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The Conceptual Transformation of Moral Rights

A classic question of comparative copyright theory is how to understand the long-standing discrepancy between civil law and common law approaches to moral rights. The recent wave of moral rights legislation in common law countries has undermined the standard narratives that relied on the idea of an inherent link between the formal inclusion of moral rights in copyright law and strong moral rights protection reflective of a particular copyright philosophy. This article provides an alternative explanation that understands both the long-standing discrepancy between and the recent convergence of civil law and common law moral rights systems as the expression of a global conceptual transformation that began in Continental Europe in the late 19th century and that has now reached most common law jurisdictions, including the United States. In addition to providing a close study of this conceptual transformation against the background of comparative copyright theory, this article also contributes to the emerging study of the globalization of legal thought by providing a specific example of how and why a particular legal concept was created, adopted, and globalized.

INTRODUCTION

It has long been a basic tenet of comparative copyright theory that American and European copyright systems differ primarily in their attitudes towards the protection of moral rights of authors, evidenced by the striking discrepancy between the rights traditionally granted to authors under the copyright statutes of most common law jurisdictions and the rights granted to them under the copyright statutes of many civil law countries. For example, while the exclusive rights contained in the U.S. Copyright Act were limited to “economic” rights granted to authors in order to provide them with incentives to promote the arts and sciences, the copyright statutes of France, Ger-

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many, and Italy also included “moral” rights designed to protect the non-economic interests of authors in their works. Legal scholars on both sides of the Atlantic have typically linked this discrepancy to profound substantive and philosophical differences. Substantively, the inclusion of moral rights in European copyright statutes has been explained by reference to a high level of protection for authors, while the exclusion of moral rights from U.S. copyright legislation has been rationalized as a function of a significantly lower level of authorial protection.¹ Philosophically, the American limitation of copyright to economic rights has been understood as an expression of Benthamite utilitarianism and Lockean labor theory, while the European focus on moral rights has been characterized as an emanation of Kantian or Hegelian personhood theory.²

The insertion of civil law style moral rights into the copyright statutes of common law countries such as the United States, the United Kingdom, New Zealand, Ireland, and Australia has undermined the descriptive power of these widely accepted explanations, because the sharp formal difference between the two copyright systems has begun to fade away without any significant philosophical or substantive shift in those countries that newly subscribe to the civil law doctrine of moral rights. In terms of copyright philosophy, it would be difficult to maintain the claim that the formal insertion of moral rights into the U.S. Copyright Act has changed or upset the utilitarian foundation of American copyright law. Regarding the substance of moral rights protection, I have shown elsewhere that the adoption of express moral rights provisions in the United States has not only failed to increase, but has actually decreased the overall protection of moral rights for authors.³ Given the standard narrative’s strong association of moral rights with specific philosophical and substantive views, one would have expected otherwise. However, if the inclusion or exclusion of moral rights in copyright law is not a function of certain copyright philosophies or certain levels of substantive protection, how are we to understand the long-standing discrepancy and the recent convergence of civil law and common law approaches to moral rights? In offering an answer to this question, this article not only provides a close study of the comparative theory and concep-

1. See, e.g., John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976); Roberta Rosenthal Kwall, *Copyright and the Moral Right*, 38 VAND. L. REV. 1 (1985); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988).

2. See, e.g., William W. Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 174 (Stephen R. Munzer ed., 2001); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 7-20 (1994).

3. See Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 404-11 (2006).

tual history of moral rights in copyright law that may serve as a basis for future policy analysis in this field but also contributes a specific doctrinal example to the emerging study of the globalization of law and legal thought.⁴

My basic claim is that the puzzling discrepancy and the recent convergence in transnational moral rights law are best understood as instances of a global conceptual transformation that is chiefly a matter internal to the legal system. The distinct focus on how moral rights rules are conceptualized is not meant to revive conceptualism, to proclaim the law's autonomy, or to deny the influence of external matters on law, but instead to highlight the crucial importance of historical changes within the legal consciousness in moral rights law. These changes essentially occurred within a 50-year window that extends from the first technical use of the French term "*droit moral*" (moral right) in 1878 to the insertion of an express moral rights provision into the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention")⁵ in 1928. Prior to the development of a cohesive moral rights theory, the standard practice in both civil law and common law countries had been to protect moral rights through a patchwork of unrelated doctrines that were not specifically tailored to moral rights issues. While most common law scholars and courts remained true to this approach until recently, the Europeans developed what has since become the moral rights orthodoxy, a highly theorized doctrine dedicated to moral rights issues. This theory gained widespread support in the early 20th century and ultimately led to the recognition of moral rights on the level of international treaties. The inclusion of moral rights in the Berne Convention turned out to be the key factor in driving the steady convergence of moral rights systems across the globe, and it is quite clear that the United States and others added specific moral rights provisions to their copyright statutes mainly to increase the appearance of formal compliance with Article 6bis of the Berne Convention.⁶ Therefore, my discussion of the global conceptual transformation that explains both the discrepancy between and the convergence of common law and civil law moral rights regimes will focus on the formative period between 1878 and 1928, with particular attention to the scholarly developments in Continental Europe and to the central question of how and why moral rights made their way into the Berne Convention.

4. For a comprehensive theory of legal globalization that covers the time periods most relevant to this article, see Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK L. REV. 631 (2003).

5. Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention].

6. See, e.g., Netanel, *supra* note 2, at 45-46.

This study consists of four parts. Part I provides a brief introduction to the modern theory of moral rights and explains alternative modes of conceptualizing moral rights in order to set the stage for the analysis to follow. Part II establishes the historical baseline by tracing the emergence of moral rights rules between the enactment of the first copyright statutes in the 18th century and the first widespread codification of moral rights rules around 1900. Part III explores the origins of the divergence between common law and civil law approaches by describing how French and German scholars created the modern theory of moral rights by gradually aggregating separate moral rights rules and by converting these rules into cohesive copyright doctrines aimed at protecting the non-patrimonial interests of authors in their works. Part IV reveals the beginnings of the recent convergence in international moral rights law by providing a close explanation of how the adoption of the modern theory of moral rights in Italy led to the incorporation of moral rights into the Berne Convention, from which they were first exported to the civil law countries before reaching the common law countries after a delay of several decades.

I. UNDERSTANDING MORAL RIGHTS

The purpose of this Part is to provide a brief overview of transnational moral rights law and to explain the differences between the three standard modes of conceptualizing moral rights. The key to understanding the different approaches to moral rights across the globe is to distinguish between the concrete decisional rules that courts apply in moral rights cases and the legal concepts employed by courts, scholars, and legislators to rationalize these rules. Therefore, I will first outline the core elements of the moral rights doctrine before highlighting the conceptual differences between the various theoretical approaches, which I will revisit in a historical context in Parts II and III. I will conclude this Part by presenting my thesis that both the discrepancy between and recent convergence of civil law and common law moral rights reasoning can be explained by reference to a process of global conceptual transformation.

A. *Moral Rights Rules*

The doctrine of moral rights consists of a collection of concrete decisional rules that are designed to protect the personal interests of authors in their works. These rules are typically understood as “rights” of authors, and copyright scholarship generally recognizes four different rights, namely the right to claim authorship of a work (right of attribution), the right to object to modifications of one’s work (right of integrity), the right to decide when and how to publish a work (right of disclosure), and the right to withdraw a work after

publication (right of withdrawal).⁷ However, simply listing these rights in the abstract does not say much about the concrete rules that courts apply when deciding moral rights cases. In fact, referring to these rules as “moral rights” is itself part of a particular mode of conceptualizing the specific rules that protect the personal interests of authors. Therefore, it is necessary to pierce the veil of standard moral rights consciousness by looking more closely at the actual set of rules employed by the courts. Interestingly, an analysis of the most prominent Continental European moral rights regimes⁸ reveals that the moral rights doctrine consists of a few rather narrow decisional rules that perform different functions depending upon whether the potential infringer of moral rights is or is not authorized to use the work in question under traditional rules of copyright law, i.e., economic rights.⁹

If an alleged infringer is not allowed to use the work in question at all (*tort scenario*), the rules derived from moral rights are fairly straightforward. Without the author’s consent, it is illegal (i) to reveal a copyrighted work to the public (right of disclosure), (ii) to disseminate a work that has been modified (right of integrity), and (iii) to interfere with the author’s decision regarding attribution or anonymity, either by falsely claiming authorship or by changing or suppressing the author’s name on copies of the work (right of attribution).¹⁰ By contrast, in a tort setting, there is no rule that corresponds to the right of withdrawal, because that right requires a contract transferring or licensing economic rights that can then be revoked by the author through the exercise of his or her right of withdrawal.

If the alleged infringer is allowed to use the author’s work on the basis of a copyright transfer or a licensing agreement (*contract scenario*), moral rights are used to guide contract interpretation and to set default or mandatory terms in copyright contracts with respect to issues such as remedies, performance, and permissible content.¹¹ Consequently, the rules derived from moral rights are quite different whenever there are contractual relations between authors and alleged infringers. In a contractual setting, the right of disclosure is

7. See, e.g., HENRI DESBOIS, *LE DROIT D’AUTEUR EN FRANCE* 472 (3d ed. 1978); 3 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 17:23, at 17:200 (3d ed. 2005).

8. See French Intellectual Property Code, Law No. 92-597 of July 1, 1992, arts. L. 121-1, L. 121-2, L. 121-4, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 3, 1992, p. 8801 [hereinafter FIPC]; German Copyright Act, *Urheberrechtsgesetz* [Copyright Law], Sept. 9, 1965, §§ 12-14, 42, *Bundesgesetzblatt, Teil I* [BGBl. I] at 1273, last amended by Gesetz, Sept. 10, 2004, BGBl. I at 1774 [hereinafter GCA]; Italian Copyright Act, Law No. 633 of Apr. 22, 1941, arts. 12, 20-24, 111, 142-43, *Gazzetta Ufficiale della Repubblica Italiana* [Gazz. Uff.], July 16, 1941, No. 166 [hereinafter ICA].

9. See Rigamonti, *supra* note 3, at 367-80.

10. *Id.* at 368.

11. *Id.* at 372, 379.

essentially transformed into a mandatory rule according to which a person commissioning a work may not obtain specific performance but may sue for damages if the author fails to deliver the commissioned work.¹² The right of withdrawal represents the compulsory rule that an author may unilaterally cancel a contract governing the exploitation of economic rights on the basis of a change in the author's personal convictions, provided that the author indemnifies the other party to the contract in advance.¹³ The right of attribution is invoked to justify a default rule in contracts governing the dissemination of copyrightable works, pursuant to which the author's name or pseudonym must be affixed to the work, unless an author chooses to remain anonymous.¹⁴ Furthermore, in the context of agreements regarding the author's anonymity, the same right is used to explain the compulsory rule that authors cannot validly bind themselves never to disclose their real identity.¹⁵ Finally, the right of integrity is reduced to the default rule that the author's work may not be substantially modified by the person disseminating the work¹⁶ and to the mandatory rule that authors may not validly consent in advance to unknown future modifications of the work left to the discretion of the other party to the contract.¹⁷

The sum of these rules in the tort and contract setting is the substance of the moral rights doctrine in France, Germany, and Italy. While there may be substantive differences at the margins, most notably with respect to the right of withdrawal and certain elements of the right of attribution, most of these rules are also recognized outside these traditional moral rights jurisdictions, especially in the United States, the United Kingdom, and Switzerland.¹⁸ The fundamental difference between civil law and common law countries is not so much their substantive level of protection, but rather the way in which moral rights rules, to the extent that they are recognized and applied in practice, are explained, justified, and rationalized. In other words, it is more the conceptual than the substantive layer that

12. Although this rule is little more than the standard rule of contract law according to which specific performance is not available in service contracts, the French case applying this rule to the American painter James McNeill Whistler, namely Cass. ch. civ., Mar. 14, 1900, D.P. 1900 I 497 (Fr.), is almost universally viewed as an emanation of the author's moral right of disclosure. See, e.g., ANDRÉ LUCAS & HENRI-JACQUES LUCAS, *TRAITÉ DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE* 311 (2d ed. 2001); FRÉDÉRIC POLLAUD-DULIAN, *LE DROIT D'AUTEUR* 409 (2005); PIERRE SIRINELLI, *PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE* 56 (2d. ed. 2003).

13. See Rigamonti, *supra* note 3, at 374.

14. See FIPC, *supra* note 8, art. L. 132-11(3); ICA, *supra* note 8, art. 126(1); GCA, *supra* note 8, § 39.

15. See, e.g., DESBOIS, *supra* note 7, at 526; HAIMO SCHACK, *URHEBER- UND URHEBERVERTRAGSRECHT* 160 (3d ed. 2005); Adolf Dietz, *The Moral Right of the Author*, 19 COLUM.-VLA J.L. & ARTS 199, 220 (1995); Netanel, *supra* note 2, at 52.

16. See FIPC, *supra* note 8, art. L. 132-22, L. 132-11(2); GCA, *supra* note 8, § 39.

17. See Rigamonti, *supra* note 3, at 377-78.

18. *Id.* at 380-99.

makes the difference in transnational moral rights law. Accordingly, the various modes of conceptualizing the decisional rules described above deserve a closer look.

B. *Moral Rights Concepts*

Both from a comparative and a historical perspective, there are essentially three different conceptual approaches to the rules that are currently viewed as being part of the moral rights doctrine, namely (i) the copyright theory championed by France, Germany, and Italy (*monist theory*), (ii) the right of personality theory used in countries like Switzerland (*dualist theory*), and (iii) the patchwork theory traditionally employed by most common law countries, including the United States and the United Kingdom.

1. Copyright Theory (Monist Theory)

Today, the standard conceptual approach to moral rights is to understand them as a genuine copyright concern. The basic idea underlying this approach is that copyrightable works are not regular commodities, but rather expressions of the author's inner self, which is why authors are presumed to have deep personal or moral interests in their works, in addition to purely economic interests.¹⁹ Therefore, within the framework of this theory, copyright law needs to recognize the intimate bond between authors and their works by protecting both economic and moral interests. While other moral rights theories may share some of these tenets, the characteristic feature of the copyright approach is to completely integrate both economic and moral interests *within copyright law* by conceptualizing the rules outlined above as emanations of a non-economic "element" of copyright represented by moral rights.

The formal inclusion of moral rights rules, phrased in rights language, in the copyright statutes of France, Germany, and Italy²⁰ is an expression of this ideology. If moral rights are elements of the author's copyright, then they ought to be formally regulated as part of copyright law. The copyright statutes of both France and Germany make this very clear by mentioning *two* attributes and objectives of copyright protection: one moral and the other economic.²¹ This un-

19. See, e.g., Morris E. Cohn, *Author's Moral Rights: Film and Radio*, 1 HOLLYWOOD Q. 69, 69-70 (1945); Raymond Sarraute, *Current Theory on the Moral Rights of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968).

20. See *supra* note 8.

21. FIPC, *supra* note 8, art. L. 111-1; GCA, *supra* note 8, § 11. Germany and Austria go even further in the implementation of the copyright approach to moral rights by extending the inalienability of moral rights to economic rights. If moral rights are inalienable, economic rights must be as well, because they are part of the same copyright and thus part of the same conceptual unity. See GCA, *supra* note 8, § 29(1) (inalienability *inter vivos*); Urheberrechtsgesetz [Copyright Law], Bundesgesetzblatt [BGBl.] No. 111/1936, § 23(3) (Austria) (inalienability *inter vivos*).

derstanding of moral rights as part of copyright law has come to dominate modern moral rights theory to the point where the term "moral rights" is almost exclusively associated with this particular mode of conceptualizing moral rights rules. Due to the conceptual unity of economic and moral rights, this approach is sometimes called the "monist" theory. In view of its dominance today, I will also refer to it as the "moral rights orthodoxy" in the remainder of this study.

2. Right of Personality Theory (Dualist Theory)

The right of personality approach to moral rights is similar to the copyright approach only in the sense that it also recognizes the existence of personal interests of authors that are worthy of protection. However, contrary to the moral rights orthodoxy, the rules protecting these interests are not conceptualized as copyright entitlements, but rather as expressions of a more generic set of inalienable rights typically called "rights of personality."²² The main legal characteristic of rights of personality is that the objects of these rights—such as a person's physical integrity, personal liberty, or reputation—are perceived to be so closely connected to the individual that these rights cannot be freely alienated, unlike property rights and contractual rights.²³ Examples of rights of personality would be the right of privacy or the right to one's identity, name, or reputation.²⁴ Continental European legal thought has aggregated these individual rights into a "general" right of personality, which is largely unknown in legal systems that do not share the European urge to abstraction. There is no need to enter into the specifics of this rather peculiar doctrinal construct; suffice it to say that its scope is sufficiently broad and flexible to provide ample protection for privacy interests of the kind protected by the moral right of disclosure and of reputational interests underlying the moral rights of attribution and integrity. Since the right of personality theory, much like the moral rights orthodoxy, understands the work to be an expression of the author's personhood, it is easy to see how authors complaining about unauthorized modifications of their works, for instance, could argue that the modifications in question violated their personhood expressed in their works.

The conceptual difference between the general right of personality and the moral rights orthodoxy is that the former, although also inalienable, is not premised on the existence of any copyrightable work and thus is technically not limited to authors. Viewed from this perspective, the copyright approach to moral rights creates a special

22. On rights of personality in general, see, e.g., REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS* 1085-94 (1996).

