International Perspectives on Moral Rights Policy Panel Event

23rd March 2010

Report of Proceedings

Contents

I. Keynote speech – Minister David Lammy MP 1
II. International perspectives 6
  1. United States - William McGrath 6
  2. France - Anne Latournerie 9
  3. Developing countries - Dr Makeen Makeen 14
  4. United Kingdom – Professor Adrian Sterling 18
III. Practitioner perspectives 22
  1. A musician's perspective 22
  2. A photographer's perspective 23
  3. The BBC's perspective 25
  4. Nokia's perspective 28

I. Keynote speech – Minister David Lammy MP

This may be, as we head to the Easter recess, my last opportunity to speak publicly on matters of intellectual property. I end in an appropriate place - this has been the most extraordinary period for copyright for a number of years. It's partly to do with what happens when you enter into a new century. It's certainly to do with huge technological change and huge change in behaviour from citizens as consumers. And therefore in a sense, and I say this not just as Minister with responsibility for intellectual property, but also as a former Minister for Culture, it is important that we take the opportunity to re-examine, or think about, moral rights in this new age, an age in which the potential for citizens to be more creative means that we need to truly understand the balance at this time.

21st century technologies are giving ordinary people wider and more frequent choices than they ever had before. Increasingly, it is they who have the power to decide what is fair and what isn't, and I think that that is a good thing. I said before, and I will say again, that questions of what we need from a modern rights system cannot, I believe, in the 21st century, be seen as solely the province of lawyers or bureaucrats. It has to be an area that requires public discourse as well, and therefore puts the individual consumer also as an equal player at the table. In that sense, it is now time to ensure that this topic is more democratised than it's been previously, and that's why I've not only

promoted the debate but I've also tried to steer it towards the big questions: what is the use of copyright? How well is it working? Are changes needed? And who should make them?

Now 300 years ago, when this country created the world's first copyright law (the Statute of Anne), we were concerned about principally economic rights: who can copy an author's books, and who gets paid for it? We have, as a nation, come to see that copyright involves more interests than those of just economic stakeholders. Every one of us has a stake in it: the student who wants to access materials for his or her presentations, the commuter who wants to put her favourite music on her iPod for the tube, the DJ who wants to use mash-ups as part of his set. And this interest is likely to grow as new technologies and means of communication grow in importance and enable us to encounter these new uses of creative content. But in the current debate on the future of copyright, we must not lose sight of creators and artists, the lifeblood of our vibrant culture and our creative industries, and we should not underestimate their contribution to our national wealth and wellbeing. The creative industries account for around 6.4% of our economy, and that will continue to grow.

So copyright isn't just about making money from creative works, important of course though that is to many people and to our economy. It is also about deeper issues of creativity, identity and control. Since the issue of moral rights is very much part of copyright, and the knowledge and creative economies are key to our recovery, moral rights must be a part of our copyright strategy as we emerge from the recession. That is why these issues are central to public debate. I suspect we will keep returning to them, and certainly I have found myself returning to them as the Minister with responsibility for intellectual property at this time.

And if you think these issues don't affect all of us, then of course you should think again. We are all creators now. I create when I post on my website, you create when you post a note on your Facebook wall, we create when we tweet to each other.

For creators, copyright serves two purposes. It ensures that they can require payment for their work, but also protects the moral stake that they have in it. The logic of the first part then is pretty obvious: if I can't make a living from my work, I won't be able to spend time in the studio and I will have to find another way to make money. It is very simple, and as Arts Minister, I heard that clarion call on a number of occasions, and I see some of the people in this room who

made that point to me (I'm thinking very definitely of the Musicians' Union when I say that).

And consumers understand this, yet for many in the modern age the temptation of free content now, for example with online file-sharing, is stronger than any concerns about the long-term impact on artists or on content quality. This is something that of course we are tackling, not only through the Digital Economy Bill but perhaps more importantly through the industry initiatives and educational campaigns that are actually key to persuading people, and reminding people, of the importance of creators and artists themselves. And crucially there will be new business models that can allow cheaper and easier access to content, such as iTunes or Spotify.

But I believe that the other side of copyright, the moral side, is just as important. Any artist puts not just effort into their work, but quite a lot of themselves, in fact, into their work. Whether a unique work when art is sold in a gallery for a six figure sum, or indeed books like J. K. Rowling's which are selling all over the world in dozens of languages, it's clear that the value of that work is largely because of the huge endeavour that an artist has put in, and there is a powerful sense in which it still remains theirs, their offering to the world - that's in a sense what we mean by a moral right. And that's why here, in the UK, we think it is important to offer protection for both the economic and moral rights of creators.

We protect moral rights in two ways. First, creators have the right to be recognised as the authors of their own work, and that is an inalienable right, even though it is sometimes complicated to apply. Some of you may recall the recent dispute around the 1960s band Procol Harum's work, "A Whiter Shade of Pale": many people were thought, or alleged to have made, a contribution to that very popular piece of music which involved sampling - questions which were very very vexed indeed.

Second, creators also have the right to uphold the integrity of their work. This means that they can object to the mutilation, modification, or distortion of their work in a way which is derogatory. In the UK these rights are waivable in most cases, and there are some exceptions to them. I know a number of people here today who would really like to change that of course. And it's a message that I picked up clearly from the work on the Government's strategy for Copyright in the Digital Age, which I launched back in 2009. Moral rights have been discussed in Parliament, in connection with the Digital Economy Bill, as they have been discussed by those in this room and beyond, in relation to

how we take forward copyright in the 21st century, and that's why today's event is timely as well as important.

SABIP has brought together today some of the leading experts across the field, both academics and practitioners of course, to set the scene for what I think is a long hard look at moral rights in this country.

We are part of a global civilisation, and share our culture and content internationally, and other nations do take very different views on moral rights, different not just from the UK but also from each other. There's a vast gulf between the US, say, and French approaches to this issue. Can those be bridged? What can we learn from our neighbours and our friends? What might they learn from us and our approach? Is it problematic that we have such different approaches to this issue at this point in time, particularly when there are global forums?

I have been concerned about allowing the space, for example, to discuss non-commercial use of material and pre-commercial use of material; pre-commercial being very important because without it we don't get the modern companies and innovations that spread creative works that we need.

And as you know, this is not just an academic question, it's an issue that affects people in their day-to-day lives and this is where you, as practitioners from the copyright world, can help us to understand how these issues impact on creators and artists in practice, both in terms of how they make a living, and also how they are recognised for their work and how indeed they garner reputation as a consequence.

