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MORAL RIGHTS: PRINCIPLES, PRACTICE AND NEW TECHNOLOGY, by **Mira T. Sundara Rajan**. Oxford University Press, 2011. 572 pp. Paperback \$150

Reviewed by Cyrill P. Rigamonti, University of Bern, Faculty of Law.
cyrill.rigamonti@iwr.unibe.ch

The stated purpose of Sundara Rajan's book on moral rights is twofold, namely to establish what is meant by moral rights as a global phenomenon and to examine moral rights issues in view of new technological developments. She states right up front that she approaches the subject with a clear goal, which is "to make a case for moral rights as an essential weapon in the fight to preserve human creativity in the Digital Age" (p.29). The text is well written and easy to read, perhaps because it is more a collection of interesting vignettes rather than a pedantic scholarly narrative. However, despite the word "practice" in the title, practitioners should not expect the book to be a comprehensive reference, as the cases selected do not necessarily reflect the entire body of case law on the subject.

In terms of structure, the book is divided into ten self-contained chapters, which is advantageous for readers who want to pick and choose just one or two chapters. The first chapter (pp.1-30) provides an introduction to the basic notions of moral rights law and explains why moral rights are ever more relevant in the digital age, but it does not really explain in what sense moral rights differ from economic rights when it comes to the challenges of the digital environment, especially as far as enforcement issues are concerned. Similarly, the second half of the book, which is meant to address the current and future development of moral rights in view of technological change, dedicates almost as much space to regular copyright law as it does to moral rights.

The second chapter (pp.31-113) essentially outlines the law of moral rights in France, Germany, and the United Kingdom, and gives some background on the historical development of the doctrine. Sundara Rajan begins each country description with brief discussions of the very early stages of the doctrine's development, but then rather abruptly jumps to overviews of current moral rights law in these countries, basically leaving gaps of up to 200 years in the case of France and the United Kingdom. In addition, the legal overviews are at times rather cursory and suffer from the fact that they focus heavily on statutory rules, thereby disregarding to a large extent the sometimes rich and complex case law, even though it is critically important for a proper understanding of delicate issues such as waivers. In the section on the United Kingdom, Sundara Rajan claims that moral rights were recognized in the 1769 landmark case of *Millar v. Taylor* and then rejected for good in 1775 in *Donaldson v. Beckett*. Although it is true that the non-pecuniary interests that later became the justification for moral rights were, in retrospect, neatly outlined by Lord Mansfield in *Millar*,¹ he neither had a clear theory of moral rights in the modern sense nor did the facts of these cases involve a moral rights scenario. Both *Millar* and *Donaldson* were about common law copyright protection in the context of what today would be a straightforward copyright infringement case. Saying that *Millar* recognized moral rights is as much an exaggeration as saying that *Donaldson* rejected moral rights. Sundara Rajan seems to acknowledge this herself in the fourth chapter, explaining that *Donaldson* was "essentially a response, not to the moral rights idea, but to a different type of claim" (p.241), but this statement should have been included in the discussion of these cases in the second chapter in order to avoid misunderstandings.

The third chapter (pp.115-225) continues to provide overviews of different moral rights regimes, in particular those of the United States, Australia, Canada, India, Japan, and Russia. This is perhaps where Sundara Rajan makes her most valuable contribution to the study of moral rights by going beyond the often discussed jurisdictions of Western Europe and the United States. Indeed, one of the best segments of the book is the subchapter on India (pp.163-81), precisely because the author provides quite a bit more background and detail than she does about other countries. The pages describing the many transformations of Russian moral rights law are also illuminating (pp.188-222).

In the fourth chapter (pp.227-81), Sundara Rajan reviews the status of moral rights in the most important international copyright treaties, in particular the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty. Occasionally, it would