23. See, e.g., 1 LOUIS JOSSEAND, *COURS DE DROIT CIVIL POSITIF FRANÇAIS* 74-75 (2d. ed. 1932).

24. See, e.g., Merryman, *supra* note 1, at 1025.

category of rights for authors only, while the right of personality approach does not. Consequently, rights of personality are not understood to be part of copyright law, but of general private law, which is why they can typically be found in civil codes, at least to the extent they are codified. Although these nuances may seem rather theoretical, this mode of conceptualizing moral rights is not pure theory. Switzerland, for example, relied on this approach to generate moral rights rules in both tort and contract scenarios,²⁵ at least until the enactment of a new copyright statute in 1992, in which it gave in to the moral rights orthodoxy by including specific moral rights provisions.²⁶ Prior to 1992, however, Switzerland did not protect moral rights through copyright law, but instead through provisions in its civil code that are universally understood as codifying a general right of personality.²⁷ For instance, when an unauthorized modified version of Charlie Chaplin's silent movie *Gold Rush* was offered for public performance, the Swiss Federal Supreme Court did not even examine whether the alleged infringer had infringed the "personal" side of Chaplin's copyright (his moral right of integrity), but instead held that Chaplin's right of personality under Article 28 of the Swiss Civil Code had been violated.²⁸ In other words, the Court generated the decisional rule underlying the moral right of integrity in a tort setting on the basis of the standard civil law right of personality rather than by reference to copyright doctrines.

3. Patchwork Theory

The patchwork approach to moral rights is similar to the right of personality approach in that it does not view moral rights rules as part of copyright law but dissimilar in the sense that it does not conceptualize these rules as flowing from a single principle or abstract right. Instead, the patchwork theory distributes the various moral rights rules across completely different legal doctrines, such as defamation, passing off, trademark law, the right of privacy, and the law of contracts.²⁹ This is also the traditional common law approach, which has sometimes been misinterpreted as a rejection of moral rights *rules*,³⁰ when it is first and foremost a rejection of civil-law-style moral rights *concepts*. In fact, both in the United States and in the United Kingdom, cases can be found for almost all moral rights

25. For a detailed analysis, see Rigamonti, *supra* note 3, at 392-98.

26. Bundesgesetz vom 9. Oktober 1992 über das Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, URG), SR 231.1 [hereinafter Swiss Copyright Act of 1992].

27. Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, SR 210 (Switz.), arts. 27-28.

28. See BGE 96 II 409, 420 (1970) (Switz.).

29. For a detailed discussion of the patchwork approach to moral rights, see Rigamonti, *supra* note 3, at 381-92.

30. See, e.g., *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947).

rules described above. While some courts may not realize or might even deny that they generate moral rights rules, others recognize that they do, and they are also clear about the fact that the concepts they use are different from those associated with the term "moral rights" in Continental Europe.³¹

For example, in *Drummond v. Altemus*,³² the court applied the moral rights rule associated with the right of integrity in a tort setting when it enjoined a publisher from selling a book that contained modified lectures, even though the lectures were in the public domain and could in principle have been reproduced without the author's consent. Instead of invoking moral rights in the copyright sense or the right of personality, the court referred to a generic right of the author "to protection against having any literary matter published as his work which is not actually his creation."³³ Similarly, in *Miller v. Cecil Film Ltd.*,³⁴ an English court used contract interpretation instead of the moral right of attribution or the right of personality to read a term into a contract between a motion picture producer and an author of song lyrics according to which the producer would not give screen credit to anyone other than the author. The point here is simply to recognize that the patchwork approach to moral rights is yet another way of conceptualizing moral rights rules, in addition to the dominant copyright approach and the civil law alternative that relies on the right of personality, even if it is currently not associated with the term "moral rights."

C. *Discrepancy and Convergence—Framing the Issue*

The preceding analysis demonstrated that the doctrine of moral rights consists of a number of decisional rules that can be conceptualized in a variety of ways, only one of which is to understand these rules as rights of authors in their works, that is, as integral parts of the author's copyright. Nevertheless, it is precisely this particular way of theorizing the rules derived from moral rights that has been globalized over the past century and that has become the universal theoretical base of moral rights legislation worldwide, also in the common law countries. Until recently, each of the three modes of conceptualizing moral rights was in active use. Most Continental European countries, in particular France, Germany, and Italy, had adopted the copyright approach to moral rights and had adjusted their copyright statutes accordingly. By contrast, Switzerland em-

31. See, e.g., *Seroff v. Simon & Schuster, Inc.*, 162 N.Y.S.2d 770, 774 (N.Y. Sup. Ct. 1957); *Geisel v. Pointer Products, Inc.*, 295 F. Supp. 331, 340 n.5 (S.D.N.Y. 1968); *Edison v. Viva Int'l*, 421 N.Y.S. 2d 203, 206 (1979); *Carter v. Helmsley-Spear Inc.*, 71 F.3d 77, 82 (2d. Cir. 1995).

32. 60 F. 338 (C.C.E.D. Pa. 1894).

33. *Id.* at 339.

34. [1937] 2 All ER 464 (Eng.).

ployed the right of personality theory, while most common law countries, in particular the United States and the United Kingdom, were representatives of the patchwork theory. Around 1990, however, the transnational state of conceptual divergence came to an end, when the United Kingdom, the United States, and Switzerland moved toward the moral rights orthodoxy by inserting explicit moral rights provisions modeled upon the copyright theory into their copyright statutes.³⁵ While the precise scope of these provisions may differ from country to country, it is clear that the *formal design* of the moral rights that are now statutorily recognized in the United Kingdom, the United States, and Switzerland implements the copyright theory of moral rights in that moral rights are conceptualized as rights of actual creators of copyrightable works that are formally a part of copyright law.³⁶

I have shown elsewhere that this remarkable conceptual shift towards the moral rights orthodoxy did not entail any significant substantive improvements in the level of moral rights protection as compared to the patchwork approach or the right of personality approach.³⁷ However, if there is no need to conceptualize the rules which have been cobbled together under the umbrella of the moral rights doctrine as part of copyright law, the question is why virtually all countries around the globe adopted this particular approach to understanding the rules typically referred to as “moral rights.” As mentioned above, for the countries that only recently added specific moral rights provisions to their copyright statutes, including the United States, the United Kingdom, and Switzerland, it is quite clear that they did so in order to increase the appearance of formal compliance with the Berne Convention.³⁸ Since moral rights were part of a copyright treaty and since the dominant state practice was to understand moral rights as a copyright concern, it was most plausible and convenient to regulate moral rights through copyright law and to insert moral rights into their respective copyright statutes, thereby implicitly endorsing the moral rights orthodoxy. It is much less clear, but much more important for this study of the conceptual transformation of moral rights, why and how moral rights made their way into the Berne Convention.

In order to answer this question, the following parts of this article will trace the emergence of the decisional rules that underlie the

35. See Copyright, Designs and Patents Act of 1988, c. 48, §§ 77-89 (Eng.) [hereinafter CDPA]; Visual Artists Rights Act of 1990, Pub. L. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33, codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 506 (2004) [hereinafter VARA]; Swiss Copyright Act of 1992, *supra* note 26, arts. 9, 11.

36. For an analysis of the conceptual design of moral rights under the CDPA, the VARA and the Swiss Copyright Act of 1992, see Rigamonti, *supra* note 3, at 401 (CDPA), 406 (the VARA), 398-99 (Swiss Copyright Act of 1992).

37. *Id.* at 398-99, 400-11.

38. See, e.g., Netanel, *supra* note 2, at 45-46.

contemporary doctrine of moral rights and will provide a close study of the conceptual transformations that led to the adoption of Article 6bis of the Berne Convention. Given that the patchwork approach adopted by the common law countries remained the same until very recently, the focus of this study is on the laws of France, Germany, and Italy as the representatives of the moral rights orthodoxy. What is remarkable about the conceptual history of moral rights is that the patchwork approach to moral rights was the standard approach during the 19th century and that Germany, France, and Italy underwent the same kind of conceptual transformation that the United States, the United Kingdom, and Switzerland are presently undergoing. As stated above, my claim is that this conceptual transformation is most plausibly explained by reference to modifications internal to legal theory and legal consciousness rather than by reference to changes in the substance and philosophy of moral rights or the requirements of any particular policy agenda.

II. CREATING MORAL RIGHTS

The purpose of this Part is not to provide an exhaustive historical account of 19th century moral rights law,³⁹ but to demonstrate that many of the *decisional rules* currently associated with the moral rights doctrine were fully recognized in the early 19th century despite the fact the *abstract concept* of moral rights, described above as the copyright concept of moral rights, was not developed in legal theory until much later. It is hardly surprising that this is true for the United Kingdom and the United States, as there are a number of early moral rights cases that were decided on the basis of doctrines other than moral rights and copyright law in accordance with the patchwork approach.⁴⁰ There is no need to expound this point here, because the 19th century approach in the common law countries differed very little from the approach that is still in use today (or at least has been in use until recently). By contrast, a review of French and German law is indispensable to demonstrate the doctrinal and conceptual commonalities between the common law and civil law ap-

39. For extensive historical studies of moral rights with a focus on France and Germany, see, e.g., 1 STIG STRÖMHOLM, *LE DROIT MORAL DE L'AUTEUR* (1966); 1 AGNÈS LUCAS-SCHLOETTER, *DROIT MORAL ET DROITS DE LA PERSONNALITÉ* (2002).

40. For the right of disclosure, see, e.g., *Pope v. Curl*, [1741] 26 Eng. Rep. 608; *Duke of Queensberry v. Shebbeare*, [1758] 28 Eng. Rep. 924; *Macklin v. Richardson*, [1770] 27 Eng. Rep. 451; *Thompson v. Stanhope*, [1774] 27 Eng. Rep. 476; *Gale v. Leckie*, [1817] 171 Eng. Rep. 588; *Clarke v. Price*, [1819] 37 Eng. Rep. 270; *Gee v. Pritchard*, [1818] 36 Eng. Rep. 670; *Prince Albert v. Strange*, [1849] 41 Eng. Rep. 1171; *Bartlett v. Crittenden*, 2 F. Cas. 967 (C.C.D. Ohio 1849); *Gilbert v. The Star Newspaper Co.*, 11 T.L.R. 4 (Ch. 1894) (Eng.). For the rights of attribution and integrity, see, e.g., *Archbold v. Sweet*, 172 Eng. Rep. 947 (K.B. 1832) (Eng.); *Lee v. Gibbings*, 67 L.T.R. 263 (Ch. 1892) (Eng.); *Drummond v. Altemus*, 60 F. 338 (C.C.E.D.Pa. 1894). See also EVAN JAMES MACGILLIVRAY, *A TREATISE ON THE LAW OF COPYRIGHT* 206-31, 296-300 (1912).

proaches to moral rights in the 19th century, as one might not expect French and German law to have ever been in sync with the common law view of moral rights.

A. *Continental Moral Rights Law in the 19th Century*

During much of the 19th century, the two central moral rights issues were (i) whether third parties, in particular creditors, could force authors to disclose their unpublished works; and (ii) whether publishers could modify the work or suppress the author's name without the author's consent if the publishing agreement was silent on this issue. In the language of the analytic outlined in the preceding Part,⁴¹ these issues involved the right of disclosure and the rights of attribution and integrity as default rules in a contractual setting. The relative importance of these two questions highlights two characteristic features of moral rights law in the 19th century.

First, the core moral rights of attribution and integrity were completely embedded in the context of the contractual relationship between publishers and authors,⁴² which is why the tort element of these two moral rights was virtually irrelevant and therefore underdeveloped at that time. This may also be a reflection of the fact that publishers who contracted with authors were by far the most likely source of threats to the authors' personal interests in attribution and integrity, because the publishers had both access to the authors' manuscripts and the means of communicating modified versions of these manuscripts to the public.⁴³ Therefore, the rise of the tort aspect of the rights of attribution and integrity coincides with the development of the concept of moral rights, and while the application of these rights in a contractual settings is understood as a mere application of a broader principle today, that principle is essentially an extension of the contractual rules generated to deal with issues of attribution and integrity in the context of publishing agreements.

Second, regarding the rights of attribution and integrity, the decisional rules that were recognized during the 19th century were default rules, not mandatory rules.⁴⁴ In fact, mandatory rules derived

41. See *supra* Part I.A.

42. See, e.g., 3 FRIEDRICH BORNEMANN, SYSTEMATISCHE DARSTELLUNG DES PREUSSISCHEN CIVILRECHTS 195 (2d ed. 1843) (explaining that the reason why literary property was not at all mentioned in the Prussian General Law of 1794 was that the only way in which a work could be disseminated to the public was through booksellers, which is why legal regulation could be limited to publishing agreements).

43. Of course, the situation is reversed today, because modern communication technologies have greatly facilitated and democratized access to and distribution of copyrightable works. For a discussion of the potential impact of these changes on the law of moral rights, see Guy Pessach, *The Author's Moral Right of Integrity in Cyberspace*, 34 INT'L REV. INTELL. PROP. & COMP. L. 250 (2003).

44. See STRÖMHOLM, *supra* note 39, at 142 (right of integrity), 149-50 (right of attribution).

from the rights of attribution and integrity as well as from the right of withdrawal⁴⁵ are of more recent origin. Since moral rights rules did not conflict with the principle of freedom of contract, the substance of moral rights was not particularly controversial during much of the 19th century. To the extent that moral rights were discussed at all, the controversy was about the proper theoretical determination of their legal nature rather than about their substantive content.⁴⁶

The prominence of the contractual relationship between authors and publishers in 19th century moral rights law has methodological implications. Since moral rights rules were primarily contractual in nature and the modern concept of moral rights was not yet established, studying moral rights through the lens of copyright law alone does not give the full picture; it is equally important to look to the law governing publishing agreements. This is perhaps most obvious for German states such as Prussia and Austria, which adopted statutory rules relating to publishing agreements years before they enacted their first copyright statutes.⁴⁷ However, it equally applies to France, whose copyright statutes of 1791 and 1793 did not contain any moral rights provisions.⁴⁸ The only difference for France when compared to the German states is that the law of publishing agreements was not regulated by the French Civil Code and was therefore left to the courts.⁴⁹

45. *See id.* at 121, 291.

46. *See infra* Part III.

47. Prussia codified its private law, including the law of publishing agreements, in 1794, but did not enact its first copyright statute until 1837. *See Allgemeines Landrecht für die Preussischen Staaten* (1794) [hereinafter ALR], §§ 996-1036; Gesetz zum Schutze des Eigenthums an Werken der Wissenschaft und Kunst vom 11. Juni 1837. Similarly, Austria included provisions relating to publishing agreements in its Civil Code of 1811, but failed to adopt a copyright statute until 1846. *See Allgemeines bürgerliches Gesetzbuch für die gesamten Deutschen Erbländer der Oesterreichischen Monarchie* (1811) [hereinafter ABGB], §§ 1164-1171; Kaiserliches Patent zum Schutze des literarischen und artistischen Eigenthums gegen unbefugte Veröffentlichung, Nachdruck und Nachbildung vom 19. Oktober 1846. For an exhaustive contemporary analysis of these (and other) statutes, see OSCAR VON WÄCHTER, *DAS VERLAGSRECHT* (1857-58).

48. *See* Loi du 13-19 janvier 1791, relative aux spectacles, and Loi du 19-24 juillet 1793, relative aux droits de propriété des auteurs d'écrits en tout genre, des compositeurs de musique, des peintres et des dessinateurs, both reprinted in 1 AUGUSTIN-CHARLES RENOARD, *TRAITÉ DES DROITS D'AUTEURS DANS LA LITTÉRATURE, LES SCIENCES ET LES BEAUX-ARTS* 315-16, 326-28 (1838). For a comparative discussion of these statutes, see Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 *TUL. L. REV.* 991 (1990).

49. *See* Code Civil des Français (1804) [C. CIV.] (Civil Code). The situation in France is parallel to the situation both in the United Kingdom and the United States. U.S. and U.K. contract law was not yet codified, and their copyright statutes—enacted in 1710 and 1790 respectively—did not address moral rights. *See* Act for the Encouragement of Learning, 8 Anne, c. 19 (1710) (Eng.); Act for the encouragement of learning, ch. 15, 1 Stat. 124 (1790).

1. Right of Disclosure

The most relevant aspect of the right of disclosure for the development of the theory of moral rights was the decisional rule against the forced disclosure of unpublished works in debt collection and bankruptcy proceedings. While this fact pattern may seem quite narrow given the potential breadth of the right of disclosure, other aspects of this right were not as important for the creation of the moral rights orthodoxy, because neither the tort nor the contract rule derived from the right of disclosure exhibited the same kind of moral rights quality as the rule against forced disclosure.

As I mentioned in the preceding Part, the right of disclosure can be disaggregated into a tort and a contract rule.⁵⁰ However, in a tort setting, the rule that it is illegal to reveal a copyrighted work to the public without the author's consent largely overlaps with traditional economic rights, if these rights are applied to unpublished works, because it is difficult to figure out whether the author objects to the release of a work for personal or for economic reasons—or both.⁵¹ In fact, the right of first publication has always been a core economic right in the Continental tradition,⁵² because the publication of a work was usually achieved by way of reproducing it in physical copies, which was the primary object of the economic right of reproduction. Since civil law countries did not follow common law countries in restricting the application of the right of reproduction to published works, there was no need to develop alternative doctrines outside copyright to deal with unpublished works.⁵³ This explains why the decisional rule derived from the right of disclosure in a tort setting

50. See *supra* Part I.A.

51. See also 1 STEPHEN P. LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 595 (1938); EUGEN ULMER, *URHEBER- UND VERLAGSRECHT* 210 (3d ed. 1980). For a discussion of minor differences between the moral right of disclosure and the economic right of reproduction, see Dietz, *supra* note 15, at 204, 212; MACGILLIVRAY, *supra* note 40, at 221.

52. See, e.g., FERDINAND WALTER, *SYSTEM DES GEMEINEN DEUTSCHEN PRIVATRECHTS* 363 (1855); 1 JOHANN CASPAR BLUNTSCHLI, *DEUTSCHES PRIVATRECHT* 192 (1853); STRÖMHOLM, *supra* note 39, at 220.