And we need to look at the wider impacts too. Alongside the issues creators have raised with me about their lack of attribution and control of their works, the Copyright Strategy also looked at the broader questions that face us at the start of the 21st century. In particular, enforcing rights is important but it's not a substitute for offering consumers valuable products and services at a price that they are willing to pay. Moreover, clearance of rights takes an incredible amount of time often, and costs money. And too much time and too much money can translate into fewer, more expensive products and services.

But we also need to know what our options are for going forward, and what would be the impact of these various options on our creators, our economy and our consumers. How do we reconcile the needs of our artists with those of our public? How do we ensure ease of use and access for our students and libraries, while respecting the emotional tie of a creator to their work?

I have sought over the last couple of years to try and bring closer together the different interests that have existed within the copyright family, which seemed quite far apart at times when I began this, and I think that the quality of the dialogue and the discussion has improved a lot over this last while. So it's my real hope that as we move in this century from intellectual property issues being purely the domain of the technical, the expert, the lawyer, into this more public arena, that this debate about the moral right alongside the economic right is one that we could have in a more open space, and one that will cut to the heart of how this 21st century delivers the Francis Bacons, the Charles Dickens, the modern artists that are able to convey, own, treasure their work, but also find it enjoyed by an increasing amount of people.

Thank you.

II. International perspectives

1. United States - William McGrath

William McGrath is a member of the Chicago law firm Davis McGrath. He is also the Associate Director of the Centre for Intellectual Property at the John Marshall Law School.

While the US has been home to many great artists and authors, photographers and film makers, and while it has certainly been a leader in providing the economic rights of copyrights, historically the United States has not been particularly hospitable to the moral rights of artists and authors. For two centuries US copyright law really had no recognition of moral rights outside the protections that flowed from the economic rights. The copyright law has never included an attribution right, or really integrity rights. Only with the enactment of the Visual Artists Rights Act (VARA) in 1990 did the US copyright law explicitly adopt certain protections for moral rights. Before discussing VARA though, I want to just talk a little bit about the treatment of moral rights outside of VARA.

Apart from VARA, you could say the protection of moral rights in the United States has been somewhat of a patchwork. There are a handful of states that have state law protection for moral rights in varying degrees. We have the Lanham Act (the US trade mark act), which prohibits false designations of origin. This provision has sometimes been applied in a manner which resembles an attribution right. It has also been applied in some situations, such as the well known Gilliam case involving a Monty Python film, in a way that has protected integrity of works. The right of publicity has also been used in a manner which would resemble the right of integrity. Finally there are de facto, if you could call them that, moral right recognitions in various industries just based on industry practices and customs, particularly with respect to attribution.

This patchwork has never been uniform, or cohesive, or reliable, in protecting moral rights, and in fact the United States Supreme Court in the Daystar case in 2003 for all practical purposes pretty much eviscerated the moral rights protection that I was referring to that emanates from the Lanham Trademark Act. In the Daystar case, the court said that the Lanham Act protection against false designation of origin refers to the origin of tangible goods, and not works of authorship (or as it calls it communicative products) so it very much narrowed, or eliminated, the type of protection that occurred in the Gilliam

case, years previous. In short, what the Daystar case does is preclude, based on the Lanham Act, any claim for false designation of origin. That left a real gap in protection of the attribution right.

Now moving to VARA. Though it is limited in scope, it does explicitly address moral rights, and in particular the rights of attribution and integrity. Obviously VARA is much narrower, for example, than the type of moral rights protection in continental countries. One of the goals of Congress in enacting this Act, back in 1990, was not to interfere significantly with the distribution and the marketing of works. They did that by intentionally creating a very narrow statute which is limited only to certain works of visual art. These works of visual art are defined somewhat narrowly. There's basically two types:

- It protects paintings, drawings, prints, or sculptures which exist in a single copy or in a limited edition (200 copies or fewer), signed and consecutively numbered by the author.
- It also protects still photographic images, but only if produced for exhibition purposes, and again either existing in a single copy, signed by the author, or in a limited edition of 200 or fewer signed and consecutively numbered copies.

The statute specifically excludes a wide category of works: posters, applied art, motion pictures, books, merchandise, advertising materials, newspapers, magazines and electronic publications are specifically excluded. Also excluded are works made for hire.

So what rights are granted? Essentially, attribution rights and integrity rights. With respect to attribution, the author of a work of visual art in the United States has the right to claim authorship of the work (so your straightforward attribution right) and to prevent the use of his or her name as the author of a work that he/she did not create, the right to prohibit misattribution. Also under the attribution right the author has the right to prevent the use of his or her name as the author of a work of visual art if it has been distorted or modified, but only if that has been done in a way that would be prejudicial to his or her honour or reputation.

With respect to the integrity right, the statute grants the author first of all the right to prevent distortion, mutilation or modification of the work but only if this is intentional, and only if the distortion would be prejudicial to the honour or reputation of the author. The VARA also provides a right to prevent destruction, but again, with certain qualifications: only for works of recognised stature, and only if the destruction is intentional or grossly negligent. The statute provides no definition for us, or guidance, really, of what recognised stature is, so the case law has been kind of working on defining or interpreting

that, and the few cases that have come out have suggested that the work must have intrinsic merit, or intrinsic worth, and that this stature must be recognised either by art experts, the art community or some cross-section of society.

There are some specific rules about modification and destruction as applied to works that are incorporated into a building. Those get a bit complicated, so I'm not really going to touch on that. There are also specific exemptions or exceptions to the modification rights, such as would allow conservation and public presentation - in other words the modification rights do not prohibit someone's specific presentation, the lighting, the placement of the work and so forth.

Both the integrity and the attribution right are subject to the doctrine of fair use as it's applied in the United States, so that adds an element of potential reasonable use, and these rights do not apply to reproductions of a work and types of work that are not protected.

The last point I want to talk about is ownership, transfer and waiver. I know that today's proceedings are particularly interested in waiver issues. First of all, the moral rights are provided to the author of the work, whether or not he or she is the owner of copyright. The rights are personal to the author so they may not be transferred. Now with respect to waiver, this was a difficult issue, which was carefully considered and much debated in Congress before the passage of the Act. Congress determined that a law prohibiting waiver, making it so that the artist could not waive their moral rights, would be too extreme in the United States. They thought that a better approach would be to allow waivers, but to require that they be in writing, first of all, signed by the author, and that they have to be specific (no blanket waivers). In the legislative history, it states that the artist is better protected under a regime requiring specificity of waivers than under one where an ideologically pure no waiver law is in fact rarely observed. So the combination of requiring a written waiver and requiring specificity is the approach that's been taken. And this writing requirement is important. Several years ago the copyright authors did a study in this area, and what they determined is that contracts relating to the arts, the type of works covered by VARA, are typically not written: they are typically oral agreements and consequently there are no written waivers or it's rare that there are written waivers in contracts of this type or transactions of this type.

