

Study contract concerning moral rights in the context of the exploitation of works through digital technology

FINAL REPORT

Study contract n° ETD/99/B5-3000/E°28

BY

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Introduction : scope of the study

According to the terms of Annexes III & IV of the contract n° ETD/99/B5-3000/E/28, the following parts of the study have been drafted :

- analysis of the disparities in the legislation and case law of the several Member States concerning the protection of moral rights, in particular with respect to the specific characteristics of the digital exploitation of works
- establishment of comparison tables describing the Member States' applicable provisions in distinguishing between the several categories of works and the type of exploitation
- analysis of the contractual practices affecting the traditional conception of moral rights
- analysis of the influence of new technologies on moral rights
- impact of the differences on the functioning of the Internal market and positions of the national governments
- necessity of a harmonisation at Community level.

A. Contacts

During the redaction of the study, the following persons have been contacted :

- Mr. Alegrezza, Ministry of Economy, Luxembourg.
- Mr. N. Alessandri, Lawyer, Bologna.
- Mr. E. Arkenbout, Department of Justice, Netherlands.
- Ms. Barthel, Department of Economy, Luxembourg.
- Mr. R. Castilla, Nauta Dutilh, Madrid.
- Mrs. L. Chimianti, SIAE, Italy.
- Mr. Czichowski, Lawyer, Boehmert & Boehmert, Berlin.
- Ms. De Mont-Luc, Department of Culture, France.
- Mr. Dillenz, Austria.
- Mr. R. Foglia, External counsellor of the Government, Italy.
- Mr. N. Gonçalves, Department of Justice, Portugal.
- Mr. F. Gonzalez, Nautadutilh, Spain.
- Ms. S. Greene, Intellectual Property Unit, Department of Trade, Enterprise and Employment, Ireland.
- Mr. Günter Auer, Ministry of Justice, Austria.
- Mr. A. Haller, Lawyer, Vienna.
- Mr. P. B. Hugenholtz, University of Amsterdam.
- Mr. Illardi, Collection of Laws (CLEA database), WIPO.
- Ms. M. L. Janota, Parliament, Austria.
- Ms. Jean-Prost, WIPO.
- Mrs. Kallinikou, Director of the Copyright Organisation, Greece.
- Mr. R. Knights, The Patent Office, Copyright Directorate, United Kingdom.
- Ms. Levaillant, Department of Justice, France.
- Mr. Lopes Rocha, Portugal.
- Ms. C. Morel, Nauta Dutilh, Amsterdam.
- Mrs. Rodriguez-Torqueros, Department of Justice, Spain.
- Mr. Schöfisch, Referat Urheberrecht, Berlin.

- Ms. A. Schulz, Bundesministerium der Justiz, Referat III B 3, Regierungsdirektorin, Germany.
- Mrs. Sullivan, Copyright Directorate, United Kingdom.
- Mr. Tacq, Department of Justice, Authors' right section, Belgium.
- Mr. A. Whiteford, The Patent Office, Copyright Directorate, United Kingdom.

B. Web sites of interest

<http://map.es>

<http://www.dlr.de/bmbf>

<http://www.etat.lu/EC>

<http://www.giustizia.it/>

<http://www.krol.it/giuristcattolici/Links.htm>

<http://www.overheid.nl>

<http://www.parlamento.it/>

I. Overview of the legislation and case law on moral rights in the Member States

Part I. Austria

I. Legal framework

II. Analysis of the different moral rights : characteristics

III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders

IV. Alienability and waiver of moral rights

V. Duration of moral rights protection

I. Legal framework

The Austrian Copyright Act (Federal Act on Copyright in Works of Literature and Art and on Related Rights of 9.4.1936) was last amended by the Amending Act of March 29, 1996 which entered into force on April 1, 1996. This Act implements the European Directives on computer programs, rental and lending rights, cable and satellite and term of Protection. The database Directive has been implemented in November 1997, and entered into force in January 1998.

II. Analysis of the different moral rights : characteristics

Austria has opted for the monistic approach to author's rights. "Moral rights are distinct from exploitation rights, but following the monistic approach of the Austrian Copyright Act, an action may violate both the exploitation right and the moral right."¹

1. The right of disclosure

"The author has the exclusive right to decide whether, by whom and how his work will be made accessible to the public (right of publication)."² This right is not expressly cited in the statute, because it is included within the so-called 'rights of utilisation'. Indeed, through the authorisation of communication, the author uses his publication right.³

2. The right of attribution

a. Legislation

The right of authorship and the right to claim credit are defined in art. 19 and art. 20 UrhG. The author has an unwaivable right to claim authorship if such authorship is challenged or if the

¹ W. DILLENZ, 'Austria', in S.M. STEWART, *International copyright and Neighbouring rights*, 2d ed., Vol 2, Butterworths, 1993, Explanatory notes, Materialien, n°2, 78.

² G. KUCSKO, 'Austria', in *Intellectual property Laws of Europe*, G. Metaxas-Maranghidis, Stanbrook and Hooper, Brussels, New York, NY, Chichester : John Wiley, 1995, p. 43. "Veröffentlichungsrecht".

³ R. DITTRICH & G. KUCSKO, *Urheberrecht*, 1981, p. 20.

work is attributed to another person. The author enjoys this right during his life, even if the term of protection (which is to be calculated from the moment of publication) has expired.⁴

The author also has the right to decide whether an author's designation is to be affixed to the work and if so, which.⁵ This means that he has the right to decide to remain anonymous, choose a pseudonym or use his real name or an abbreviation in connection with his work (art. 20, § 1). As regards photographs, the author must affix a notice on the photograph himself to be identified as the author (art. 74 §3). The author's right does not protect against the false attributions of the work by someone else, but the rules of personality rights apply in this case. An adaptation must not be credited with the name of its author in a way that will give the impression that it is an original work (art. 12, § 2).⁶ In like manner, a copy of a work of the graphic or plastic arts must not be credited in a way that creates the impression that this is the original (art. 20 §3).

b. Case law

An author could object to the non-designation of his name on a book of illustrations for children.⁷

3. The right of respect or right of integrity

a. Legislation

The holder of the economic rights cannot alter the work, its title or the author's designation, when he makes it accessible to the public or reproduces it for the purpose of distributing it, unless either the author has given his consent or it is permitted by law (art. 21).⁸ Art. 21, §1 does not imply that the author who has transferred the right of exploitation, has also transferred the right of modification. Conversely, when the author has expressly permitted modifications of his work (even in general terms), he can only forbid modifications which seriously harm his moral rights (art. 21, § 3). The right of integrity also applies when the work is made available to the public by anyone not bound by contract. Users must respect the work even if the use of the work is free (art. 57 § 1). For original works of the graphic and plastic arts, the right of integrity is stronger in the sense that even when the use is private, persons must respect the integrity of the work (art. 21, § 2.)

However, modifications are allowed under the principle of fair use, especially such modifications which are appropriate to the manner or the purpose of the authorised exploitation of the work (art. 21 § 1).⁹ Modifications are not allowed when they distort the meaning or the essence of the work. In addition, someone who communicates the work to the public or prepares copies to diffuse them, except for works from the plastic arts, cannot make modifications to the originals, when the work has not been disclosed (art. 20 al. 2).

b. Case law

⁴ J. AICHER, 'Österreich/I', in MÖHRING, SCHULZE, ULMER, ZWEIGERT, *Quellen des Urheberrechts*, 1991, p. 29.

⁵ G. KUCSKO, 'Austria', *Intellectual property Laws of Europe*, 1995, p. 43.

⁶ R. DITTRICH, 1981, p. 21 See also W. DILLENZ, in S.M. STEWART, 7 Moral rights, n° 3.40. See also, J. AICHER.

⁷ OGH Wien, July 1, 1986, *Weihnachtslieder*, *GRUR Int.*, 1987, 262.

⁸ G. KUCSKO, 1995, p. 43.

⁹ See DILLENZ, 'Austria', in S.M. STEWART, § 3.41.

Modifications are allowed only when the author agrees or when the law permits it.¹⁰ The use of a work for promotion or advertising purposes requires the permission of the author according to art. 21.¹¹ The right of integrity protects against modifications to the title of a work.¹² Fair use can justify modifications, for instance, “the shortening of a letter to the editor of a journal falls under fair use.”¹³ Changes in the script of a TV play infringe the right of integrity.¹⁴ To cut a painting (landscape) to change it from oblong format to upright format (portrait) was considered to violate the integrity right.¹⁵ In a recent case, where mostly damages were discussed, a broadcasting organisation had infringed the right of attribution and integrity of two photographers by filming their photographs without mentioning their names and by not showing the frames and texts which surrounded their photographs.¹⁶ An author is allowed to prohibit the modification (size reduction, change of the space between letters and addition of a 3D effect) of his copyrighted logo.¹⁷

4. The economic right of adaptation

The translation is in any case permitted.¹⁸ However, “the author of a translation or another adaptation may use it in the manner reserved to him only to the extent permitted by the author of the adapted work.”¹⁹

5. The right to retract

This right to retract does not exist in Austrian law.

¹⁰ OLG Wien Sept. 21, 1989, MEDIEN + RECHT, 1990, 61.

¹¹ W. DILLENZ, ‘Austria’, in S.M. STEWART, n° 3.4.

¹² OLG Wien 6 dec. 1984 MEDIEN + RECHT, 1985/2 Archiv 13.

¹³ W. DILLENZ, ‘Austria’, n° 3.41. OGH 10.11. 1970, ÖBI 1971, 112. See also, Supreme Court, March 19, 1937, *Angriff gegen Unternehmen* SZ 19/102. For the modification of a work’s title, see Court of Appeals of Vienna, Dec. 6, 1984, *Ephraim Kishon*, MuR 1985/2 Archiv 13 (Korn).

¹⁴ OGH 3.10.1972, *C’est la vie*, ÖBI 1973, 112.

¹⁵ Court of Appeals of Vienna, Sept. 21, 1989, *Mount Rainier* MuR 1990, 61.

¹⁶ Obersten Gerichtshof, May 26, 1998, GRUR Int., 1999, Heft 2, p. 183.

¹⁷ OGH, June 22, 1999.

¹⁸ R. DITTRICH, 1981, p. 16.

¹⁹ G. KUCSKO, 1995, p. 43.

6. The right of access

The right of access (art. 22) can be exercised by the author as long as it is necessary, to make reproductions of the work. In so doing the author must take into consideration the interest of the owner. The owner must therefore make the work accessible to the author so that he can make reproductions. The owner is nevertheless not obliged to return the work to the author in order for him to exercise his right of reproduction. Nor is the owner obliged to keep the work in good condition.

III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders

1. Audio-visual works

Audio-visual works are works of collaboration (art. 11 al. 3).

1.1. The right of attribution

a. Legislation

In the case of cinematographic works, the producer has the right to be credited as a producer (art. 38, § 2). But the real author of the film keeps his right to be named as the author of the film (art. 39). In addition, “any person who has participated in the creation of a commercially-produced cinematographic work in such a manner that the overall nature of the work may be deemed to constitute an individual intellectual creation, may demand of the producer that he be named as an author in the film itself (and in the advertising of the movie).”²⁰

“In areas where commercial interests conflict with the moral rights of authors such as in the case of commercially-produced photographs, the producer may replace the person who took the photograph.” (art. 74)²¹

b. Case law

The mention “ ‘photography and editing’ were done by such person” does not amount to designation, so that the consent of the authors is not required to change this mention.²²

1.2. The right of integrity

a. Legislation

“Any change in the cinematographic work, its title or the designation of authors, which under art. 21 is permissible only with the author's consent, requires the authorisation of the authors so designated (art. 39 (4)).”²³

b. Case law

The consent of the author is needed to cut scenes of a movie which provoked street demonstrations.²⁴ In a recent case, the highest court decided that the shortening of a movie

²⁰ R. DITTRICH, 'Letter from Austria', *Copyright*, 1991, p. 166-167. See e.g. Supreme Court, May 8, 1990, *Wien zum Beispiel* MuR 1990, 189 (Walter). Furthermore, only the authors who are listed in the film credits can benefit from the 'reduced' moral rights.