53. For common law alternatives, see, e.g., *Gee v. Pritchard*, 36 Eng. Rep. 670 (1818) (property and breach of trust); *Fraser v. Edwardes*, [1905-1910] MacG. Cop. Cas. 10 (K.B. 1905) (Eng.) (breach of confidence); *Mansell v. Valley Printing Co.*, [1905-1910] MacG. Cop. Cas. 135 (Ch. 1908) (Eng.) (common law right in an unpublished literary or artistic work); *Bartlett v. Crittenden*, 2 F. Cas. 967, 968 (C.C.D. Ohio 1849); *Giesecking v. Urania Records, Inc.*, 155 N.Y.S.2d 171 (Sup. Ct. 1956). Note also that some American state civil codes contained provisions that essentially granted authors exclusive ownership in "products of the mind" prior to publication. See CAL. CIV. CODE § 980 (1872); S.D. CIV. CODE § 570 (1877); N.D. CIV. CODE § 570 (1877); MONT. CIV. CODE § 1360 (1895). These provisions were identical to § 429 of the draft Civil Code for the State of New York championed by David Dudley Field. See N.Y. CODE COMM'RS, *DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK* § 429, at 130 (Final Draft 1865). Interestingly, most of these provisions are still on the books today. See S.D. COD. LAWS § 43-43-1 (West 2006); N.D. CENT. CODE § 47-07-04 (West 2006); MONT. CODE ANN. § 30-13-131 (West 2006).

was associated with economic rights at an early stage in the development of Continental copyright law. Therefore, it was unlikely that this particular decisional rule would prompt the development of a separate moral rights theory.

The same was true for the decisional rule underlying the right of disclosure in a contractual setting, albeit for different reasons. I mentioned earlier⁵⁴ that the *Whistler* rule, according to which specific performance is not available for those who commission works of art if the artist fails to deliver the commissioned work,⁵⁵ is merely an application of the general rule against specific performance in service contracts embodied in Article 1142 of the French Civil Code.⁵⁶ Once disaggregated into a generic contractual rule, the right of disclosure in a contract scenario no longer looks like a rule specifically tailored to protect the personal interests of authors in their works, which further reduces its distinct moral rights quality and therefore the likelihood of it being recognized as a crucial element in the construction of the moral rights orthodoxy. This is confirmed by the fact that 18th and 19th century Prussian and Austrian laws are often overlooked in discussions about the origins of moral rights, even though both countries recognized the decisional rule underlying the right of disclosure in a contractual setting as part of their statutory regimes governing publishing agreements. More specifically, already under the General Prussian Law of 1794 ("ALR"),⁵⁷ authors were given the right to rescind their contracts with publishers if there were circumstances or obstacles that prompted authors not to release their works.⁵⁸ If this was the case, authors had to compensate the publishers for their actual damages arising from the rescission of the contract⁵⁹ and for lost gains if the author subsequently changed his mind and had the work published within one year after the rescission of the contract.⁶⁰ However, the publisher had no right to specific performance.⁶¹ Similarly,

54. See *supra* note 12.

55. Cass. ch. civ., Mar. 14, 1900, DP 1900 I 497 (holding that the American painter James Whistler could not be forced to surrender a portrait commissioned by Sir Eden but was obliged to indemnify Eden and to return any consideration received).

56. See also CA Paris, 1e ch., July 4, 1865, DP 1865 II 201 (holding that the French painter Rosa Bonheur, who refused to deliver a painting that she had previously promised to deliver for a fixed price, could not be ordered to deliver the painting but was obliged to pay damages to the other party to the contract on the basis of Art. 1142 of the French Civil Code).

57. See *supra* note 47.

58. ALR § 1005.

59. ALR § 1006. One commentator criticized this provision as going too far because authors should not be held liable for damages if the reason for the author's failure to complete the work arose out of the "nature" of the creative process. See 1 WÄCHTER, *supra* note 47, at 390.

60. ALR § 1007.

61. See BORNEMANN, *supra* note 42, at 197-98. Note, however, that some commentators did not exclude the possibility of specific performance of the delivery of a com-

the Austrian Civil Code of 1811 ("ABGB")⁶² contained a provision according to which the author's failure to deliver the manuscript to the publisher entitled the publisher to rescind the publishing contract and to claim damages,⁶³ which seems to suggest that although the publisher technically had a right to the manuscript, that right would not be specifically enforced.⁶⁴ Not surprisingly, the discursive context in which the applicable rules were discussed was the content of the respective contractual duties of authors and publishers under the law governing publishing agreements, without any reference to moral rights of authors or any other inalienable rights of authors in their works.⁶⁵

Therefore, since the tort aspects of the right of disclosure were identified with the economic right of reproduction and since the contractual aspects of the right of disclosure were associated with the application of a generic rule of the law of contracts, the primary historical importance of the right of disclosure from a moral rights perspective was its use to resist forced publication in debt collection and bankruptcy cases. The decisional rule itself was recognized by French courts as early as 1828, when a French court held that an unpublished musical work could not be seized by creditors,⁶⁶ which was somewhat unusual given that the work certainly had some economic value and that the right of (first) reproduction could be freely traded. In other words, the outcome of the case could not be rationalized on the basis of economic rights or contractual principles. At that

pleted manuscript. See 1 WÄCHTER, *supra* note 47, at 334-36; 3 CHRISTIAN FRIEDRICH KOCH, DAS RECHT DER FORDERUNGEN NACH GEMEINEM UND NACH PREUSSISCHEM RECHTE 724 (1843).

62. See *supra* note 47.

63. ABGB § 1166.

64. Franz von Zeiller, the most authoritative contemporary commentator on the ABGB, is ambiguous regarding specific performance, but his explanation of ABGB § 1166 seems to imply that, as a practical matter, the publisher's contractual right to the manuscript would not be specifically enforced. See 3 FRANZ EDLEN VON ZEILLER, COMMENTAR ÜBER DAS ALLGEMEINE BÜRGERLICHE GESETZBUCH 513-14 (1812) (stating that forcing authors to complete and deliver their works would be an "uncertain and inappropriate means."). Note also that at least one 19th century Austrian scholar claimed that authors were also entitled to rescind publishing agreements under the ABGB, provided that they had changed their views, arguing that it would be "absurd" to force authors to complete their works. See LUDWIG KIRCHSTETTER, COMMENTAR ZUM OESTERREICHISCHEN ALLGEMEINEN BÜRGERLICHEN GESETZBUCH 514 & n.26 (1868) (referring to 1 WÄCHTER, *supra* note 47, at 391). *But see* PETER HARUM, DIE GEGENWÄRTIGE ÖSTERREICHISCHE PRESSGESETZGEBUNG 155-56 (1857) (rejecting specific performance only in the case of changed scientific views relating to unfinished works).

65. See 1 WÄCHTER, *supra* note 47, at 333-36 (discussing the issue in a section entitled "author's performance"); KIRCHSTETTER, *supra* note 64, at 513-14 (discussing the question in a section relating to the dissolution of publishing agreements). See also ETIENNE BLANC, TRAITÉ DE LA CONTREFAÇON 110 (4th ed. 1855).

66. See Cour royale de Paris, Jan. 11, 1828, reported by 2 AUGUSTIN-CHARLES RENOUARD, TRAITÉ DES DROITS D'AUTEURS DANS LA LITTÉRATURE, LES SCIENCES ET LES BEAUX-ARTS 354 (1838).

time, the court resorted to the idea that unpublished works could not be seized because they did not legally exist prior to publication.⁶⁷ Clearly, this decisional rule was in need of a better explanation, but the concept of a copyright-based moral right of the author was not yet in sight.⁶⁸

2. Rights of Attribution and Integrity

Although the decisional rules identified with the rights of attribution and integrity were primarily contractual in nature, they were much more important than the right of disclosure in a contract scenario because they could not be reduced to a general contractual rule that also applied outside the specific context of authors and publishers. Therefore, the contractual implications of the rights of attribution and integrity could not be deduced from a recognized general principle of law. Quite to the contrary, if courts had followed the general rule, they would have had to conclude that publishers could alter the authors' manuscripts and suppress their names at will, because publishers typically owned the property rights in the manuscripts.⁶⁹ As a result, the adoption of a rule that restricted what publishers could do with their lawfully acquired property required some kind of special explanation. Before analyzing the standard explanation of early 19th century scholars, I will briefly show that the (default) decisional rule underlying the rights of attribution and integrity in a contractual setting was recognized in Continental Europe long before the rise of the moral rights orthodoxy.

a. Decisional Layer

The Prussian ALR not only addressed aspects of the right of disclosure; it also contained a few provisions relating to the modification of works that indicate (i) that the author was positively entitled to modify the work prior to the beginning of the printing phase, and

67. *Id.* See also STRÖMHOLM, *supra* note 39, at 118-19 (tracing the idea of the legal non-existence of unpublished works to a French decree enacted in 1805); BLANC, *supra* note 65, at 122 (rationalizing this rule by invoking the "nature of things" and the "liberty and dignity of the humanities").

68. Note that the explanations offered by common law scholars were not much different from the ones suggested by their civil law colleagues. See, e.g., RICHARD GODSON, PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTIONS AND OF COPYRIGHT 315 (1823) ("until the act of publication is accomplished, an author has an undoubted right to have full controul [sic] over it"); WALTER ARTHUR COPINGER, THE LAW OF COPYRIGHT 78 (1870) ("the author's right of withholding the publication continues till the very moment his book is actually given out to the public"). *But see* GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 218 (1847) ("It is also a right that adheres solely to the person entitled to exercise it, so long as he does not see fit to alienate it; and it cannot be seized by creditors, and does not pass to assignees under a bankruptcy.").

69. A (singular) example of this line of reasoning is the early English case of *Cox v. Cox*, [1853] 68 Eng. Rep. 1211.

(ii) that the publisher was not entitled to release updated or modified versions of the work without the author's consent. The former is implicit in a rule that entitled the publisher to rescind the contract if the author modified the work prior to the printing phase and that held the author liable for damages arising from changes made during the printing phase even if the publisher consented to these changes.⁷⁰ The latter emerges from the rule that the publisher's rights in the work were limited to the edition in question and did not extend to updated or modified versions of the work, which required a new contract and, therefore, the author's consent.⁷¹ The Austrian ABGB followed the ALR in that it also required a new contract for the publication of modified editions,⁷² and although there was no express provision obligating the publisher to faithfully reproduce and print the manuscript as submitted by the author, this duty was understood to be self-evident under the ABGB.⁷³ By contrast, the law of the Grand Duchy of Baden⁷⁴ contained two express provisions establishing the right of integrity in a contractual context. Articles 577dd and 577de stated that the publisher, upon acquisition of the author's manuscript, had the right to determine the formal presentation of the book, but did not have the right to modify the content of the author's work absent any contractual provision to the contrary. In German states that did not have any statutory rules addressing the issue of whether publishers could modify the author's work, the courts developed default rules similar to those contained in the statutes discussed in this paragraph.⁷⁵

In France, cases establishing the publisher's duties to name the author and not to modify the author's work, can be traced back to at least 1814, when one French court decided that "a work sold by an author to a publisher or a bookseller must bear the author's name and must be published as sold or delivered, if the author so desires,

70. ALR §§ 1008, 1009.

71. ALR §§ 1012, 1016, 1017.

72. ABGB § 1168. In this context, it is interesting to note that early commentators referred to the "personal" nature of the right of authors to modify their works when explaining why this right could not be transferred to the author's heirs under ABGB § 1169. See ZEILLER, *supra* note 64, at 519.

73. See HARUM, *supra* note 64, at 153; KIRCHSTETTER, *supra* note 64, at 513.

74. See Land-Recht des Grossherzogthums Baden (1809). This code was essentially a translation of the French Civil Code of 1804 with a number of additions that included a few provisions relating to property rights in works of authorship. For a list of these additions, see KARL SALOMO ZACHARIÄ, ZUSÄTZE UND VERÄNDERUNGEN, DIE DER CODE NAPOLEÓN ALS LANDRECHT FÜR DAS GROSSHERZOGTHUM BADEN ERHALTEN HAT (1809).

75. For example, a German court applying the law of Saxony, whose Civil Code of 1865, while containing a few provisions relating to publishing agreements (§§ 1139-1149), did not address the issue in question, held that a publisher was not allowed to substantively modify a work of authorship even though the publisher had been explicitly authorized to translate it. See Reichsoberhandelsgericht [ROHG], 39 ZEITSCHRIFT FÜR RECHTSPFLEGE UND VERWALTUNG 502, 507 (1874).

provided that there is no agreement to the contrary, except for typographical errors if it is a printed work or orthographical errors if it is a manuscript.”⁷⁶ As the French scholar Jean Rault showed in his comprehensive work on publishing agreements, the French courts consistently applied this rule in numerous cases throughout the 19th century (and beyond).⁷⁷ An early case involving Auguste Comte’s famous *Cours de philosophie positive* demonstrates that the default rule against unauthorized modification was quite strictly enforced, even when the modification was more contextual than actual.⁷⁸ Comte’s editor Bachelier had objected to a passage in the preface of Comte’s sixth volume because he found it defamatory.⁷⁹ Comte refused to delete the passage, but allowed Bachelier to add a statement distancing himself from Comte’s preface. However, Bachelier did not just disassociate himself from Comte’s preface, but also added a negative comment about Comte⁸⁰ and published the volume without clearing the statement with him. Comte filed suit, and the court held that publishers were not allowed to make any additions or omissions without the author’s formal authorization and that it was also a violation of industry custom to print a work without the author’s advance imprimatur.⁸¹

b. Conceptual Layer

Scholars in the 19th century had varying rationales for the decisional rule underlying the rights of attribution and integrity, but they never ascribed it to copyright-based inalienable rights of authors in their works. The standard approach was to resort to the nature of literary property to explain why the rights that the author sold to the publisher were limited property rights, similar to usufruct or lease, which would not allow the publisher to alter the substance of the

76. Trib. civ. Seine, Aug. 17, 1814, reported by RENOUARD, *supra* note 66, at 332-33. See also Trib. com. Paris, Aug. 22, 1845, DP 1845 IV 435; Cass. ch. civ., Aug. 21, 1867, DP 1867 I 369.

77. See JEAN RAULT, *LE CONTRAT D'ÉDITION EN DROIT FRANÇAIS* 353-61 (1927). See also BLANC, *supra* note 65, at 96-104; STRÖMHOLM, *supra* note 39, at 124-26.

78. See Trib. com. Paris, Dec. 29, 1842, reported by BLANC, *supra* note 65, at 100 n.1.

79. Essentially, Comte had complained about how the *École Polytechnique*, at which he was employed, was governed. In particular, he had criticized the “disastrous influence” exercised by François Arago, at that time professor and a high-ranking administrator at the school. See 6 AUGUSTE COMTE, *COURS DE PHILOSOPHIE POSITIVE* xv-xvi n.1 (1842).

80. Bachelier, in his statement, included a short note written by Arago and addressed to Bachelier, in which Arago suggested that Comte’s preface was motivated by resentment regarding Arago’s role in the appointment of Charles-François Sturm as a professor at the *École Polytechnique*. See Bachelier, *Avis de l'Éditeur*, in COMTE, *supra* note 79, at iii (1842). Comte later retracted his statement, but still lost his position at the school in 1844. See Anonymous, *Faith and Science*, 34 *METHODIST Q. REV.* 9, 18 & n.† (1852).

81. See Trib. com. Paris, Dec. 29, 1842, reported by BLANC, *supra* note 65, at 100 n.1.

work by modifying it absent any express contractual provision to the contrary.⁸² This property argument was usually coupled with the observation that the default rule had to be that publishers or other buyers of the manuscript could not alter the work, because the sale of the rights to a manuscript did and could not imply any alienation of the author's reputation.⁸³ A similar argument in support of the default rule underlying the rights of attribution and integrity was made by relying on the nature of the publishing agreement, which could not be understood as a simple sales contract,⁸⁴ because the author was not only interested in being paid in exchange for delivering a manuscript, but also expected the work to be published, which is why the publisher had a contractual duty to publish the work as delivered by the author.⁸⁵ These arguments show that the moral rights rules currently associated with the rights of attribution and integrity were firmly rooted in the common law of contracts.⁸⁶ At the same time, the importance of reputational interests were well recognized,⁸⁷ but no contemporary scholar thought in terms of inalienable rights of authors in their reputation, let alone in terms of inalienable rights of authors in their works.⁸⁸ In other words, the modern concept of moral rights had not yet entered the legal consciousness of that time,⁸⁹ and most 19th-century legal scholars expressed little or no

82. See, e.g., 1 JEAN-MARIE PARDESSUS, *COURS DE DROIT COMMERCIAL* 172 (6th ed. 1836) (discussing the question in a section dealing with commercial sales contracts); BLANC, *supra* note 65, at 96-97 (discussing this issue in the context of the effects of the assignment of the author's right of reproduction). For a judicial expression of this line of reasoning, see C. de Bordeaux, 1e ch., Aug. 24, 1863, S. 1864 II 194. Note that the idea of conceptualizing the rights acquired by publishers as limited property rights was earlier used in discussions about counterfeiting. See Johann Gottlieb Fichte, *Beweis der Unrechtmässigkeit des Büchernachdrucks*, 21 *BERLINISCHE MONATSSCHRIFT* 443, 457 (1793).

83. See PARDESSUS, *supra* note 82, at 172; BLANC, *supra* note 65, at 97. See also WALTER, *supra* note 52, at 356, 358 (1855) (explaining that the author's interest in publication is mostly "spiritual," while the publisher's interest is "monetary" and invoking the author's "literary honor" and "conscience" when discussing the limitation of the publisher's publication rights to one edition); KOCH, *supra* note 61, at 726.

84. See, e.g., WALTER, *supra* note 52, at 357; BORNEMANN, *supra* note 42, at 195.

85. See RENOUEAU, *supra* note 66, at 327-28, 330-31 (discussing this issue as part of a section analyzing the contractual duties of copyright assignees); 1 WÄCHTER, *supra* note 47, at 345 (discussing these questions in the context of contractual obligations arising from the publishing agreement).

86. Note that common law scholars took the same approach by discussing the question of whether publishers could alter the author's work in sections of their books dedicated to agreements between authors and publishers. See COPINGER, *supra* note 68, at 253-56; EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS* 375-77 (1879).

