it is to the economic rights in copyright, the author continues to be the pivotal actor in the exercise of the rights, whereas this is not the case with respect to the economic rights, as discussed earlier.[96] This distinction is a reflection of the fact that, unlike copyright interests, moral rights are not assignable.[97] Indeed, the lack of assignability in moral rights is one of the chief reasons that the American government has not enthusiastically endorsed them–and yet it bears repeating that it is a defining characteristic of moral rights, just as assignability is a fundamental feature of the copyright.[98]

This difference between copyright and moral rights over the assignability of rights demonstrates one of the reasons why the social bargain, argued as the basis of the grant of copyrights to authors, is not viable as the basis for the grant of moral rights to authors. Since moral rights cannot be assigned, there is no interest in moral rights that those who invest in the dissemination of expressions can exploit as compensation for their investment. Moral rights, then, do not necessarily lead to a wider dissemination of facts and ideas throughout society than would have occurred under the pre-industrial craft production of manuscripts and works of art. Indeed, on the contrary, when the holder of the economic interest afforded by copyright is different from the

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94. *E.g.*, Christopher Aide, *A More Comprehensive Soul: Romantic Conceptions of Authorship and the Copyright Doctrine of Moral Right*, 48 U. TORONTO FAC. L. REV. 211 (1990).

95. JAMES BOYLE, SHAMANS, SOFTWARE, & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51-60 (1996).

96. It is true that authors in Canada routinely waive their moral rights, just as they also routinely assign their copyrights, if the copyright vests in them under the statute in the first place. Despite the reality of the routine assignment of copyright interests to non-authors, much theorizing about copyright continues to focus upon the role of the author in copyright. *See, e.g.*, BOYLE, *supra* note 95; Drassinower, *supra* note 46; *see also* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW, *supra* note 86, at 462-79. The ability to waive moral rights has been clearly articulated in Canadian law since 1985. Copyright Act, R.S.C., ch. C-42, § 14(2) (1985) (Can.). As will be discussed further below, the theory of moral rights being described here is better served if the moral rights are not subject to waiver. On the other hand, even in jurisdictions where moral rights are not subject to waiver, it remains the author's choice whether to pursue the moral rights in any situation. As is the case with the economic rights created by copyright, both moral rights and economic copyrights are in essence systems of private rights and enforcement remains at the prerogative of the rights holder.

97. Copyright Act, R.S.C., ch. C-42, § 14(2) (1985) (Can.).

98. As Drier points out, there are other interests at stake where intellectual property interests are concerned: "[C]opyright law accommodates more than just proprietary and user interests; it also sets a framework for the relationship between competitors by serving as the basis for trading rights in protected works–for securing, dividing and exploiting markets." Drier, *supra* note 85, at 297.

author, who continues to control the moral rights,[99] the existence of moral rights can act as a limitation on the power of the copyright-holder.

Therefore, since moral rights do not create the same incentives as the copyright does, the existence of moral rights does not serve society by encouraging a larger dissemination of information (which is the social benefit derived from the economic rights in copyright), and, therefore, society does not receive any enhanced *access* to information from the existence of moral rights. Indeed, the dominant justification for moral rights does not make such claims, although Gary Lea concludes his description and history of moral rights with the comment that "the claims that moral rights are not a public interest issue and that they have nothing to do with economic or marketplace matters because of their personal, non-pecuniary nature are . . . not sustainable."[100] However, it remains common to see moral rights described as "part of an author's personality or personal identity in much the same manner as the relationship of parent and child."[101]

Nevertheless, while the two systems of copyright and moral rights have been demonstrated to be distinct, they remain integrated by their focus upon works and their respective authors. The two regimes are undeniably related.[102] The nature of that relationship, from the public's perspective, centers on the contribution each system makes to the fundamental requirements of individuals in society related to satisfying information needs: the need for access to information and the need for indications of the authority of the information available in order to make informed choices among available sources. Copyright systemically addresses the first need and moral rights systemically address the second. This perspective on the proper roles and functions of both copyright and moral rights is completely consistent with the fact that a single physical action can bring about an infringement of the copyright in a work as well as a separate and distinct infringement of moral rights in a work.

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99. *See* Copyright Act, R.S.C., ch. C-42, § 14(3) (1985) (Can.). An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.

100. Gary Lea, *Moral Rights: Moving from Rhetoric to Reality in Pursuit of European Harmonisation*, *in* 6 THE YEARBOOK OF COPYRIGHT AND MEDIA LAW 2001/2002, at 61, 77 (Eric Barendt & Alison Firth eds., 2002).

101. ROBERT G. HOWELL, LINDA VINCENT & MICHAEL D. MANSON, INTELLECTUAL PROPERTY LAW: CASES AND MATERIALS 381 (1999).

102. Here the historical tradition supports the interrelatedness of the two concepts; in England, original home of the copyright, explicit moral rights were not legislated until very recently (1988, as noted previously, *supra* note 2), whereas, in France, the original jurisdiction to develop the moral rights regime, at least until 1957, the right to publish was not explicitly codified. NORMAND TAMARO, THE 2001 ANNOTATED COPYRIGHT ACT 103 (Ishnan Kaur trans., 2001).

Moral rights thus serve society's interest in authority control.[103] Their existence assists the public by identifying works with a particular source.[104] In return, the authors of works are given particular, unassignable, elements of control over their creativity. This is the implicit social bargain that has permitted moral rights regimes to endure and to spread to various jurisdictions. The authors of works are given these rights of control over their creativity despite the separate existence of the copyright interests, which are designed to be transferable, and which, in any case, are not necessarily vested by the law in the creators themselves (for example, as noted above, in the employment situation).