²¹ W. DILLENZ, 'Austria', n° 3.40.

²² OGH May 8, 1990, MR 1990, p. 189 (with note Walter).

²³ R. DITTRICH, 'Letter from Austria', *Copyright*, 1991, p. 166.

²⁴ OGH, 11.2.53, *Im weissen Rössel*, ÖBI 1953, 20.

by the broadcasting organisation without the author's consent and the showing of this movie as such, was a violation of the right of integrity of the director and of the author of the script.²⁵

2. Works of collaboration

a. Legislation

Collaboration works can take two forms : "Miturheberschaft" and "Teilurheberschaft" (art. 11). "Miturheberschaft" (or joint authorship)²⁶ means that a work is made by several persons together and is indivisible. In this case, the author's right belongs collectively to all authors. Every joint author has the right to act against violations of his rights (art. 11 al. 2). An agreement between all joint authors must be concluded to enable modifications or uses of the work. If one of them refuses to agree without good reason, the other co-authors can act against him.

There is "Teilurheberschaft" when the work is not indivisible. Authors must come to an agreement on the uses of the work. However, the author of the texts can use his work as pure literary work and the composer can use his work without words as a pure musical work, without the others' consent.²⁷ Movies are classified in the category of indivisible works of collaboration ("Teilurheberschaft") (art. 11 al. 3).

b. Case law

The co-operation of a lyricist/librettist of an operetta and a composer does not necessarily constitute joint authorship.²⁸ Similarly, subsidiary activities such as researching the material for a work which does not lead to independent intellectual co-operation is not a work of joint authorship.²⁹

3. Performers moral rights

Moral right of performers are less comprehensive than those of authors. They mainly consist of the right to demand a mention of their name on the work to which their neighbouring rights relate.³⁰ The right to claim credits is reduced (art. 68).

IV. Alienability and waiver of moral rights

The principle is that author's moral rights are not transferable between living persons and cannot be waived³¹. Moral rights are transferable to heirs (art. 23). If the author transfers one of his economic rights, he nevertheless keeps the moral rights.³² Indeed, the author can authorise some persons to exploit his economic rights (art. 14-18) but not his moral rights (art. 19-21).

²⁵ Obersten Gerichtshof, Nov. 10, 1998, "Den Kopf zwischen den Schultern", GRUR Int., 1999, Heft 6, p. 553.

²⁶ W. DILLENZ, 'Austria', n°6 'Ownership and transfer of rights'.

²⁷ J. AICHER, p. 19.

²⁸ OGH May 31, 1937 SZ 19/1979.

²⁹ OGH April 25, 1951 SZ 24/112.

³⁰ G. KUCSKO, 1995, p. 44.

³¹ Art. 23 al. 3 states that author's rights are untransferable except in cases provided in art. 23 al. 1 and 2.

³² R. DITTRICH, 1981, p. 22.

However, according to art. 19 to 21, moral rights can be exercised by collecting societies insofar as it is necessary to the efficient exercise of the “utilisation” rights also transferred and administered by this society (i.e. economic rights).³³ The collecting society can give the authorisation to utilise the work only under the author’s name (thus respecting art. 20). This means that the designation is not a separable element of the contract on the utilisation right. The society can also act on behalf of the author to object to any violation of his authorship right. In this regard, the society will not exercise a right that has not been transferred without material (existent) legal relationships. The authorship right is included in the utilisation rights that the author has transferred to the society.³⁴ This is due to the monistic approach to authors’ rights.

V. Duration of moral rights protection

As Austrian Copyright law is monistic, the moral rights should expire at the same time as moral rights and should not be perpetual. Thus the protection ends 70 years after the author’s death (art. 60). The author can enjoy the protection of rights stated by art. 19 and 21 §3 during his life time, even if the term of protection is extinguished (art. 65). The author can act exclusively during his life time against deformation and mutilation (art. 21 al. 3).³⁵ After his death, the right of attribution can be exercised by his heirs. As regards the performer’s right to be mentioned, it never expires before the death of the holder of exploitation rights. After the death of this right holder, the right subsists and passes to the next right holder of the exploitation rights (art. 68). There is an exception to this rule for persons who interpret music in choirs or orchestras.

³³ OGH July 1, 1986, GRUR Int. 1987, 262 = Jbl. 1986, 780, Öbl 1986, p. 162 = MR 1986, n° 5, p. 14 (Walter)

³⁴ Same. See also, R. DITTRICH, 'Lettre d'Autriche', Le Droit d'Auteur, 1987, p. 179.

³⁵ J. AICHER, p. 30.

Summary

Legislation is monistic. No rights of disclosure, retract nor access. Right of attribution is simple (claim authorship, remain anonymous or pseudonymous). Right of integrity is not very detailed either. Moral rights are not transferable nor waivable. There seems to be no exception to this rule.

From the scarce Austrian case law, it seems that generally courts recognise violations quite frequently and it does not appear that courts make a balance of interests. Therefore, it seems to be rather protective of authors. When one analyses the case law in the light of specific problems of free circulation of works, the rather protective tendency could in a speculative manner have an impact on the internal market. To give an example based on the cases above mentioned, if a picture was changed from oblong format to upright format in Germany and was legal there, if the work is imported in Austria, the author could easily get a court ruling blocking the entry of such modified works in Austria. However, this does not prevent the original work from circulating freely in the Community.

Part II. Belgium

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection
- VI. Relationships between moral rights protection of authors and of performers

I. Legal framework

The legal framework in Belgium is constituted of several statutes : the main Copyright Act is the Copyright and Neighbouring rights Act (Loi relative au droit d'auteur et aux droits voisins) of June 30, 1994 (LDA) to which must be added the Act implementing the Directive of May 14, 1991 on the legal protection of Computer Programs of June, 30 1994 (LPO).³⁶ Finally, the Belgian legislator has also recently implemented the Directive on the Protection of Databases of March 11, 1996 partially in the LDA and partially in a new Act of August 31, 1998, which entered into force on November 14, 1998 (LBD). All five directives relating to copyright and neighbouring rights have thus been implemented into Belgian law.

³⁶ A recent executive order of the Walloon Region (July 4, 1998) requires that all regional civil servants waive their moral rights of disclosure, attribution and integrity. The terms of the order are so general that he can be reasonably assumed that they violate the Copyright Act and should not be enforced. For a comment, see V. CASTILLE, 'Arrêté du Gouvernement wallon violant les dispositions du droit moral, I.R.-D.I., 1999, p. 85.

II. Analysis of the different moral rights : characteristics

Belgian law reflects the dualistic view of author's rights. Moral rights are protected through art. 1 §2 of the Copyright Act (LDA).

1. The right of disclosure

a. Legislation

The right of disclosure has a positive and negative aspect : on the one hand, it can be defined as the right of the author to decide when his work is completed and when he wishes to disclose it to the public.³⁷ On the other hand, even if the work is completed, he can still choose not to disclose it.

Negatively, or conversely, the right of disclosure prohibits third parties to disclose the author's works to the public without his authorisation. Even if the author disclosed his work, the editor cannot exploit the work without an agreement on the exploitation (contract of alienation of rights). The will to disclose can be presumed in certain circumstances (e.g. deposit of the author's work at a collecting society).

Exhaustion

When the author gives his consent to publish the work on a medium, he exercises his right of disclosure for that particular medium only. If the publisher wants to publish the work on another medium, he needs the author's authorisation (for example, if a work is only to be published on a CD-ROM, then the publisher needs another authorisation if he wants to publish it on the Internet).³⁸ In this sense, it can be said that the right of disclosure is not exhausted with the first means of disclosure.

The non-exercise of the right of disclosure has a patrimonial effect : as long as a work is not disclosed or is not ready for sale or publication, creditors cannot take hold of it (art. 1, §2, al. 4 LDA). The majority of commentators agree that the theory of the 'abuse of right' can be applied to the refusal to disclose and to other moral rights³⁹.

b. Case law

The right of disclosure of an unpublished work belongs exclusively to the author or to his/her heirs, after his death. A collecting society cannot grant this right, of its own initiative.⁴⁰

³⁷ See e.g. Brussels, Feb. 4, 1988, RIDA, 1988, 137, p. 91.

³⁸ B. LIPS, D. VILARS, A. MAQUA, J. FOLON, *Du numérique au multimédia, Aspects juridiques et commerciaux*, Ministère de la Région Wallonne, DGTRE, 1998, p.107.

³⁹ Civ. Anvers (réf.), Dec. 19, 1966, J.T., 1967, p. 224 (about the representation of *Les Mains Sales* from J.P. Sartre, the theory of 'abuse of right' is not *per se* excluded in the field of moral rights). The judge did not rule on the abusive exercise of any right in this decision but merely stated this opinion as a sort of 'obiter dictum' so that in Belgium there is no case law on this issue yet.

⁴⁰ Civ. Brussels, (réf.), Feb. 9, 1996, *ASBL Promo v. SABAM, A & M*, 1996, p. 413.

2. The right of attribution

a. Legislation

The right of attribution or attribution is the right for the author to decide to publish his work under his name, to do so under a pseudonym or to remain anonymous (art. 1 §2, al. 5 LDA).⁴¹ Conversely, he also has the right to let someone else sign his work. The author can also object to false attributions.

The law sets forth a rebuttable presumption of authorship in favour of the person whose name appears on the work (art. 6 al. 2 LDA). This rule also applies in favour of the publisher whose name appears on an anonymous or pseudonymous work (art. 6 al. 3 LDA). The anonymous or pseudonymous author can reveal his identity at any time (art. 6 al. 3 LDA). In this latter case, the presumption in favour of the publisher does not apply, as this presumption is only valid towards third parties. This means that the author "remains the author" in his relation with the publisher.⁴²

b. Case law

The Court of Cassation, in a case involving an architectural work, has decided that the right of attribution does not give the author a positive right to sign his work⁴³. For the Court of Cassation, this 'right of affixing' derives from the property right, not from the author's moral right. The architect can only affix his signature with the owner's consent. The consequence is that the author could only claim the right to prevent the affixing of a false name.

In another case, the National Lottery was condemned for having reproduced several elements of some of Magritte's paintings on lottery tickets without mentioning his name.⁴⁴ The editor of a CD has no right to be mentioned on the CD if the work is not anonymous. The presumption does not work in this case. The artists remained owners of their moral rights.⁴⁵ In the AGJPB⁴⁶ v. Central Station case, the district court found a violation of the right of attribution of the journalists because Central station did not mention their name in the electronic diffusion of their articles.⁴⁷

⁴¹ Cass. May 22, 1980, R.D. Intell., 1981, p. 354 (allowing Ms. Forani to sign with Dali because she collaborated to the realisation of the work with him); Brussels, March 29, 1991, Rechtskundig Weekblad, 1991-1992, p. 814 (recognises the right of the author to be mentioned on the reproduction of a photograph).

⁴² A. STROWEL & J.P. TRIAILLE, *Le droit d'auteur, du logiciel au multimédia*, 1997, p. 26.

⁴³ Cass., Jan. 16, 1941, Pas., 1941, I, p. 11 (concerning the right for an architect to affix his name on the building : the consent of the promoter is required).

⁴⁴ Sept. 9, 1994, RIDA, n° 163, p. 190, *confirmed by* Court of Appeals of Brussels, Apr. 18, 1997, *SABAM & C. Herscovici v. Loterie Nationale*, RIDA, n° 174, 1997, p. 201.

⁴⁵ Pres. Trib. First Instance, Brussels, cess., Aug. 5, 1999, *Buy My Record & Deprijck v. AMC & EMI Group Belgium (Viktor Lazlo case)*, Ing.-Cons., n° 7-8, 1999, p. 484.

⁴⁶ Association of Journalists. Central Station was a company which put the journalists' articles on the Internet without their consent.

⁴⁷ *AGJPB et al. v. SCRL Central Station*, A & M, 1996/4, 426; *confirmed by* Court of Appeals of Brussels, 9th ch., Oct. 28, 1997, A & M, 1997/4, p. 383.