Now one exception to that is art that is involved in buildings, art in a lobby of a building, art incorporated into the structure of a building. Here, because of

some early cases that came down under the statute, building owners have become somewhat nervous and savvy about the situation and so typically building art, if you want to call it that, is subject to a waiver. If building owners weren't able to get those kinds of waivers, they would not want to get involved in it: they don't want the prospect of having artwork that they can't modify, alter, get rid of, remove from the building, etc.

So in sum, the Visual Artists' Rights Act is an attempt to balance artists' rights with commercial realities, to recognise the attribution and integrity rights to a degree, without unduly interfering with the marketing and distribution of the works, and also to avoid the potential chilling effect that may come with over-protection in this area.

2. France - Anne Latournerie

Anne Latournerie is Head of Publishing at the Documentation Francaise (similar to the Stationery Office in the UK). She has also worked as an Editorial Assistant at the Independent newspaper and took part in the project to build a new French National Library.

I want to make three preliminary remarks. First of all, moral rights, like all intellectual property, do not exist in isolation - they are linked with other key issues: the liberty to create, the way works are circulated, the organisation of the market, the place of the authors in society and so on.

Secondly, both authors' rights and the concept of copyright face a dual tension: tension between authors and intermediaries and tension also between authors and the public interest.

Thirdly, economic rights and moral rights have intertwined all along the battle for authors' rights in France. The French history of authors' rights is full of political and cultural battles. However, clearly it is organised around the central figure of the author. I will first briefly summarise the French history of authors' rights then I will go to moral rights today in France and finish with the effect of moral rights legislation on the recognition and remuneration of authors.

History of moral rights in France

Let us take a look at three key moments in the history of moral rights in France. First of all, of course, the Revolution, which is the time when authors' rights first prevailed with the victory of authors over editors. Prior to this, the

King would grant editors a royal privilege (and monopoly) to publish works. The revolution led to the abolition of the privilege and later to two major laws, the laws of 1791 and 1793. The legacy of this period is twofold: first, the role that authors themselves played in the battle for the right, and secondly, that exclusive rights were granted from then on to authors, both a reproduction right and a distribution right.

In France, as in the United States, authors' rights legislation had two aims: to grant personal rights to the authors, but also to encourage the circulation of works and knowledge (in the spirit of the Enlightenment). That is why revolutionary lawyers stated that public property is a rule, whereas authors' rights are an exception.

The 19th century was also a key moment for moral rights. The debate centred around two aspects: the nature of authors' rights (are they personal rights or natural rights?) and their duration (should it be limited or perpetual?). There were many actors involved in this battle: economists, lawyers, but also many authors, including very famous ones like Lamartine, Victor Hugo and Balzac, defending their rights in the name of the Romantic philosophy of the author. It is in the 19th century that jurisprudence and doctrine begun defining the main principles of moral rights in France. Around that time France also played a large role at an international level, introducing moral rights at the revision of the Berne Convention in 1928, where article 6 recognised paternity rights and integrity rights.

However it is not until 1957 that France enshrined these moral rights in legislation with the first modern law to recognise both moral rights and economic rights – this was also the first law to consider new cultural practices such as modern publishing, radio and cinema. To my surprise as an historian, this law was not a natural evolution of French legal tradition but rather involved a protracted debate and even a counter-proposal by Popular Front Minister Jean Zay to limit these rights. The 1957 Act tried to reach a compromise between the necessity of creation and the necessity of exploiting works. This was very important, especially for cinema, as will be discussed later on.

What we learn from the French history of authors' rights is that moral rights are not just the subject of a few lines in legislation, they are an integral and key part of French authors' rights. Moral rights are a symbol and a source of leverage for authors. Moral rights consecrate the idea that there is an intimate link between the authors and the work, because the work carries a personal imprint of the author.

Moral rights today in France

So what moral rights exist today in France? First I must say that they have a central place in copyright legislation. I must also highlight the key notion of originality, which determines whether a work of mine is protected by authors' rights or not.

- The first moral right in France is the right of attribution, to be identified as an author of the work and to have this recognised. It is quite simple in practice in many cases, though the development of digital works raises some new questions such as when and how to record the author's name in collective works. Some fear that there will be an erosion of this right.
- The second moral right in France is the right of disclosure – the right to decide when and where to publish. For example, it is a breach of moral rights to publish the lyrics of a song on the Internet without prior authorisation – this was recently judged to be the case in France for the lyrics to a song by Jean Ferrat, a deceased French musician. Another example it that of the famous Whistler case at the beginning of the last century, where it was established that a painter is not obliged to deliver his painting even if the work has been commissioned (rather than just purchased) from him. One of the debates surrounding this right is whether the right of disclosure extends beyond the first use – namely, does the author need to authorise every distribution of the work. Lawyers are divided on this subject.
- The third right is the right of integrity, the right to object to derogatory treatment of the work. The French interpretation of integrity rights is broader than in the UK. In France, derogatory treatment covers not only damage to the work's form (mutilation or modification) but damage to *the spirit of the work*. There are many examples of this right in action with regard to damage to work's form, such as superimposing sound on silent films not being allowed, for example. Poor quality reproduction of text or photographs could also be considered a breach of the right of integrity as has recently been claimed by French publisher La Martiniere in its case against Google Books. In terms of damage to the spirit of the work, this could be the case, for example, when incorporating a work into a compilation of works.
- The last moral right in France is the right to withdraw and retract. This grants an author the right to take the work out of circulation, with two conditions: first of all, the author has to give compensation for any

damages incurred; secondly if the author changes his mind, distribution rights should be offered to the owner of the work (publisher/editor) first.

There are many specific provisions for certain types of works, for example for “works of collaboration”, which is a term used to describe films or TV or radio programmes. In the case of a film, a moral right exists only when a film is finished and has been signed off by the Producer, Director and any co-author of the film. After that integrity rights apply – the film cannot be cut, colourised, or interrupted by ad breaks without the creators’ consent.

In France, moral rights for works created in employment do not reside with the employer but with the author of the work. There are two exceptions to this: for computer work, and work produced by civil servants.

So what are the characteristics of moral rights in France? First, moral rights are perpetual (they have no fixed term) and are heritable – they are transmitted after the death of the author to his/her heirs. This is a key issue in France and has been hotly debated – to whom should rights go after death? Specific provisions have been included in the law for this purpose: in the first instance, the author’s will is considered. If it remains unclear, the right goes to the executor, then to the descendents, then to the husband and wife, etc.