87. See STRÖMHOLM, *supra* note 39, at 135-36.

88. *Id.* at 142, 180-81. Occasionally, however, commentators referred to the author's contractual right to have his work published as is. See, e.g., WALTER, *supra* note 52, at 359.

89. For the German Imperial Court, founded in 1879, see, e.g., RGZ 4, 133 (invoking German common law rather than German copyright law when holding that a publisher was not entitled to publish a modified edition of a work after the author's death without the author's heirs' consent); RGZ 18, 10 (suggesting, in a case involving a tort

interest in discussing the decisional rules associated with moral rights as a separate issue that deserved a theory of its own.

B. Codification of Decisional Rules

The preceding overview suggests not only that civil law and common law countries recognized roughly the same decisional rules at roughly the same time, but also that they used similar conceptual frameworks when applying these rules to moral rights controversies, navigating safely within the confines of the familiar legal categories of contracts, torts, and "literary property."⁹⁰ The lack of a coherent theory of moral rights became particularly obvious during the last quarter of the 19th century, when many countries around the globe began to enact statutory rules embodying the rules against forced disclosure and unauthorized modification of the author's work. They essentially scattered these rules throughout the same or different statutes without any apparent formal or conceptual connection between the individual provisions. Some countries chose to follow the Prussian and Austrian model of incorporating some of these rules into their civil codes as part of the overall regulation of publishing agreements,⁹¹ but most countries decided to insert these rules into their newly enacted or revised copyright statutes, perhaps because the strong factual link between the law of publishing agreements and copyright law made it plausible to combine them in one statute, especially when preexisting codifications did not comprehensively regulate publishing agreements. However, even when moral rights rules were inserted into a copyright statute, they were virtually never part of the section defining the rights of authors, but instead they were tucked away as miscellaneous provisions in different sections of the statute, which shows that these rules were not yet understood as deriving from absolute rights of authors. As the following overview shows,⁹² this was a truly global phenomenon, because virtually every country that inserted or contemplated inserting such provisions into its copyright statute prior to World War I followed this conceptual approach.

scenario, that the dissemination of a work whose title page had been modified was unlawful even in the absence of a violation of the copyright statute then in force). *But see* RGZ 12, 50. *See also* STRÖMHOLM, *supra* note 39, at 340.

90. *See* STRÖMHOLM, *supra* note 39, at 131-42 (reviewing the various doctrines invoked by French courts in right of integrity cases prior to 1880).

91. One example is Switzerland, which adopted two provisions reflecting the decisional rule underlying the right of integrity as part of its general regulation of publishing agreements in its Code of Obligations in 1881, which was two years before the enactment of the first Swiss federal copyright statute. *See* Bundesgesetz über das Obligationenrecht vom 14. Juni 1881, BBl 1881 III 109, 186, art. 378(1), 379.

92. Note that the following review of statutory rules relies on the comprehensive collection of copyright statutes by ERNST RÖTHLISBERGER, URHEBERRECHTS-GESETZE UND VERTRÄGE IN ALLEN LÄNDERN (3d ed. 1914).

In surveying the decisional rules that were adopted, I will focus on the rights of attribution and integrity as well as on the rule against forced disclosure. Other rules associated with the right of disclosure, most notably the right of first publication and the unavailability of specific performance in service contracts, were recognized, either as part of the author's economic rights or as a matter of basic contract law, long before the wave of 19th century statutory moral rights rules examined here. Therefore, including those rules would not only lead to the meaningless inclusion of all copyright statutes protecting the right of (first) reproduction and all civil law codes rejecting the specific performance of service contracts, but it would also be misleading in that it would falsely suggest that these rules were somehow characteristic for the late 19th century when they had been recognized much earlier. Ironically, France is missing from the list, not because it did not recognize moral rights rules, but because the French did not codify any of these rules until 1957,⁹³ largely because the judge-made rules were considered to be sufficient.⁹⁴

1. Right of Disclosure

The rule that creditors could not force insolvent authors to surrender their unpublished works was adopted in numerous countries around the globe prior to World War I. While the precise scope and wording of the provisions varied from statute to statute and from country to country, the rule against forced disclosure was never phrased in terms of a right of the author to resist publication and was never included in the statutory sections that enumerated the rights of authors. A few examples should illustrate this point. Denmark inserted its provision against the forced disclosure of unpublished works, couched in negative terms in sense that creditors were not able to acquire the right to publish unpublished works or to disseminate unpublished manuscripts, in a section relating to the "transfer of the author's right."⁹⁵ Belgium addressed the issue as part of its copyright statute's "general provisions" and enacted a rule that distinguished between different types of works, limiting the ban on forced disclosure to the lifetime of authors for works other than literary and musical works.⁹⁶ Brazil adopted a similar rule and extended it to published works in the sense that no rights of the living author

93. See French Act on Literary and Artistic Property of 1957; Law No. 57-298 of Mar. 11, 1957, J.O., Mar. 14, 1957, p. 2723; 1957 D.L. 102, arts. 6, 19, 20, 32, 47, and 56.

94. Note that moral rights legislation proposed in 1908 was rejected in part because the protection provided by the courts was considered sufficient. See Albert Vaugeois, *Rapport*, 7 BULLETIN DE LA SOCIÉTÉ D'ÉTUDES LÉGISLATIVES 51, 77-78 (1908).

95. See § 12(1) of the Danish Copyright Act of 1912.

96. See § 9 of the Belgian Copyright Act of 1886. See also § 9 of the Copyright Act of Luxembourg of 1898.

could be seized by creditors.⁹⁷ By contrast, in a section entitled "alienation and assignment of the rights of authors," Italy enacted a provision that differentiated between the right of first publication, which could not be seized by creditors at all, and the right of reproduction, which could be seized only if the author no longer owned it.⁹⁸ China's rule against the seizure of unpublished works was part of a copyright section on "prohibitions," while Japan's copyright statute regulated the matter under a generic heading called "on copyright."⁹⁹ Finally, Germany's provisions, inserted in a section relating to the "conditions for protection" rather than the section describing the "rights of authors," did not distinguish between published and unpublished works.¹⁰⁰ The point of this survey is simply that while the rule against forced disclosure was recognized around the globe in various ways, none of these rules was phrased in a way that would have allowed the inference that the drafters of these rules understood them to be part of an overarching theory protecting the personal interests of authors. Instead, they were usually phrased as generic rules prohibiting access to unpublished or published works by creditors. The same pattern can be identified in the case of statutory provisions codifying the contractual aspects of the rights of attribution and integrity, to which I will now turn.

2. Rights of Attribution and Integrity

By far the most important legislative phenomenon during the 19th century was the worldwide enactment of statutory provisions that codified the decisional rule associated with the rights of attribution and integrity in a contract scenario. The pertinent rules adopted prior to World War I can be divided into two different categories. The first category was limited to a codification of the publisher's default duty to name the author and not to modify the work in the context of publishing agreements.¹⁰¹ The second category includes statutory provisions that extended the scope of this duty beyond publishing agreements to any and all contracts between authors and assignees or licensees. Similar to the rule against the forced disclosure of unpublished works, these rules were usually not inserted into the rights section of the copyright statutes in question, but instead were part of the sections containing general or miscellaneous provisions, reflecting the contemporary view that these rules did not qualify as abso-

97. See art. 7 of the Brazilian Copyright Act of 1898.

98. See §§ 16(2), 17(1) of the Italian Copyright Act of 1882.

99. See § 38 of the Chinese Copyright Act of 1910; Art. 17 of the Japanese Copyright Act of 1899, as amended in 1910.

100. See § 10 of the German Act on the Copyright in Literary and Musical Works of 1901; § 14 of the German Act on the Copyright in Works of Fine Art and Photography of 1907.

101. One country which opted for this type of legislation is Switzerland. See *supra* note 91.

lute copyright entitlements or rights *in rem*. Furthermore, none of the statutes that included such rules made them mandatory, which explains why the enactment of these rules was not particularly controversial. After all, they were simple rules of contract interpretation that did little more than codify a default rule that had long been recognized by the courts, that had become part of industry custom, and that could easily be eliminated by way of contract.

These default rules were quite popular and could be found in countless copyright statutes enacted during the last quarter of the 19th century,¹⁰² with France, Italy, and the United Kingdom being the most notable exceptions. Even the United States considered the adoption of a statutory default rule, according to which assignees of the copyright could not modify the work or suppress the author's name in the absence of a specific contractual provision to the contrary.¹⁰³ Germany enacted both a specific default rule for publishing agreements and a more general default rule applicable to all assignment and licensing contracts. Given the importance of German legal theory for the development of what would become the moral rights orthodoxy, a brief look at these rules is helpful in understanding the legislative background against which the copyright-based theory of moral rights emerged. In 1901, Germany adopted both a new copyright statute relating to literary and musical works¹⁰⁴ and a separate statute governing publishing agreements,¹⁰⁵ which had not been regulated in the German Civil Code ("BGB")¹⁰⁶ that had entered into force in 1900. These statutes were supplemented with an additional copyright statute relating to the fine arts and photography in 1907.¹⁰⁷ All three copyright-related statutes contained the same provision almost verbatim, according to which the publisher or the assignee was "not allowed, absent any agreement to the contrary, to add to, shorten, or otherwise modify the work, its title, and the au-

102. See, e.g., art. 8 of the Belgian Copyright Act of 1886; art. 5 of the Brazilian Copyright Statute of 1898; §§ 34-35 of the Chinese Copyright Act of 1910; art. 16 of the Colombian Literary Property Act of 1886; art. 19 of the Costa Rican Copyright Act of 1896; § 9 of the Danish Copyright Act of 1912; art. 19 of the Ecuadorian Literary and Artistic Property Act of 1887; art. 5 of the Greek Statute on Rights of Authors in Stage Works of 1909; art. 8 of Luxembourg's Copyright Act of 1898.

103. See § 57 of the Memorandum Draft of a Bill to Amend and Consolidate the Acts Respecting Copyright, Copyright Office Bulletin No. 10, 1905, *reprinted in* 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT xiii, xli (E. Fulton Brylawski & Abe Goldman eds., 1976).

104. See Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst, v. 19.6.1901 (RGBl. 1901, 227) [hereinafter LUG].

105. See Gesetz über das Verlagsrecht (Verlagsgesetz), v. 19.6.1901 (RGBl. 1901, 217) [hereinafter VerlG]. An English summary of this statute can be found at RICHARD ROGERS BOWKER, COPYRIGHT—ITS HISTORY AND ITS LAW 430-34 (1912).

106. See Bürgerliches Gesetzbuch [BGB] (Civil Code) (F.R.G.).

107. See Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie, v. 9.1.1907 (RGBl. 1907, 7) [hereinafter KUG].

thor's designation," unless the author could not "in good faith object to the modification in question."¹⁰⁸

The text of these provisions reflects both the substance and the concept of moral rights at the turn of the century. Substantively, the decisional rules that were recognized around the globe were little more than default rules for publishing agreements and copyright assignments that could be modified by the parties at will. Conceptually, these rules were neither phrased nor understood in terms of copyright-based rights of authors in their works,¹⁰⁹ but rather as reasonable contractual limitations on the rights of assignees and licensees of the author's copyright. Nevertheless, despite the fact that these statutory rules did not reflect the modern moral rights orthodoxy, it is fairly easy to see how they could be rationalized as an instance of a broader principle that is the protection of the personal interests or the moral rights of authors in their works. This is what happened when Continental European thinkers, led by German legal scientists, embarked on their quest to conceptualize, systematize, and codify the entire body of what is known as private law, including copyright.¹¹⁰ In other words, while the common law countries remained true to the 19th century approach to moral rights, the civil law countries moved to the next stage in the evolution of the modern concept of moral rights, which was characterized by the recognition of rights that could neither be categorized as copyright entitlements nor as part of the traditional legal categories offered by the common law.

III. CONSTRUCTING MORAL RIGHTS

The process of conceptual transformation that ultimately produced the modern moral rights orthodoxy overlapped with the judicial creation and partial codification of the patchwork of decisional rules that I described above. This process began during the last quarter of the 19th century and involved two analytically separate stages. The first stage involved a process of abstraction that gradually aggregated the various decisional rules into a coherent theory, and eventually, into a right called "*droit moral*" (moral right) in France and "*Persönlichkeitsrecht*" (right of personality) in Germany. It was understood, however, that while these abstract notions included personal rights of authors, they also included similar rights of inventors

108. See LUG § 9; KUG § 12; VerIG § 13.

109. See STRÖMHOLM, *supra* note 39, at 333, 337 (pointing to statements in the legislative history rationalizing these rules as protection of the personal "interests" of authors, as opposed to recognizing personal "rights" of authors).

110. The United States and the United Kingdom did not partake in this process of theorization, at least as far as copyright law is concerned. See LADAS, *supra* note 51, at 4 ("There has been no thorough-going juristic analysis of copyright in England or in the United States on the basis of the present-day understanding of legal rights and interests in terms of modern juristic legal interpretations").

as well as other rights derived from personhood. The second stage began in the early 20th century and was based on a process of specification in that select elements of the categories of "*droit moral*" and "*Persönlichkeitsrecht*" were further developed into the modern theory of moral rights with the clear understanding that this theory differed from previous ones because it conceptualized moral rights as copy-right-based rights of authors in their works. At that point, moral rights had become an integral part of the Continental conception of copyright law now known as the "*droit d'auteur*" system.¹¹¹

If the development of the decisional rules associated with moral rights during the 19th century was the work of courts and legislatures, the creation of new legal concepts was the work of professors. In fact, the new legal categories of "*droit moral*" and "*Persönlichkeitsrecht*" were a result of the pervasive theorization and doctrinal construction that was characteristic of the particular mode of legal consciousness that was predominant prior to World War I.¹¹² If legal scholarship was to be recognized within the academy at that time, it had to combine two elements, namely identifying the governing principles in the maze of individual rules and determining how different principles related to one another, a process called "legal construction."¹¹³ The combination of *principle* and *system* then allowed the legal scientist to fill gaps within the system by deriving new rules based on analogies supported by a common underlying principle rather than by pure instinct.¹¹⁴ Not surprisingly, this seemed particularly important in emerging areas of law such as copyright, patents, and trademarks, which presented a host of new issues that had not yet been settled. The method of conceptualizing and classifying rights within the legal system held the promise of generating the legal rules necessary to deal with these issues in the absence of comprehensive legislation and was, therefore, considered the primary task of legal scholarship.

The obsession with classification may seem like a largely irrelevant matter of legal aesthetics today, but it should not be overlooked that this was a crucial task at that time for at least two reasons. First, the existence of statutory rules on copyright alone was not suf-

111. For an early study comparing the common law "copyright" system to the civil law "*droit d'auteur*" system, see Rudolf Monta, *The Concept of "Copyright" versus the "Droit d'Auteur,"* 32 S. CAL. L. REV. 177 (1959).

112. For an analysis of this mode of legal consciousness, typically referred to as "classical legal thought," and a theory of its globalization, see Kennedy, *supra* note 4, at 633, 637-48.

113. See 1 JOSEF KOHLER, *LEHRBUCH DES BÜRGERLICHEN RECHTS* 136 (1906) ("Only those who know how to create principles and how to construct are legal researchers and scientific jurists."). See also EDUARDO PIOLA CASELLI, *DEL DIRITTO DI AUTORE* 73, 80-81 (1907).

114. KOHLER, *supra* note 113, at 135-38.

ficient for the rights of authors to be recognized as legitimate.¹¹⁵ The legal consciousness dominant in the last third of the 19th century required an “inner justification” for these rights,¹¹⁶ which largely depended upon the satisfactory incorporation of these rights into the generally accepted categories of the traditional legal system. Second, legal constructs were operative on a very abstract level,¹¹⁷ which is to say that the classification of a right had substantive implications, especially in the context of reasoning by analogy.¹¹⁸ For instance, if copyright was conceptualized as property, it would follow from this very classification that copyright protection had to be perpetual, because property rights are perpetual.¹¹⁹ Therefore, the controversy about the proper classification of a particular right according to its “essence” or “nature” was not just about form, but also about substance.

Against this backdrop, the single most important issue for 19th-century copyright scholars was the question of how to classify the rights of authors within the traditional system of private rights that German and French scholarship had inherited from Roman law. Since the decisional rules associated with moral rights were mostly understood as rules of contract interpretation rather than as separate rights similar in structure to economic rights, the scholarly discussion of copyright during the 19th century had a clear focus on the legal nature and the proper classification of *economic* rights. By contrast, the relevance of moral rights rules was largely limited to what their existence meant for the understanding of statutory copyright entitlements, at least until the idea of moral rights as independent rights *in rem* was generally accepted at the beginning of the 20th century. Nevertheless, the conceptual transformation that produced the copyright-based concept of moral rights can hardly be understood without a basic understanding of the general conceptual framework in use at that time. Therefore, I will first review the scholarly debate

115. See, e.g., JOSEF KOHLER, *DAS AUTORRECHT* 1 (1880) (“The right of authors is one of the few rights that still have to fight for their scientific existence.”); 1 OTTO VON GIERKE, *DEUTSCHES PRIVATRECHT* 756 (1895) (“There is a strand of legal scholarship that is unable to recognize a right as a good right if it cannot be constructed using the concepts of Roman law.”).

116. See, e.g., MAX LANGE, *KRITIK DER GRUNDBEGRIFFE VOM GEISTIGEN EIGENTUM* 36 (1858); HARUM, *supra* note 64, at 29-30.

117. See DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* 31 (AFAR ed. 1998) (1975) (stating that a “defining characteristic of Classicism, in contrast to pre-Classical and modern thinking, was the claim that very abstract propositions were nonetheless operative” and concluding that “there was a general increase . . . in the felt operativeness of constitutional and doctrinal principles” between 1850 and 1900).

118. See PIOLA CASELLI, *supra* note 113, at 78-80; KOHLER, *supra* note 113, at 137-38; 1 NICOLA STOLFI, *LA PROPRIETÀ INTELLETTUALE* 216 (2d ed. 1915).