The lack of enthusiasm which the United States has shown for the moral rights regime may be completely consistent with this view of the function of moral rights in a society. From this perspective, the failure of the United States to codify moral rights provisions in copyright legislation may be seen to be completely consistent with the emphasis that the United States currently seems to place on the commercial exploitation of information.

In the context of commercial exploitation of information, by the twentieth century the traditional print publishing industry had created imprimaturs of quality through the identities of the major publishing houses. As media empires continued to grow throughout the last century, particularly in the United States, it may be suggested that as the twenty-first century has dawned that same function of providing the public with imprimaturs of quality has been increasingly provided through the trademarks of the major entertainment conglomerates. Trademark functions quintessentially, in the commercial sphere, as the indicator of the public's sense of source. In a society which reveres trademark and where important information sources are identified in the minds of the public with particular trademarks, there may be less impulse for a strong system of moral rights to be developed to respond to the information needs of the public. Of course, since trademark can meet the public's information needs only in the sense of indications of authority, after the public has become aware of competing sources of information (trademark having nothing to do with access issues per se), a system of authority indication through trademark would require that those conglomerates

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103. As stated in MACNEIL, *supra* note 90, at 28, by the mid-nineteenth century it was clear that a distinction was being recognized between authenticity and reliability but that establishing a source's authenticity could assist an information-seeker with evaluating that source's reliability. As is discussed further herein, by extension, legally enshrining the right to integrity and the right to association would help anchor the public's ability to judge an author's reliability.

104. Indeed, the first registration system for printing presses in England, introduced in 1538, included the requirement that the name of the author and printer appear on each book. *See* MCKEOWN, *supra* note 1, at 15.

maintaining the trademarks also maintain control over very significant proportions of the information transfers in society.[105] This may well have been the American experience of the twentieth century. In a more distributed information environment, perhaps such as the Internet is providing as the twenty-first century proceeds, and as trademarks come to represent increasingly diverse portfolios of goods and services, trademark may not be able to continue adequately serving this informational need in society to evaluate the authoritativeness of information sources.

In an environment less dominated by trademark and the power of domestic commercial empires in information areas, it might be expected that another system for identifying authority in information sources would take root. It is argued herein that this system has been the moral rights regime, beginning in Europe and then gradually extending into the laws of other nations.

The analysis of copyright and moral rights as social bargains, albeit different and separate bargains, when bolstered by the historical experience, particularly of copyright, creates an effective policy argument for the protection of both copyright and moral rights in an information economy. It appears that both moral rights and copyright may best be understood as manifestations of information policy designed to further the interests of society in an expanding supply of reliable, available information–copyright addressing the question of the supply of available information and moral rights addressing the question of making the reliability of that supply ascertainable to potential users.[106]

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105. This possibility may have motivated the following rather pessimistic comment, made by American Adam Moore, after reviewing the moral rights regime:

> Arguably the creator's rights tradition has played [a] minor role in the formulation and application of Anglo-American systems of intellectual property. Even in those countries where these rights are codified in the law, they are apt to be overshadowed by the aforementioned economic rights and incentive based social progress arguments. . . . The globalization of intellectual property, rapid growth of digital networks, and expanding power of multinational corporations, have pushed systems of intellectual property away from theoretical foundations and back toward privilege.

Adam D. Moore, *Intellectual Property: Theory, Privilege, and Pragmatism*, 16 CAN. J.L. & JURISPRUDENCE 191, 204 (2003). Of course, as argued herein, it may be in the pragmatic, economic interests of societies now to limit the privilege of elites created by the technology of the industrial revolution in order to foster the social and economic conditions necessary for efficient and effective information transfer. This appears to be a prerequisite to success in the new age of communications, precisely because the strengthening of the moral rights regime assists the public in identifying reliable and relevant information for their needs.

106. This argument would seem to put to rest any problem with the constitutionality of moral rights as a federal exercise of power: As personal rights distinct from copyright, they might be problematic for the Canadian federal government to legislate. *See* Benoit Toupin,

Viewing moral rights as a bargain between the author of works, who receives a certain measure of control over the results of her or his creativity, and the public, who need indicators of authority in order to evaluate information sources, is as different from the argument that moral rights are purely personal rights of the author[107] as the concept of the social bargain in copyright is different from the argument that the copyright is purely a property right of the copyright holder. The concept of the social bargain in the grant of both copyright and moral rights is not antithetical to the property analysis of copyright[108] or the rights-based analysis of moral rights. Rather, it can accept that moral rights may be rights-based and that copyright may be a species of property, but it focuses more on the question of why copyright and moral rights have been created in the first place and continued as the information age matures–because both can be seen to serve a social purpose.

It is increasingly evident that the need to assist information users to make judgments about the quality and reliability of available information is becoming more urgent in the emerging environment. As Clifford A. Lynch points out:

> Highly distributed information dissemination systems like the World Wide Web herald a fundamental change. . . . Among the consequences of this shift will be a new emphasis on the provenance of data and metadata, and the need for information retrieval systems to permit users to factor in trust preferences about this information.[109]

Moral Rights Under Copyright Legislation: In Search of Their True Nature, 45 C.P.R. (3d) 289, 291 (1998); Ysolde Gendreau, *Moral Rights*, *in* COPYRIGHT AND CONFIDENTIAL INFORMATION LAW OF CANADA 161, 169 (Gordon F. Henderson ed., 1994). However, under this thesis, they are, if not clearly federal under § 91(23) of the Constitution Act (conferring federal jurisdiction over "copyrights"), at least very arguably part of interprovincial trade and commerce (at least as much as is personal data protection), which is federal. *See* David Vaver, *Authors' Moral Rights in Canada*, 14 INT'L REV. INDUS. PROP. & COPYRIGHT L. 329, 361 (1983); Constitution Act, 1867, 30 & 31 Vict., c. 3 (Eng.).