Moral rights are inalienable – you still have them even if you don’t use them. They are also unwaivable. That’s very important in France. Transfer of moral rights is not permitted in contract, even in cases where an author sells their economic rights. This is linked to the fact that in France moral rights are deemed to have a “Charactere D’Ordre Public” (i.e. are a fundamental requirement in society’s best interest) – they must be enforced and cannot be overriden.

Finally, there is a discretionary element to moral rights – the author determines whether or not their moral rights have been infringed rather than a judge, though a judge could in special cases have recourse to the doctrine of “abuse of rights” to rein in an author.

In summary, the main differences between France and other countries with copyright legislation are: pre-eminence of moral rights, that moral rights reside with the author and not the employer even if the work is created in the course of employment, broad coverage of rights with few exceptions (where other countries have many exceptions), full rights (rather than just rights of paternity and integrity as in the UK), and rights being both perpetual (unlike in the UK

where moral rights exist only for the duration of copyright term) and unwaivable.

Impact of moral rights

Finally, let us consider the effect of moral rights in France on authors' remuneration and recognition. This is a difficult question to answer as it is not easy to evaluate the economic impact of moral rights. In terms of remuneration, moral rights provide authors with the power to prevent new exploitation of works, which can give them better bargaining power relative to major companies; however this does not necessarily result in better remuneration. For an author, invoking their moral rights could mean that they forfeit new royalties from international distribution, and also impedes the smooth flow of business and the economy to an extent. For example, a musician can be opposed to a company moving a video from one platform onto another one, or a journalist can refuse to let a company put their article in a database because it would be alongside other articles.

Moral rights face new challenges in the digital world, and have been given new relevance in many debates around IP. The primary characteristic of the digital world is that work is copied very easily. Copying is not a new problem for the creative industries; however the scale of the problem is very new. But the second characteristic of the digital world is important as well. The development of social networks and web 2.0 enables new practices - the public are using works in a very different way to what the authors might have expected. The public need access to works in order to transfer, use, mash and produce new works. So now the author contends not only with intermediaries but also with the public with regard to their moral rights. On the other hand, the digital world means that the number of "authors" expressing themselves has greatly increased.

In terms of recognition of authors, there is no doubt that the right of integrity and paternity contribute to the recognition of the author. I would also add that moral rights have a dual purpose: they protect the author's private interest but also the public interest in preserving the integrity of cultural property. The public is interested in stability of meaning, values, and cultural products and therefore also in preserving the integrity of works. In the digital world, issues concerning the quality, authority and reliability of information and cultural products have become key. The cultural incentive of moral rights has thus become a social utility.

Moral rights do not encourage increased supply, creation and dissemination of works in the same way as economic rights, as they do not provide the same incentive. However, moral rights serve an increasingly important social and cultural role as has been discussed. As a conclusion, I would say that moral rights are being viewed in a positive light, and the outlook for them is optimistic. Intellectual property policy is designed to further the interest of society in ensuring an expanding supply of reliable and accessible creative work. Copyright (economic rights) can help stimulate the supply of creative works while moral rights can support reliability.

The European Commission, in its work on creative industries, has put the contribution of the creator at the centre of the economic and legal discussion, putting forward the concept of an economy which is not only concerned with facilitating exploitation of copyright works, but also with the expression of creation. As property and common goods become intertwined in the immaterial domain, IP policy is once again facing the challenge of a fair balance between creators' rights and culture as communal human property.

3. Developing countries - Dr Makeen Makeen

Dr Makeen Makeen is a lecturer in commercial law from the School of Oriental and African Studies, University of London.

One of the most difficult things we face in the copyright world as far as non-European, non-North American countries are concerned is the term "developing countries". It is a term that is undefined, and it is really difficult to try to define it for copyright purposes. However, for the purposes of this talk, I will use the term "developing country" to mean a country that pays a subscription fee that is specified for a developing country under the rules of the General Assembly of the United Nations.

In the last 15 years the developing countries have been incredibly active in enacting new pieces of legislation, either because they never had copyright law before and they were introducing copyright law for the first time, or to expand the scope of existing law. Why did they do that? They did that because in 1994 we had the TRIPS agreement (Trade-related aspects of intellectual property rights), and if you want to join the World Trade Organisation, you have to comply with the requirement of the TRIPS, so developing countries passed new laws to comply with TRIPS.

Although TRIPS did not ask any developing country to offer moral rights protection, most of the developing countries who enacted new laws or

expanded already existing laws in the last fifteen years offered a very comprehensive type of moral rights protection. There were three reasons for that. The first reason is that the developing countries wanted to sell the TRIPS agreement to their own public, where the public was concerned that TRIPs would serve mostly to protect foreign copyright works rather than the national interest. The moral rights issue was used to convince the public that copyright was not a harmful thing. In most countries, the government asked authors to help make this argument and enabled authors to make these arguments in the media as if the argument was really coming from authors.

The second reason is that the developing countries accepted that there is more to gain than to lose from either recognising moral rights protection for the first time or extending the scope of already existing moral rights. The third reason is linked to the second: some of the developing countries hoped, and still do hope, that they can protect their cultural heritage by moral rights.

It is incredibly difficult to talk about all developing countries and put them in one pigeon hole; however, on the whole you could say that in the developing countries there are two major copyright systems: one which is the authors' rights or *droits d'auteur,* and the other one which is the copyright. Strangely enough, this distinction between the civil law systems and the common law systems, or the author's right versus the copyright, was not based on colonial links at all. So for example, Egypt, which was occupied by Britain for over 70 years, after independence chose the civil law system, i.e. the authors' rights, and Egypt influenced another 19 countries around it.

<u>Civil law countries</u>

Let me talk about the civil law countries or the authors' rights systems first. The countries that followed the civil law system tradition or the authors' right tradition did not really follow the German approach; rather they followed the French approach, introducing four major rights: the right to divulge the work, the right to paternity, the right of integrity and the right to withdraw from circulation. Some countries, like Armenia, introduced a fifth right, which is arguably a moral right, the right of access. So if you're a painter and you've made a picture, and it took you twenty years to come up with the painting and then you sell it, but you want to have access to this painting one more time, just to inspire you to paint something else, the law gives you the licence to do so.

These rights are, more often than not in the civil law countries, inalienable, perpetual, and they are imprescriptible. Most of the civil law countries, with the

exception of Lebanon, do not allow authors either to assign or to waive their moral rights. So unlike in the United Kingdom where you can waive but you cannot assign, in the developing countries you cannot do either.

The scope of the right of paternity is really straightforward: every time the work is used, the work has to be attributed to its author. The right to divulge the work is very much like that in the French system: the author can decide not to publish the work or withdraw it from circulation even if there is a contractual agreement subject to three conditions: first you have to exercise this right through the courts; second you have to indemnify the publisher for any losses incurred; and thirdly, if you are going to republish the work, you have to give the right of first refusal to the initial publisher under the same terms and conditions.