3. The right of respect or right of integrity

a. Legislation

The right of respect gives the author the right to object to “any distortion, mutilation, or other modification of, or other derogatory action in relation to the said work.” This right gives him the power to prevent anyone from modifying his work, even if he alienated his economic rights. The respect of the author’s work means that no one can change the title, shorten the work, carry out cuts, interrupt a movie with adverts, etc. Any modification, be it material or intellectual, without any limitation is within the scope of the law. The Belgian Copyright Act does not add the phrase - “that would prejudice his honour or reputation” - so that the author need not prove a prejudice to get compensation for derogatory action. The author does not have the burden of proof. The only case in which the author must prove a prejudice to his honour or reputation is the case in which the work has been moved out of its context or environment.

Destruction

The author can object to the destruction only of the original work and not of the copies, e.g. he can object to the destruction of his manuscript or his sculpture⁴⁸, or the negative of a or master copy of a film (art. 16 al. 3 LDA)⁴⁹.

b. Case law

First of all, case law anterior to the new Act, deciding that no proof of prejudice is necessary, is still valid as it is conform to the new Act’s provisions.⁵⁰ There can be a violation of the integrity of the work even in the case there is no material harm. In this sense, one cannot modify the spirit of a play (light, easy-going) into some kind of drama which aims at criticising a frivolous society.⁵¹ There is no violation of the right of respect when a broadcasting organisation shows works (photographs) of an author (with the consent of the author or heirs), accompanied by comments on his life (the author had been a collaborator during the Second World War). The fact that the broadcasting organisation recalls facts of the author’s life is not a violation of his personality either.⁵²

The modification of a logo (i.e. a work of the applied arts) protected by copyright, without the author’s consent, and unjustified by technical necessity or usefulness, violates the right of integrity.⁵³ It is interesting to note that here the judge makes a balance of interests while the legislation does not require it.

There is a infringement of the integrity right if an article is reproduced without the footnotes.⁵⁴

⁴⁸ For a sculpture, see e.g. Paris, May 14, 1974, R.T.D.Co., 1976, p.351, n° 4.

⁴⁹ This view prevails even if the LDA 94 does not stipulate it expressly. See C. DOUTRELEPONT, p. 278.

⁵⁰ Brussels, June 8, 1978, *Tintin en Suisse*, J.T., 1978, p. 619. (Publication of comics with Hergé’s characters in a completely different context).

⁵¹ Brussels, Sept. 29, 1965, *La Veuve Joyeuse*, J.T., 1965, p. 561 et obs. Corbet.

⁵² Prés. Civ. Brussels, (réf.), Dec. 17, 1997, A & M, 1999, p. 227.

⁵³ Civ. Tournai (1re ch.), Sept. 8, 1997, *P. Duchêne and S.P.R.L. Bureau de Création graphique v. S.A. Yplon*, A & M, 1998, p. 145 (emphasis added). The court bases her reasoning on A. BERENBOOM, *Le droit d’auteur*, 1984, p. 129.

⁵⁴ Civ. Brussels (cess.), Nov. 6, 1995, *Uyttendaele e.a. v. P. Sessler*, A & M, 1996, p. 147.

An editor, who publishes a comic strip presenting it as being the following of a series of the previous albums of a deceased author who did not express the wish that someone else carries on his work, infringes the author's right of integrity. In the present case, the front and back covers did not allow the reader to realise that the deceased author was not the author of the new album. There was then a confusion or a false identity of the author's work which caused an infringement of the right of respect.⁵⁵ In the Magritte case, mentioned above in the attribution right, the National Lottery had also distorted the works by fusing the elements of the paintings together into a sole image and by associating them with a game of chance.

4. The right of adaptation

In Belgium, the economic right of adaptation covers diverse types of adaptations : derivative works, translations, adaptations in a different "genre".⁵⁶

Derivative works

Derivative works consist of translations, compilations, anthologies, variations, adaptations of musical works. Art. 1 §1, al. 2 LDA provides that authors of these new works are considered authors, having the same rights than the original author on the original work. The original author has rights on works derived from his but he is not a co-author of the derivative work. Adaptations are generally composite works.⁵⁷

Translations

There is no need for authorisation to translate a work (art. 1 §1, al. 2 LDA). The translator must be faithful to the original version of the work. However, the translator can choose words and be creative. He will be considered an author (with economic and moral rights) of his translation⁵⁸.

⁵⁵ Civ. Brussels (réf.), Oct. 17, 1996, *Fondation E.P. Jacobs v. Les Editions Black et Mortimer, A & M*, 1996, p. 430.

⁵⁶ This right is included in the right of reproduction and does not exist as such, apart for computer programs, where the Act on the protection of Computer Programs (LPO) separates it from the right of reproduction.

⁵⁷ See below.

⁵⁸ For more, see A. BERENBOOM, *Le nouveau droit d'auteur*, 1995, n° 76.

Adaptations

The adaptation in a different "genre" requires the original author's authorisation (e.g. if someone wants to adapt a novel into a movie). The right of adaptation raises the question of distortion. The author of the original work must admit that the adapter can have his own view of the work, but the adapter cannot distort the original work. This limit is difficult to draw and appreciation is often subjective.

Adaptation and multimedia works

Two types of adaptations are possible :

- transfer on a new medium of a work initially conceived on another medium without creating a new work (e.g. zoom, size reduction, cuts, samples...).
- creation of a derivative work (e.g. create an animation from original drawings). In addition of being an adapted work, the work will be transformed through interactivity as the user (not only the author of the derivative work) is able to modify the multimedia work. Problems of moral rights (especially with respect to the right of integrity) will raise.

5. The right to retract

This right does not exist in Belgium. The reasons are that such a right would be contrary to the principle of the "convention-loi" (the principle under which one is bound by a contract and cannot withdraw from it unilaterally). This means that the right of disclosure is exhausted with the first exercise that the author makes of it (in a particular medium). If however, the author decides to retract, civil law allows the contracting party to have the author replaced or to obtain the execution of the author's obligations.

6. The right of access

The author has a right of access in a reasonable measure to exercise his economic rights only, e.g. in order to take photographs of his painting to be able to sell reproductions (art. 3 §1 al. 3 LDA). The fact that the law says 'in a reasonable measure' puts a boundary that judges will have to set by weighing the different interests in presence⁵⁹.

7. Classification of authors rights in different categories - relationships between economic and moral rights

It is important to note that a decision of October 17, 1996 states that 'it seems to be impossible to make a balance between moral and economic rights and that moral rights prevail'.⁶⁰

⁵⁹ C. DOUTRELEPONT, p. 359.

⁶⁰ Civ. Brussels (réf.), Oct. 17, 1996, *Fondation E.P. Jacobs v. Les Editions Black et Mortimer, A & M*, 1996, p. 430.

7.1. Relation between the rights of adaptation and integrity

The difference between the rights of integrity and of adaptation is that one right is moral, the other, economic. One is attached to the author's personality, the other is not. Therefore, one cannot be granted by contract and can only be exercised by the original author while the other can be transferred by contract and exercised by someone else than the author, which can be a legal person. Yet a correlation can exist between these two rights. Indeed if the author waives his economic right of adaptation, it can be implied that he waived the exercise of his right of integrity as to the specific parts of the right of adaptation he conceded. A contract by which the author gives his consent to adapt the work does not allow the contracting party to change the essence of the work (religious, artistic, philosophical)⁶¹, the type of the work (comedy, drama)⁶², the psychology of the characters⁶³ or material elements of the work (the historical framework, the characters' names) ⁶⁴.

7.2. Relation between the rights of disclosure and of communication to the public

The right of disclosure is a moral right. The right of communication to the public is an economic right. These two rights are clearly distinct in Belgian law. The author has first to disclose the work to the public for it to be communicated to the public. As said previously, even if the author disclosed his work, the editor cannot exploit the work without an agreement on the exploitation (contract of alienation of rights).

III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders

1. Software

1.1. The right of disclosure

Only economic rights can be alienated to the employer. Thus moral rights remain in the realm of the author's power. The author can partially waive his right of disclosure⁶⁵. But it is controversial whether the right of disclosure really belongs to the author of the software because art. 4 of the LPO stipulates that article 6 bis of the Berne Convention applies and not Belgian law, and the Berne Convention does not provide for the right of disclosure⁶⁶. Moreover, the legislative preparatory materials confirm the legislator's intent to institute only a minimal moral rights regime.

1.2. The right of attribution

There is no difference with other types of work; the general provisions of LDA apply.

61 F. VAN ISACKER, *De morele rechten van de auteur*, Bruxelles, Larcier, n° 165.

62 F. VAN ISACKER, n° 165.

63 F. VAN ISACKER, n° 165.

64 A. STROWEL & J.P. TRIAILLE, 1997, n° 565, p. 434.

65 C. DOUTRELEPONT, p. 200.

66 A. STROWEL & J.P. TRIAILLE, 1997, p. 165. For authors who think that the right of disclosure applies for programmers, see F. BRISON et J.P. TRIAILLE, *La nouvelle loi sur la protection des programmes d'ordinateurs dans le sillage de la loi sur le droit d'auteur*, J.T., 1995, p. 143. Authors who hold the opposite opinion : A. PUTTEMANS, "Au bout du droit d'auteur : la nouvelle protection juridique des programmes d'ordinateur", RDC, 1995, 766-787 (see p. 775); A. STROWEL, *La loi belge du 30 juin 1994, sur les programmes d'ordinateur : vers un droit sui generis*, RIDA, Apr. 1995, N° 164, p. 201.

1.3. The right of integrity

The right of integrity is less strong than the right conferred to other works because it is limited to instances of prejudice to honour or reputation (Art 4. LPO).

1.4. Characteristics of moral rights

The relationship between the special and the general Acts is at stake in respect of this question. Indeed, this question remains controversial because the special statute on programs (LPO) refers to Berne which gives less protection while the general law (LDA) more protection. Berne does not say a word on the alienability of moral rights but does not prevent Contracting Parties to provide that authors can alienate their moral rights, temporarily or permanently⁶⁷. In conclusion, the two moral rights of attribution and integrity are alienable and it is possible to waive them even globally.⁶⁸

2. Audio-visual works

Audio-visual works are a species of works of collaboration (art. 14 LDA).

2.1. The right of disclosure

Authors can exercise their moral rights only when the audio-visual work is completed (rule of the "final cut") (art. 16 al. 2 LDA)⁶⁹. The work is completed when the main director and the producer come to an agreement as to the final version. Therefore if there is no agreement, the work cannot be disclosed. The right of disclosure thus belongs to the director and the producer in common (it is interesting to note that the producer is in theory not a person which could exercise any moral rights because he is not an author; in this sense, Belgian law has given de facto a disclosure right to the producer⁷⁰).

If one of the authors of an audio-visual work cannot or does not want to complete the work, he cannot object that his work is being used to complete the audio-visual work (art. 15 LDA). Thus the producer can employ another author to have it completed.

⁶⁷ A. STROWEL & J.P. TRIAILLE, 1997, p. 166-167.

⁶⁸ A. STROWEL, 'La protection des programmes d'ordinateurs, loi belge, directive européenne et droit comparé', in *Le droit des affaires en évolution, 7ème journée du juriste d'entreprise*, Bruylant, Bruxelles, Kluwer Antwerpen, 1996, p. 153.

⁶⁹ In France, see L. 121-5 and in Spain, art. 93 §1.

⁷⁰ G. VAN BOSSTRAETEN & T. VANHYFTE, 'II. Authenticity of authorship and work, Belgium', in *Copyright in Cyberspace*, ALAI Study days, Amsterdam, 4-8 June 1996, p. 187.

2.2. The right of attribution

The rule of the “final cut” applies : only after the work is completed can an author exercise his right of attribution.