107. *See, e.g.*, Van Kirk Reeves, *Retained Rights of Authors, Artists, and Composers Under French Law on Literary and Artistic Property*, 14 J. ARTS MGMT. & L. 7 (1984) (stating that "French case law and statutes are permeated with the humanistic, even metaphysical notion that a creative work is, much more than an item of property, an extension of the very personality of the creative artist").

108. Although it would appear to be antithetical to the property law perspective evident in the argument, recently put forward by Norman Siebrasse, that, rather than attempting to strike a balance between providing an incentive to create works and encouraging their dissemination, copyright law should focus primarily on ensuring that property rights are clearly defined. The public interest should be served by ensuring that the public dealing with intellectual property has clear notice of the ownership interests involved in particular copyrighted works. *See* Norman Siebrasse, *A Property Rights Theory of the Limits of Copyright*, 51 U. TORONTO L.J. 1 (2001).

109. Lynch, *supra* note 88, at 12.

As the late Sam Neill[110] pointed out at the conclusion of his essay on the "Dilemma of the Quality of Information": "In the last analysis, the problem of the quality of information is a moral problem that only individual scholars, newspeople, moviemakers, businesspeople, politicians, and citizens can solve–and then only as individuals."[111]

The history of moral rights in Canada bears out this analysis of the role of moral rights in society. The earliest copyright legislation in Canada did not include any aspect of moral rights protection.[112] The Copyright Act,[113] passed in 1921, similarly included no aspect of moral rights protection.[114] Beginning with the year that the new 1921 Copyright Act came into force, 1924, there were repeated attempts made to add moral rights protections to the Act—in 1924,[115] 1925,[116] 1926,[117] and 1927.[118]

Then, as introduced above, Article 6*bis* was added to the Berne Convention in 1928, which read:

> (1) Independently of the author's economic rights, and even after the *transfer* of the said rights, the author shall have the right to claim authorship of the

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110. Sam Neill was a professor of Library and Information Science at the Graduate School of Library and Information Science, now the Faculty of Information and Media Studies, at the University of Western Ontario.

111. S.D. NEILL, DILEMMAS IN THE STUDY OF INFORMATION: EXPLORING THE BOUNDARIES OF INFORMATION SCIENCE 94 (1992).

112. The Legislature of Lower Canada in 1832 enacted copyright legislation, which was repealed in 1841 and replaced, in the new Province of Canada, by the Act of 1847. However, the Privy Council in Britain later held that the British Literary Copyright Act, 1842, 5 & 6 Vict., c. 45 (Eng.), covered all the Dominions despite various colonies having passed their own legislation. *See* Routledge v. Low, (1868) 3 L.R. 100 (H.L.). Canadian decisions later also accepted this position. *See* Smiles v. Belford, [1877] 1 O.A.R. 436, 447; Durand et Cie v. La Patrie Publishing Co., [1960] 20 Fox Pat. C. 84, 92. After Confederation in 1867, the first federal Copyright Act was passed in 1868, 31 Vict., c. 54 (Eng.). The Copyright Act of 1875, which was passed and ratified by the British Parliament for effect in Canada after discussions between British and Canadian officials, was continued (R.S.C., ch. 62 (1886) (Can.)), with revisions (R.S.C., ch. 70 (1906) (Can.)), in force until 1924. The British Literary Copyright Act of 1842 was also still effective in Canada until 1924, as was the British Copyright (Musical Compositions) Act, 1882, 45 & 46 Vict., c. 40 (Eng.). The 1924 statute did not have retrospective effect. *See id.*

113. R.S.C., ch. 24 (1921) (Can.). This Act, with revisions through the Copyright Act Amendment in 1923, came into force on January 1, 1924.

114. It was this Act, which went into effect in 1924, that first introduced into Canada the Berne Convention requirement that copyright arise in works upon creation, without the need for registration.

115. *See* Bill 28, 1924, 14th Parl., 3d session (Can.).

116. *See* Bill 2, 1925, 14th Parl., 4th session (Can.).

117. *See* Bill 3, 1926, 15th Parl., 1st session (Can.).

118. *See* Bill 45, 1927, 16th Parl., 2d session (Can.).

> work[119] and to *object to* any distortion, mutilation or other modification of... the said work, which would be prejudicial to his honor[120] or reputation.[121]

Canada became, for the first time in its own right, a signatory to the Berne Convention at this same Rome Copyright Convention in 1928.

Subsequently, two further attempts to introduce moral rights into the Canadian legislative scheme were made in 1930.[122] None of these half dozen early Canadian attempts were successful.[123] The Copyright Act Amendment of 1931,[124] however, was designed to bring Canadian law into conformity with the Berne Convention, at the level of the 1928 Rome Convention, and, *inter alia*, introduced moral rights into Canadian law.[125]

The following wording, which was virtually identical to the Berne Convention wording, was passed:

> Section twelve of the said Act is hereby amended by adding thereto the following subsection:
>
> "(5) Independently of the author's copyright, and even after *the assignment, either wholly or partially,* of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to *restrain* any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation."[126]

As may be seen from the italicization in the above quoted sections from the Berne Convention and the Canadian legislation, the Berne word "transfer" became more explicitly "the assignment, either wholly or partially" in the Canadian statute, and the Berne words "object to" also became the more explicit "restrain" in the Canadian section. The protections for the author were identical: the right of paternity or attribution and the right to integrity.

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119. Known as the right to paternity or attribution, as discussed above.