119. See, e.g., 2 GEORG BESELER, *SYSTEM DES GEMEINEN DEUTSCHEN PRIVATRECHTS* 953 (4th ed. 1885).

about the classification of copyrights (economic rights)¹²⁰ prior to discussing the processes of conceptual abstraction and specification that led to the creation of the now dominant theory of moral rights.

A. *Copyright Theory in the 19th Century*

The traditional system of classification that 19th-century scholars had inherited from Roman law divided the entire body of law into three categories, namely the law of persons, the law of property, and the law of obligations.¹²¹ Legal scholars concerned with the proper determination of the “essence” or “nature” of statutory copyright entitlements quickly realized that none of the three available categories was a good match. First, it was evident that copyrights were not derived from rules relating to the status or the legal capacity of persons, which made them ineligible for classification in the first category relating to the law of persons. Second, most scholars concluded that the law of obligations was inappropriate as a category, because copyright entitlements were rights *in rem*¹²² that could not be reduced to a mere liability rule, because damages were not required for a finding of infringement.¹²³ Third, the natural law tradition of associating copyright entitlements with property rights¹²⁴ lost its plausibility when the legal scope of the term “property” was limited to rights in *tangible* things in the wake of the revival of the narrow Roman law notion of property during the 19th century.¹²⁵

A good example of both the rejection of the notion of “property” for copyright and the substantive importance of choosing the “correct”

120. For more detailed reviews of copyright theories, see Anonymous, *De la nature juridique du droit d'auteur*, 36 LE DROIT D'AUTEUR 98 (1923); EDUARDO PIOLA CASELLI, CODICE DEL DIRITTO DI AUTORE 195-201 (1943); LADAS, *supra* note 51, at 7-10.

121. See, e.g., JULES DE BORCHGRAVE, ÉVOLUTION HISTORIQUE DU DROIT D'AUTEUR 2 (1916).

122. Note, however, that a few prominent 19th-century scholars, including Immanuel Kant, had attempted to explain the publisher's exclusive right to print books on the basis of the law of obligations. See JOHANN STEPHAN PÜTTER, DER BÜCHERNACHDRUCK NACH ÄCHTEN GRUNDSÄTZEN DES RECHTS GEPRÜFT 46 (1774); Immanuel Kant, *Von der Unrechtmässigkeit des Büchernachdrucks*, 5 BERLINISCHE MONATSSCHRIFT 403 (1785).

123. See, e.g., LANGE, *supra* note 116, at 48-49.

124. See, e.g., NICOLAUS HIERONYMUS GUNDLING, RECHTLICHES UND VERNUNFTMÄSSIGES BEDENCKEN EINES ICTI, DER UNPARTHEYISCH IST, VON DEM SCHÄNDLICHEN NACHDRUCK ANDERN GEHÖRIGER BÜCHER 5, 10 (1726) (suggesting, on the basis of a broad notion of property, that those who reprinted published books were “thieves”). See also EDUARDO PIOLA CASELLI, TRATTATO DEL DIRITTO DI AUTORE 33-38 (2d ed. 1927).

125. See, e.g., JOHANN CASPAR BLUNTSCHLI, DEUTSCHES PRIVATRECHT 112 (3d ed. 1864); GUSTAV VON MANDRY, DAS URHEBERRECHT AN LITERARISCHEN ERZEUGNISSEN UND WERKEN DER KUNST 34 (1867); 3 OTTO STOBBE, HANDBUCH DES DEUTSCHEN PRIVATRECHTS 8-10 (2d ed. 1885); LANGE, *supra* note 116, at 116; BESELER, *supra* note 119, at 953; PIOLA CASELLI, *supra* note 113, at 83. See also LADAS, *supra* note 51, at 1-2, 7. Note that this was true even in countries like Austria whose statutory definition of “property” in ABGB § 285 was technically not restricted to rights in tangible objects. See FRANZ BYDLINSKI, SYSTEM UND PRINZIPIEN DES PRIVATRECHTS 518 (1996).

categories is the behavior of the German delegation during the 1885 negotiations leading to the adoption of the Berne Convention.¹²⁶ The originally proposed title of the Convention focused on the protection of the rights of authors ("*protection des droits d'auteurs*"). However, the French delegation suggested that the title be changed to include the protection of literary and artistic property ("*protection de la propriété littéraire et artistique*"), because the term "*droits d'auteur*" (author's rights) was not as widely accepted in France as the term "*Urheberrecht*" (author's right) was in Germany, and since the Convention was drafted in French, the French proposal should prevail.¹²⁷ The German delegation objected to this proposal, insisting on the original title and stating that Germany could not accept the French proposal, "given the consequences that legal science would draw from the term property."¹²⁸ The Germans ultimately lost a vote on this issue by five to seven.¹²⁹ They then declared that this decision would most probably prevent Germany from joining the Berne Convention, because Germany could not accept a term that was "incorrect" in view of its domestic legal system.¹³⁰ The Swiss delegation subsequently proposed a compromise consisting of replacing the original expression "*protection des droits d'auteur*" (protection of author's rights) with the alternative "*protection des œuvres littéraires et artistiques*" (protection of literary and artistic works).¹³¹ This compromise was ultimately adopted. At the same time, it was declared that all countries were free to translate the Convention any way they deemed appropriate and that the wording of the title was not meant to express a preference for any particular legal theory.¹³² The fact that Germany, at that time the leading producer of literary works, preferred to walk away from an important international treaty rather than accept a title that it deemed inaccurate shows the high stakes behind the apparently purely formal choice of the "correct" concept.

Given that the traditional concepts and categories of private law were inadequate for the proper determination of the "legal nature" of

126. See ACTES DE LA 2ME CONFÉRENCE INTERNATIONALE POUR LA PROTECTION DES ŒUVRES LITTÉRAIRES ET ARTISTIQUES RÉUNIE À BERNE DU 7 AU 18 SEPTEMBRE 1885 [hereinafter ACTES 1885], at 20, 40.

127. ACTES 1885, at 20 (statement by the French delegates Lavollée and Renault). Note that the term "literary and artistic property" had been used in France since the enactment of the very first French copyright statutes in 1791 and 1793. It is still in use today. See, e.g., LUCAS-SCHLOETTER, *supra* note 39, at 17.

128. ACTES 1885, at 20.

129. See ACTES 1885, at 40. Not surprisingly, the French proposal was supported, *inter alia*, by the United Kingdom and Spain, both countries in which the expression "literary property" was commonly used to refer to copyright. See ACTES 1885, at 40 n.1.

130. See ACTES 1885, at 40.

131. *Id.*

132. *Id.*

copyright entitlements, scholars developed different strategies¹³³ that ultimately resulted in two exactly opposite solutions to the problem of classification. The first approach was to associate copyright entitlements with a newly recognized category of private rights that had been created by expanding the law of persons beyond personal status and legal capacity to include rights of persons in their personhood, usually called “rights of personality” or “rights of individuality.”¹³⁴ The notion underlying these rights was to protect “the individuality of the individual as such”¹³⁵ and to safeguard “respect for the individual.”¹³⁶ On this level of abstraction, any conceivable right *in rem* could qualify as a right of personality, because the violation of any right could be understood as disrespecting the rightholder’s “personhood” or, the rightholder’s “will,” which is the same thing.¹³⁷ Indeed, rights of personality were sometimes used as a catch-all category to accommodate virtually any right that did not fit into the other recognized categories of rights, including intellectual property rights.¹³⁸ Perhaps the most influential proponent of the personhood theory of copyright was Otto von Gierke, who claimed that copyright entitlements were rights of personality because their object, the work of authorship, originated with the author and was, therefore, part of the author’s “sphere of personhood.”¹³⁹ Moreover, Gierke argued, no other theory could explain why the duration of copyright was tied to the life of the author.¹⁴⁰ The primary conse-

133. For an overview, see KARL KAERGER, *DIE THEORIEN ÜBER DIE JURISTISCHE NATUR DES URHEBERRECHTS* (1882); BORCHGRAVE, *supra* note 121; STOLFI, *supra* note 118, at 216-71.

134. See Carl Gareis, *Das juristische Wesen der Autorrechte, sowie des Firmen- und Markenschutzes*, 35 *ARCHIV FÜR THEORIE UND PRAXIS DES ALLGEMEINEN DEUTSCHEN HANDELS- UND WECHSELRECHTS* 185 (1877); Étienne H. Perreau, *Des droits de la personnalité*, 8 *REVUE TRIMESTRIELLE DE DROIT CIVIL* 501 (1909). See also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890); Roscoe Pound, *Interests of Personality*, 28 *HARV. L. REV.* 343 (1915).

135. Gareis, *supra* note 134, at 196.

136. Perreau, *supra* note 134, at 503.

137. See CYRILL P. RIGAMONTI, *GEISTIGES EIGENTUM ALS BEGRIFF UND THEORIE DES URHEBERRECHTS* 52-53 (2001). Consequently, the right of personality could be viewed as the culmination of the “will theory” in private law. For a discussion of the will theory and its critiques, see Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 *COLUM. L. REV.* 94 (2000).

138. See Gareis, *supra* note 134; GIERKE, *supra* note 115, at 708-17. For a critique of the broad scope of the personality theory, see Josef Kohler, *Zur Konstruktion des Urheberrechts*, 10 *ARCHIV FÜR BÜRGERLICHES RECHT* 241, 246-58 (1895); ALPHONS MELLIGER, *DAS VERHÄLTNIS DES URHEBERRECHTS ZU DEN PERSÖNLICHKEITSRECHTEN* 29 (1929).

139. See GIERKE, *supra* note 115, at 756. See also BESELER, *supra* note 119, at 954; BLUNTSCHLI, *supra* note 52, at 191-92; Felix Dahn, *Zur neuesten Deutschen Gesetzgebung über Urheberrecht*, 5 *ZEITSCHRIFT FÜR GESETZGEBUNG UND RECHTSPFLEGE* 1, 5-11 (1871); LANGE, *supra* note 116, at 41.

140. See GIERKE, *supra* note 115, at 762, 768. Theories similar to the right of personality had been advanced much earlier in the context of the Roman *actio iniuriarum*, when it was argued that the reprinting of a book was essentially a

quence of categorizing copyright entitlements as rights of personality was that they had to be inalienable, because the defining feature of rights of personality was their inalienability,¹⁴¹ in stark contrast to "patrimonial rights,"¹⁴² the term used to categorize all rights that could be monetized and that were fully alienable.¹⁴³ The consequence of inalienability was exactly the reason why the personhood theory of copyright met a great deal of resistance from scholars who argued that this "construction" could not explain the "daily transfer of the author's rights."¹⁴⁴

This critique was the basis of the second approach to the problem of classification, which fully embraced the idea that copyright entitlements were alienable "patrimonial rights."¹⁴⁵ As plausible as this approach may seem from a modern perspective, establishing it in the minds of late 19th-century legal scholars was not easy, because its advocates had to overcome the dominant notion that the category of patrimonial rights was limited to property rights in tangible things. After all, the personhood theory had gained support precisely because it offered a solution to the problem that copyright could not be conceptualized as property in the traditional sense of the term. The typi-

usurpation of the author's right to disseminate his work in a manner that expressed an utter disregard for the author's personhood and, therefore, amounted to what the Romans called *iniuria*. See LEOPOLD JOSEPH NEUSTETEL, *DER BÜCHERNACHDRUCK NACH RÖMISCHEM RECHT BETRACHTET* 26-27 (1824). However, the scope of this ancient Roman cause of action had been significantly narrowed over the centuries, at least under German common law, and was thus no longer a viable doctrinal basis for protecting the full range of personality interests recognized in the late 19th century. See Rudolf von Jhering, *Rechtsschutz gegen injuriöse Rechtsverletzungen*, 23 *JHERINGS JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS* 155 (1885); ZIMMERMANN, *supra* note 22, at 1090-92.

141. See, e.g., Perreau, *supra* note 134, at 517; GEORGES MICHAÉLIDÈS-NOUAROS, *LE DROIT MORAL DE L'AUTEUR* 45 (1935).

142. See 1 BERNHARD WINDSCHEID, *LEHRBUCH DES PANDEKTENRECHTS* 107-10 (6th ed. 1887). Note that "patrimonial law" was the name of the "super-category" that referred to the core of private law, which consisted of the law of property and the law of obligations. See 1 FRIEDRICH CARL VON SAVIGNY, *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 339-40, 367 (1840); 2 JOSEF KOHLER, *LEHRBUCH DES BÜRGERLICHEN RECHTS* 1, 2 (1906).

143. See JOSSE RAND, *supra* note 23, at 75.

144. Josef Kohler, *Die Idee des geistigen Eigentums*, 82 *ARCHIV FÜR CIVILISTISCHE PRAXIS* 141, 201 (1894). Another reason that was invoked to oppose the personhood theory was that any and all rights could be understood as rights of personality, which made it useless as a legal concept. See, e.g., 1 JOSEPH UNGER, *SYSTEM DES ÖSTERREICHISCHEN ALLGEMEINEN PRIVATRECHTS* 505 (5th ed. 1892); STOBBE, *supra* note 125, at 11.

145. Note that the term "patrimonial right" had a different meaning in copyright law during much of the 19th century. If scholars objected to the idea that copyright entitlements were "patrimonial rights," it was usually not because they endorsed the notion of copyright as a right of personality in Gierke's sense, but rather because they rejected the claim that a finding of (civil or criminal) copyright infringement required a showing of actual damages. See, e.g., LANGE, *supra* note 116, at 48-49; HARUM, *supra* note 64, at 53; BLUNTSCHLI, *supra* note 52, at 192; STOBBE, *supra* note 125, at 12, 14. For a judicial rejection of *this* understanding of copyright as a patrimonial right, see RGZ 12, 50 (51-52).

cally German objection to “copyright as property” also explains why the most obvious solution—expanding the category of property rights to include rights in intangible objects, such as works of authorship—was not an option, even though this solution had been endorsed by scholars as influential as Rudolf von Jhering.¹⁴⁶ Therefore, the creation of a new category of patrimonial rights was the only means of freeing copyright from the grip of personhood theorists and incorporating it into patrimonial law. This task was undertaken by Edmond Picard and Josef Kohler, whom Roscoe Pound once described as “without question the first of living jurists.”¹⁴⁷ Although the creation of a new category of rights called “*droits intellectuels*” (intellectual rights) by Picard¹⁴⁸ and “*Immateriälgüterrechte*” (rights in immaterial goods) by Kohler¹⁴⁹ involved little more than rebranding the good old property rights theory, it was revolutionary at that time,¹⁵⁰ and Picard made it quite clear that he expected to be recognized for his pioneering work.¹⁵¹ It is important to understand that most scholars adopting this theory, including Josef Kohler, did not deny the existence of rights of personality,¹⁵² but they rejected the idea that copyright entitlements were rights of personality and insisted on a clear conceptual separation between alienable rights of authors in their works (copyrights) and inalienable rights of authors in their personhood (rights of personality). Therefore, this approach is often referred to as the “dualist theory” of copyright. This dualist approach was dominant when leading French and German scholars began to create the modern copyright-based theory of moral rights by converting the patchwork of decisional rules identified in Part I into rights *in rem*.

B. Phase I—From Rules to Rights

The first step toward the creation of the modern moral rights theory was the gradual combination of the various decisional rules associated with the moral rights of disclosure, attribution, and integ-

146. See Jhering, *supra* note 140, at 303-13. See also CHRISTIAN F.M. EISENLOHR, DAS LITERARISCH-ARTISTISCHE EIGENTHUM UND VERLAGSRECHT 44 (1855); JOSSE RAND, *supra* note 23, at 791.

147. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 140, 155 (1911).

148. See Edmond Picard, *Embryologie juridique*, 10 JOURNAL DU DROIT INTERNATIONAL PRIVÉ 565 (1883). Note that Edmond Picard's work was quite influential not just in his home country of Belgium, but also in France. See STRÖMHOLM, *supra* note 39, at 272.

149. See KOHLER, *supra* note 115, at 1.

150. See, e.g., PIOLA CASELLI, *supra* note 124, at 40 (speaking of a “major development in the scholarly discussion”). The expansion of the category of patrimonial rights to include rights in immaterial goods was quickly adopted. See, e.g., 2 OTTO STOBBE, HANDBUCH DES DEUTSCHEN PRIVATRECHTS 1 (2d ed. 1883).

151. See Picard, *supra* note 148, at 566-67.

152. See, e.g., PIOLA CASELLI, *supra* note 124, at 518.

riety under the umbrella of an abstract right *in rem*. This newly recognized right of the author was then integrated into the broader theoretical framework outlined above as a "right of personality" or, as the French called it, a "*droit moral*" of the author that was separate and apart from the author's statutory right to reproduce the work in copies. The French scholar André Morillot is typically considered to be the first to have used the term "moral right" in a technical sense,¹⁵³ and his work illustrates both the process of consolidating the various decisional rules into a single legal concept and the paramount importance of German law and legal scholarship in the development of the moral rights orthodoxy. In addition, Morillot's work is a good example of the conceptual transformation that occurred during the last decades of the 19th and the first decades of the 20th century.

1. Discovering Moral Rights

In an article published in 1872,¹⁵⁴ Morillot discussed the issue of whether creditors had the right to force publication of an unpublished work during the author's lifetime, which touches upon the author's right of disclosure.¹⁵⁵ Under Article 1166 of the French Civil Code, the answer to the question depended upon whether the author's right of publication was "exclusively attached to the person."¹⁵⁶ Morillot conceded that there was no statutory authority stating that the author's right of publication was a "personal right" in the sense of Article 1166. He then relied on the conceptual analytic described above by distinguishing between extra-patrimonial or "moral" rights that are not susceptible to direct monetary valuation and patrimonial rights that can be valued in money.¹⁵⁷ While the former cannot be exercised by creditors, the latter can.¹⁵⁸ In support of his claim that the right of publication was a "moral right," he again invoked the conceptual framework outlined above by saying that because the right of authors to make decisions about the publication of their works could

153. See, e.g., Pierre Sirinelli, *Le droit moral de l'auteur et le droit commun des contrats* 7 (Dec. 18, 1985) (unpublished doctoral thesis, Université de Droit, d'Economie et des Sciences Sociales de Paris) (on file at Langdell Library, Harvard Law School); STRÖMHOLM, *supra* note 39, at 277. For earlier, non-technical uses of the term, see *id.* at 177-78.