2.3. The right of integrity

a. Legislation

Again, under the rule of the “final cut”, the author can exercise his rights of integrity only after the completion of the work. In other words, authors can exercise their right of integrity at the exploitation phase. However, this rule is softened by the correlative rule that unless otherwise provided by contract, the author can use his contribution to exploit it in another genre, in respect of the rules governing "collaboration works". This means that the author can exploit his contribution as long as it does not prejudice the common work (art. 5 al. 2 LDA).

b. Case law

A modification of an audio-visual work without the author’s consent, after the work has been completed, is a violation of the right of integrity. The president of the Tribunal of First Instance, must command the defendant to stop this violation.⁷¹

3. Works of collaboration and composite works

Works of collaboration

The legal regime of collaboration works is important in respect of multimedia works, as collaboration works tend to generalise in the field of multimedia.⁷² Two conditions are required to have a collaboration work : several natural persons and a common programme or inspiration. Art. 4 LDA suggests co-authors to have a contract between themselves regulating the way they wish to exercise their rights. This article applies to moral rights also (art. 4 in fine).

If the work is indivisible, economic rights must be exercised in common. The statute however says that any of the authors can act individually against any violation of his author's rights and ask damages. If the work is separable, the same regime applies. The co-author cannot however, after the work's completion, use his contribution in another work (art. 5 LDA). Yet the author can exploit his contribution separately if it does not prejudice the work of collaboration.

If there is no convention between the co-authors, the decision vests in the judge. For instance, the judge can decide that the work can be published even if one of the authors refuses (interfering with the right of disclosure of one of them); he can decide that the name of some authors be omitted on the work (interfering with the right of attribution); he can authorise the contracting party to replace one of the authors by another and have the work completed by another person (interfering with the right of integrity).

Composite works

Composite works are works composed of several pre-existing works without consultation or collaboration between the authors. In other words, the composite work is a sort of melting-pot

⁷¹ Tribunal of First Instance, Bruxelles, (réf.), Feb. 21, 1997, *Luc Janssen v. N.V. ERA Films, A & M*, 1997, p. 223.

⁷² See A. STROWEL & J.P. TRIAILLE, 1997, p. 24-25.

of previous works which forms a new one. The author of the new work will have to respect the moral rights of the authors of pre-existing works.

The category of collective works does not exist in Belgium.

5. Performers moral rights

Artists or performers have limited moral rights compared to moral rights of authors (they lie closer to rights of personality than moral right of the authors) (art. 33 and 34 LDA).

5.1. The right to have their name mentioned

Firstly, the mention must conform to the "loyal professional practices" of the sector (e.g. the name of the artists is not always mentioned on the adverts of a movie). Secondly, this right gives them the power to object to any "inexact attribution".

5.2. The right of respect

The right of integrity is limited in two ways. Firstly, it is limited by the author's rights (the performer's claim cannot go against the rights of the author) and secondly, it is limited by the fact that the performer can only object to a violation prejudicial to his honour or reputation. For instance, the performer cannot object to cuts in his performance because it is the author's power to decide how to disclose the work. He cannot object to the dubbing of his voice unless otherwise agreed (art. 36 al. 1 LDA). However, a performer can object to the dubbing of his voice if he has not been warned and if this dubbing is prejudicial to his reputation.⁷³ Like the author, the performer can limit by contract the exercise of his rights.

IV. Alienability and waiver of moral rights

The Act provides that moral rights are inalienable. "The global waiver of the future exercise of moral rights is void" (art. 1, § 2, al. 1). In other words, the author cannot renounce to exercise his rights in advance globally or generally. This also implicitly means that a precise and limited waiver is possible. This means that the author cannot alienate definitely his rights but he can grant the exercise of part of them or in other terms, renounce to exercise them. For instance, the author can make a star sign the book even if it is not the star but him who wrote the book or the architect can let the owner modify the house he has designed⁷⁴. Another example is that the author cannot accept to never exercise his disclosure right. He cannot renounce to exercise it before the work is completed.⁷⁵ A special mandate to exercise moral rights of the author to a collecting society is possible.

⁷³ Comm. Brussels. (réf.), June 5, 1984, I.C., 1984, p. 333.

⁷⁴ Brussels, Dec. 15, 1930, Pas. 1931, II, p. 6; Brussels, March 23, 1946, Ing. Cons., 1946, p. 22; Civ. Mons, Apr. 5, 1938, Pas. 1938, III, p. 103.

⁷⁵ F. GOTZEN, 'Le droit moral dans la nouvelle loi belge relative au droit d'auteur et aux droits voisins', Ing.-Cons., 1995, p. 135-146.

There is no need for a written contract but the waiver must be in express terms.⁷⁶ It is better to have the waiver in writing, although the law does not require it. Indeed there is a controversy as to the legal nature of the waiver. Some say it is a contract and therefore, contracts have to be proven against the author with a written document. Others say that this rule of evidence does not apply to waivers because they are not contracts.⁷⁷

Tacit agreement is possible if it is certain. For instance, if the author accepts the adaptation of his work, it can be implied that he has waived his right of integrity. Even if the author has renounced to exercise his moral right of integrity, he can still object to the modification if it causes (and he proves that it is) a prejudice to his honour or reputation.

For certain works, the right of integrity is less protective. For example, architects can waive their right of integrity as long as this waiver does not prejudice their honour or reputation.

Status of the employed author

The mere existence of a contract of employment or a commission does not imply a waiver of moral rights. Only economic rights are alienated to the benefit of the employer. As regards the right of disclosure, for instance, the fact that the commissioner stipulates that the work must be delivered at a certain date, does not prevent the author to exercise his right of disclosure later if the work is not completed at that date.

V. Duration of moral rights protection

The Act does not provide that moral rights are perpetual, thus duration of moral rights is identical to the duration of economic rights, which is 70 years⁷⁸ (art. 2 LDA). The duration of performers' moral rights is 50 years after the performance or after the fixation (art. 38 LDA).

VI. Relationships between moral rights protection of authors and of performers

The rights of performers are limited by the rights of authors. Art. 33 al. 1 states that performers' rights cannot limit the exercise of authors' rights. This formulation goes beyond the text of the Rome Convention and the EC Directives on rental and lending rights and on cable and satellite (these texts reject the supremacy of authors' rights on performers' rights). This raises a problem of conformity of the LDA with these texts⁷⁹.

⁷⁶ Case law already established the principle of express consent before the 1994 LDA was enacted : see Brussels, Sept. 29, 1965, J.C.P., 1966, II, 14820 obs. Françon. Similarly, case law had established inalienability of moral rights Brussels. May 9, 1953, IC, 1953, p.193; Liège, Oct. 21, 1982, J.T., 1983, p. 12.

⁷⁷ A. STROWEL & J.P. TRIAILLE, 1997, p. 88-90.

⁷⁸ A. STROWEL & J.P. TRIAILLE, 1997, p. 49.

⁷⁹ A. STROWEL & J.P. TRIAILLE, 1997, p. 92.

Summary

Legislation is dualistic. The right of disclosure is very detailed and very protective. The right of attribution is simple (right to claim authorship, to object to false attribution as and remain anonymous or pseudonymous). The right of integrity is absolute : no proof of prejudice is needed to act against violations. There is a right to access but not a right to retract. Moral rights are not transferable but partial waivers are allowed.

Case law relating to attribution is generally protective of authors, except for architectural works. As regards the right of integrity, courts are also generous for authors, as the legislation does not require the proof of a prejudice. To take the case of the comics book confusing the consumers as to the attribution, it seems that in similar cases, in the event the confusing work was produced outside Belgium and was imported in Belgium, courts would block its entry in Belgium. In like manner, if an article was legally reproduced without the footnotes in another country (or the Belgian author could not object to it in that country), the Belgian author could nevertheless bar its importation in Belgium. However the cases discussed seem to be exclusively of a purely national nature.

Part III. France

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection
- VI. Relationships between moral rights protection of authors and of performers

I. Legal framework

The Intellectual Property Code (Code de la Propriété Intellectuelle (CPI)) of July 1, 1992 has been amended several times, on January 3, 1995, in 1996, by the decree n° 96-103 of Feb. 2, 1996, in application of law n° 94-361 of May 10, 1994 concerning the legal protection of Computer Programs and by the Act n° 97-283 of March 27, 1997 implementing the term and satellite-cable directives.

The Intellectual Property Code is completed by the Act on Author's Rights and on the Rights of Performers, Producers of phonograms and videograms and audiovisual communication Enterprises (n° 85-660 of July 3, 1985) and the Ministerial Order pursuant to art. 20 (title II) of Act n° 85.660 of July 3, 1985 on the Rights Neighbouring on Copyright of Performers engaged in the making of an audio-visual work of Oct. 17, 1990.

II. Analysis of the different moral rights : characteristics

Moral rights are set forth in art. L. 121-1 to L. 121-9. Author's rights are based on a dualistic approach in France (art. L. 111-1) although it is contested by certain authors.⁸⁰ This means that author's moral and economic rights are governed by separate legal regimes. In France, moral rights are pre-eminent, as the legislation cites them before economic rights. The term 'moral right' is preferred to the term 'the moral rights' as there is a unity of the moral right. This means that all moral rights have common characteristics.⁸¹

These characteristics, which will be studied in detail, are their personal character, their imperative character, their 'universalistic' character (i.e. moral rights can be invoked by foreigners, whatever their country's legal regime on moral rights is or the faculty for a foreigner

⁸⁰ Dualism : H. DESBOIS, *Traité, Le droit d'auteur en France*, Dalloz, 1978; A. FRANÇON, A et H. LUCAS; No Dualism : J. RAYNARD.

⁸¹ A. & H.J. LUCAS, *Traité de la Propriété Littéraire et Artistique*, Paris, Litec, 1994, p. 304, n° 371 & 372.

to invoke a moral right on his work under French law), perpetuity, inalienability, immunity from attachment, imprescriptibility.⁸²

1. The right of disclosure (droit de divulgation)

a. Legislation

The right of disclosure is the right for the author to decide of the disclosure of his work in the conditions and the way chosen by him. The right of disclosure was first recognised in the 1900 Whistler case⁸³. The Court of Cassation decided that exhibition of a painting in a public space does not amount to disclosure. Indeed the intent of the painter was to test the critics' reaction and not to divulge the work. The exhibition was not done in a lucrative goal. If the author pursues a lucrative goal in the disclosure, then the work is 'fully disclosed'. Whistler had to return the money he had received from the commissioner and refrain from showing the painting in a form in which the portrayed person would be recognisable.

The right of disclosure is now stipulated in art. L.121-2, § 1 CPI. The statute does not define the disclosure but a concrete intentional act of disclosure to the public is needed. The author must have the intent to disclose. The certainty of the intent will not generally cause problems in case the author has alienated the material support of his work⁸⁴ unless it was only a sketch that the author decided to correct.⁸⁵ Normally the public exhibition of the work will amount to disclosure, the Whistler solution cannot be generalised because in that case, the exhibition was only for the purpose of testing the critics. Concerning the intent, it seems sufficient that the work has been made available to the public, an effective 'communication to the public' is not needed to prove the intent.

Disclosure has to be done on a medium but it can be oral.⁸⁶ There is no disclosure if the author improvises his oral speech and wishes to improve it before being criticised.⁸⁷

The author has the control over disclosure. He cannot be forced to disclose an unfinished work, e.g. a general rehearsal of a play or musical performance does not imply a disclosure even if a limited public is invited.⁸⁸ If he transfers reproduction or performance rights without having previously disclosed the work, the author still retains his right of disclosure because a

⁸² The fact that moral rights are imprescriptible does not mean that the author can wait more than 30 years to act against a violation of his rights, but that a violation can arise 30 years after the transfer or disclosure of the work.

⁸³ Trib. Civ. Seine, March 20, 1895; Paris, Dec. 2, 1897, D., 1897, II, p. 265; Cass. March 14, 1900, DP, 1900, 1, p. 497. The *Rouault* case detailed the solution adopted in Whistler, see Court of Appeals Paris, 1st ch., March 19, 1947, D., 1949, p. 20. The definition of the right of disclosure was also iterated by the Paris Court of Appeals in *Camoïn*, March 6, 1931, DP 1931, 2, p. 88 (the author had torn his painting and thrown the parts away) for the preceding judgment, see trib. Civ. Seine, Nov. 15, 1927.