120. Known as the right to integrity, as discussed above.

121. Berne Convention, *supra* note 1 (as modified at Rome in 1928) (emphasis and footnotes added).

122. Bills 16 & 37, 1930, 16th Parl., 4th session (Can.).

123. Elizabeth Adeney argues that those bills presented to Parliament before Canada joined the Berne Convention in 1928 that sought to introduce moral rights protection were stronger in their protection of authors' rights than the protections actually passed to bring Canada into compliance with the Berne Convention. *See* Elizabeth Adeney, *Moral Rights: A Brief Excursion into Canadian History*, 15 INTELL. PROP. J. 205 (2001).

124. 21 & 22 Geo. V., ch. 8 (1931) (Can.).

125. *Id.* at § 5. According to J.A.L. Sterling, this made Canada exceptional among the common law countries, with most other common law jurisdictions being unenthusiastic about the inclusion of moral rights in the Berne Convention and then largely claiming afterward that other elements of their general law already covered their obligations in this regard. *See* STERLING, *supra* note 1, at 280.

126. 21 & 22 Geo. V., ch. 8 (1931) (Can.) (emphasis added).

Canada revised its moral rights provisions in 1988, and completely reworded them. Canadian moral rights protection thus came to include three types of rights which continue to be enshrined in the Canadian law. These are the right to attribution or paternity, the right to integrity in the work, which, as illustrated above, had already been protected, albeit in another form, since 1924, and the right to association, which was added.

The terminology and arrangement in this current Canadian legislation are somewhat confusing, however, in terms of identifying the three rights in language that parallels the terminology used by other authorities.

The current wording of Article 6*bis* of the Berne Convention is:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.
>
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
>
> (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.[127]

The right to attribution or paternity appears in the Canadian statute as:

> The author of a work, has . . . in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym . . . .[128]

The right to integrity appears as:

> The author of a work, has, subject to section 28.2 the right to the integrity of the work . . . .[129]

and

> The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,
>
> (a) distorted, mutilated or otherwise modified.[130]

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127. Berne Convention, *supra* note 1.
128. Copyright Act, R.S.C., ch. 42, § 14.1(1) (1985) (Can.).
129. *Id.*
130. *Id.* at § 28.2(1)(a).

And, finally, the newer right to association,[131] still using the language of "integrity," appears as:

> The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author, . . .
>
> (b) used in association with a product, service, cause or institution.[132]

All three of these rights can be defended as serving the public's interest in creating legal assurances of the sources of works so that members of the public may assess the authority of those works. The right to integrity preserves the author's right to control the content of the work and thus the public's right to be assured that a work represented to emanate from that author is in fact as the author constructed it. The right to paternity or attribution allows an author to insist that her or his identity is attached to the work and thus functions in much the same way as trademark is intended to function (as a reliable indication of source for the public).[133] And, finally, the right of association permits the author to protect the integrity of the whole of her or his oeuvre by ensuring that no element of contextual placement is able to obscure the author's intended context, thus ensuring that the public reputation of the artist's work is as the author intended.[134]

B. The Problem of Anonymity in the Context of Moral Rights

The revisions of 1988 in Canada also inserted into the Copyright Act, as an aspect of the moral rights protection, a right for authors that appears to be unique as an aspect of moral rights protection: a right to retain anonymity.[135]

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131. It may be noted that this last right, the right to association, is not usually listed as part of the standard set of moral rights. *See* MCKEOWN, *supra* note 1; STERLING, *supra* note 1.

132. Copyright Act, R.S.C., ch. C-42, § 28.2(1)(b) (1985) (Can.).

133. The similarity of function between trademark and moral rights has been mentioned in the text *supra* preceding note 107, and deserves further research.

134. For example, prior to the enactment of this right, see the refusal by a Quebec court to grant an interlocutory injunction at the request of the well-known Quebec nationalist (separatiste) singer/song-writer Gilles Vigneault to stop the issuance of an incomplete recording of his song "Mon Pays" in a context which appeared to promote Canadian unity (during a period of time in which these issues were being hotly debated). Le Nordet, Inc. v. 82558 Canada Ltée, [1978] C.S. 904.

135. Consider a recent Canadian government report which states:

> *Moral rights* stem from the continental European legal tradition and are based on the relationship between the author and his or her work. These rights allow an author to protect the integrity of his or her work from prejudicial alterations and to be associated with the work as its author by name or under a pseudonym or *to remain anonymous*.

COPYRIGHT POL'Y BRANCH OF THE DEP'T OF CAN. HERITAGE, *supra* note 58, at 4 (emphasis added). As will be discussed, this last right does not appear to be part of the European tradition.

Section 14.1(1), partially quoted above in connection with the right to paternity or association, actually continues as follows:

> (1) The author of a work, has . . . in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym *and the right to remain anonymous.*[136]

Other nations provide that an author who is anonymous can avail her- or himself of the moral rights provisions of the statute. Canada's provision appears to go further: to make it an infringement if someone identifies by name the true author of a work which has been made available anonymously by the author. Such a right does not appear as part of the moral rights provisions enacted by other nations.[137] This begs the following question: is

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136. Copyright Act, R.S.C., ch. C 42, § 14.1.1 (1985) (Can.) (emphasis added).