154. André Morillot, *De la personnalité du droit de publication qui appartient à un auteur vivant*, 22 *REVUE CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE* 29 (1872).

155. Note that Morillot also includes the case in which creditors demand the publication of a new edition of an already published work, which raises parallel, but not identical questions; see *id.* at 29. However, since the difference is irrelevant to the point made in the text, I will focus my discussion on the case of the forced publication of an unpublished work.

156. See C. civ., art. 1166.

157. See Morillot, *supra* note 154, at 30.

158. See *id.* at 31 ("It follows that moral rights are not in the patrimony and cannot be exercised by creditors. The purely pecuniary rights are part of the patrimony and can be exercised by creditors.").

not be classified within the categories of “property” and “obligations,” it would not qualify as a patrimonial right and, therefore, had to be a personal right, or, as he put it, a “*droit moral*.”¹⁵⁹ This argument was only plausible because Morillot also rejected the idea that copyright entitlements are property rights on the basis that property rights were limited to the relation between persons and *tangible* things. Moreover, he relied on the idea that a work of authorship is part of the author’s sphere of personhood when he explained that recognizing real property rights in literary works would be tantamount to recognizing property rights in human beings, which was legally impossible lest one were to allow the sale of people into slavery.¹⁶⁰ Therefore, the reason for granting authors exclusive rights in their works was not to protect the author’s patrimony, but to protect “the inviolability of the author’s personhood,” of which these rights are an integral part.¹⁶¹ In addition, Morillot claimed that the outcome of his conceptual analysis was also just, not only because a work is the result of the author’s will and personal labor, but also because the act of publication engages the author’s moral responsibility and reputation.¹⁶²

Aside from the distinctly conceptualist reasoning employed by Morillot, there are three points that deserve further elaboration. First, from a comparative perspective, Morillot’s description of his “*droit moral*” is strikingly similar to the concept of “common law copyright” that was recognized in the United States and the United Kingdom throughout the 19th century. More specifically, Morillot explained that the moral right would expire once the author consented to publication, thereby giving way to a patrimonial right to reproduce the work in copies.¹⁶³ This is exactly what the common law copyright was all about, because it also expired upon publication, leaving authors with their economic rights under the copyright statutes. The idea that Morillot’s moral right, at least in its initial form, can be understood as the Continental equivalent to the common law right of first publication is intriguing given the hostility that moral rights traditionally faced in common law countries. Second, Morillot’s approach exhibits the profound shift in the conceptual framework used to rationalize the rule against forced disclosure. I showed earlier that this rule was originally justified by reference to the notion that unpublished works did not legally exist and could not, therefore, be seized by creditors. Morillot’s explanation turns this rule into a right *in rem* by theorizing it as an expression of the author’s rights in his own personhood opposable to everyone else, now called the right of

159. *Id.* at 31, 35, 49.

160. *Id.* at 33.

161. *Id.* at 33, 36.

162. *Id.* at 45, 46, 49.

163. *Id.* at 37, 38.

disclosure. This shift may have been obvious in view of the fact that the exclusive right of reproduction, which can be understood as a generalization of the right of first publication, had always had a clear statutory basis and had always been conceptualized as a right *in rem*. Nevertheless, the shift in the rhetoric is remarkable. Third, compared to the scope of the modern theory of moral rights, Morillot's moral right was quite narrow, because it was limited to the right of disclosure and did not yet encompass any of the decisional rules that would be associated with the rights of attribution and integrity today. Morillot did not mention these rules in his analysis, but given the narrow scope of the question that he examined, expanding the coverage of his moral right was not necessary. In fact, only six years later, he expanded the reach of the "*droit moral*" to include rules derived from the rights of attribution and integrity.

2. Toward a Theory of Moral Rights

In 1878, Morillot published a book¹⁶⁴ commenting on three German intellectual property statutes that had been enacted between 1870 and 1877 and that essentially covered copyright and patent law.¹⁶⁵ Morillot's book is yet another impressive example of both the conceptualist method in use at that time and the conceptual transformation of moral rights. One chapter of the book was dedicated to the "indispensable" task of identifying the "general principles" that govern the rights of authors, in order to "determine the nature of the right that the author has over his work" by discussing the different elements of the statutes' content in "logical order."¹⁶⁶ By appealing to logical order, general principles, and the nature of rights, Morillot placed himself firmly within the mainstream of 19th-century conceptualist legal thought. He again relied on the fundamental distinction between moral rights and patrimonial rights when developing a theory of the "dual" nature of the author's right, according to which the author has a moral and a patrimonial right that are completely separate and distinct from each other. In his words:

The right that the author exercises over his work is dual, moral and patrimonial. These two rights are absolutely distinct. The author exercises a moral right over his work that allows him to prevent and suppress all aggressions that, while attacking his work, would at the same time harm his

164. ANDRÉ MORILLOT, DE LA PROTECTION ACCORDÉE AUX ŒUVRES D'ART, AUX PHOTOGRAPHIES, AUX DESSINS ET MODÈLES INDUSTRIELS ET AUX BREVETS D'INVENTION DANS L'EMPIRE D'ALLEMAGNE (1878).

165. See Gesetz betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken, v. 11.6.1870 (RGBl. 1870, 339); Gesetz betreffend das Urheberrecht an Werken der bildenden Künste, v. 9.1.1876 (RGBl. 1876, 4); Patentgesetz, v. 25.5.1877 (RGBl. 1877, 501).

166. MORILLOT, *supra* note 164, at 95.

conscience and his personhood. This is incontestable prior to publication. This is equally true after publication. It is by virtue of the general principles of law, especially Article 1382 of the Civil Code, that the author exercises this kind of *actio iniuriarum*. The source of this action thus lies in natural law. The author also has the *author's right* proper, that is, *an exclusive right of reproduction*. This right is purely patrimonial, and only tends to enrich the author. Its source is positive law.¹⁶⁷

This paragraph is one of the first and perhaps one of the most complete and concise descriptions of the “dualist” approach to copyright law that also recognized, in the form of a right *in rem* similar in structure to statutory copyright entitlements, the moral right of the author.¹⁶⁸ Two points are important in this context.

First, Morillot considerably modified and expanded his conception of the moral right. Contrary to what he had asserted (noted above) in 1872, by 1878, he claimed that the author's moral right survived publication¹⁶⁹ and included, in addition to the right of disclosure, the familiar contractual rules underlying the rights of attribution and integrity, now rationalized as an expression of the moral right, a right *in rem*. The following excerpt makes this conceptual transformation abundantly clear:

If, for example, the idea, once expressed in a manner perceptible to the senses, but not yet published by its author, were taken by a third party and published without the will or against the intentions of the author, this fact would constitute a violent and unjust aggression toward the personhood of the latter, a veritable attack on his liberty, a very real moral harm for which he could demand redress. The same would be true if, once the work had been published by its author, a third party wanted to republish it, under his own name, stealing from the writer or the artist the glory to which they are solely entitled . . . Furthermore, if a third party, even if invested by the author with the right to publish, were to give only a vicious or incorrect representation of the work, this case would also constitute a veritable violation of the author's personhood.¹⁷⁰

In this paragraph, Morillot first addresses the right of disclosure, but then explicitly invokes the right of attribution in a tort setting before

167. *Id.* at 108 (numbers omitted and text reformatted; emphasis in original).

168. Note that Morillot's dualist approach seems to have been heavily influenced by German legal science. See STRÖMHOLM, *supra* note 39, at 272, 274.

169. MORILLOT, *supra* note 164, at 109.

170. *Id.* at 110.

discussing the rule associated with the right of integrity in a contractual setting, this time, however, recast as a right *in rem* without reference to contractual default rules. Therefore, the abstract construct that Morillot called "moral right" consisted of exactly the decisional rules that have come to be known as the rights of disclosure, attribution, and integrity. Their inclusion under the umbrella of the "*droit moral*" was explained by reference to the unifying principle that the author's personhood or "personality" expressed in the work deserved respect.¹⁷¹ This move was a significant change compared to how the patchwork of moral rights rules had been understood during much of the 19th century, namely as expressions of default rules in publishing agreements.

Second, Morillot's approach of switching from rules to rights, combined with a distinctly "dualist" understanding of copyright law, came to dominate Continental legal consciousness during the first quarter of the 20th century. In France, the dualist theory was endorsed by the French Supreme Court in its famous *Lecocq* decision,¹⁷² in which the Court reversed a lower court's holding that copyright entitlements were not part of the marital assets to be divided in the case of divorce, explaining that while these assets included the author's "monopoly of exploitation" relating to published works, such inclusion would not affect the author's ability, "inherent in his personhood," to modify or suppress his work.¹⁷³ Some courts used language that made the diffusion of the rights-based dualist model of copyright even more visible, especially when they discussed the question of whether authors would retain any rights in their works if they assigned the copyright in the work. For example, one court explained that despite such assignment, "the author did not deprive himself of the inalienable and imprescriptible right to have his work respected and to oppose anything that could bring any harm whatsoever to his artistic reputation and to the expression of his thoughts."¹⁷⁴ The notion that authors retained inalienable rights to safeguard the integrity of their works and to protect their reputation even after the transfer of the copyright in the work became a standard formula in court decisions in the first decades of the 20th century, although the precise legal basis of this right was often unclear.¹⁷⁵ In addition to the courts, most legal commentators, such

171. *Id.* at 111-13.

172. Cass. civ., June 25, 1902, D.P. 1903 I 5.

173. *Id.*

174. Trib. civ. Seine, 3e ch., Feb. 3, 1912, 59 ANNALES DE LA PROPRIÉTÉ INDUSTRIELLE ARTISTIQUE & LITTÉRAIRE 88, 91-92 (1913). *See also* Trib. civ. Seine, Mar. 25, 1909, Gaz. Pal. 1909 I 451.

175. *See* STRÖMHOLM, *supra* note 39, at 290.

as François GénY,¹⁷⁶ accepted and supported the dualist approach to copyright law.¹⁷⁷ In Italy, the transition from contractual rules to rights *in rem* in the name of the protection of the author's personhood manifested in the work could even be found in studies on the law of publishing agreements. For instance, one scholar writing in 1913 suggested that the faithful reproduction of the author's work was more a matter of the author's "right of personality" than of the publisher's contractual duties under the law of publishing agreements.¹⁷⁸ Even more important for the international prestige of the dualist approach than the support from influential Italian scholars¹⁷⁹ was its adoption and skillful promotion by the leading German intellectual property scholar of that time, Josef Kohler.¹⁸⁰ In fact, in a review of Morillot's book, Kohler explicitly praised Morillot's clear distinction between "the right of the author as a patrimonial right and the individual right of personality" and reiterated the practical importance of this distinction in the context of creditor's rights in unpublished works, which, as discussed above, happens to be the context in which Morillot first used the term "moral right."¹⁸¹

C. Phase II—Moral Rights in Copyright Law

At the end of the 19th century, the primary conceptual basis of the decisional rules associated with the rights of disclosure, attribution, and integrity was no longer the law of contracts and literary property, but the moral right in France and the right of personality in Germany and Italy.¹⁸² For the theory of moral rights, the most important feature of the new "dualist" approach to copyright was that moral rights were understood as being completely separate and apart from copyright (economic rights), both formally and conceptually. As explained above, this conception of moral rights falls somewhere between the common law idea of moral rights as a patchwork of unrelated rules and the moral rights orthodoxy that currently dominates

176. See 1 FRANÇOIS GÉNY, *DES DROITS SUR LES LETTRES MISSIVES* 335 (1911) (distinguishing, "within the totality of the rights of authors," between a moral and a patrimonial right).

177. See STRÖMHOLM, *supra* note 39, at 298-99. Note that even the few scholars who did not share the dualist approach agreed that the principal foundation of the moral right was respect for the author's personhood manifested in the work. *Id.* at 301.

178. See ALFREDO DE GREGORIO, *IL CONTRATTO DI EDIZIONE* 267-68 (1913).

179. See, e.g., STOLFI, *supra* note 118, at 258, 266.

180. See, e.g., Kohler, *supra* note 138, at 258-70; KOHLER, *supra* note 115, at 123-24, 129, 137-38; JOSEF KOHLER, *URHEBERRECHT AND SCHRIFTWERKEN UND VERLAGSRECHT* 13-14, 439-67 (1907).

181. See Josef Kohler, 21 *KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* 510, 512-13 (1879).

182. In the context of copyright law, the difference between "moral rights" and "rights of personality" was primarily one of terminology. See, e.g., KOHLER, *supra* note 180, at 439 (1907).

copyright scholarship. The early 20th century was also when Switzerland codified the dualist theory (the right of personality approach). It inserted a general right of personality into its Civil Code in 1912.¹⁸³ While the Swiss remained true to this approach until recently by maintaining that authors were protected by two conceptually separate rights, the Germans, followed by the Italians, fully integrated moral rights into copyright law, thereby creating the modern concept of moral rights (the copyright approach). Interestingly, the French, much like the Swiss, initially held on to the dualist notion of copyright,¹⁸⁴ although they eventually also followed the German lead, but not until after the enactment of Article 6bis of the Berne Convention in 1928.

The second phase of the conceptual transformation that ultimately produced the moral rights orthodoxy began in Germany shortly after 1900. The most important factor in triggering this process of transformation was Germany's failure to codify an abstract right of personality as part of its Civil Code enacted in 1900,¹⁸⁵ combined with the positivist belief in the exclusivity of statutory law ("what is not in the code is not law"), the increased scholarly emphasis on interest analysis,¹⁸⁶ and the insertion of a few moral rights rules into statutory copyright law in 1901 and 1907.¹⁸⁷ The basic idea is that the failure of the German legislature and courts to adopt specific rules protecting rights of personality along the lines of Articles 27 and 28 of the Swiss Civil Code pushed German scholars to modify their approaches to moral rights, because there was no basis in the legal system for one integral part of the dualist notion of copyright, namely the right of personality.

1. Rejection of the Right of Personality

When codification work began in Germany in the early 1870s, the category of rights of personality had not yet been widely recog-

183. See *supra* Part I.B.2.

184. Anything else would have come as a surprise given that French copyright law was still based on the revolutionary decrees of 1791 and 1793 and thus did not have any copyright provision that could have remotely been interpreted as establishing moral rights. As a result, moral rights had to be secured outside the context of copyright law. This understanding of the French position is confirmed by the fact that even when formal moral rights legislation was proposed, the draft bills were all based on dualist notions. See, e.g., Vaunois, *supra* note 94, at 77-78 (project of 1908); Albert Vaunois, *Rapport*, 18 BULLETIN DE LA SOCIÉTÉ D'ÉTUDES LÉGISLATIVES 229, 236-37 (1922) (project of 1922); ABDEL-MONEIM EL-TANAMLI, DU DROIT MORAL DE L'AUTEUR SUR SON OEUVRE LITTÉRAIRE ET ARTISTIQUE 85 & n.1, 87 (1943) (projects by Marcel Plaisant proposed in 1921 and 1925). See also STRÖMHOLM, *supra* note 39, at 312.

185. See LADAS, *supra* note 51, at 578; STRÖMHOLM, *supra* note 39, at 242.

186. See, e.g., Philipp Heck, *Was ist diejenige Begriffsjurisprudenz, die wir bekämpfen?*, 14 DEUTSCHE JURISTEN-ZEITUNG [DJZ] 1457, 1460 (1909) (characterizing the primary object of legal scholarship to be "research into the relationship between legal norms and interests").

187. See *supra* text accompanying notes 104-08.

nized as an integral part of the German system of private law.¹⁸⁸ Despite the fact that this view had changed by 1900,¹⁸⁹ when the BGB entered into force, the right of personality was not included in the German codification, at least not in its abstract form. This was not an oversight, but a conscious attempt to limit monetary relief for non-patrimonial harm, such as pain and suffering, in stark contrast to Article 1382 of the French Civil Code, which did not restrict the availability of monetary relief in tort cases. More specifically, the drafters of the BGB were opposed to including an abstract right of personality, in part because they feared that judges would be given too much power to expand liability when asked to use their discretion in assessing the amount of damages that could be awarded in the case of a violation of this right whose precise contours were unclear.¹⁹⁰ As a result, aside from a few express statutory exceptions, the German tort system was based on the idea that a tort action for the recovery of damages was only available if the conduct in question (i) violated a statutory provision intended to protect another person, (ii) amounted to an intentional violation of *bonae mores*, or (iii) violated a person's life, physical integrity, health, personal liberty, property, or any other right.¹⁹¹ Since there was no statutory provision recognizing the right of personality, any interests previously protected by that right and not explicitly recognized by statute had to be converted into "rights" in order for monetary relief to be available. This is precisely what the German Imperial Court did on a variety of occasions, but it consistently rejected the existence of a "general" right of personality,¹⁹² as opposed to "special" rights of personality specifically recognized by statute (or judicial fiat), such as the right to one's name or the right to one's image.¹⁹³

188. See SAVIGNY, *supra* note 142, at 335-36; WINDSCHEID, *supra* note 142, at 104-05.

189. Even the German Imperial Court recognized the existence of a general right of personality prior to 1900, although it rejected its application in the case at hand; see RGZ 41, 43.

190. See, e.g., Fritz Smoschewer, *Das Persönlichkeitsrecht im allgemeinen und im Urheberrecht*, 3 ARCHIV FÜR URHEBER-, FILM- UND THEATERRECHT [UFITA] 231, 251 n.318 (1930). For a contemporary comparative analysis of this issue, see Alfred Seng, *Zur Frage der Vergütung nichtökonomischen Schadens aus Delikten*, 5 ARCHIV FÜR BÜRGERLICHES RECHT 336 (1891).