have been helpful if some of the claims had been better supported by evidence, for example the claim that 19th century authors such as Victor Hugo “certainly recognized the idea of moral rights and were familiar with its significance as a legal concept in French and Continental law” (p.243), or that the presence of moral rights in the 1928 Berne Convention “was clearly a product of their efforts” (p.243), which is not at all that clear.² Moreover, the statement that the WIPO Copyright Treaty “makes no reference whatsoever to moral rights” (p.259) is difficult to understand given the explicit reference in Article 1(4) to the Berne Convention, which obviously includes a moral rights provision in Article 6bis. Perhaps the most interesting topic of this chapter is the question of why moral rights for performers were included in the WIPO Performances and Phonograms Treaty, the answer to which is not self-evident given the traditionally hostile attitude of the United States, its primary driver, towards moral rights generally. Unfortunately, the book does not go beyond suggesting that an extra layer of rights might benefit the music industry indirectly (pp.267-68). Sundara Rajan concludes the chapter with a call for further international harmonization in order to adapt moral rights to technological change, but she wisely warns that an international legislative framework will not be enough and that “the solutions will need to address long-term problems, deeply ingrained legal biases, and deep-seated cultural prejudices” (p.280).

The fifth chapter (pp.283-319) marks the beginning of the second part of the book, which is dedicated to moral rights in the digital context. In particular, Sundara Rajan discusses moral rights as they apply to computer programs as “literary works” and reviews different national approaches that tend to be somewhat restrictive even in countries in which moral rights are generally accepted. She concludes that “the legal imperative to treat computer programs as literary works may be mistaken” (p.297) and recommends the exemption of functional uses from moral rights protection by limiting moral rights to the protection of honor and reputation. In addition, she argues in favor of exceptions to allow for the development of new features or programs, without, however, giving concrete details on how such an exemption would have to be crafted. Sundara Rajan also reiterates the importance of applying moral rights in the corporate context on the basis of a human rights argument and with the goal of establishing “a more humane environment in the software industry” (p.301). This line of thought is a distinctive feature of the book, even though there is no apparent reason to recast moral rights protection in human rights language in order to make the case for applying moral rights in a corporate context. A purely utilitarian rationale invoking the importance of attribution as an economic value would probably be more effective in practice. The motion picture and videogame

industries are good examples of how complex attribution systems can develop even in the absence of statutory moral rights protection as an important element of doing business, selecting talent, and building careers.

The sixth chapter (pp.321-73) addresses moral rights and digital issues in music, again on the basis of an understanding of moral rights as “human rights of authors and artists” (p.327). By contrast, however, the chapter’s primary focus is on economic rights in the context of sampling, mixing, file-sharing, legal downloading, and the global licensing of music through ISPs. From the point of view of moral rights, the most interesting segments in this chapter relate to whether splitting albums, format shifting, and the use of music to create ringtones violate moral rights, the latter of which is explored through the lens of a pioneering decision by the German Supreme Court. As part of her recommendations, Sundara Rajan reiterates that moral rights should also be protected in the digital context but cautions that they should be “subject to certain modifications which are appropriate to this environment” (p.371). In her view, this means that the right of attribution should be “exercised with technological necessity in mind” and that the right of integrity should be “restricted to situations of damage to reputation” (p.371). The latter is, of course, exactly what the minimum standard of the Berne Convention is all about.

Moral rights in film are the subject matter of the seventh chapter (pp.375-435). The fact that motion pictures cannot be created without the collaboration of a large number of people has always been a challenge for copyright law. This is no different for moral rights. Accordingly, the focus of this chapter is placed on the definition of authorship in moral rights law, which is indeed an important topic given that the exercise of these rights depends on establishing authorship. Sundara Rajan’s review of the laws of various countries shows that there are vastly different approaches to authorship across the globe. A large portion of this chapter is dedicated to India, which is particularly useful, because it brings lesser-known, yet very interesting cases to the attention of a broader audience. As part of her recommendations, she concludes that the moral rights of disclosure, attribution, and integrity are “appropriate for film”, but “should be tailored to the practical requirements of the medium” (p.433). Sundara Rajan also observes that moral rights have not chilled the film industry in those countries that do have them, and that the defensive position of the United States is “quite anomalous” in this respect (p.434), potentially generating “national embarrassment” if “Hollywood’s neglect of moral rights translates into American disregard for America’s own filmmakers” who receive better protection abroad than at home (p.434). Consequently, she concludes this

chapter with a call for the United States not to be left behind, as there is “little need for the American film industry to be fearful” (p.435).