137. Even in France, the Code provides that "[t]he authors of pseudonymous and anonymous works shall enjoy in such works the rights afforded [to identified authors]. They shall be represented in the exercise of those rights by the original editor or publisher, until such time as they reveal their true identity and prove their authorship." 1992 C. PRO. INTL. L. 113-16. Jeff Borg, in *Moral Rights: A Legal, Historical and Anthropological Reappraisal*, 6 INTELL. PROP. J. 341 (1991), may be interpreting this as a right to anonymity analogous to Canada's, but it seems clear that it is only the right given to those who are anonymous, not an actionable right to remain anonymous. Britain provides no rights for an anonymous author, although it does expressly provide a right to attribution, provided that these rights have been expressly asserted. The U.K.'s Copyright, Designs and Patents Act of 1988 provides: "If the author or director in asserting his right to be identified specifies a pseudonym, initials or some other particular form of identification, that form shall be used . . . ." Copyright, Designs and Patents Act, 1988, c. 48, § 77(18) (Eng.); *see also* IRINI A. STAMATOUDI, COPYRIGHT AND MULTIMEDIA PRODUCTS: A COMPARATIVE ANALYSIS 226-40 (2002). Sources available in English for the following jurisdictions were also reviewed and found to contain no provision similar to the Canadian one: Brazil, Germany, Italy, Japan, the Netherlands, Poland, and Romania.

Canada leading the way in moral rights protection[138] or is this protection for anonymity in Canada something other than moral rights protection?[139]

This question is not intended to raise any question about the merits of the provision for protection of anonymity in the Canadian statute. Just as the Canadian Copyright Act contains provisions for a private copying regime[140] which is separate from the copyright provisions of the Act,[141] the legislators may well and appropriately have chosen to include a right to privacy among the moral rights provisions of the statute. However, it is important analytically to distinguish each of these various provisions, even though housed in one statutory enactment. The right to not be identified in a particular situation is generally considered to be a right to privacy–part of the right to be let alone.[142]

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138. This issue is important because there are related questions pressing in the Canadian copyright context. For example, the Copyright Act currently gives certain economic rights (although not the rights accorded the holders of copyright in works) to the makers of sound recordings, broadcasters (with respect to communication signals), and performers in their performances. No moral rights attach to sound recordings, communication signals or performers' performances. Performers, in particular, are lobbying for such rights. *See* COPYRIGHT POL'Y BRANCH OF THE DEP'T OF CAN. HERITAGE, *supra* note 58, at 25. Bill C-60, which died on the order paper after the First Reading in Parliament, when the Canadian federal election of June 20, 2005, was called, had proposed extending moral rights protection to "other subject matter" than works, a category in the Canadian Copyright Act analogous to "neighboring rights" in the American context. Under section 9 of this proposed Act to Amend the Copyright Act, new sections 17.1 and 17.2 would have been added to the Copyright Act and would have provided prospectively for moral rights in certain cases of public performance and sound recordings (those involving "a live aural performer's performance"). In order to ascertain the appropriate policy response to the interests seeking moral rights protection, it is vital to understand the role being played throughout Canadian society by the moral rights regime and to consider the players involved in the industries recognized by the current economic rights given to sound recordings, communication signals, and performers' performances.

139. Again, this is not to argue that the value of privacy is not important in the context of Canadian society, or in the context of another society, but rather, it is to ask whether the protection of such a value, if legislated, is properly to be considered an element of moral rights protection.

140. *See* Copyright Act, R.S.C., ch. 42, § 79 (1985) (Can.). This scheme was added to the Copyright Act in 1997, S.C., ch. 24, § 50 (Can.).

141. The private copying regime compensates copyright holders through a levy on all blank recording media sold in Canada, at a rate determined by the Copyright Board of Canada, but, on the other hand, the statute has created an exception to the rights of those same copyright holders in that copying of musical works onto those recording media for private use is not an infringement of the copyright holders' rights. This is a different system for compensating the holders of copyright in music than through copyright, even though it has been enacted as part of the Copyright Act.

142. As this author argues elsewhere, it may be more useful to consider privacy as "the state of being let alone"–a description which is consistent with the early usage of the term recorded in 1450 in the OXFORD ENGLISH DICTIONARY (2d ed. 1989): "The state or condition of being withdrawn from the society of others, or from the public interest." *See* Margaret Ann

Can it be properly considered to be part of the moral rights if those rights are, as argued here, predicated upon serving the public interest in ensuring authority indicators for information?

It is not necessary here to resolve certain definitional issues involved in the area of privacy law. There are challenging distinctions to be made in this area: distinguishing privacy, in the sense of the "right to be let alone,"[143] from personal data protection, which gives individuals certain controls over information about themselves when that information is in the hands of others;[144] distinguishing people's rights to control information they hold about themselves (perhaps part of the "right to be let alone"[145]) from information about themselves held by others;[146] and, finally, distinguishing people's rights to maintain secrets about any subject, not just about themselves.[147] A right to anonymity, however, can clearly be seen to be connected to a dialogue about a person's rights to control information known only to her or to him (that she or he is the author of a particular work). Concern over the right to remain an anonymous author would form part of an individual's concern over the right to maintain secrets and could be considered part of a concern over the right to be let alone.[148]

The addition of the author's right to anonymity in Canada occurred, apparently without any prior policy history,[149] and certainly without any

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Wilkinson, *Privacy and Personal Data Protection: Albatross on Access?*, *in* ACCESS TO INFORMATION IN A DIGITAL WORLD 109-32 (Karen G. Adams & William F. Birdsall eds., 2004).

143. A discussion usually traced back to Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

144. *See* Margaret Ann Wilkinson, *The Copyright Regime and Data Protection Legislation*, in COPYRIGHT ADMINISTRATIVE INSTITUTIONS: CONFERENCE ORGANIZED BY THE CENTRE DE RECHERCHE EN DROIT PUBLIC (CRDP) OF THE FACULTY OF LAW OF THE UNIVERSITE DE MONTREAL 77-100 (Ysolde Gendreau ed., 2002).