191. See BGB §§ 823, 826. Note also that compensation for non-patrimonial harm, with the exception of BGB § 847 (and, at that time, BGB § 1300), was explicitly excluded by BGB § 253. See also GERHARD VON BUCHKA, VERGLEICHENDE DARSTELLUNG DES BÜRGERLICHEN GESETZBUCHES FÜR DAS DEUTSCHE REICH UND DES GEMEINEN RECHTS 167 (2d ed. 1898).

192. See, e.g., RGZ 51, 369; RGZ 56, 271; RGZ 64, 155; RGZ 109, 51. Note that the successor court of the Imperial Court, the *Bundesgerichtshof*, recognized the existence of a general right of personality in 1954 on the basis of constitutional law (and with explicit reference to Art. 28 of the Swiss Civil Code) in the context of the unauthorized publication of a letter that did not qualify for copyright protection and for which moral rights protection was not available. See BGHZ 13, 334.

193. See BGB § 12; KUG § 22.

Against this backdrop, it is clear why one of the most important themes in German tort law in the 20th century was the gradual erosion of restrictions on monetary relief for non-patrimonial harm, which had largely been a consequence of the fact that private law in the 19th century had been built on and organized around the notion of "patrimony." There is no need to trace this erosion here, because the relevance of the legislative and judicial rejection of the concept of a "general" right of personality for the theory of moral rights does not depend on these substantive restrictions within the German law of torts. Nevertheless, the failure to recognize the right of personality in the BGB made it difficult for scholars to continue to rely on that right to explain and justify the existence of the moral rights rules that had been recognized for decades and whose validity had been expressly reiterated when some of them became part of the German copyright statutes of 1901 and 1907. The increased belief in statutory positivism during the first couple of decades of the 20th century, combined with the idea of eliminating or reducing the need for doctrinal construction by codifying large bodies of law, worked against the dualist approach to copyright. Conceptualizing moral rights as part of a "general" right of personality that was not recognized in statutory law and that had been explicitly rejected by the drafters of the BGB looked too much like the kind of doctrinal construct that the modern codification was meant to overcome. Not surprisingly, a typical argument against 19th-century dualism was that the right of personality that Kohler and others had invoked to construct moral rights rules was out of touch with positive law.¹⁹⁴ Given the new statutory basis of these rules, it became increasingly plausible to understand them as an integral part of the author's copyright, a theory later called "monism."¹⁹⁵ When discussing early personhood theories of copyright, Kohler once wrote that merging the author's right of personality and the author's patrimonial (economic) rights into one was "the chronic disease of copyright scholarship in Germany"¹⁹⁶—yet it was precisely this "disease" that ultimately prevailed and that is currently spreading all across the globe.

194. See, e.g., GIERKE, *supra* note 115, at 763; PIOLA CASELLI, *supra* note 113, at 87.

195. Note that the distinction between "monism" and "dualism" has a different meaning today, because all countries that subscribe to the moral rights orthodoxy are conceptually "monist." By contrast, in the modern sense, a country is monist if the moral and patrimonial elements of the copyright follow the same rules in terms of duration and alienability (e.g., Germany, Austria), and it is dualist, if they do not (e.g., France, Italy). See, e.g., Sam Ricketson, *Moral Rights and the Droit de Suite*, 1 ENT. L. REV. 78, 79 (1990); Dietz, *supra* note 15, at 202, 206-07.

196. Josef Kohler, *Zur Literatur des Autorrechts*, 21 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 189, 197 (1879).

2. From Dualism to Monism

Given the positivist attitude of many scholars writing in the early 20th century, it is fitting that one of the most ardent and influential proponents of the “monist” approach to copyright was Philipp Allfeld, a scholar who wrote section-by-section commentaries on the newly enacted copyright statutes.¹⁹⁷ The basic argument of copyright monism was that moral rights are best understood as one of two sides of the author’s copyright, the other side being the right of reproduction and other patrimonial rights. After all, the inclusion of moral rights provisions in the copyright statute was not a mere coincidence,¹⁹⁸ but rather the expression of a single principle underlying the statutory protection of the author, namely that the act of creating the work generates a relationship between author and work that entitles the author to exclusive protection regardless of whether the author is motivated by patrimonial or personal interests.¹⁹⁹ Shifting the analytic from the dualist focus on the “objects” of the author’s rights—the work in the case of patrimonial rights and the author’s personhood in the case of rights of personality—to the various interests that authors might have is characteristic of the monist approach to copyright. The idea that the author’s moral and economic interests were interwoven in the sense that moral *rights* could be used to protect economic *interests* and that economic *rights* also protected moral *interests* quickly became the most important argument against 19th-century “dualism,”²⁰⁰ although hardly any dualist ever claimed that economic rights could only be used to protect economic interests. In any event, the dualist reliance on *two* rights to protect the manifold interests of authors of copyrightable works was perceived as an artificial disruption of a natural unity of interests. Therefore, the conclusion that personal and patrimonial rights cannot be meaningfully separated because the author’s personal and patrimonial interests are inextricably linked seemed particularly plausible at that time. What made this theory a success, however, was not its analytical or

197. See, e.g., PHILIPP ALLFELD, KOMMENTAR ZU DEM GESETZE BETREFFEND DAS URHEBERRECHT AN WERKEN DER BILDENDEN KÜNSTE UND DER PHOTOGRAPHIE (1908).

198. In response to his critics, Kohler had argued that the fact that moral rights were included in the copyright statute did not necessarily mean that there was an “inner connection” between moral rights and copyright entitlements. See KOHLER, *supra* note 180, at 3.

199. See ALLFELD, *supra* note 197, at 18 n.44. See also ULMER, *supra* note 51, at 116 (using the now famous metaphor of a tree, whose roots symbolize the various authorial interests, both personal and patrimonial, and whose branches stand for the various authorial rights, again both personal and patrimonial, whereas interests and rights are combined in the trunk of the tree, which represents the author’s unitary copyright).

200. See, e.g., PIOLA CASELLI, *supra* note 113, at 87. Note, however, that the idea that economic rights could be used to serve personal interests was not at all new. See, e.g., HARUM, *supra* note 64, at 56.

explanatory power, but rather the fact that it was adopted by the German Imperial Court.²⁰¹

In moral rights cases, the German Imperial Court had to operate on the basis of the statutory provisions enacted in 1901 and 1907, which were conceived and phrased as rules of contract interpretation applicable to copyright assignments and licenses.²⁰² Therefore, in order to adopt or create the *monist* approach to copyright, the Court had to convert these rules into rights and then conceptualize these rights as part of the author's statutory copyright entitlements rather than as an application of the author's right of personality. In its first decision regarding the new statutory provisions, the Court declined to hold that attaching advertising materials to journals and redistributing them as one package violated the statutory provisions.²⁰³ However, the Court cited Allfeld for the proposition that the statutory moral rights provision in question, while applicable only in the context of a transfer of the copyright, presupposed the "exclusive right of the author to decide about the continued existence and the form of the work."²⁰⁴ The Court further explained that this provision demonstrated that the list of rights contained in the statute could not be exhaustive, precisely because of the rights that the statutory moral rights rules presupposed.²⁰⁵ The Court's statements in this case clearly show both the transition from rules to rights and the idea that these rights are an integral part of the author's copyright. This reading of the case was confirmed by at least three subsequent cases in which the Court refused to recognize the "general" right of personality while referring to the statutory moral rights provisions as the "personal elements of copyright,"²⁰⁶ which qualified as "special" rights of personality. The reference to these special rights of personality was not meant to be an endorsement of dualism in the sense that there was a right outside copyright, but rather as an expression of the view that these prerogatives, while being elements of the author's copyright, protected the author's personal interests.²⁰⁷

The breakthrough for copyright monism occurred in 1912, when the German Imperial Court first created a moral right of integrity on the basis of the statutory moral rights rules and then squarely held that the basis of this right was not the common law right of personal-

201. See STRÖMHOLM, *supra* note 39, at 351.

202. See, e.g., Johannes Mittelstaedt, *Droit moral im deutschen Urheberrecht*, 18 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 84, 87 (1913); Fritz Smoschewer, *Der Persönlichkeitsschutz in der neuesten Urheberrechts-Gesetzgebung des Auslandes und die Lehren für den deutschen Gesetzgeber*, 1 ARCHIV FÜR URHEBER-, FILM- UND THEATERRECHT [UFITA] 491, 516 (1928).

203. See RGZ 69, 242.

204. *Id.* at 244.

205. *Id.* at 243.

206. See RGZ 69, 401 (403); RGZ 79, 397 (398); RGZ 113, 413 (414).

207. Accord STRÖMHOLM, *supra* note 39, at 342.

ity, but *statutory copyright law*.²⁰⁸ The case before the Court was about the creator of a mural who sued the person who had commissioned it and who later decided that she did not like the nude figures included by the creator and thus had them draped. The artist argued his case on the basis of the general right of personality, despite the fact that he had retained the copyright in the mural (and thus could have invoked copyright law), because the modification of the original embodiment of a work did not violate any of the statutory copyright entitlements. Furthermore, since the moral rights provisions that Germany had included in its copyright statutes did not apply outside the context of a contractual transfer of the copyright, they were not directly applicable to the facts at hand, as there had been no transfer. In line with mainstream 19th-century moral rights theory, the general right of personality appeared to be the most promising legal basis in support of the artist's moral rights claim, so the artist relied on the right of personality to justify his claim. However, the Court rejected the artist's argument, explaining that German law did not recognize any general right of personality, but then nevertheless decided in favor of the artist and ordered the defendant to have the draping removed. In so holding, the Court again reasoned that the statutory moral rights provisions, although purely contractual in nature, self-evidently presupposed the existence of a *statutorily protected absolute right* of authors to make their works accessible to the world in their original and unaltered form.²⁰⁹ In other words, the Court explicitly confirmed the existence of an absolute right of integrity²¹⁰ and made it clear that the legal basis of this right was not the common law but the copyright statute. The Court endorsed the monist idea that the moral right of integrity was part and parcel of the author's statutory copyright entitlements,²¹¹ which were now understood as reflecting the fact that the author had both a patrimonial and a personal interest in his work. This decision marks the beginning of the global moral rights orthodoxy.

IV. GLOBALIZING MORAL RIGHTS

The preceding analysis of the conceptual transformation of moral rights showed that the patchwork approach to moral rights was the world standard during much of the 19th century, that Continental European scholars aggregated this patchwork into a coherent theory based on the idea of rights of personality, and that Germany, in the

208. See RGZ 79, 397. The case was also noted in the United States. See Note, 26 HARV. L. REV. 654 (1913); LOUIS D. FROHLICH & CHARLES SCHWARTZ, THE LAW OF MOTION PICTURES 59 n.33 (1918).

209. RGZ 79, 397 (399).

210. See also RGZ 102, 134 (140-41).

211. Accord STRÖMHOLM, *supra* note 39, at 348; Smoschewer, *supra* note 190, at 257, 274.

early 20th century, departed from the then dominant dualist conception by integrating moral rights into copyright law, thereby creating the notion that moral rights are copyright-based personal rights of authors in their works. What is remarkable about this development is that while dualism was the product of the pervasive theorization of private law during the late 19th century, monism was largely the result of the vagaries of the codification of German tort law. There was no specific policy agenda that could explain the German move, because in deciding moral rights cases, the Imperial Court could have reached whatever outcomes it wanted by recognizing a "general" right of personality instead of turning statutory default rules for copyright contracts into rights *in rem* and then pretending like the legislature presupposed the existence of these rights when there is no evidence in the legislative history that it actually did.²¹² From the point of view of policy, this turn of events is a historical accident, which made the German conception of moral rights a highly unlikely candidate for global adoption. Nevertheless, it happened, and it did so despite the fact that Germany did not formally codify monism until 1965.²¹³

I explained in the introduction to this article that the most important reason for the international breakthrough of the German mode of conceptualizing moral rights was the influence it had on the adoption of Article 6bis of the Berne Convention in 1928. Therefore, the purpose of this Part is to examine that influence. My thesis is that the spread of the monist theory throughout the world was not just some unintended side effect of Article 6bis, but instead corresponds precisely to what the drafter of Article 6bis had in mind when he put the issue of moral rights on the agenda of the Berne Convention revision conference held in Rome in 1928. In other words, my claim is that Article 6bis was enacted in the spirit of the German version of the moral rights doctrine and has greatly contributed to the globalization of the now dominant concept of moral rights. More specifically, I will show how the German monist approach to moral rights was first codified in the Italian Copyright Act of 1925 in a conscious attempt to overthrow Italy's clearly dualist past and how the same forces that caused this switch were also responsible for the insertion of Article 6bis into the Berne Convention. The single most important person in this context was the Italian scholar, judge, and politician Eduardo Piola Caselli, the towering figure of Italian copyright law in the first half of the 20th century.

212. See STRÖMHOLM, *supra* note 39, at 348.

213. Germany's copyright statutes of 1901 and 1907 were in force until the currently valid copyright act entered into force in 1966. See Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz), v. 9.9.1965 (BGBl. 1965 I, 1273).

A. *Italian Copyright Act of 1925*

Of the European countries that enacted new copyright statutes prior to 1928, Italy was the only one that deliberately based its legislation on German monism. While other countries, such as Romania,²¹⁴ Czechoslovakia,²¹⁵ and Poland²¹⁶ had inserted moral rights provisions into their copyright statutes, their approach was still based on 19th-century dualism. Even in those instances in which moral rights were formally enacted as rights *in rem* alongside the traditional set of patrimonial or “economic” rights, the laws remained conceptually dualist. The Polish Law of 1926 is a particularly good example, because it shows the transition from the first to the second phase of the moral rights theory with great clarity in that the statute recognized absolute personal rights of the author regardless of any contractual context,²¹⁷ conceptualized them as “personal rights,” and treated them as completely separate and independent of the author’s copyright²¹⁸—yet they were formally part of the copyright statute.²¹⁹ In other words, the Polish solution was right in between the first and second phase of the moral rights doctrine in that it was formally monist, but conceptually dualist. Italy was the first country to make the move toward full formal and conceptual monism by implementing German monist copyright theories in its legislation. Since it served as a model for Article 6bis of the Berne Convention, a closer look at its legislative history is in order.

214. See Romanian Law on Literary and Artistic Property of 1923, available in French translation at 37 LE DROIT D’AUTEUR 25 (1924). Note that the inclusion of moral rights was considered “original” at that time, which confirms my claim that modern moral rights consciousness is a product of the first third of the 20th century. See Comment, 37 LE DROIT D’AUTEUR 30, 31 (1924).

215. A French translation of the 1926 Copyright Act of Czechoslovakia is available at 40 LE DROIT D’AUTEUR 29 (1927). The pertinent statutory provisions are largely similar to those contained in the German copyright statutes of 1901 and 1907. Interestingly, at that time, they were understood as an example of the author’s dual moral and patrimonial right. See Comment, 40 LE DROIT D’AUTEUR 99 (1927).

216. See Polish Law relating to Author’s Rights of 1926, available in French translation at 39 LE DROIT D’AUTEUR 133 (1926) [hereinafter Polish Law of 1926].

217. Note that the Polish Law also contained contractual rules relating to moral rights. See arts. 28, 29, 32, 33, 49 of the Polish Law of 1926.

218. Arts. 12 and 58 of the Polish Law of 1926.

219. Note that one of the members of the Polish codification commission that drafted the Polish Law of 1926 explicitly referred to Josef Kohler’s dualist theory when explaining that the author enjoyed two separate rights, namely the right to an immaterial good (“droit sur un bien immatériel”) and a right of personality (“le droit de la personnalité”). See F. Zoll, *La nouvelle loi polonaise sur le droit d’auteur du 29 mars 1926*, 39 LE DROIT D’AUTEUR 97 (1926).

The Italian Copyright Act of 1925²²⁰ replaced the first copyright statute of 1865,²²¹ which Italy had enacted shortly after its unification. In line with standard 19th-century practice, the Italian Copyright Statute of 1865 did not contain any moral rights provisions aside from the prohibition of the forced disclosure of unpublished works.²²² Some of the reform commissions that had been working on a revised copyright statute since 1897²²³ planned to include the rights of integrity and attribution in addition to the right against forced disclosure and, a novelty, the right of withdrawal. However, the language of the provisions they proposed closely resembled the 19th-century dualist approach,²²⁴ because they would have established *general* rights of personality completely separate and apart from the author's patrimonial rights.²²⁵ The reliance on dualism as opposed to monism prompted Eduardo Piola Caselli, who—contrary to other Italian scholars²²⁶—had already adopted the German monist approach and rejected Kohler's dualist theory in the first edition of his copyright treatise published in 1907,²²⁷ to intervene with the government official in charge of the project, arguing that the provision was too "generic" and that it should be given a "more precise and definite" content.²²⁸ The alternative wording that he proposed²²⁹ was

220. Regio decreto legge 7 novembre 1925 n. 1950, convertito con legge 18 marzo 1926 n. 562 [hereinafter Italian Copyright Act of 1925]. For an annotated edition of this statute, see ETTORE VALERIO, *LA NUOVA LEGGE SUL DIRITTO D'AUTORE* (1926).

221. Legge 25 giugno 1865 n. 2337 sui diritti spettanti agli autori delle opere dell'ingegno [hereinafter Italian Copyright Statute of 1865]. See also PIOLA CASELLI, *supra* note 124, at 22-23, 25.

222. See Italian Copyright Statute of 1865, art. 16.

223. Between 1897 and 1921, there were four reform commissions, but none of their projects became law. See PIOLA CASELLI, *supra* note 120, at 7.

224. The draft provisions are reported by Eduardo Piola Caselli, *Il diritto morale di autore*, 1 *IL DIRITTO DI AUTORE* 3, 21-22 (1930). See also PIOLA CASELLI, *supra* note 124, at 533-36.

225. See, e.g., Art. 16 of the 1917 draft statute, reported by Piola Caselli, *supra* note 224, at 22. The dualist approach chosen by the 1917 commission is not surprising, if one considers that the person in charge of drafting the moral rights provision was the Italian scholar Nicola Stolfi who had previously adopted the dualist approach in his 1915 copyright treatise. See STOLFI, *supra* note 118, at 258, 266.

