

# **Charging Bull v. Fearless Girl: An issue of Moral Rights under Copyright Law**

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## Abstract

Moral rights, under several legislations, is granted with certain limitations and exceptions. However, in the recent controversy of *Charging Bull and Fearless Girl* (The Charging Bull Case), the artist tried to expand the meaning and scope of moral rights beyond what is provided under the present laws.

While the matter has not yet proceeded for litigation, the said controversy has raised some key issues in relation to moral rights under the copyright laws. These key issues are as follows - (i) what is the scope of artist's moral rights under the copyright law?;(ii) to what extent can an artist control how its work is displayed in public?;<sup>1</sup> and (iii) whether moral rights are absolute or have limitations.

The aforementioned issues will be addressed throughout the article by analyzing current laws on moral rights in different countries as well as the existing case laws. It is also to be noted that this article will focus on moral rights in the context of artists and physical copyrighted works such as sculptures, paintings etc.

## 1. Origin and Purpose of Moral Rights

### 1.1. Background

The concept of moral rights is quite different from an artist's economic rights over its creations. In simple words, an artist may transfer the ownership of its work to a third party, but he/she always retains the right to be recognized for creating that work irrespective. Furthermore, an artist can also object to any distortion, mutilation, or other modification of its work which is detrimental to his/her honor/reputation. But what is the purpose of providing an artist with moral rights in the first place?

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<sup>1</sup> Bereskin, Parr LLP-Catherine Lovrics & Tamara Céline Winegust, PUBLIC ART INSTALLATIONS: IS FEARLESS GIRL 'S GIRL POWER TRAMPLING MORAL RIGHTS IN CHARGING BULL? WE SAY NO. | LEXOLOGY, <http://www.lexology.com/library/detail.aspx?g=c707d5b2-ee8b-448d-923f-ff558c00a1d1> (last visited May 17, 2017).

French scholars and philosophers are the earliest known advocates of the concept of moral rights in relation to copyrighted works. According to the philosophies of Kant and Hegel, ‘a creative work is not simply an external object but the communication of an author's thoughts, imbued with his personality.’<sup>2</sup> Therefore, the underlying principle behind the concept of moral rights is that when an artist creates a work, it is anchored to its personality and therefore, an artist has a personal interest in protecting its integrity.

## 1.2. Legislative Origin

The concept of moral rights owes its international recognition to Article *6bis* the Berne Convention for the Protection of Literary and Artistic Works, 1886 (Berne Convention). Article *6bis* provides that even after an author transfers its economic rights, it has 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.’

While the Berne Convention came into force in 1886, not many member states jumped on the bandwagon to provide for moral rights under their own copyright laws.

For a long time, U.S. resisted incorporating the concept of moral rights in its laws as the legislators believed that ‘it is incompatible with the classic utility model of copyright law.’<sup>3</sup> It wasn’t until 1989 that the U.S. finally joined the Berne Convention and enacted the Visual Artists Rights Act of 1990 (VARA). Scholars argue that VARA’s text is ‘somewhat a hasty, superstitious enactment and it offers an odd balance personhood and object interests.’<sup>4</sup> Therefore, many also argue that the treatment of the concept of moral rights is a mere eyewash in the U.S.

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<sup>2</sup> Sonya G. Bonneau, *Honor and Destruction: The Conflicted Object in Moral Rights Law*, 87 ST JOHNS LAW REV. BROOKLYN 47–105, 52 (2013).

<sup>3</sup> *Id.* at 54.

<sup>4</sup> *Id.* at 67.

It was not until 2000, that Australia formally recognized the moral rights by way of *Copyright Amendment (Moral Rights) Act 2000 (Cth)*.<sup>5</sup> The current law now provides an artist with a right of attribution; a right not to be falsely attributed; or right of integrity.<sup>6</sup> However, the Australian law makes an exception that an artist/author ‘can consent to derogatory treatment of their work and non-attribution, as well as ‘reasonable’ infringement.’<sup>7</sup>

India on the other hand, amended its copyright act to incorporate moral right provisions as early as in 1984.

A more detailed discussion on the laws will take place in the next section.