The right of integrity is the most interesting aspect of moral rights in the civil law countries of the developing countries. Why? Because they learnt the game from the developed countries, so they have two different standards: they apply one to their own nationals and a completely different one to foreign nationals.

The right of integrity is very wide; however in most developing countries that follow the civil law system this right does not really comply with the second part of Article 6 of the Berne Convention. According to this, the right of integrity covers two things: it covers something called the *form of the work* (deletion, addition, alteration) and something called the *spirit of the work* (for example when you use the work as it is without changing its nature but in a context that was not intended by the author). Most of the civil law countries, in the developing countries, forgot or ignored the latter part, and therefore they protect the form but they do not protect the spirit.

The criteria that governs the application of the right of integrity is subjective. What does that mean? It means that the author has the last say. Unlike in the United Kingdom where the author has to prove to the judge that he has an honour that is worthy of protection, and then has to prove that there was a damage to this reputation or honour, in the civil law countries in the developing countries, in the authors' rights systems, you don't have to prove any reputation honour because *dignitas* is something that's given to you by birth. Furthermore, you don't really ask how the work was perceived by the public and thus whether there was damage to the author's reputation or honour: the court follows the subjective view of the author, as long as the author is not abusing his or her right.

Now there is a problem with such a wide scope of the right of integrity: developing countries need to have access to foreign works, and if you give such wide protection to foreign authors, you will hardly be allowed to translate a single work without getting into trouble. The Berne Convention, in its appendix, caters for the needs of the developing countries in terms of translation and reproduction. But since the developing countries also have moral rights, foreign authors can come and invoke moral rights, especially when it comes to translations, so most developing countries came up with this fantastic trick: when it comes to foreign works and translations the right of integrity is applied objectively, not subjectively; the author can't have the last say on it. This allows developing countries to have access to foreign works, because the appendix in the Berne Convention on its own is not good enough, as moral rights could still hinder the flow of works to the developing countries.

Common law countries

The common law countries followed the UK approach and made exactly the same mistakes (and are very proud of it). The first right is the right of paternity, which more often than not is subject to a formality requirement (and therefore it doesn't apply automatically, but has to be asserted by the author). Secondly, the right of integrity applies objectively, not subjectively, i.e. the author has to go through all the trouble of proving honour and reputation and then that such honour or reputation has been damaged. Thirdly they introduced a right called *false attribution*, which is of course a UK invention. False attribution is not really a moral right *strictu sensu* as it benefits authors as well as non-authors.

All these moral rights are waivable. Interestingly, if you look at the copyright law of Barbados and Botswana, you will see that moral rights are waivable, but strangely enough they are unassignable; you cannot assign them.

As for duration, unlike the civil law countries in the developing countries, the common law countries adopt a term of protection that's linked to the economic rights, so it's 50 years *post mortem auctoris*[1].

Renewed interest

The last point I wanted to conclude with is to discuss why developing countries have started taking moral rights even more seriously in the last six or eight months. The reason is very simple: if you are following the WIPO

[1] After the death of the author

negotiations now on the protection of traditional knowledge and expressions of folklore, you will find that the text that will be discussed on 7 May, within the next six weeks or so, is really recognising some sort of a moral rights protection to protect cultural heritage, and that's why the developing countries are supporting the text. Whether anything will come out of this text or not, and whether it will ever be a treaty, God only knows, but it seems that this trend to extend moral rights to cover cultural heritage is not only at the national level but also at the international level.

4. United Kingdom – Professor Adrian Sterling

Professor Adrian Sterling is Vice President of the British Copyright Council,[2] Professorial Fellow, Queen Mary Intellectual Property Research Institute, and Visiting Professor, King's College, University of London.

Can I suggest that moral rights in the UK can be seen from the following points of view:

- the views of authors and performers,
- the views of disseminators, including broadcasters, the film industry, publishers and internet service providers,
- the view of the practitioner,
- the view of the academic,
- the view of the public, and
- the view of the legislator.

Here I wish to give the view of one who has been a practitioner and now works in academia.

UK law on moral rights

Moral rights are enshrined in Chapter IV of the Copyright, Designs and Patents Act 1988 ("the 1988 Act").

The 1988 Act grants the author the right of attribution (often called "the right of paternity", a term which I consider inadequate to cover the categories of human beings who create works) and the right concerning preservation of the integrity of the work.

Performers enjoy moral rights by virtue of the amendments to the 1988 Act made by the Performances (Moral Rights etc.) Regulations 2006 (SI 2006/18), covering the performers' rights of attribution and of preservation of integrity of the performance.

[2] Professor Sterling's presentation represents his view, and not the official view of the British Copyright Council.

As far as authors are concerned, the UK provisions on moral rights are designed to implement the provisions of Article 6*bis* of the Berne Convention by which the UK is bound (together with some 160 other countries) (see Annex A).

Performers' moral rights are recognised in order to reflect the provisions of Article 5 of the WIPO Performances and Phonograms Treaty 1996 which binds the UK (and some 85 other countries, including all other Member States of the European Union) (see Annex B).

In some laws, particularly those of the civil law system (e.g. in France and Germany) moral rights also include those of the right of divulgation of the work and the right of retraction of the work from circulation, by reason of changed opinion.

In 1928 when it was proposed that moral rights should be incorporated in the Berne Convention, the United Kingdom and the countries of the common law system were not generally in favour of the proposal. However it was accepted that the common law remedies of defamation and in contract, passing off and so forth, were sufficient to comply with the proposed provisions. It was not until the passing of the 1988 Act that moral rights were given statutory recognition in the UK.

There has been much discussion on whether UK law conforms to Article 6*bis* of the Berne Convention. First there is the question as to whether the requirement of section 78 of the 1988 Act that the right of attribution must be asserted in order to be applicable is a formality in terms of the Berne Convention, in which case the requirement would not conform to the Convention rules, which preclude formalities as a condition of protection (Article 5(2), see Annex A). As stated in Article 37(1)(c) of the Berne Convention, in the case of differences of opinion on the interpretation of the various texts of the Convention, the French text shall prevail. The French text of Article 6*bis*(1) states that the author has the right to "*revendiquer*" the rights of attribution and integrity of work. I consulted my colleague, Professor André Lucas, the distinguished authority on French authors' right law. His view is that in the Berne Convention the use of the word "*revendiquer*" here means benefiting of a right to which one is entitled, and not just the right to claim that right. From that point of view I suggest that consideration should be given to the abolition of the requirement of assertion under section 78 of the 1988 Act: this provision does not seem to be necessary, and raises concerns which should be removed.