⁸⁴ Court of Appeals of Paris, *Rouault*, March 19, 1947, D., 1949, p. 20; TGI Paris, *Fleuss v. Raysse*, D., 1992, somm., p. 14.

⁸⁵ Paris, 4th ch. A, Feb. 17, 1988, *Pons*, RIDA, Oct. 1989, n. 142, p. 325.

⁸⁶ However, a court decided that an author's conferences could not be published because they were intended to a limited number of persons and not the general public, see TGI Paris, 1st ch., Dec. 11, 1985, D., 1987, somm. P. 155 (Lacan's conferences).

⁸⁷ TGI Paris, 1st. Ch., Nov. 20, 1991, Légipresse, 1992, III, p. 33 (Barthes).

⁸⁸ P.Y. GAUTIER, *Propriété littéraire et artistique*, 3ème ed. Mise à jour, Collection Droit fondamental, PUF, 1999, p. 179.

waiver of the right of disclosure is forbidden.⁸⁹ Nevertheless, once the author has signed a contract of publication he is supposed to have accepted the disclosure of his work⁹⁰. Furthermore, the author can use his right of disclosure to force the contracting party to publish his work⁹¹. In case the author signed a contract on future works, he has the right to refuse to disclose but then must indemnify his contracting party (see e.g. Rouault case). The latter cannot force the author to execute his obligation in nature.⁹² In the case of commissioned works, the author also remains in possession of his moral right of disclosure. He can refuse to deliver the work or to refuse to complete the order. To make a 'derivative work', the author of the derivative work must always ask the authorisation of the author, as to the disclosure right.

Art. L. 121-3 allows courts to order any appropriate measure in case of flagrant abuse in the use or non-use of the disclosure right. So if the author's heirs are unreasonably refusing permission to disclose unpublished works of the author, application can be made to the court for the necessary permission.⁹³ Lucas even proposes that if the refusal is abusive, it can be considered void and the contracting party of the author can disclose.⁹⁴

Exhaustion of the right of publication

The majority of the French doctrine and the Court of Cassation are of opinion that the right of disclosure is not exhausted by the first use.⁹⁵ Indeed the author determines the means by which he discloses his work. Thus the right of disclosure is not exhausted by the first manner and the first time in which the author discloses his work.⁹⁶ The author does not have a right of disclosure for the several original copies of a work. Once he has disclosed the first of these copies, the right of disclosure is exhausted.⁹⁷

b. Case law

The right of disclosure is discretionary.⁹⁸ It belongs only to the author.⁹⁹ The right of disclosure is absolute, even the partial reading of an undisclosed document amounts to

⁸⁹ A. LUCAS - R. PLAISANT, 'France', in M.B. NIMMER - P.E. GELLER, *International copyright law and practice*, New York, Matthew Bender, October 1996, FRA-93.

⁹⁰ Art. L. 132-4 determines the procedure for disclosure and the conditions applicable in contracts for the publication of a work.

⁹¹ P.Y. GAUTIER, 1999, p. 180.

⁹² C. DOUTRELEPONT, *Le droit moral de l'auteur et le droit communautaire*, Bruylant, Bruxelles, 1997, p. 192. See also A. & H.J. LUCAS, 1994, p. 318, & n. 141.

⁹³ J.A.L. STERLING, *World Copyright law*, 1998, p. 285.

⁹⁴ A. & H.J. LUCAS, 1994, p. 317 and n. 135.

⁹⁵ See e.g. F. POLLAUD-DULIAN, 'Moral rights in France through recent case law', *RIDA* 1990, n°145, p. 165, commenting the *Lacan* case; L. GOLDGRAB, 'France' in C. VAN RIJ, 1995, p. 90, citing A & H.J. LUCAS, 1994, p. 314, n° 386.

⁹⁶ A. & H. J. LUCAS, p. 314. See for instance the *Barthes* case where the court ruled that the oral disclosure does not exhaust the other types or means of disclosure.

⁹⁷ Cass. June 4, 1971, cited by D. GAUDEL, 'Arts graphiques et plastiques en France', in *ALAI* 1993, p. 364 (tapestries).

⁹⁸ Cass. 1st. civ. June 5, 1984, *RIDA* Apr. 1985, p. 150; *Bull. Civ. I*, n° 184; Cass. 1st civ., May 19, 1976, *RIDA* Jan. 1977, p. 104. However, the court of Cassation seems to contradict herself when she sanctions the abuse of the right of retract, see Cass. May 14, 1991, *RIDA* Jan. 1992, p. 272.

⁹⁹ Trib. Civ. Seine, Oct. 10, 1951, *D.*, 1952, p. 390; Orléans, Feb. 18, 1959, *D.*, 1959, p. 440.

infringement.¹⁰⁰ A work cannot be disclosed without the authors' consent even if it is completed but the author finds it is not satisfactory.¹⁰¹ The publication in the press of the script and extracts of dialogues of a movie, before its showing in movie theatres, without the author's authorisation, infringes the right of disclosure.¹⁰² "Putting on sale abandoned paintings while knowing that the artist was opposed to their disclosure as immature works, violates his right of disclosure."¹⁰³

If the work is disclosed under another form without the author's authorisation, it infringes her right of disclosure.¹⁰⁴ For instance, the written publication of a text to which the author had given an oral format infringed his right of integrity.¹⁰⁵ A publisher cannot publish a book reproducing most of an author's works without his consent or the heir's consent.¹⁰⁶ The interests or rights of the possessor of the original manuscript outweigh the 'rights' of the 'pioneer', the person who reveals an undisclosed work.¹⁰⁷ The unauthorised use for publicity purposes of a creative work infringes the publication right of the author. The refusal by the organiser of an art exhibition to show the works of an artist does not in itself infringe his moral right.¹⁰⁸

With respect to abuse by heirs of the right of disclosure, a first decision found abusive the refusal to publish works because the reason for non-disclosure was not based on the will of the author but on familial interests.¹⁰⁹ In another case, the heirs could not deviate from the clearly expressed will of the deceased author.¹¹⁰ Thus if the author's will is not clear, former art. 20 of the 1957 Act does not apply. The heirs of A. Artaud misused the right of disclosure by objecting to carry on publication of Artaud's complete works by an editor with whom the author signed a contract.¹¹¹

¹⁰⁰ Cass. Feb. 25, 1997, *Perbet v. Consorts Bauzon*, RIDA, n° 173, 1997, p. 233.

¹⁰¹ Cass. Crim. Dec. 2, 1964, Gaz. Pal., 24-27 Apr. 1965. See also TGI Paris (réf.), July 1, 1983, RIDA, Oct. 1983, 256.

¹⁰² TGI Paris, Feb. 17, 1999, *Gaumont c. C. Clavier*.

¹⁰³ A. LUCAS, A.- R. PLAISANT, 'France', in NIMMER, M.B.- GELLER, P.E., *International copyright law and practice*, New York, Matthew Bender, October 1996, FRA-92.

¹⁰⁴ Paris, 4th ch. Feb. 13, 1981, RIDA, Apr. 1982, p. 126 (photographs published in a magazine and disclosed by a TV channel without authorisation).

¹⁰⁵ TGI Paris, 1st ch., Nov. 20, 1991, RIDA 1992, n° 151, 340 (allowing the taping of a lecture or publishing a synopsis does not amount to disclosures of the work, concerning a summary of a course given by R. Barthes), *reversed by* Court of Appeals of Paris, RIDA January 1993, N°153, p. 191. See also Cass., 1st civ. Nov. 14, 1973, JCP-1974-II-17653, RTDCom. 1974, p. 514.

¹⁰⁶ Paris District Court, (TGI), July 7, 1993, unpublished, cited by L. GOLDGRAB, in C. VAN RIJ, 1995, p. 83. (about the publication of Coluche's works. Moreover there were errors, alterations and omissions.)

¹⁰⁷ Cass. Civ. 1st, Nov. 9, 1993, RIDA, Jan. 1994, p. 322, D., 1994, 155.

¹⁰⁸ Paris, 1st Ch., Apr. 10, 1995, RIDA, 1995, N° 166, 316.

¹⁰⁹ TGI Reims, Jan. 9, 1969, D., 1969, jp. P. 569.

¹¹⁰ TGI Paris Dec. 1, 1982, unpublished works of Montherlant, RIDA Jan. 1983, p. 165.

¹¹¹ TGI Paris, July 6, 1994, RIDA n°163, 1995, p. 244, confirmed by Court of Appeals of Paris, Dec. 19, 1997, RIDA, n°178, 1998, p. 315. For other cases, see Cass. Civ. I, Apr. 13, 1992, RIDA 1992, n°154, 149 (to invoke 121-3, the party must have a personal interest); Rennes, Nov. 16, 1990, RIDA 1991, n°148, 168, C.D.A. Jan. 1991, 10, *Foujita*; TGI Paris, 3d ch. July 6, 1994, RIDA 1995, N°163, 244; Cass. 1st civ., Nov. 24 1993, RIDA 1994, n°160, 216; Court of Appeals of Paris, 25th ch. B, March 17, 1989, Juris-data, n. 021069.

2. The right of attribution (droit de paternité)

a. Legislation

First of all it must be noted that in France, the 'right of respect' encompasses the right of attribution and the right of respect for the work (art. L. 121-1). The author has the right to have his name and quality respected (right of respect for name and qualification) (art. L. 121-1, § 1).¹¹² This is the positive aspect of the right. The right to respect the quality apparently refers to the indication of the author's professional status or honorific titles (e.g. professor).¹¹³ The name must be indicated on edited copies and advertising documents (art. L.132-11, §3).¹¹⁴ The name cannot be replaced by an allusion, such as the author of the History of Paris.¹¹⁵ The right of attribution also encompasses the right to remain anonymous or to publish under a pseudonym. This is the negative aspect of the right. If the public can easily recognise the author ('transparent' pseudonym), the regime of pseudonym works does not apply but the general rules applies.¹¹⁶

Art. L. 113-1 sets forth a rebuttable presumption of authorship in favour of the person whose name appears on the work. This presumption does not prevent co-authors to claim authorship for a work which has not been disclosed under their name.¹¹⁷

It is controversial whether the author can act on the basis of the moral right of attribution when his name is used in relation with a work he has not created (false attribution). For C. Colombet and C. Doutrélepon, the right of attribution does not protect this hypothesis. The civil code and rights of personality such as rules forbidding defamation or violations of honour should apply instead.¹¹⁸ Moreover there is a special criminal statute which represses false attributions.¹¹⁹ In France, courts have nevertheless used the attribution right to forbid such false attributions.¹²⁰

¹¹² See e.g. Court of Appeals of Paris, Feb. 9, 1931, DH 1931, somm. p. 48; Trib. civ. Seine, Nov. 26, 1931, Gaz. Pal. 1932, 1, p. 337; Trib. Civ. Seine, July 11, 1933, Gaz. Pal. 1933, 2, p. 606. See also Court of Appeals of Paris, Jan. 20, 1988, Cahiers du droit d'auteur, May 1988, p. 104; Court of Appeals of Paris, Feb. 25, 1988, Cahiers du droit d'auteur, June 1988, p. 18, Court of Appeals of Paris, June 7, 1988, Cahiers du droit d'auteur, Sept. 1988, p. 21; TGI Paris, Oct. 25, 1988, Cahiers du droit d'auteur, Feb. 1989, p. 12; Court of Appeals of Paris, Dec. 21, 1988, Cahiers du droit d'auteur, Feb. 1989, p. 12.

¹¹³ J.A.L. STERLING, p. 285. The omission by the editor of one the author's titles is not a breach of contract : see T. Comm. Seine, Apr. 2, 1951, D., 1951, p. 343.