### **1.3. Conclusion**

Over the years the concept of moral rights has not only found its place in copyright laws of almost all countries, but has also developed significantly. However, the extent, scope and interpretation of these rights vary from each jurisdiction. The next section of this article will discuss the laws on moral rights of various countries and their judicial interpretation so far.

## **2. The scope of the Artist’s moral rights in USA, Canada, India, and Australia**

### **2.1. Background**

The controversial situation between the *Charging Bull and the Fearless Girl* statutes sparked a recent debate in relation to the extent of moral rights. In this case, Artist *Di Mondica* installed the famous “Charging Bull” statue in 1989 in New York City soon after the end of Wall Street financial crisis. On 7th March 2017, on the eve of women's day, a young girl's statue created

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<sup>5</sup> Francina Cantatore & Jane Johnston, *Moral rights: Exploring the myths, meanings and misunderstandings in Australian Copyright Law*, 21 DEAKIN LAW REV. 71, 73 (2016).

<sup>6</sup> *Id.* at 73–74.

<sup>7</sup> *Id.* at 71.

by Artist *Kristen Visbal* was installed on a traffic island near Wall Street.

The installation was commissioned by advertising agency McCann New York and financial investment company State Street Global Advisors (SSGA). The new installation was placed near the Charging Bull statute, thus, making it appear that the little girl is facing the charging bull without fear.

Soon after the installation, Artist *Di Mondica* claimed that the new installation has infringed his moral rights, as it gives his art a new meaning. The Artist's claim sparked legal debate where many law experts acceded to the fact that 'No one can deny that the two works now interact, and the interaction conveys a message. The artist of Charging Bull though didn't agree to the "new" message.'<sup>8</sup>

It is important to note that only a handful of cases have interpreted moral rights to date.<sup>9</sup> The following section will examine some of those cases in addition to whether in the given facts the artist's moral rights would have been infringed under the US, Canadian, Indian and Australian copyright laws.

## 2.2. USA

U.S. legislators have always been paranoid about granting moral rights to authors/artists. Therefore, even though VARA was an outcome of USA's accession to Berne Convention, the extent of moral rights introduced by VARA has been very limited in nature. It is important to note that VARA only covers physical copyrighted works such as paintings, sculptures, drawings etc. Since both the works in question are physical artworks, the provisions of VARA would be relevant.

As discussed earlier, the text of VARA aims to protect an artist's honor and reputation. However, there are certain provisions of the Act which limit the extent of the scope of moral rights. Section 106A(c)(3) of the Act provides that in case of no physical harm to the object/artwork

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<sup>8</sup> Bereskin, Lovrics, and Winegust, *supra* note 1 at 1.

<sup>9</sup> Bereskin, Lovrics, and Winegust, *supra* note 1.

there is no infringement of moral rights.<sup>10</sup> Another exception provided under the Act is that ‘the modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification.’<sup>11</sup> A bare reading of these provisions indicates that VARA’s scope of protecting an artist’s moral rights is very limited.<sup>12</sup>

Given the factual position, where there is no physical harm caused to the Charging Bull statue and that it is only a case of public presentation, one can argue that the artist’s claim under the U.S. law is most likely to fail.

### 2.3. CANADA

In Canada, the Canadian Copyright Act governs the concept of moral rights. The Canadian law recognizes three kinds of moral rights – (i) right of paternity; (ii) right of integrity; and (iii) right of association. While the right of paternity and right of integrity are the core principles derived from the Berne Convention, the right of association is a fairly unique concept found under the Canadian law.

Under the concept of the right of association, the author, *inter-alia*, has the right to refuse and/or object to the association of his/her artistic work with ‘a product, service, cause or institution.’<sup>13</sup> Applying the said concept to the facts of the Charging Bull Case, one could possibly argue that in Canada the artist has a fair chance of succeeding in his claims. Considering that his work has been associated with the cause of women empowerment without his consent, which in turn portrays his art as the negative force.

On the contrary, it can also be argued that the famous Canadian case of *Snow v. The Eaton Centre Ltd*<sup>14</sup>. sets a slightly different precedent. In the said case, the artist Michael Snow’s

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<sup>10</sup> Bonneau, *supra* note 2 at 68.