The second aspect regarding the 1988 Act's conformity to the Berne Convention concerns the question of the exceptions. Under the 1988 Act there are a number of exceptions to the exercise of moral rights, for instance as regards the integrity right in respect of publication in newspapers (section 81(4)), and there has been much debate about whether those exceptions are in conformity with the objects of the Berne Convention. According to Article 13 of the TRIPS Agreement (by which Agreement the UK is bound), limitations or

exceptions to exclusive rights must be confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder (the “three step” test). But the TRIPS Agreement does not provide for the granting of moral rights, nor does the EU Information Society Directive, which contains similar provisions regarding the three step test (Article 5(5)). I suggest that the three step test should apply to exceptions to moral rights as well as to exceptions to economic rights. There seems to be no reason in logic or justice why the test should apply to economic rights but not to moral rights.

UK law and laws of other countries

As regards the common law system, I would like to mention briefly the position in Australia, Canada, Nigeria and the United States. Under sections 195AR and 195AS of the Australian Copyright Act, there is no infringement of moral rights if it is reasonable to commit the (potentially infringing) act in the particular circumstances. The application of these provisions depends on what is meant by “reasonable” and the Act contains a list of matters which must be taken into consideration in this connection.

Canada was the first common law country to give statutory recognition to moral rights, and has a reasonableness test for the exercise of the rights of attribution and integrity of work (section 14 of the Canadian Copyright Act).

Nigeria has the common law system. The Nigerian Copyright Act 1990 states in section 11(2) that the moral rights of attribution and integrity are perpetual, inalienable and imprescriptible, an approach derived from French law, which, like many other laws of the civil law system, grants a high standard of protection of moral rights, without the extensive list of exceptions which one encounters in the 1988 Act.

The Federal Copyright Act of the United States contains no general recognition of moral rights, only granting such rights in respect of works of visual art (section 106A). The US Act provides a specific right to prevent destruction of certain works of visual art, a provision not contained in the UK Act. William McGrath has described the objective of the US Copyright Act as the balancing of authors’ rights with the interests of users. Protection of moral rights is available under the laws of some States, e.g. those of California and Massachusetts.

In general, I would remark that the common law lawyer’s approach to moral rights is often different from that of a lawyer of the civil law system. The common law lawyer will generally look first to the question of infringement of the economic rights of reproduction, communication to the public etc., whereas a lawyer of the civil law system will, when considering a case of possible infringement, immediately consider whether there has been infringement of moral rights.

Impact of UK moral rights law on creators' remuneration, recognition, bargaining power and supply of creative works

As regards the impact of UK moral rights law on creators' remuneration, I submit that the principle justifying moral rights has nothing to do with money. My moral rights are my personal rights as a human being. I should not be forced to forego my personal rights for commercial considerations.

In terms of supply of creative works, it seems that it would be difficult to determine statistically whether knowledge of having strong moral rights will make an author create more works, or performers give more performances. But of this I am convinced: that authors and performers will be encouraged to develop and continue the exercise of their talents when they know that what they produce will be fully protected by the law as regards their recognition as authors and performers, and that the integrity of their works and performances will likewise be protected.

In terms of waivability, section 87(1) of the 1988 Act states that it is not an infringement of any of the moral rights to do any act to which the person entitled to the right has consented. The Act goes on in subsections 2, 3, and 4 of section 87 to provide that moral rights are waivable. Broad provisions on waivability are, I believe, undesirable in a law that satisfactorily recognises moral rights. One of the reasons is the possibility of inequality of bargaining power as between, for instance, a young and unknown author and a large publishing company. Far better to abolish the possibility of general waivability and to provide that in the contract between the author or performer and the publisher or producer or other user that the author or performer may agree not to exercise the relevant moral right in circumstances which are precisely described in the contract and which conform to the three step test.

Conclusion

My conclusion is that a high standard of protection of moral rights is in the interests of authors and performers, since such protection helps to ensure that what is distributed is properly attributed and authorised, such protection also being in the public interest by contributing to the maintenance and promotion of artistic creativity.

III. Practitioner perspectives

1. A musician's perspective

Article 5 of the WIPO Performances and Phonograms Treaty (WPPT) states that, independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live and oral performances, or performances fixed in phonograms, have the right to claim to be identified as a performer of his performances, except where omission is dictated by the manner of the use of that performance. The performer can object to any distortion, mutilation or other modification of their performances that would be prejudicial to their reputation, and as far as the term of this right goes, in the second part of Article 5, it states that these rights shall be maintained at least until the expiry of the economic rights. Nation states therefore have leeway in how they implement such rights.

UK performers have had their moral rights strengthened since the introduction of the WPPT. UK performers signed waiver clauses long before moral rights were fully understood. But now performers understand better the notion of the moral interests of artists.

In the UK, waiver clauses mean that moral rights do not exist as they are signed away by contract. The UK copyright law is fine; however in reality the contract negates it. But moral rights are important. Whilst moral rights are waivable they can be used by performers to support the case for stronger economic rights. The music industry is now faced with the problem of identifying performers from old repertoire. If there had been effective moral rights, going back to the sixties, it is considered that the music industry would not have the problems it is dealing with now.

These problems are being exacerbated through the advent of new technologies. YouTube, mash-ups and the variety of user-generated content on social networking sites mean that more than ever before performers want to be recognised for their performance and they should have a say in the integrity of that performance. Even if there is no remuneration the performer should have the right to be associated with the performance. You see it on the credits in films. It should be simple.

Musical performers fall into two categories: featured and non-featured artists. Featured artists are more concerned with ensuring the integrity of the performance. However, there is a problem with mutilation of the performance.

This concerns the use of that performance, and how it is disseminated to the public. Two examples are the use of music in torture by security forces and the sale by the British National Party (BNP) of CDs of “English” folk music. The BNP were acting as a retailer and selling the CD to raise funds for their Party. This received press coverage and the case is still going on. It is therefore vital for a performer to have rights over what happens to their performance.

Music is dots and lines on a page without the performance. In conclusion the Musician’s Union consider that moral rights in the UK should be strengthened, but it is also very important to educate artists and performers to know what their rights really are.

2. A photographer’s perspective

Moral rights affect all creators and not just photographers. Visual arts as a whole are very different, in a way, to other people, and specifically commercial illustrators are the same as commercial photographers, and we share the same problems with moral rights.