¹¹⁴ TGI Paris 3d ch. Dec. 8, 1980, RIDA, Apr. 1981, P. 175, TGI Paris 3d ch. June 28, 1983, RIDA, Oct. 1983, p. 251; TGI Paris, June 26, 1985, D., 1986, I.R. 184; Paris 4th ch., Apr. 20, 1989, RIDA, Jan. 1990, p. 317. For advertising, see Trib. Civ. Seine, Feb. 20, 1922, Gaz. Pal., 1922, 2, 282; TGI Paris (réf.), March 8, 1985, RIDA July 1985, p. 185; TGI Paris 1st ch., Feb. 21 1990, D., 1991, S.C.95 (Buren columns); Court of Appeals of Paris, 4th ch. B, Dec. 6, 1990, Juris-data, n. 025855.

¹¹⁵ Trib. Com. Seine, Apr. 2, 1951, D., 1951, 343.

¹¹⁶ TGI Paris 1st ch., July 9, 1980, RIDA, Oct. 1980, p. 147.

¹¹⁷ Cass. Nov. 24, 1993, RIDA, 1994, n°161, p. 196, somm. Kerever; Paris March 1, 1993, RIDA, n°157, p. 282, somm. Kerever.

¹¹⁸ See C. COLOMBET, *Propriété littéraire et droits voisins*, Précis Dalloz, 1994, p. 115; C. DOUTRELEPONT, 1997.

¹¹⁹ See A & H.J. LUCAS, 1994, p. 330, n°408.

¹²⁰ A & H.J. LUCAS (1994, p. 327) criticise this and argues that these violations should be treated under the civil code and the defamation wrong.

b. Case law

Decisions which recognised a violation of the right of attribution

An editor cannot reveal the name of the author if the author chose to remain anonymous or chose a pseudonym.¹²¹ The name of the architect must be mentioned on the building.¹²² However, if the architect's work is not original, his name must not be mentioned.¹²³ Similarly, his name must be mentioned on photographs of the building.¹²⁴ On the contrary, the right of attribution of an author of design or of a work of applied arts, may be limited.¹²⁵

The omission of the name of the author of a song in the credits of movie violates his right of attribution.¹²⁶ In like manner, the omission by the editor of the author's name and of the title of his works is a violation of the right of attribution.¹²⁷ Similarly, the omission of the author's name on one of his photographs infringes his attribution right.¹²⁸ A court has ruled that the name of the photographer must be mentioned on the reproduction even if the photograph is not protected by copyright.¹²⁹ Even if a work is famous, the advertising agency must still indicate the name of the author in the margin of a photograph of the work.¹³⁰ Someone who deletes the author's name or substitute their own is liable.¹³¹ If the name has been omitted, the author and his successors can act to have it mentioned.¹³² The name of the author must be

Paris Dec. 17, 1986, J.C.P., 1987, II, 20899; Paris Oct. 27, 1988, J.C.P., 1990, I, 3433, n°9; Paris, March 23, 1992, RIDA, 1993, n°155, p. 181 (the attribution of work to Rodin of a work which is not his, is a violation of the right of respect of his name); Court of Appeals of Paris, 1st, Sept. 25, 1987, RIDA, Jan. 1988, n. 135, p. 104, D., 1988, somm. P. 205; TGI Paris, Jan. 14, 1988, *Rachmaninoff*, RIDA, Oct. 1988, p. 321; Court of Appeals of Colmar, 1st ch., Nov. 2 1988, Juris-data, n. 049870; TGI Paris, 1st. Ch. Jan. 17, 1990, D., 1991, somm. p. 95, confirmed by Court of Appeals of Paris, 1st ch. A, Jan. 14, 1991, Juris-data, n. 020286 (the prejudice (the fact that a reproduction of a painting in a magazine was made under the name of another artist) is not repaired by a late rectifying note without the accompanying picture of the painting); Paris, 13th ch., May 23, 1992, RIDA Jan. 1993, p. 181; TGI Paris, May 9, 1995, *Ministère Public v. D. Amar*, in A. KEREVER, 'Chronique de jurisprudence', RIDA 1996/1, p. 187. A court had decided that the affixing by the restorer of an unsigned painting of the author's name, is a misdemeanour, see Nov. 2, 1960, RIDA Jan. 1962, p. 118.

¹²¹ Paris July 5, 1979, D., 1980, p. 580.

¹²² Rennes, Nov. 22, 1911, D., 1914, 2, p. 5.

¹²³ Cass. June 5, 1984, RIDA Apr.; 1985, p. 150, Cons. Etat, May 6, 1988, RIDA Jan. 1989, p. 178.

¹²⁴ TGI Paris 3d ch., Nov. 13, 1970, Gaz. Pal., 1971, 1, p. 352.

¹²⁵ Paris, Nov. 22, 1983, D., 1985, inf. Rap., p. 10. Paris, March 6, 1991, D.S. 1992, somm. 75 (the author of an advertising film is supposed to have waived his right of attribution since such a film has no credits).

¹²⁶ See TGI Paris, Nov. 26, 1997, *J. Ferrat v. Soc. GMT Productions*, RG n° 95/22491, RIDA, 1998, n°177, p. 169. There was infringement of the right of the author as well as the performer as the author was himself singing his song.

¹²⁷ Court of Appeals of Paris, Sept. 27, 1996, *Ed. Larousse v. R. Garcia Pelayo*, RIDA, n° 174, 1997, p. 203.

¹²⁸ See *Arkadia v. J.P. Lenoir* cases, below.

¹²⁹ Court of Appeals of Angers, Apr. 18, 1989, unpublished, cited by D. GAUDEL, in ALAI 1993, p. 365.

¹³⁰ TGI Paris, 1st ch., Feb. 21, 1990, D.S. 1991, somm. 95, obs. Colombet.

¹³¹ Paris 13th ch., Oct. 5, 1995, RIDA, 1996, n° 168, 303.

¹³² e.g. TGI Paris (réf.), March 8, 1985, RIDA, July 1985, n. 125, p. 185.

mentioned on a translation of his work and in general in works derived from his.¹³³ A translator has the right to be mentioned.¹³⁴

The right of attribution applies to works of collaboration¹³⁵ and collective works.¹³⁶

Decisions which did not recognise violations

The omission of the name of the author in an advert showing his sculpture does not violate his right of attribution because the reproduction of the sculpture in the advert is too imprecise to allow it to be distinguished from other plastic works.¹³⁷ The affixing of the signature of a painter on a copy of one of his paintings, which has fallen in the public domain, is not a violation of his moral right when there is no possible confusion between the original and the copy.¹³⁸ The commissioner of a building cannot claim attribution of architectural arrangements when it is the architect who is the author.¹³⁹

Status of the employed author

There is never a transfer of moral rights in case of employment. The author can demand his name to be mentioned, even after the termination of the employment contract, as the right is imprescriptible.¹⁴⁰

3. The right of respect or right of integrity (droit à l'intégrité)

a. Legislation

The general principle states that the author has the right to object to any modification which violates the integrity of the work or modifies its "spirit" (L. 121-1 al. 1). There are many other dispositions in French law which specify the right of respect : art. 121-5 al. 3 for audio-visual works; art. 132-22 for works which can be executed publicly by theatres, cinemas, TV channels, digital servers...; art. 132-11 al. 2 in the publishing sector.

In addition to art. 121-1 al. 1, art. 112-1 forbids to take account of the type of work, the form of expression, the merit or the destination of the work to discriminate between them. As long as the works are original, they are protected. The text does not treat of the measure of the

¹³³ Court of Appeals Paris, 4th ch. Jan. 27, 1987, Juris-data, n. 021223, Court of Appeals of Paris, 4th ch.B, Nov. 12, 1992, Juris-data, n. 022996.

¹³⁴ Court of Appeals of Paris, Jan. 20, 1999, *M.L. Navarro & SGDL v. Hachette Livre*, RIDA, Apr. 1999, p. 285. The exact manner that the mention must take is determined by the customs, as in contractual relations between the editor and the translator.

¹³⁵ TGI Paris, June 28, 1983, RIDA, 1983, n°118, p. 251. When a collaboration work is published with the author's contribution without his consent and without mention of his name, both his rights of attribution and disclosure are infringed : see Court of Appeals of Pau, March 10, 1988, RIDA Jan. 1989, p. 179; TGI Paris, Oct. 12, 1988, Cahiers du droit d'auteur, Feb. 1989, p. 11, TGI Paris, Nov. 23, 1988, autobiography of F. Lopez, Cahiers du droit d'auteur, March 1989, p. 15.

¹³⁶ Cass. April 15, 1986, RIDA, 1986, n°130, p. 143.

¹³⁷ TGI Paris, May 28, 1997, RIDA, 1998, n°175, p. 231.

¹³⁸ TGI Paris, May 9, 1995 *confirmed by* Court of Appeals of Paris, Oct. 5, 1995, 13th ch. Corr., *J. Espié v. P. Renoir*, RIDA, N°168, p. 303 & p. 263, *confirmed by* Cass. (Ch. Crim.), June 11, 1997, RIDA, 1998, n°175, p. 237.

¹³⁹ Court of Appeals of Paris, *Bourgeois v. Doueb*, RIDA n°173, 1997, p. 235.

¹⁴⁰ C. DOUTRELEPONT, p. 241.

protection that must be afforded to works in general. But it is normal that the protection varies in function of the intensity of the link between the author and the work (e.g. in case of software, the personality of the author does not appear in the work as much as in a painting for instance)¹⁴¹.

Art. L. 121-1 al. 1 makes no reference to the words of 'honour and reputation' used in art. 6 bis of the Berne Convention so that the author is the only judge of the violation; the judge or a third party cannot substitute his appreciation of the violation to the author's one.¹⁴² As the Act absolutely forbids any modification, the courts should not try to see whether there is a violation to honour or reputation but find directly that any modification is a violation of the right of respect. Thus the courts do not proceed to a careful weighing of interests but "try to determine whether the effect of the act of which a complaint is made is to "denature the ethic of the work" ".¹⁴³

Nevertheless, courts generally agree to exercise a certain control on the author's claim of integrity violation. Firstly, the judge analyses whether there is a violation or not.¹⁴⁴ Secondly, the court refers to 'customs'. For instance, in the advertising sector, the author is never cited, so that an author must accept that his name will not be mentioned in a commercial. Thirdly, the judge takes into account special limitations to the right of integrity, i.e. technical constraints inherent to the work itself (a movie made for the cinema cannot be compared with its broadcasting on TV; necessarily the quality of the showing will differ).

Authors cannot base a claim of violation of their honour or reputation only (i.e. not in connection with their works) on the basis of their moral right of integrity.¹⁴⁵ The right of integrity protect only against erroneous citations. However, this is not satisfactory as truncated citations do not reflect the author's thoughts or change the meaning of the author's thoughts and can be a violation of the right of integrity.¹⁴⁶ The possessory lien of the creditor does not in itself violate the right of respect of the author; in other words, the author must prove a violation of his right of respect (e.g. the creditor does not take care of the work)¹⁴⁷.

b. Case law

¹⁴¹ The ALAI has adopted a resolution that forwards this idea. See *The moral right of the author*, Antwerp Congress, 1993, p. 560.

¹⁴² TGI Paris, 3d ch., Oct. 15, 1992, *Brut de Béton v. J. Lindon*, RIDA Jan. 1993, n° 155, p. 225 (En attendant Godot), see below. Contra, *Dali* case, see below.

¹⁴³ J.A.L. STERLING, p. 285. Sometimes the two aspects (the 'denaturation' of the spirit and the violation of the integrity) are present; see e.g. Court of Appeals of Paris, 1st ch. , Dec. 14, 1987, RIDA 1988, n°138, p. 299; Court of Appeals of Paris, 1st ch. , May 9, 1989, Juris-data, n. 022735; D. 1990, somm. p. 160.

¹⁴⁴ I. THERY, 'Le droit moral dans l'oeuvre multimédia', in *Le multimédia, marché, Droit et pratiques juridiques*, *Actes du Juriscope*, 1994, P.U.F., 1995.