<sup>11</sup> THE VISUAL ARTISTS RIGHTS ACT OF 1990, 17 U.S. § 106A(c)(2).

<sup>12</sup> Bonneau, *supra* note 2 at 71.

<sup>13</sup> Lesley Ellen Harris, *Moral Rights in Canadian Copyright Law*, 34 LAW NOW; EDMONTON, 2010, at 1–4.

<sup>14</sup> *Snow v. The Eaton Centre Ltd.*, 70 C.P.R. 105 (1982).

geese sculptures were attached to the ceiling of the downtown Toronto Eaton Centre. During the Christmas celebrations, the Eaton Centre tied red bows to the neck of the sculptures as part of the decoration, without the consent of the artist.<sup>15</sup> On becoming aware the artist considered the addition of bows as an alteration of its work and that it negatively impacted his reputation. The court ruled in favor of the Artist.

It is important to note that in the aforementioned case, the Canadian Courts dealt with the physical element being added to an artistic work without the artist's consent. It did not deal with a situation where the original work is intact and only its physical surroundings have changed and/or modified. Therefore, even though the Canadian copyright law is more comforting on the issue of moral rights, one could still argue that the Charging Bull's artist's claims are a bit too far-fetched even under the Canadian law.

## 2.4. INDIA

In India, the concept of moral rights can be found under Section 57 of the Indian Copyright Act, 1957. The language of the said section is in accordance with the Berne Convention, thus, providing the artist/author with the right to paternity as well as the right to integrity. However, the said section also provides an exception to the extent of moral rights. It specifically states that 'failure to display a work or to display it to the satisfaction of the author shall not be deemed to be an infringement of the rights conferred by this section.'<sup>16</sup>

In order to examine the position of moral rights in India, let us consider the landmark case of *Amar Nath Sehgal vs Union Of India (Uoi) And Anr.*<sup>17</sup> This is the first time that an Indian Court dealt with the issue of moral rights and upheld them. The brief facts of the case are as follows.

In 1959, Artist Amar Nath Sehgal was commissioned to design a mural by Ministry of Works, Housing and Supplies of the Union Government of India. After its completion, the said mural

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<sup>15</sup> Harris, *supra* note 13 at 1.

<sup>16</sup> THE COPYRIGHT ACT, INDIA 57 (1)(b) (1957).

<sup>17</sup> *Amar Nath Sehgal vs Union Of India (Uoi) And Anr.*, 117 DLT 717 (2005).



was placed in an important government venue. The mural gained public eye and became a landmark in the city.<sup>18</sup> However, years later when the government venue went under renovation, the said mural was taken off and put in a store. In the process, the mural suffered physical damages beyond repair. The artist on becoming aware of the condition of his art brought an infringement action against the Union of India for, *inter-alia*, infringement of his moral rights.

After 13 years long legal battle, the artist won the case on the context that Indian Copyright Act provides an artist with the right ‘to restrain any distortion, mutilation or modification of the work which could be prejudicial to his honor or reputation.’

At this point, it is important to note that in this case as well there was physical harm caused to the artwork which ultimately led the artist to prove his case. However, in the Charging Bull situation, it’s the way the art is perceived in public.

Since the Indian law specifically states that ‘failure to display a work to the satisfaction of the author shall not be deemed infringement’ of moral rights, the Artist’s claim is likely to fail under the Indian law as well.

## 2.5. AUSTRALIA

As mentioned earlier, the concept of moral rights received legal sanction in Australia in the year 2000. Like most common law countries, the Australian copyright law also envisages the principles of attribution and integrity.

However, the language of the Australian legislation with respect to moral rights is quite tight. It requires certain set conditions to be satisfied before an artist can claim an infringement of its moral rights.<sup>19</sup> The Act, *inter-alia*, requires ‘doing of anything in relation to an artistic work that results in a material distortion or material alteration to that work and is prejudicial to the

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<sup>18</sup> Copyright in the Courts: How Moral Rights Won the Battle of the Mural, , /wipo\_magazine/en/2007/02/article\_0001.html (last visited Jun 16, 2017).