Integrity rights and the attribution rights are of great importance to photographers, visual artists, illustrators and all creators. Images are the perfect medium for the digital age. All photographers use the Internet to enhance their reputations and sell their work to new and existing clients, through their own websites, online galleries, or libraries which license their work on their behalf. Images are constantly lifted from the Internet. Despite warnings and embedded metadata they can suddenly appear on other websites, Facebook and other social networking sites. The embedded data just disappears. Publishing tends to make it disappear through the process it has to go through. It’s obviously removable by people who want to remove it as well, but particularly when an image changes format, metadata is lost. It will disappear as soon as the work is moved around on the Internet. And of course most magazines and newspapers have online editions, which is where images become particularly vulnerable due to certain exceptions in the 1988 Copyright Patents and Designs Act. Exceptions exist for reporting current events and publishing a newspaper, magazine or periodical, and that’s a fact that sadly all commissioning editors are aware of.

The integrity right is important to photographers as images are easily manipulated. To be published, every image goes through a computer system. This happens whether it is delivered digitally or by analogue. Whilst it is there the image can be manipulated in whatever form the commissioning editor

wants. Images manipulated before publication in a newspaper, for example, can distort the truth and place the photographer in a position of having to defend his reputation. Images downloaded from the Internet can be manipulated to the point where they are still recognisable as a photographer's work, but the changes, or extreme cropping, have changed the visual impact of the image, or made the photographer look like their work is no longer of a high quality, which could in turn damage their career. Those that commission work may no longer trust the photographer to produce the appropriate quality of work, and subsequent commissions could be lost.

The fact that the attribution right has to be asserted in the UK causes photographers a lot of problems. Whilst most professionals are aware of moral rights, they do not necessarily know that they need to assert their right. As professional bodies, it is important to keep educating them on these issues. However, in reality, the issue is relegated to the bottom of the pile when a shoot is being done, and an onerous contract full of other worrying clauses has to be negotiated with the client's lawyer. This is an impossible task for a freelancer to achieve.

The need to assert is also unfair on amateur photographers. This is not just an issue for professionals as photography is an area that anyone can participate in. Most households have a camera and create copyright works and therefore become authors under the CDPA. More and more members of the public are being encouraged to submit images to competitions, newspapers, news programmes, and any number of television programmes, including weather broadcasts, but they are very unlikely to know that they can assert their right to a credit.

If the right has not been asserted, or a waiver has been thrust on the photographer, then the image will most probably become orphaned. Public lending rights won't be forthcoming, because a credit is needed to prove authorship. Secondary income in the form of reprography may not be available if an orphan is published without the author's knowledge.

Regarding additional remuneration from re-sales, under the artist's re-sale right, an artist has to be credited to be traced back. No further licence revenue will be received if they are not credited and reputation may be lost, as well as possible future commissions. There may also be increased costs to users trying to locate a photographer and an increased cost to collecting societies trying to trace a creator to give them monies that are due to them.

Moral rights have no monetary value and are not enforceable. To enforce their moral rights a photographer who discovers a lack of credit or that an image has been treated in a derogatory way has to prove a loss of income. As a freelancer, this is incredibly difficult. How do you demonstrate yourself to someone commissioning work if your work has not been credited, or if it has been used in a derogatory fashion or has been lowered in quality? An injunction at this point is useless because the damage has been done, and the damages are unquantifiable.

The lack of reward and recognition may diminish the incentive to create new works which will in turn diminish the UK's creative industries. So whilst copyright belongs to the photographer, without strong moral rights to protect the integrity of an image and ensure that a photographer is credited when the image is published, the right to control copying is actually diminished.

The attribution right is fast becoming more valuable than copyright and it enables a photographer to manage their reputation which in turn generates income and has the additional benefit of preventing orphan works.

3. The BBC's perspective

The BBC is a creator of IP rights, and a user of creator's rights on a very large scale. About £2.3 billion per annum is spent on producing original content, and within that over £300 million is spent on the creative contributions contracted for our in-house production activity.

As a creator and user of copyright on this scale, the BBC respects creators' rights and works extensively with creator stakeholders via a wide range of joint relationships with their representative bodies. Essentially, the BBC deals extensively with the subject matter of moral rights in our joint agreements and contractual arrangements, which in the broadcasting world concerns credits and re-editing..

To place them in context: TV, radio and online production involve aggregating many layers of different creative contributions. Directors, writers, composers, actors, musicians, artwork, photographs and film footage are all likely to contribute to the production of television content. So-called multi-platform production, where production is undertaken from the outset with a view to exploiting it across TV, radio and online, as well as the multiple ways of distributing and re-using content digitally, including clips or segments from whole programme productions, requires a great deal of re-editing and reformatting. In turn, this requires flexibility in terms of how programme

contributions can be used. This creates a pressure within production both to standardise the contracts the BBC use and to ensure that all of these programme contributions can be used in a flexible way.

A final point is that financing the production is far more complex than previously, and particularly in television. Expensive signature drama or landmark factual programmes often require multiple investors because productions on this scale are now unfeasible for sole producers. The recent television adaptation of Andrea Levy's Small Island, which was commissioned jointly from two different independent producers by BBC Vision, was made with the support of co-production finance from WGBH in Boston and also with an interest from Northern Ireland Screen, because it was substantially made on location in Northern Ireland. In this context, moral rights can be seen as militating against investment, and some co-investors, particularly those from the United States, will insist on a waiver of moral rights for key UK contributions.

So how are moral rights dealt with in the BBC? This part of the presentation divides the approach broadly into those situations where the BBC itself is responsible for commissioning the original creative work and those situations where we enter into licences or agreements for using existing intellectual property, such as commercial music or photographs.

In the first category it is the standard approach to some original programme contributions for the BBC to obtain a waiver of moral rights in its contracts. For example, commissioning original musical works from composers for incorporating into TV programmes (as distinct from when musical works are commissioned for public performance purposes) will be subject to a waiver. This largely takes us back to the point about the need for flexibility in their capacity to edit and re-edit the programme content. But nevertheless, despite the waiver it would be the usual practice to credit a composer at the end of a television programme with "the original music by" or "musical score by".

And an associated point here which is important to bear in mind is that it is an entirely separate music reporting system which identifies the composer of commercial musical works for the purposes of distributions that are made from collecting societies. The music collecting societies' system does not depend on the inclusion of contributors in the end credits for the purposes of their remuneration.

A second category also entails a waiver of moral rights under their contracts, but here the contract itself, a related framework agreement or an agreed

protocol will deal with the subject matter of moral rights and will set out some provisions regarding the nature of the credit that will be given to the contributor and deal with terms relating to the arrangements for the final edited programme.