See for instance, "Thérèse", the author of the movie moved for summary judgement to ask for an announcement before the broadcasting of his movie because he did not appreciate the persons to be interviewed for a debate after the diffusion. The court refused to grant summary judgement (Paris, 1st ch., 16 March 1989, G.P., 15 June 1989, n° 165-166.)

¹⁴⁵ See e.g. *Thérèse* case; Court of Appeals of Paris, 1st ch. A, Nov. 16, 1992, Juris-data, n. 022985.

¹⁴⁶ P. SIRINELLI, 'L'auteur face à l'intégration de son oeuvre dans une banque de données doctrinale', *De l'écrit à l'écran*, D., 1993, 44è cahier, p. 329.

¹⁴⁷ P.Y. GAUTIER, 1999, n° 359, p. 537.

Courts have detailed the extent of the right of integrity; no modifications are allowed either in the form of the work or in its spirit¹⁴⁸; the work must be preserved in its integrity and details¹⁴⁹. A misrepresentation (presenting the work in misleading, disparaging circumstances, ways or contexts), even if there is no material modification, infringes the right of integrity.¹⁵⁰ French case law prohibits the destruction of the work, which is seen as a violation of the right of integrity.

Literary works

It is against the right of respect to modify the text, the title, the order of the chapters, the preface, the cover page¹⁵¹, or add a preface or a warning to the text.¹⁵² A publisher cannot publish the work in several booklets when the author has accepted the publication in the form of a book.¹⁵³

If an author has authorised to publish excerpts of his work, he can nevertheless object to the publication of excerpts if they distort his “general line of thought.”¹⁵⁴ The publication of a condensed version of the work with poorly reduced photographs violates the integrity right.¹⁵⁵ The publisher is liable if he fails to correct any typing or semantic errors.¹⁵⁶ A collection of

148 For a review of cases, see e.g. A. BERENBOOM, n° 102, p. 134; P.Y. Gautier, 1999, pp. 200-211, A & H.J. LUCAS, 1994, p.332 ff; C. COLOMBET, p. 118 ff. See e.g. Paris, July 28, 1932, *Pages de ma vie (Chaliapine)*, D., 1934, II, p. 139.

149 Paris, March 12, 1936, *Banque de France v. Merson* case, Gaz. Pal., 1936, I, p. 94; Paris June 6, 1979, D., 1981, I, R.85.

150 Paris, 4th ch., Dec. 12, 1995, RIDA 1996, n° 169, 372. Contra: Cass. Civ. I, Feb. 6, 1996, RIDA, 1996, n° 169, 351.

Cass. Civ. I, Dec. 6, 1966, RIDA, 1967, n° 53, 15 (using the title of a work as that of another violates the right of respect of the former work). Contra: Cass. Civ. I, Feb. 6, 1996, RIDA, 1996, n° 169, 351.

151 See Trib. civ. Seine, Dec. 31, 1924, DP, 1925.2.54; Paris 1st c. Dec. 8, 1988, D.S. 1990, somm. 53 obs. Colombet; TGI Paris, Sept. 21, 1994, *St Ex*, RIDA, Jan. 1995. 253; Paris, Feb. 13, 1995, RIDA, Oct. 1995. 241; *Groddeck*, Paris, June 7, 1982, RIDA, Oct. 1982. 178, D., 1983 inf. rap. 97 (removal of a chapter because it was racist); Paris, Sept. 5, 1997, “Sheila”, RIDA, Apr. 1998. 416 (cover page). See Paris District Court, (TGI), July 7, 1993, unpublished, cited by L. GOLDGRAB, 1995, p. 83. About the publication of Coluche's works. Moreover there were errors, alterations and omissions. Court of Appeals of Paris, Sept. 5, 1997, *Ed. La Seine v. A. Chancel*, RIDA 1998, n°178, p. 305 (To transform the presentation of a work of fiction into a autobiographical work is a Distortion; there was also a modification of the title which could introduce a confusion in the public's mind, because it made believe that it was entirely autobiographical). Court of Appeals of Paris, March 25, 1998, *Nataf v. Ed. De Vecchi*, RIDA, 1998, n°178, p. 163 (even if the title is to be decided by the editor, if this title distorts the content of the book, there is infringement of the right of integrity).

152 TGI Paris, Nov. 25, 1987, *Moritz*, JCP, 1988 II, 21062 (added preface); Jan. 7, 1982, RIDA, 1982, 114, p. 177 (disparaging preface). Court of Appeals of Paris, March 25, 1998, *Nataf v. Ed. De Vecchi*, RIDA 1998, n°178, p. 163 (added warning); see also Paris Court of Appeals, March 9, 1989, RIDA, 1990, n°143, p. 310 (a publisher cannot make changes to the work and then insert a warning for the public in the credits).

153 TGI Paris, June 5, 1987, Cahiers du droit d'auteur, Jan. 1988, p. 14.

154 Paris, Oct. 10, 1957, Gaz. Pal., 1958, 1, 27.

155 Paris 4th ch., June 6, 1979, D.S. 1981, inf. Rap. 85.

156 Paris Court of Appeals, Jan. 4, 1988, D., 1989, n° 49.

poems cannot be published in a neglecting way.¹⁵⁷ It was held to be against the right of integrity to publish a very critical work about Albert Camus.¹⁵⁸

Dramatic works

The director of a play must respect the author's conceptions.¹⁵⁹ In particular the director cannot change the play's ending and the scenic indications such as to distort the work.¹⁶⁰ He cannot take a character out of his environment.¹⁶¹ The author can refuse changes made by the director to the characteristics of the characters of the play (for instance make women play instead of men).¹⁶² Secondary authors involved in the creation of a play who claim there is a modification to their work (such as the designer of costumes) must prove the damage.¹⁶³

Musical works

A user cannot change the music or the words.¹⁶⁴ It is prohibited to make cuts in a musical show.¹⁶⁵ Even if a song, included in a movie, was separated in two parts, the movie respected the spirit of the song.¹⁶⁶ A song (or a work in general, such as a picture) cannot be used for an advert or a broadcast which would go against the conceptions of the author and would use the music to commercial ends.¹⁶⁷ In a recent case, the use of the music in the advert had been

¹⁵⁷ Court Of Appeals of Paris, 4th ch. A, Feb. 1, 1993, D., 1993, inf. rap. p. 158.

¹⁵⁸ TGI Paris, 1st ch., Feb. 15, 1984, RIDA, 1984, n° 120, 178, D.S. 1984, inf. Rap. 291.

¹⁵⁹ For case law, see : TGI Paris Nov. 27, 1985, Lucernaire, RIDA July. 1986. ¹⁶⁶ (a comedy of manners was treated like a gulag play).

¹⁶⁰ Court of Appeals of Paris, Sept. 27, 1996, *Centre Culturel Aragon-Triolet v. L'Instant Théâtre*, RIDA 1997, n° 172, p. 201.

¹⁶¹ See Paris May 11, 1988, RIDA, n° 142, p. 344 (Tintin And other characters were included in a play in another context which the author did not agree upon : Tintin becomes in the play a unpowerful and disillusioned character), *confirmed by* Paris 20 Dec. 1990, *Veuve Hergé*, D., 1991. 532 note Edelman.

¹⁶² See *En Attendant Godot*, TGI Paris; 3d ch., 15 Oct. 1992, RIDA, Jan. 1993, n° 155, p.225.

¹⁶³ See Paris May 11, 1965, J.T., 1965, 465, *Dali v. TRM*, *confirmed by* Cass, March 5, 1968, D., 1968, 382 (about "Pelleas and Melisande costumes"). The fact that some accessories had been added to costumes designed by Dali does not give the author a right to say that his work has been distorted, as long as the additions do not result in an inaccurate portrayal of his work). *Contra* Paris, Nov. 20, 1935, DH, 1936. 26.

¹⁶⁴ See *Vesoul from J. Brel*, Paris, June 21, 1988, RIDA, Oct. 1988. 304, D., 1990, somm. 53; Civ. 1st March 27, 1990, Bull. civ., I, n°75 (the RPR had used for its electoral propaganda two paragraphs of a song); TGI Paris, Nov. 26, 1997, RIDA, Apr. 1998, 455 (it is forbidden to dissociate the words and the music to make the public participate to a karaoké).

¹⁶⁵ Court of Appeals of Paris, 25th ch., March 18, 1988, Juris-data, n. 021113.

¹⁶⁶ *J. Ferrat v. Soc. GMT Productions*, cited above.

¹⁶⁷ Court of Appeals of Paris, 1st ch. A, Feb. 20, 1990, *Parlez-moi d'amour*, Juris-data, n. 022451. Paris, March 6, 1991, *Contrex*, D., 1992, somm., 75, obs. Hassler, RIDA, July 1992. 149 (however the court decided that there was a violation of the right of publication and not of the right of integrity); Paris TGI, 3rd ch. 2d sec., March 28, 1991, *Chico Buarque v. Polygram and Schweppes France*; TGI Paris, May 15, 1991, *Massenet v. SARL Foxtrot production*, JCP, 1992 II 21919, obs. X. Daverat; TGI Paris, Oct. 17, 1991, *W. Badarou v. Dièse* (advertisement for 36 15 Playboy); Feb. 5, 1992, *Ne me quitte pas*, RIDA July 1992.205; TGI Paris, Dec. 18, 1992, *EMI v. NRJ* (advertisement for a political party); Paris 4th ch. 14 June 1993, Gaz. Pal., Dec. 31 1993, somm. 15 (image of work incorporated in an erotic film); Paris, Apr. 7, 1994 *Mambo (Badarou and island music v. La Cinq)*, D., 1995, somm. 56, obs. Colombet (erotic advert); Paris, June 26, 1996, *J. Brel*, RIDA, Jan. 1997. 337 (advert for a bank); Paris Sept. 27, 1996, *Myène Farmer and Laurent Boutonnat v. Sony music entertainment*, Jan. 1997. 251, RDPI, Nov. 1996.34 (advert

allowed by the author by contract. The author sued the advertising agency for having modified the text. However the author waived his moral rights in the contract. The court should have therefore ruled that it was contrary to the principle of inalienability of the right of integrity.¹⁶⁸

When only extracts of musical works are used, case law diverges.¹⁶⁹ In one case, a court held that the moral right was not infringed when the advertisement enhanced the author's reputation and at the time of the song's recording, he knew that it would be part of the sound track of an advertisement.¹⁷⁰

Multimedia (digitised) works

Digitisation allows warping, morphing, compositing which can infringe the right of integrity. Similarly, the injection in pay-per-view channels and the possibility for users to interact with the work and thus transform it can violate the right of integrity. It is also possible for the webmaster of an internet site to change the destination of a work, even if it does not modify the work itself.¹⁷¹ A 'first' example of an infringement of the right of integrity (and attribution) by a multimedia producer is the reproduction of photographs in a digitised form in a CD-ROM without the author's authorisation. His name was not mentioned on all photographs and certain photographs were placed in another context.¹⁷²

Works of visual and plastic art

It has been held to infringe the integrity right :

- to modify the work in a way that the author has not consented to.¹⁷³
- to reframe a picture to include it in a multiple photo frame.¹⁷⁴
- to sell a work in separate parts. ¹⁷⁵
- to centre a photograph differently.¹⁷⁶
- to change the environment of a work.¹⁷⁷

for Dolls); Paris Sept. 24, 1997, *Daft punk*, Légipresse, March 1998, III, 33; Cass. civ. 1st, Feb. 24, 1998, *TF1 v. Sony music*, RIDA, July 1998, p. 213.

¹⁶⁸ TGI Paris, Sept. 3, 1997, *D. Berbelivien v. Soc. Agapes*, RIDA 1998, n° 175, p. 231.

¹⁶⁹ There is a violation : TGI Paris, 3d ch. May 10, 1996, RIDA 1996, n° 170, 326; Paris, 1st ch., June 25, 1996, Juris-data, n°022363. No violation : Paris 13d ch. Sept. 28, 1995, RIDA 1996, n° 170, 254; Trib. Com. Paris, 6th ch. Apr. 10, 1995, Juris-data, n°048496.