145. ALAN WESTIN, PRIVACY AND FREEDOM 7 (1968).

146. *See* ELIZABETH NEILL, RITES OF PRIVACY AND THE PRIVACY TRADE: ON THE LIMITS OF PROTECTION FOR THE SELF 47 (2001).

147. KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 184 (1988).

148. Personal data protection is a legislated area and, as such, depends upon the statutes in place in each jurisdiction. However, in Canada it would be challenging to connect the right to anonymity–that is, the right to *not* be personally named in connection with authorship of a work–with the protections of these statutes, since the protections depend on the information in question being identifiable with a particular individual. See, for example, the definition in the federal Privacy Act, R.S.C., ch. P-21, § 3 (1985) (Can.) ("'Personal information' means information about an identifiable individual that is recorded in any form.").

149. No mention of it is made in either STANDING COMM. ON COMMC'NS & CULTURE, H.C., A CHARTER OF RIGHTS FOR CREATORS: THE REPORT OF THE SUB-COMM. ON THE REVISION OF COPYRIGHT (1985), or in SUB-COMM. ON THE REVISION OF COPYRIGHT, H.C.,

debate, in 1988.[150] In that year, when An Act to amend the Copyright Act and to amend other Acts in consequence thereof was passed,[151] S.12.1 (1) stated:

> The author of a work, has subject to section 28.2,[152] the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and *the right to remain anonymous*.[153]

The right to attribution or paternity (termed in the Canadian Act as "the right . . . to be associated with the work"), onto which this right of anonymity seems to be tacked, is, as mentioned above, the right to insist that the author be identified with the work and to have a cause of action if that attribution is not made. An author may preserve or achieve anonymity, given the existence only of the right to attribution, by merely failing to enforce the right to attribution in cases where her or his identity has been omitted. The right to paternity or attribution alone, however, would not give the author the right to *insist* that her or his identity be omitted.[154]

MINUTES OF PROCEEDINGS AND EVIDENCE OF THE SUB-COMM. OF THE STANDING COMM. ON COMMC'NS AND CULTURE ON THE REVISION OF COPYRIGHT (1985).

150. Only two Commons Debates were held on Bill C-60 (which was passed by the House of Commons on February 3, 1988), one on June 26, 1987, and the other on February 3, 1988. No mention was made in either about the author's right to remain anonymous. Three further debates on that Bill occurred in the Senate after the passage of the Bill in the House of Commons, on February 4, 1988, on February 11, 1988, and on May 3, 1988, and none of these debates mentioned the author's right to anonymity either.

151. That Bill C-60 received Royal Assent on June 8, 1988, and became 1988 S.C., ch. 15 (Can.).

152. Section 18.2(1) (now Section 28.2(1)) provided:

> The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,
>
> (a) distorted, mutilated or otherwise modified; or
>
> (b) used in association with a product, service, cause or institution.

Copyright Act, R.S.C., ch. C-42 § 28.2(1) (1985) (Can.). The recent IHAC Report on Copyright recommended that infringement of the right to integrity should be presumed, as it was prior to the 1988 amendments, when modification is made to an original work. INFO. HIGHWAY ADVISORY COUNCIL, COPYRIGHT AND THE INFO. HIGHWAY: FINAL REPORT OF THE COPYRIGHT SUBCOMM. 9 (1995). Such is indeed the case, even under the 1988 amendments, where a painting, sculpture, or engraving are involved, as "the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work." Copyright Act, R.S.C., ch. C-42, § 28.2(2) (1985) (Can.).

153. Copyright Act, R.S.C., ch. C-42, § 14.1(1) (1985) (Can.) (emphasis and footnote added).

154. Likewise, apparently the right does not automatically give a right to insist that a false attribution be rescinded. *See* RICKETSON, *supra* note 6, at 468. On the other hand, David Grant argues that Article 6*bis* of the Berne Convention contains four rights of attribution:

> (1) the positive right of artists to have works of art attributed to themselves; (2) the negative right of artists to remove or prevent further attribution of works created by

The positive right to insist that the author's name be omitted is what the Canadian government has apparently granted through the wording of the end of section 14.1(1): "the right to remain anonymous." This has given an author in Canada the positive right to *not* be associated with the work. Indeed, it is most interesting that, whereas the right to attribution or paternity in Canada has been qualified, since the 1988 amendments, by the notion of reasonableness in the circumstances, the construction of section 14.1(1) would indicate that the right to anonymity in Canada is without qualification, and is hence arguably a stronger right in Canada than is the right to attribution or paternity.[155]

It is sufficient here to point out that this right to anonymity is arguably properly considered to be an aspect of privacy or personal data protection. It is, however, a rather singular instance in which the individual wishes to be heard–to disseminate ideas and facts–but wishes to withhold one particular element of fact from the dissemination: her or his identity. The question here, leaving aside whether the right of anonymity is a privacy or personal data protection right, is whether the right of anonymity ought properly to be included or developed as part of the moral rights regime in the intellectual property context.[156]

If, as argued herein, moral rights are best described as a social bargain similar to that which makes the economic right of copyright an effective instrument of information policy, then the right to anonymity should not be

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> the artist that have been modified to the detriment of the artist's reputation; (3) the negative right of artists to remove or prevent attribution of works that they did not create; and (4) the negative right of artists to prevent attribution of a work created by the artist, but regarding which the artists chooses to remain anonymous or to use a pseudonym.

Grant, *supra* note 3, at 543 (footnotes omitted). However, Grant appears to be citing to American authorities with respect to these claims rather than to the Convention itself, and, as can be seen from the wording of Article 6*bis* reproduced above, there does not appear to be a strong basis in the actual language of the Convention itself for these claims, other than the first one. The British Act of 1988 provides for both a right of attribution and the right to object to false attribution, which Irini Stamatoudi argues are linked together logically. *See* STAMATOUDI, *supra* note 137, at 227.