The eighth chapter (pp.437-85) returns to more standard turf by addressing moral rights in the visual arts. Sundara Rajan aptly notes that, in this area, moral rights attract ready sympathy, receive stronger protection than other kinds of works, and are recognized even where the general recognition of moral rights is in doubt, such as in the United States. She also observes that “moral rights of visual artists often turn upon a special approach to the interpretation of the moral right of integrity in the visual context” (p.439), which is indeed the case, given that some countries tend to extend the right of integrity into the realm of preservation of cultural heritage, thereby extending the traditionally individualist approach to moral rights into the social sphere. In this context, the book briefly discusses the Visual Artists Rights Act of 1990 and the special provisions regarding the visual arts in Canadian moral rights law, and further includes short reviews of illustrative international cases, such as the *Calatrava* case in Spain. A recurring theme in this and previous chapters is the author’s culturally sensitive critique of copyright law and Western moral rights regimes as being based upon a romantic notion of authorship that is exaggerated and often inadequate to deal with the needs for attribution and integrity of Aboriginal communities. Accordingly, in the context of the Australian *Yumbulul* case, Sundara Rajan explores the idea of an “Aboriginal moral right that would be vested in the community concerned” and that may also be a “possible solution to the dangers of cultural appropriation” (p.454), but she also openly acknowledges the difficulties in applying such a right in practice. A large part of this chapter is devoted to conceptualizing moral rights as a bridge between intellectual property rights and the protection of cultural heritage, using Indian moral rights cases as a conduit for discussion.

The ninth chapter (pp.487-532) addresses moral rights in the context of what Sundara Rajan calls “open access”. It includes an analysis of creative commons licenses, which put a premium on attribution and integrity, but, contrary to what the book claims, do not provide an “alternative to copyright protection” (p.497). The entire idea of creative commons is to work within the copyright system and use it to enforce its licensing terms when necessary, even if the standard terms of creative commons licenses happen to be more permissive than others. Sundara Rajan also criticizes the creative commons approach of enabling free access while retaining a certain level of authorial control by arguing that authors cannot make a living giving away their works for free. The latter may be true in the abstract, but the argument overlooks that the creative commons movement does not force

anybody to make his or her work available for free. It simply provides licensing options for those who want to disseminate their works without being paid while providing users with legal certainty about the terms of the applicable copyright license. In the balance, this passage creates a surprising contrast in attitude to the first 500 pages of the book, which are almost exclusively concerned with the non-economic interests of authors on the basis of moral rights understood as human rights. Following a few words about the theoretical relevance of moral rights in the context of the free software movement and large-scale collaborative undertakings of the Wikipedia type, Sundara Rajan turns to the Google Book project. This is an unusual choice for a book on moral rights, given that moral rights are the least of Google's copyright problems, with the exception perhaps of the question of whether displaying "snippets" of texts violates the author's moral right of integrity. Unfortunately, however, this issue is not explored in depth. Analytically, the claim that the moral right of disclosure is implicated if a book is included in Google's archives (p.524) is also strange, because this right is typically understood to be limited to the *first* disclosure, and such disclosure must have happened long before Google incorporated the book in its digital archive.

In the tenth chapter (pp.533-35), Sundara Rajan concludes the book with two messages that are keyed to her two stated purposes of defining moral rights and exploring their application in the digital environment. First, she finds that moral rights are a "robust doctrine" that is "widely accepted in countries representing diverse traditions" and that consists of increasingly different approaches also throughout common law countries (p.533). Second, she maintains that moral rights are ever more needed in the digital environment, because they "protect knowledge" and "turn social attention to the human side of culture" (p.535).

The book is definitely an interesting read. Those who are not familiar with moral rights or copyright law may want to read it as a whole, as a collection of stimulating issues, not just regarding moral rights, but also regarding economic rights. Scholars in the field who are already well-read on the doctrine of moral rights and its history can still benefit by focusing on Sundara Rajan's overview of moral rights regimes that are not as well known in the Western hemisphere, in particular the previously under-explored countries of Russia and India.

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- ¹ See also Cyril P. Rigamonti, Deconstructing Moral Rights, 47 Harv. Int'l L.J. 353, 381-82 (2006).
- ² For a different account on why moral rights were inserted into the Berne Convention during the 1928 revision conference, see Cyril P. Rigamonti, The Conceptual Transformation of Moral Rights, 55 Am. J. Comp. L. 67, 111-119 (2007).

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