In a third category which would relate, for example, to the authors of television scripts that are commissioned by the BBC, the standard terms actually do assert the writer's rights to be identified, and other terms in the contract will deal in some detail with the arrangements for the final edit of the programme, including a contractual right to have a credit removed in the event that the writer regards the final edit for UK transmission as a derogatory treatment. However, the terms go on to say that if they are not complied with, this is regarded as a breach of the agreement and would give rise to damages rather than injunctions so, in other words, there we are protecting our ability to edit and distribute the programme as the producer requires.

In order to distinguish these original commissioning arrangements from licences relating to existing intellectual property material there are BBC collective agreements, mainly in relation to the use of music rights, or there are standard terms agreements, for example relating to the use of photographs, where the works are likely to be the subject of a heads contract[3]. So the BBC's standard terms in these cases will acknowledge that it is often impractical to attribute every work that is used in the context of television production and distribution, but the terms go on to say that the licences are not intended to affect the author's existing integrity right. Any adaptations of the original work would therefore need further agreement outside of the standard terms or collective licences. However, a quick poll on this amongst colleagues in the BBC revealed only one case in their collective memory, and this is from the 200,000 items of commercial musical works that are reported by the BBC every week, where a composer had complained of an alleged infringement of their integrity rights. This case involved changing the words of a song to satirise George W. Bush and, in the absence of a parody exception in the UK, the BBC settled the claim.

So to conclude: in practice the BBC deals with UK moral rights through contracts, industrial agreements or collective licences. This contractual freedom deals, to some extent, with balancing the interests of creators with the needs of programme production, finance and distribution. Our ability to edit is vital, even for the most basic news footage or for contributions from the public. Waivers are therefore obtained principally to create certainty over the

[3] A non-binding document outlining the main issues relevant to a tentative partnership agreement.

use and re-use of content and where it can be a condition for programme investment. The experience of the BBC is that contractual discussions over how moral rights issues are dealt with do not crossover into the discussions about the values that are paid for different contributions and for the use of programmes that incorporate those contributions.

From our view the flexibility in the current law is helpful, and works on the ground with a degree of consensus. An unwaivable integrity type of right would be specifically problematic in some production financing situations. In terms of future developments, on attribution, the BBC is committed to providing Web-based information to support every programme because research shows that this is something that is welcomed by audiences for the purposes of finding out more about the contributions to the production. This will, inevitably, have the effect of increasing the amount and quality of information about programme contribution, irrespective of the underlying legal position.

Finally, programme production and distribution is more global, and as the Minister said this morning, we all recognise that the UK creative industries punch above their general economic weight. BBC Worldwide has a very successful track record in overseas distribution of BBC branding and content. In this respect, the BBC would be wary of any changes nationally which could inhibit the use or re-use of content internationally.

4. Nokia’s perspective

Nokia takes a largely practical and pragmatic approach to make things flow, so as to be efficient and successful for companies, consumers and other stakeholders. Nokia is a large multi-national company which operates in over 125 countries around the world. One of Nokia’s strengths is that it works at a very local level, because different markets function in different ways, and the interests of consumers and the public in different countries are also different. There are different cultural sensitivities and other issues that need to be taken into account on a country-by-country or region-by-region basis.

What’s been particularly interesting this morning is that we’ve heard so many different views about a topic and legislation that affects all of us, but from so many different standpoints, so many different vantage points, and one of the things that’s very important to bear in mind, one of the conclusions I think that we have, at Nokia, is that it’s very hard to find a “one-size-fits-all” solution. Any changes or revisions can have major implications for different parties, depending on what their views are, and depending on how they do business.

Nokia's traditional standpoint on this issue starts off with the basic conclusion that Nokia feels the current UK approach is quite helpful and beneficial and we would question why we would seek to change it at this point in time.

Very importantly, as was mentioned by the BBC, the UK approach embraces the freedom of contract, which Nokia feels is of very significant and vital value. Effectively, it gives people more choice. Creators have the choice when they contract whether they want to contract for certain uses, whether they want to retain certain rights, or whether they are willing or happy to waive those rights. That flexibility leads to greater opportunities for the creators, for industry and for the UK.

It's important to bear in mind that not all creative persons have the same business objectives or the same interests, and there are different types of usages. There are different types of models or businesses where people may decide to be active and with that they may make different choices about their moral rights. It is also important to understand from a company perspective, especially let's say a larger multi-national company perspective, what some of those needs are. For a company like Nokia, who may want to launch a project or a campaign in a number of different countries, this requires huge amounts of investment. It also requires huge amounts of planning and we are not talking days or months, we are talking potentially a year in order to make something happen. A company like Nokia needs to coordinate and implement things amongst large numbers of regions and as part of that, as part of that campaign, when we're using creative content, and when we're working with creators to provide content, Nokia may have to localise, adapt, translate, make the content usable for those different countries, for the different markets and for different cultural sensitivities. There are different tastes, and if persons want to contract with Nokia, it is important that there is legal certainty and financial certainty that Nokia can carry out what it is planning to do over that period of time. That is important not only from Nokia's perspective, but also with the number of parties who disseminate and distribute, and work with creative persons in creating content.

It is also important to bear in mind that the UK, as a result of its current system, attracts many benefits and opportunities as companies come to the UK, employ creators and invest in the market. Also many of the creations that come out of this process end up being exported to many parts of the world so it promotes UK creativity.

It is also important to stand back and look at the regulatory framework and the marketplace in the UK. The UK has a very dynamic and vibrant market place.

The UK encourages innovation, it encourages experimentation, and it encourages investment, which is very significant and important for all parts of the chain. The UK is a very critical creator of content, and not just for local consumption, but also for export. The UK is one of the key exporters of content worldwide, and that indicates that something is working very well within the current framework. So with all of these positive attributes and benefits in mind, Nokia considers that the UK approach is a good one. If the regulatory framework were to be tweaked to strengthen moral rights, the vast array of interests, businesses, and creators would need to be considered.

Nokia would urge caution in revising any approach. Nokia's approach on these issues is evolving as there are many new types of usages that are up and coming, some of which may impact on businesses, creators and consumers more than others. But it is important that we retain the current strengths in promoting and encouraging creation and the sharing of creation across the many new opportunities that technology brings. As a result of this it is important to consider whether in some cases more or stronger protection will enhance creation and the sharing of creation. With these many new developments it is important to discuss and reflect as to what changes might be made, but for the time being, Nokia's position is that the current strengths of the UK framework should be preserved.

ANNEXES

ANNEX A: Berne Convention for the Protection of Literary and Artistic Works (1971), Articles 5(1)(2), 6*bis*

Article 5

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

....

Article 6bis

(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 honour 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.

ANNEX B: WIPO Performances and Phonograms Treaty 1996, Article 5

Article 5

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

(2) The rights granted to a performer in accordance with paragraph (1) 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 Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.