155. In a footnote, Thomas Prowse agrees with this proposition, although in his text he argues that the right to remain anonymous is as limited by the reasonableness requirement as are the other elements of the right of attribution. Thomas W.E. Prowse, *Moral Rights Under the Copyright Act: Beyond Beribboned Geese*, 6 INTELL. PROP. REV. 98, 99 (1989).

156. Conceptual clarity is particularly important to tackling the multidimensional problems facing the law in the new economy, as pointed out by Wendy Adams while disambiguating the role of the economic interests in copyright from the role of personal property. Wendy A. Adams, *Secondary Markets for Copyrighted Works and the "Ownership Divide": Reconciling Competing Intellectual and Personal Property Rights*, 37 CAN. BUS. L.J. 321 (2002).

part of the moral rights regime.[157] Moral rights should be recognized as those rights given an author in return for society's interest in the authority of works. Rights should be given authors in this connection which have the potential to aid members of the public in determining the authority of the information being disseminated through the works involved. The right to anonymity, on the other hand, appears to undermine the public's ability to assess the authority of particular works.[158]

As Anne Wells Branscomb pointed out:

> [T]wo bodies of law have come down to us over the centuries that have imposed limits on the exchange of information in the marketplace. One, *intellectual property*, offers legal controls over the creative productivity of the human brain, and the other, *privacy law* (a much more recent legal innovation),[159] maintains boundaries through

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157. It may also be possible to argue that the right to maintain a pseudonym is also not legitimately part of the bargain that society should create through moral rights regimes. However, this instance is not so clear-cut as is the instance concerning the Canadian right to anonymity. The right to maintain a pseudonym is couched in terms of the right to insist upon the integrity of the work even though it is published under a pseudonym, and in having the work published in connection with the pseudonym. These rights may be argued to protect society's interest in having a unique identification of a body of work with an individual author, even though the identity of that particular author created in the minds of the public is a substitution for the author's actual legal identity.

158. Writing in a privacy context, Richard Posner has indicated that he might permit property rights in accurate information since there would be no harm in economic terms in not disclosing it. *See* Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 400 (1978). But I argue that, in the case of the author's identity, there *is* a social cost in not disclosing the identity of the author because the authority of a work cannot be accurately judged without that information. And, indeed, Richard Posner himself, while favoring corporate confidentiality, is generally against legal protection of personal privacy (other than for private conversation) precisely because:

> [P]eople . . . induce others to engage in social or business dealings with them from which they derive an advantage but at the same time they conceal some of the facts that these acquaintances would find useful in forming an accurate picture of their character . . . which are material to the representations (implicit or explicit) that those individuals make concerning their moral qualities.

Id. at 399-400. In this case, I argue, suppressing the identity of the author could be concealing information pertinent to the information-seekers' evaluation of the authority of a particular source.

159. See Elizabeth Neill's argument that privacy is an inherent area of human development despite the paucity of evidence of its having been a priority historically. *See* NEILL, *supra* note 146, at 118 (citing 1 NORBERT ELIAS, THE CIVILIZING PROCESS: HISTORY OF MANNERS (1978); 2 NORBERT ELIAS, POWER AND CIVILITY (1982); DAVID FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND (1972); FERDINAND SCHOEMAN, PRIVACY AND SOCIAL FREEDOM (1992); LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800 (1977); LIONEL TRILLING, SINCERITY AND AUTHENTICITY (1972)).

> which curious eyes may not penetrate to invade those areas over which we may maintain exclusive personal control.[160]

It would appear that the right to paternity and even the right to maintain a pseudonym are rights which, when given to authors, will also serve the public's interest in the authority of information. The public may develop an association of quality or identity with a pseudonym which will serve virtually as well as would a publication under the author's real name. Indeed, if given by a jurisdiction, the right of authors who have published anonymously to avail themselves of the power of moral rights legislation is also a right which serves the public interest in the authority of information, by allowing those authors to insist on their moral rights in works, such as the integrity of their works. By contrast, the right of an author to be able to insist on remaining anonymous, even if her or his identity is discovered, does not in any way assist the public in judging the authority of the work–indeed, quite the opposite. It is important to recognize that Canada, in providing for such a right, has, in fact, privileged a privacy interest of authors over the interest of the public in determining the authority of certain works. While this may be an important social outcome, it is serving the public's interest in the protection of privacy values; it is not serving the same goal as the moral rights regime.

CONCLUSION

This analysis has demonstrated the basic fitness of the notion of copyright as an influence over the supply of information circulating in society. It is a regime which encourages wide dissemination of information artifacts and thus serves the public by facilitating wider access to information. However, members of the public require more than just access to information in order to meet their information needs. They also need evidence of the authority of the information made available to them in order to make judgments about which information to use in meeting particular needs. People need to be able to select between competing sources of information. This Paper has illustrated how the moral rights regime serves the needs of information users in society by giving authors rights which enable authors to maintain control over aspects of their works. These aspects of the works, when controlled by the original authors, also permit members of the public to establish appropriate assessments of the authority of those works when accessing them to meet an informational need.