226. See, e.g., 1 FRANCESCO FERRARA, *TRATTATO DI DIRITTO CIVILE ITALIANO* 371 & n.2 (1921) (adopting an approach similar to Kohler's and explicitly rejecting Piola Caselli's).

227. See PIOLA CASELLI, *supra* note 113, at 85 (following Allfeld), 87 (adopting monist theory and rejecting Kohler), 97 (calling the author's right a legal institution of "mixed character"). See also Piola Caselli, *supra* note 224, at 18-21, 32 (discussing the theories of Gierke, Kohler, and Allfeld, and siding with the German monist theory that he translated into Italian as "concetto unitario" [unitary concept]); PIOLA CASELLI, *supra* note 120, at 200-01, 321-23; PIOLA CASELLI, *supra* note 124, at 56-61, 519-22.

228. Piola Caselli, *supra* note 224, at 22. See also PIOLA CASELLI, *supra* note 120, at 201, 326; PIOLA CASELLI, *supra* note 124, at 32, 535-36.

229. See Piola Caselli, *supra* note 224, at 22. His proposal was intentionally based on German monism; *id.* at 33.

subsequently almost literally inserted into Article 16 of the Italian Copyright Act of 1925, which read as follows:

Independent of the patrimonial rights recognized by the preceding articles, the author has, at any time, an action to prevent the paternity of his work from being disregarded or the work from being modified, altered, or distorted in a manner that causes severe and unjust harm to his moral interests.²³⁰

The crucial difference between this provision and the one originally proposed was the focus on moral rights as rights of authors in their *works* as opposed to rights in their *personhood*. In this context, the reference to the independence of these moral entitlements from patrimonial rights was no longer an indication of the different *legal basis* of these entitlements (right of personality versus copyright), as it had been in the 19th century, but rather an expression of the different *legal nature* of these entitlements (personal versus patrimonial) and of their independent *legal existence*.²³¹ In other words, the codification of moral rights in Italy came with a specific theory of copyright that relied upon the German model of conceptualizing moral rights as an element of the author's copyright and that consciously rejected the dualist approach prevalent in the 19th century. As Piola Caselli put it:

It cannot be contested that the [Italian Copyright Act of 1925] intended to establish the moral right legislatively as an integral element of copyright, that is, in conformity with the unitary concept . . . Irrespective of the opinions of the drafters of the law, the statutory text cannot be interpreted other than as an implementation of the unitary system of copyright.²³²

Another point of interest is that Article 16 of the Italian Copyright Act of 1925 also parted with the 19th-century statutory tradition of limiting the rules associated with the rights of attribution and integrity to a contractual setting. It did so by formally elevating these rights to rights *in rem* that also apply outside the context of publishing agreements or assignment contracts, just as the German Imperial Court had done in 1912. It was precisely this approach that would serve as a model for Article 6bis of the Berne Convention only three years later, and yet again, it would be Eduardo Piola Caselli who

230. Italian Copyright Act of 1925, art. 16.

231. See Piola Caselli, *supra* note 224, at 27; LADAS, *supra* note 51, at 600. See also POLLAUD-DULIAN, *supra* note 12, at 441 (2005).

232. See Piola Caselli, *supra* note 224, at 32. See also *id.* at 33, 36; PIOLA CASELLI, *supra* note 120, at 324. But see Fritz Smoschewer, *supra* note 202, at 505 (claiming that the Italian approach is "obviously dualist").

played the pivotal role in the drafting and adoption of this provision.²³³

B. Article 6bis of the Berne Convention

1. The Italian Proposal

The Berne Convention did not contain any moral rights provisions until it was revised in Rome in 1928, which also suggests that moral rights had not been considered part of copyright law anywhere during the 19th century. Interestingly, the issue of moral rights was not even part of the initial agenda that had been prepared by the International Bureau²³⁴ for the 1928 conference in Rome. It was the Italian administration hosting the conference that added moral rights to the agenda after Piola Caselli convinced his colleagues on the Italian delegation who were reviewing the initial agenda that it could only increase Italy's international reputation if its own domestic moral rights law were adopted on the international level.²³⁵ Not surprisingly, at Piola Caselli's request,²³⁶ the Italian proposal followed Article 16 of the Italian Copyright Act of 1925, modified only to include a right of first publication in addition to the rights of attribution and integrity.²³⁷ When Piola Caselli presented this proposal at the revision conference during the opening session, he did not hide the fact that the conceptual basis of the Italian proposal was the monist theory, to which he explicitly referred as the "unitary concept."²³⁸ By contrast, and likely for strategic purposes, the Italian administration's original memorandum in support of its proposal had been more ambiguously worded to embrace both the traditional dualist and the more recent monist concepts of moral rights, as it used the phrases "the personal (moral) right of the author" and "the personal or moral content of the author's right" interchangeably.²³⁹ The official reports of the revision conference further reveal that Piola Caselli himself, at least in his official capacity as representative of the host country, also remained ambiguous as to which version the Italian delegation preferred. On the one hand, he spoke of the "*droit personnel (ou moral) de l'auteur*" (personal or moral right of the author) when expressing Italy's desire to extend the Berne Convention to moral rights,²⁴⁰ which could have been understood to mean that he

233. See ETTORE VALERIO, *DISPOSIZIONI SUL DIRITTO D'AUTORE* 352 (1930); LADAS, *supra* note 51, at 580; Smoschewer, *supra* note 190, at 350, 363.

234. The International Bureau ("BIRPI") was the predecessor organization of the World Intellectual Property Organization ("WIPO"), which was established in 1967.

235. See Piola Caselli, *supra* note 224, at 168-69.

236. *Id.* at 169.

237. See ACTES DE LA CONFÉRENCE RÉUNIE À ROME DU 7 MAI AU 2 JUIN 1928, at 106-07 [hereinafter ACTES 1928].

238. See ACTES 1928, at 161; Piola Caselli, *supra* note 224, at 171 & n.1.

239. See ACTES 1928, at 106.

240. See *id.* at 160.

endorsed the dualist approach by distinguishing between two separate personal and patrimonial *rights* of the author. On the other hand, Piola Caselli invoked moral rights as the protection of the personal and moral *interests* of the author,²⁴¹ which tends to suggest that the author's copyright was a single right that protected two different interests, which is a monist conception. However, creating these strategic conceptual ambiguities did not alleviate all concerns, and there was still a great deal of resistance against the idea of inserting a moral rights provision into the Berne Convention.

2. Substantive and Conceptual Concerns

Interestingly, of the four primary objections, only one was substantive, while three were concerned with the particular conceptual structure proposed by the Italian delegation. The *substantive* concern was voiced by the common law countries,²⁴² which found it impossible to reconcile the author's right of disclosure with the binding force of publishing agreements when this right was declared inalienable in the sense that it would be available to authors regardless of any assignment of their patrimonial rights to the publishers. In other words, the right of disclosure as proposed by the Italian delegation seemed to interfere unduly with the legitimate interests of commercial intermediaries and was thus not included in Article 6bis.²⁴³ The three *conceptual* concerns related precisely to the monist approach that the Italian delegation had chosen.

First, the German and Austrian delegations, while supporting the protection of moral rights through copyright law, objected to the perpetual duration of moral rights that the Italian proposal suggested, because on the basis of the strictly monist approach to which they subscribed, moral rights not only had to be part of copyright law, but they also had to expire when economic rights expired.²⁴⁴ This objection confirms that the monist approach had been fully accepted in Germany (and Austria) by 1928 and that they were particularly serious about a complete integration of moral rights into copyright law. In order to avoid a negative vote on the Italian proposal by the German and Austrian delegations, Article 6bis was changed to no longer address the question of the duration of moral rights.²⁴⁵

Second, a number of delegates who interpreted the conceptually ambiguous Italian memorandum on moral rights as calling for the

241. See *id.* at 162, 197.

242. The common law countries were the United Kingdom, Australia, New Zealand, the Irish Free State, Canada, and South Africa. See Ricketson, *supra* note 195, at 79.

243. See Piola Caselli, *supra* note 224, at 174-75.

244. See ACTES 1928, at 238.

245. See Piola Caselli, *supra* note 224, at 177.

protection of simple rights of personality²⁴⁶ used this ambiguity to oppose the Italian draft provision and to advocate for their own proposals that were inspired by Kohler's dualist theory. Not surprisingly, it was a Polish delegate who pushed for the adoption of a provision similar to the dualist regime adopted in Poland in 1926.²⁴⁷ Piola Caselli viewed this move as an "assault" on the conference by the followers of Kohler's idea of moral rights as rights of personality.²⁴⁸ He defended his monist approach by clarifying the statements made in the original memorandum²⁴⁹ and argued that if moral rights were rights of personality, as opposed to rights of authors in their works (and thus copyright entitlements), they could not be included in an international treaty confined to the regulation of copyright law.²⁵⁰ The question was not definitively resolved, but the Polish delegate did not further insist on the Polish proposal and ultimately supported the Italian draft.²⁵¹

Third, and most importantly, Article 6bis was opposed by the common law countries on the basis of two separate but related arguments, which essentially amounted to an open rejection of the type of moral rights theory advocated by Piola Caselli, who soon realized that he could not get Article 6bis passed if he insisted on an exclusively monist approach to moral rights. Instead, he switched to diplomatic skills and conceptual concessions.²⁵² The *first* argument advanced by the common law countries was that moral rights were not part of their copyright tradition.²⁵³ Piola Caselli recognized this objection as "evidently valid"²⁵⁴ and sought to convince the British and Australian delegates that they should not oppose moral rights because the substance of Article 6bis was already protected in their countries under the common law.²⁵⁵ This effort, although in conflict with Piola Caselli's monist agenda, was successful, and the common law countries changed their position once the wording of Article 6bis was modified from protecting "moral interests" to protecting the author's "honor and reputation."²⁵⁶ The Australian delegate, Sir William Harrison Moore, also explicitly confirmed the view that moral

246. See ACTES 1928, at 201.

247. *Id.* at 119-20, 198-99, 237.

248. See Piola Caselli, *supra* note 224, at 180.

249. See ACTES 1928, at 174-75, 203, 238.

250. Piola Caselli, *supra* note 224, at 181 & n.1. See also ACTES 1928, at 203 n.1 (referring to the dualist approach as an "old theory" overcome by modern legislation).

251. See ACTES 1928, at 291.

252. See Piola Caselli, *supra* note 224, at 178.

253. See ACTES 1928, at 201.

254. Piola Caselli, *supra* note 224, at 178.

255. See ACTES 1928, at 203 n.2; Ricketson, *supra* note 195, at 79.

256. Piola Caselli, *supra* note 224, at 180; Ricketson, *supra* note 195, at 79. Note that Italy, in 1941, also changed its copyright statute to reflect a shift from the protection of moral interests to the protection of the author's honor and reputation. See ICA, *supra* note 8, art. 20(1).

rights were protected under the common law.²⁵⁷ The *second* argument also implied an objection to Piola Caselli's version of the concept of moral rights. Australia argued that because moral rights were a matter of (state) common law as opposed to (federal) copyright law, the federal government could not possibly incorporate moral rights into its copyright statute and would have to leave the implementation of Article 6bis to the common law of the individual states.²⁵⁸ Since this was not a substantive rejection of moral rights, but rather a way of saying that Australia would not amend its copyright statute due to its different conceptual approach to moral rights, the other delegations did not consider Australia's disclaimer an obstacle to compliance with the Berne Convention. Consequently, Australia did not see any reason to vote against an international moral rights provision, and Article 6bis was unanimously adopted.²⁵⁹

3. Monism and the National Implementation of Article 6bis

In the end, Piola Caselli did not fully succeed in his quest to have the German monist version of moral rights enshrined in international law, because the Berne Convention does not mandate the enactment of a particular theory of moral rights,²⁶⁰ nor does the actual text exclude a dualist interpretation.²⁶¹ Nevertheless, experience has shown that as countries implement the Berne Convention and enact new copyright statutes, they tend to speak in the language of monism and ultimately follow the German model, even if it is just for reasons of legislative convenience.²⁶² Even countries such as Switzerland, which has recognized a "general" right of personality since 1912, eventually felt obliged to emulate the moral rights orthodoxy, at least formally. As explained above, this is somewhat ironic given the likelihood that the German Imperial Court would probably not have switched to monism if the German legislature had not been under the spell of the notion of patrimony and had instead enacted a

257. See ACTES 1928, at 238.

258. *Id.* On the objection to moral rights based on concerns of federalism, see also John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1049 n.85 (1976).

259. The basic rule is that a revision of the Berne Convention requires unanimous consent. See Berne Convention, art. 27(3).

260. See Berne Convention, art. 6(2), as adopted in 1928. See also Ricketson, *supra* note 195, at 82.

261. See, e.g., Smoschewer, *supra* note 202, at 524; Fritz Smoschewer, *Moralisches Recht und Persönlichkeitsrecht auf dem Kongress in Budapest*, 4 ARCHIV FÜR URHEBER-, FILM- UND THEATERRECHT [UFITA] 343, 347-52 (1931).

262. The United Kingdom is a good example in this respect. See Reform of the Law Relating to Copyright, Designs and Performers' Protection—A Consultative Document 58 (Cmnd. 8302 H.M.S.O. 1981) ("Whether these doubts [as to whether the United Kingdom complies with the Berne Convention] are justified or not, the Government considers that the occasion of a new Copyright Act presents a good opportunity to clarify the position and to bring all the provisions necessary to meet the [Berne Convention] together in a single statute.").

“general” right of personality. No matter what the intentions of a country’s legislature may be, the insertion of moral rights, as abstract rights *in rem*, into copyright law greatly facilitates the reception of the particular version of moral rights that conceptualizes them as copyright-based inalienable rights of authors in their works.

CONCLUSION

Intrigued by the recent wave of moral rights legislation in common law countries, this article reexamined the question of how to understand the traditional discrepancy between and the convergence of civil law and common law approaches to moral rights. Instead of resorting to philosophical or substantive considerations, this Article provided an alternative explanation that understands these transnational legal phenomena primarily in terms of a global conceptual transformation that began in Continental Europe in the late 19th century and that has recently reached the United States and other common law jurisdictions. In other words, the traditional discrepancy between the systems was not so much a result of different copyright philosophies or different levels of substantive protection, but rather the result of a conceptual transformation within Continental European moral rights law that had not yet been adopted by the common law countries. Likewise, the recent convergence of the systems is largely the product of the common law jurisdictions undergoing the same kind of conceptual transformation towards a copyright-based theory of moral rights that most civil law countries underwent in the early 20th century, the difference being that the adoption of this theory in common law countries was driven by international law rather than by changes within legal theory prompted by the vagaries of the codification of German tort law. Moreover, my historical analysis of the Continental European origins of the copyright theory of moral rights revealed that it is best described as the product of the globalization of a historical accident that has little to do with any commitment to the cause of moral rights or with any consensus about the technical superiority of this particular way of conceptualizing moral rights.

One question remains: does it matter whether the decisional rules associated with moral rights are rationalized as part of copyright law, as rights derived from personhood, or as by-products of more general legal doctrines? Piola Caselli himself, for example, thought that the monist approach was superior to the dualist theory from a strategic perspective, because the latter might complicate the national implementation of Article 6bis for three reasons.²⁶³ First, the dualist association of moral rights with rights of personality could

263. See Smoschewer, *supra* note 261, at 344-45 (quoting from a report submitted by Piola Caselli to a congress held in Budapest in 1930).

harm the cause of moral rights during the national implementation phase in countries whose legislatures were opposed to rights of personality. Second, lawmakers in favor of rights of personality might still fail to enact moral rights legislation on the basis that rights of personality were a matter of general private law and would, therefore, not require implementing legislation. Third, identifying moral rights with the right of personality may, given the unclear scope of the latter, invite improper and exaggerated applications of this right. The basic idea behind these three reasons is obviously that it matters whether moral rights are associated with copyright law or whether they are associated with broader legal concepts that have a more extensive scope of application, because it may be easier to avoid political opposition if the issue of moral rights can be presented as affecting a very limited and clearly defined set of fact patterns.

Whatever the merits of the above reasons in the specific context of national moral rights legislation, they imply a more general point regarding the importance of legal concepts that shows why a proper historical understanding of the conceptual transformation of moral rights is important. If legal concepts are the grammar or the language in which concrete rules are expressed,²⁶⁴ they determine the discursive context in which these rules are discussed, which may affect the way in which the controversies giving rise to these rules are approached. For example, if the decisional rule identified earlier, according to which authors may not validly consent in advance to unknown future modifications of their works,²⁶⁵ is conceptualized as a contractual rule, it is immediately apparent that its purpose is to establish a mandatory term and to restrict freedom of contract in favor of authors. However, if the same rule is couched in the language of moral rights, the issue is recast as one regarding the limits of the waivability of the right of integrity, which tends to obscure the issue and to disconnect the discourse about copyright contracts from the broader discussion about public policy limitations of the freedom of contract. This is why moral rights are rarely discussed by contracts scholars, even though moral rights scholarship could learn a great deal from contract law given that the protection of moral rights in contractual settings is often less about rights of authors than it is about distribution and paternalism in copyright contracts.²⁶⁶ Legal concepts matter because they determine the frame of reference for a

264. The grammar/rule distinction mirrors Duncan Kennedy's use of the *langue/parole* distinction. See Kennedy, *supra* note 4, at 634-35; Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147, 1175 (2001); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE}* 133-35 (1997).

265. See *supra* Part I.A.

266. For a general discussion of distribution and paternalism in contract (and tort) law, see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law*, 41 *MD. L. REV.* 563, 570-72 (1982).

particular issue. In the case of moral rights, the lasting effect of the triumph of monism has been to successfully remove the discussion about the decisional rules derived from moral rights from the context of similar issues in other fields of law, which in turn has greatly contributed to cross-cultural misperceptions of moral rights in legal scholarship that have prompted this study and that future students of moral rights should avoid.