<sup>19</sup> Lisa Chighine, *Damned if you do, damned if you don't: When can an art gallery make changes to an artwork?*, 34 UNIV. TASMAN. LAW REV. 34, 39 (2015).

artist's honor or reputation'.<sup>20</sup>

While examining the aforementioned provision, emphasis is supplied on the words 'material distortion' and 'material alteration'. Although the word 'material' is not defined under the statute, it is generally synonymous with 'physical', 'substantial' and/or 'quantifiable'.

Therefore, it can be argued that similar to other common law countries, the Australian copyright law also requires the author/artist to establish substantial physical harm to their artwork in order to claim infringement.

Moreover, the Australian Copyright Law also provides that 'a person does not [infringe the right of integrity] if the person establishes that it was reasonable in all the circumstances to subject the work to the treatment.'<sup>21</sup> While the meaning of the said provision is quite straight forward, it can also be interpreted to mean that (i) grant of moral rights do not permit an artist to control the effect of its work on an audience; (ii) moral rights are not absolute rights and cannot control the right of other artists.

The Charging Bull Case is a classic example for the application of this exception where another artwork was installed in close proximity to an existing artwork. The public viewed the two artworks in conjunction and thus the charging bull came to be treated as a negative force. Since the artist cannot control how and where the artwork of another artist should be displayed, it was treatment received was reasonable in all circumstances.

## 2.6. Conclusion

Right from the Berne Convention to domestic laws, the legislative intent can be summed up to give "integrity" a more physical definition and not a right to control over placement with other independent works. Consequently, it can be affirmed that the Charging Bull artist's claim is likely to fail in most common law countries.

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<sup>20</sup> Copyright Amendment (Moral Rights) Act 2000 (Cth) s 195AK(a).

<sup>21</sup> Ibid s 195AS

### 3. Is it justified to extend the scope of moral rights beyond its present form?

In the preceding sections, we have discussed how moral rights in its present form has certain limitations and exceptions. In other words, it is basically limited to ensure that an artist/author is correctly recognized for its work and that the work is not distorted/mutilated to the detriment of an artist's reputation. While the current laws on moral rights are deemed sufficient, some scholars argue otherwise.

It has been argued that in copyright law, the trend has always been to focus on the economic rights rather than strengthening the moral rights.<sup>22</sup> Scholars who argue in favor of extending the scope of moral rights beyond its present form, provide two forms of justification – (i) economic; and (ii) moral.<sup>23</sup>

Under the economic justification, it is argued that an artist invests skill, labor and time to create a work which is then an extension of its personality. Therefore, such an investment should be protected to the maximum possible extent.<sup>24</sup> On the other hand, the moral justification provided is based upon the natural law principle.<sup>25</sup> It states that when a work comes into existence, an alienable moral right gets automatically attached to it. Therefore, the artist must have a moral right to protect not only direct moral rights infringement but also indirect infringements such as a change in relative placement/surroundings.

However, there is a problem with the argument of granting excessive moral rights. Under the present scheme, the authors have the right to object to any false attribution or the absence of any attribution at all. Moreover, irrespective of their ownership status they can object to any distortion which hampers their reputation.

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<sup>22</sup> Poku Adusei, *Modern challenges to moral rights protection under copyright law: The way forward*, 2005, <http://search.proquest.com.ezp01.library.qut.edu.au/docview/305380589/abstract/3CBF3AB8200E42D0PQ/1>.

<sup>23</sup> *Id.* at 33.

<sup>24</sup> *Id.* at 33.

<sup>25</sup> *Id.* at 34.

Yes, these rights are not absolute and come with limitations of various types under different jurisdictions. But a classic reason for doing so is that by extending the scope of moral rights beyond its present form, the authors will get the right to control the way their work is perceived. As per a famous saying, beauty is in the beholder's eyes, however, extending the scope of moral rights would result in the artist's control over the beholder's eyes. A situation like this is likely to only create more chaos.

Moreover, a parallel argument to the economic justification is that extending moral rights beyond its present form can stifle creativity, making it difficult for artists to display their works alongside other artists at the same place such as art galleries.

The present law on moral right neither tilts completely in favor of artists nor in favor of public good. Therefore, it would be safe to conclude that it is not justified to extend the scope of moral rights beyond its present form.