Tracing the information flow consequences of the original copyright concept and analyzing the underlying effect of the moral rights regime

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160. BRANSCOMB, *supra* note 27, at 7.

indicates that the two regimes are indeed both involved in influencing the flow of information in a society, and each is properly related to the characteristics of the containers of information, the works. But, each plays a completely distinct role in influencing the flow of information because each is related to a different aspect, or property, of the containers of information. Copyright affects the supply of information that is available to be channeled and hence the access to information in a society; moral rights affect the information seeker's ability to judge the quality of the available information.[161]

As demonstrated in the discussion of the Canadian right to anonymity, the justification for the moral rights regime being presented here, focusing on its function in society, can be used to consider the appropriate reach of such a regime. Thus, as the analysis presented herein establishes, it would appear that the extension of the moral rights regime in Canada to include a right to anonymity is unjustifiable in terms of the fundamental role of moral rights in information policy, although it may indeed be an appropriate measure to preserve individual privacy.

On the other hand, given the increased possibilities for manipulation of recordings as society experiences digitization, further research may establish that there is good reason to extend moral rights protection to sound recordings. Moreover, if digitization puts the authenticity of performers' performances at risk, then it would also seem to be socially desirable to attach moral rights to this area of subject matter.[162]

Similarly, the question of the period of protection for moral rights is one that has vexed various states implementing the regime. In the original Berne Convention, the span of moral rights protection was left undefined. This analysis of the social and economic importance of moral rights would lead to the conclusion that moral rights should attach to works for as long as their

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161. Thus, both the copyright and moral rights regimes should have an important role to play in achieving the objectives of Canada's reform process as set out in the recent federal framework for copyright reform. *See* INTELL. PROP. POL'Y DIRECTORATE INDUS. CAN., A FRAMEWORK FOR COPYRIGHT REFORM (2001). The federal framework is designed to:

(1) create opportunities for Canadians in the new economy;
(2) stimulate the production of cultural content and diversity of choices for Canadians;
(3) encourage a strong Canadian presence on the Internet; and
(4) enrich learning opportunities for Canadians.

See id. It may be noted that a recent report submitted in compliance with the requirement of section 92 of the Copyright Act, which requires that there be a report within five years of the coming into effect of the reforms of Bill C-32 in September 1997, does not mention the right to anonymity. *See* INTELL. PROP. POL'Y DIRECTORATE INDUS. CAN., SUPPORTING CULTURE AND INNOVATION: REPORT ON THE PROVISIONS AND OPERATION OF THE COPYRIGHT ACT (1997).

162. It is more difficult to discern, on its face, any argument based on this analysis that would favor extension of moral rights to broadcasts–broadcasting being an area which has been argued above to involve extensions of channel control rather than ordinary copyright control.

provenance and authority is an issue for the society which seeks to make use of the underlying works.[163]

As demonstrated above in the discussion describing the changes in the production and flow of information, until fairly recently there were various mechanisms in existence in society which served to fulfill the need for authority in information selection. However, in the twentieth century, the sources of information have been multiplying and the channels of information distribution have similarly been augmented, and one important result has been the decline in the ability of elites to provide the imprimatur of authority on the dissemination of information.

It is perhaps not surprising, then, that the development of the moral rights regime has lagged behind the development of the copyright regime. The eighteenth century needs of societies involved in the industrial economy were met through copyright in combination with authority controls exercised by elites. Since the late nineteenth century, revolutions in communications technology have caused another shift in our social and economic fabric. It would appear that, as a result, the need for the social and economic role played by moral rights has been increasing: Technology is again the engine driving a "new economy"–but now, specifically communications and information technology, rather than an industrial economy.[164] As elites have lost ground over control of the means of communication, the need for other indicators of authority has grown. Although trademark can function as an

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163. Contrary to the proposed periods set forth recently by David Lametti, which are centered around the "personhood" of moral rights and thus revolve around the lifespan of the author. *See* David Lametti, *Coming to Terms with Copyright*, *in* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 507-08 (Michael Geist ed., 2005).

164. Consider, for example, Paul Vandoren, *Copyright and Related Rights in Society*, *in* THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT: PROCEEDINGS OF THE ROYAL ACADEMY COLLOQUIUM ORGANIZED BY THE ROYAL NETHERLANDS ACADEMY OF SCIENCES [KNAW] AND THE INSTITUTE FOR INFORMATION LAW 165 (P. Bernt Hugenholtz ed., 1995), which specifically recognizes the increasing role that moral rights can play in our emerging society, although not really articulating why this role should be given to the authors and artists that are identified:

> Modifications and adaptations of existing works and protected services have never been as easy as they are today in the digital environment, due to the new technologies. This trend will continue. We may see the day where almost anybody could change the colours of a film or replace the heads of artists and, then, send the film back on the network. Whilst these technological innovations are applauded by certain sectors, it is not a surprise that they are seen with some unease by others–authors and artists. We may thus face a situation in which rightholders will make more use of their moral rights . . . .

Id. Under this analysis, authors and artists should be encouraged to exercise these rights, particularly in an era when technology makes works fluid and impermanent, in order to give the public the opportunity to understand and evaluate the origins of particular works.

indicator of source, it is generally a tool of commercial elites, and it is therefore not surprising that, in many countries, the system of moral rights protection is preferred.

Whereas, in the industrializing societies which first adopted and embraced copyright, the ownership and control of ideas and facts were drivers permitting the new industrialization to occur and produce the new wealth, in the twentieth century and into the current period, the ideas and facts themselves are becoming the new wealth. In this environment, issues concerning the authority of information, its reliability and currency, become important and valuable. The moral rights regime is one way a society can ensure that information can be associated with its source. The social "bargain" that is implicit in the moral rights regime has permitted the regime to endure and spread. While it is traditionally couched in terms of the rights given to authors, those rights serve society's interest in authority control.

In the many new highly decentralized, flat, non-hierarchical domains of information exchange such as those which occur in the Internet environment, enhancing an author's ability to control these authority indicators appears to be increasingly one of the only policy tools available to enhance the public interest in reliably accessing relevant, timely information to meet information needs.