¹⁷⁰ Paris Court of Appeal, Nov. 10, 1992, *Ed.. 23 v. Guidoni*.

¹⁷¹ P.Y. GAUTIER, 1999, p. 207.

¹⁷² TGI Paris Apr. 29, 1998, RIDA Jan. 1999, p. 321.

¹⁷³ For case law, see : Paris, Feb. 9, 1931, *Cappiello*, GP, 193, 1, 133, DH 1931, somm. 48 (someone had taken and modified a drawing for a chocolate ad); Paris, March 12, 1936, DH, 1936, 257; see also Paris, Oct. 31, 1988, C.D.A. Apr. 1989, 22; Paris 4th ch. March 16, 1989, C.D.A. Apr. 1989, 12 (truncated reproduction of a poster); Dec. 12 1988, *Catena*, RIDA, July 1990, 333 & Civ. 1st Dec. 17, 1991, Bull. civ., I, n° 360 (changing a logo); refrigerator Buffet case (see above).

¹⁷⁴ Paris, June 11, 1990, RIDA, n° 146, p. 293; Paris, Feb. 11, 1981, RIDA, n° 112, p. 126.

¹⁷⁵ TGI. Seine, June 7, 1960; Paris, May 30, 1962, D., 1962, 572; Cass. July 6, 1965, Gaz. Pal., 1965, II, 126 (the owner of a refrigerator's panels decorated by Buffet wanted to sell the Different panels or parts of the refrigerator separately. The Court of Appeals of Paris decided that it is an abuse of his right of ownership in the work for the owner to sell the parts separately. The owner can only sell them in their integrity).

¹⁷⁶ A photograph is reproduced with another type of centring (Maria Callas' photograph), see Court of Appeals of Versailles, Nov. 5, 1998, *Soc. Arkadia v. J.P. Lenoir*, RIDA Apr. 1999, p. 283.

¹⁷⁷ A counter example : Trib. com. Lyon, Apr. 28, 1997, *Cesar*, RIDA, Jan. 1997, 373.

- to eliminate the decoration surrounding a photograph.¹⁷⁸
- to present a drawing upside down.¹⁷⁹
- to damage a sculpture.¹⁸⁰
- to use the work for advertising purposes.¹⁸¹
- for the owner not to take care of the work, be it a private individual or a state authority (e.g. museums).¹⁸² The question of the proof of a correct care is however difficult. For instance, in the case of a fountain which had been deteriorated, the decision seemed to imply that a state authority, as the representant of the general interest, has a stronger obligation to maintain works of art in good condition, which does not imply that individuals should not incur liability for not taking care of copyright works.

In conclusion, in some cases, especially in cases involving two conflicting interests such as the interests of the author and of the owner of the work, courts make a balance between their interests to decide if adjunctions on a work or a modification is severe enough to be violating the moral right. In a 1976 case, a court decided that the municipality which had destroyed a sculpture because of its insalubrity and danger for children, was not liable because its decision was based on considerations of public safety.¹⁸³ For instance, the destruction of a sculpture which was integrated in an architectural ensemble was justified because the conditions of setting up of the work disappeared consequently to a modification of the site.¹⁸⁴ The right of integrity of a sculptor is not violated by the transfer of his statue in another site when the spirit of the work was not linked to the original site.¹⁸⁵

¹⁷⁸ TGI Paris, June 26, 1985, D.S. 1986, inf. Rap. 184 (journal had published a photograph of Dali, had re-entered it and suppressed the decoration surrounding it).

¹⁷⁹ Court of Appeals of Paris, 8th ch., Oct. 21, 1987, Juris-data, n. 026643.

¹⁸⁰ Court of Appeals of Paris, 4th ch. A, Nov. 6, 1990, Juris-data, n. 024687.

¹⁸¹ TGI Paris (réf.), Oct. 19, 1989, Juris-data, n. 044195 (reproduction of the character Becassine, pregnant, for a contraceptive advert); Court of Appeals of Paris, 4th Ch., June 6, 1978, *Soc. Corot v. Veuve Lurçat*, RIDA, Jan. 1979, n° 99, p. 165; Court of Appeals of Paris, 4th Ch., March 13, 1989, Juris-data, n. 020925., Court of Appeals of Paris, 1st ch. B, March 19, 1992, Juris-data, n. 020968 (modification of *Marianne's* face); Court of Appeals of Versailles, 1st ch., July 9, 1992, *RSCG Lorraine v. Marceau*, RIDA 1993, n°158, p. 208 (use of a character created by a mime); Court of Appeals of Paris, June 11, 1997, *Lemaître v. Guerlain*, RIDA, n° 174, 1997, p. 205 (use of the frescoes of the Museum of the Colonies).

¹⁸² See : Cons. préf. Montpellier, Dec. 9, 1936, *Fontaine de Roussillon*, DP, 1936. 3. 68 (a municipality was condemned because he did not take care of a fountain, which was deteriorated by children; then the municipality decided, Due to the awful state of the fountain, to destroy it completely); Paris, July 10, 1975, *Scrive*, D. 1977, 342, RIDA, Jan. 1977, 114 (a supermarket withdraws a fountain from its hall, without justification, there was an abuse of the right of ownership in Destroying the work). For other examples (see GAUTIER, p. 209).

¹⁸³ Trib. Adm. Grenoble, Feb. 18, 1976, RIDA Jan. 1977, p. 116.

¹⁸⁴ TGI Paris, June 24, 1992, Juris-data, n. 045409. Nonetheless, in this case, the destruction was also justified because the owner could not identify the sculptor to inform him of the intent to destroy the work.

¹⁸⁵ Trib. Comm. Lyon, Apr. 28, 1997, *C. Baldaccini v. Soc. Slyci*, RIDA 1997, n° 173, p. 237. His right of disclosure was also exhausted by the first edification of the statue.

Someone who has altered the work must restore it back into its original state (unless the work was destroyed or altered by “force majeure”).¹⁸⁶ The right of respect does not protect the author who wishes to enjoin lawful sales which diminished the painter’s rating.¹⁸⁷

The author of a decoration for an opera is not a co-author of the opera so that he cannot object to the removal of a scene where his decoration appeared.¹⁸⁸ When works have less originality or are works of the applied art, courts are less willing to grant relief for violation of the right of integrity.¹⁸⁹

Architectural works

Due to the inherent utilitarian function of architectural works, there is often a conflict between the architect and the owner, and courts generally apply the balance of interests principle.¹⁹⁰ This principle requires that different factors be considered, such as the state, the place of the work, the author’s will, the gravity of the violation, the commitment of the owner.¹⁹¹ A major part of the doctrine thinks that before destroying the work, the owner should inform the author and offer him the possibility to take back his work, while compensating the owner.¹⁹²

This is illustrated by a famous case : Bull asked an architect to design a building which would be “the reflection of a high technology industry”. The architect designed a glass window with a huge hall. The company then decided to build two rooms inside the hall and modified the first floor decoration. The architect argued it was against his moral rights. The Court of Appeals ruled that his objection was an abuse of his moral right.¹⁹³ The Court of Cassation iterated that the moral right of integrity is not absolute. A balance of the interests or of the rights of the author and of the owner has to be done.

In another famous case, Renault had began building the edifice but in the course of construction, decided it did not want to continue due to technical reasons, so it destroyed the

¹⁸⁶ See e.g. *Munch*, Civ. 1st 3 Dec. 1991, Bull. civ. I, n° 341 (mosaic of a fountain collapses because of a conception mistake of the author; the contracting party must not put the mosaic back to its original state).

¹⁸⁷ Cass. Civ. I, Dec. 3 1968, D.S. 1969, 73; Cass. Civ. I, May 10, 1995, RIDA 1995, n° 166, 285 (failure to exploit a work cannot be actionable on the basis of moral rights).

¹⁸⁸ Trib. Civ. Seine, 1st ch. 1st sec., Oct. 15, 1954, RIDA, Jan. 1955, p. 146; RTDCom. 1955, 137. (F. Léger’s Decorations for an opera of D. Milhaud (Bolivar)).

¹⁸⁹ See e.g. modification of ‘logos’, Court of Appeals of Versailles, 1st ch., June 29, 1987, *Vasarely v. Renault*, Juris-data, n. 044865; Court of Appeals of Versailles, 12th ch., June 16, 1988, RIDA, 1989, n°142, p. 341. See also TGI Annecy, Sept. 10, 1998, *Molinard v. Soc. Les Fromagers Savoyards*, RIDA, Jan. 1999, p. 319. The work was made for advertising purposes, so that the respect of the right of integrity is lessened.

¹⁹⁰ See e.g. Cass. Civ. 1st, Dec. 1, 1987, *Ville de Lille v. Gillet*, RIDA 1988, n°136, p. 137. In this case, the City of Lille had distorted the work of the architect and did not show that there were technical reasons for doing so; See also other case, TGI Paris, March 25, 1993, *Hayama v. Hôtel Nikko*, RIDA July 1993, p. 354.

¹⁹¹ TGI Paris 3d ch., March 25, 1993, RIDA 1993, n°157, p. 354.

¹⁹² See H. DESBOIS, n° 460; C. COLOMBET, 1994, p. 343; P. SIRINELLI, *Le droit moral de l’auteur et le droit commun des contrats*, p. 501-505. For a sculpture, see e.g. Paris, May 14, 1974, R.T.D.Com., 1976, p.351, n° 4 (The author can object to the destruction of his sculpture).

¹⁹³ TGI Paris, March 29, 1989, *Bonnier v. Bull*, J.C.P., Doctr. 1990, 3433, n° 6; Paris, May 15, 1990, J.C.P., Doctr., 1991, 3478, n° 35 and annex n° 6; Cass. 7 Jan. 1992, RTDCom., 1992, p. 376. See A. STROWEL, 1993, p. 502.

building. The Court of Cassation decided that the Court of Appeal was wrong in deciding that there was no moral right on Dubuffet's unfinished work. The Court of Appeals on remand decided that the author can exercise his moral right to prevent the destruction of his work, even if it was uncompleted.¹⁹⁴

Generally the author also has the right to be warned in advance before the execution of a modification. Modifications must be accepted by the architect.¹⁹⁵ Nonetheless, the original architect cannot demand that he be the one chosen by the owner to proceed to the modifications. Courts have nevertheless sometimes obliged parties to come to an agreement, which can lead to give the realisation of the works to the original architect.¹⁹⁶ The construction of a restaurant on the roof of the theatre of the Champs-Élysées did not infringe the architect's right to maintain the integrity of the theatre.¹⁹⁷ The addition of a new construction to an architectural group was held to infringe the integrity right.¹⁹⁸ The requirements of urban planning outweigh the moral rights of an architect.¹⁹⁹ Technical reasons to modify a building were deemed sufficient to outweigh the architect's moral right.²⁰⁰ Economic reasons can also justify certain modifications.²⁰¹ The necessity to obtain an authorisation to build a building prevails upon the moral right.²⁰² The architect cannot demand the intangibility of the work because it would violate the right of ownership and the principles of the freedom of commerce.²⁰³

Status of the employed author

The employer can impose on the author certain constraints justified by aesthetic or financial reasons. The author cannot in these cases, object to such modifications, and invoke his moral right of integrity.²⁰⁴

¹⁹⁴ Cass. Jan. 8, 1980, *Dubuffet*, D., 1980, 89, note B. Edelman; Versailles, July 8, 1981, *somm. Comm.*, 1982, 45, obs. C. Colombet, *confirmed by Cass. Civ.*, I, March 16, 1983, RIDA 1983, n° 117, 80. In the *Fresques de Juvisy* case, (Trib. Versailles, June 23, 1932, D., 1932, p. 487, *reversed* Paris, Apr. 27, 1934, D., 1934, p. 385) the owner of property has full power to dispose of it and this destroy it (frescoes had been painted on a chapel's wall, because they hurt the sacred character of the place the priest painted the wall without informing the author). This decision has little presidential value due to its specific circumstances. Since then the Dubuffet case has occurred.

¹⁹⁵ Trib., March 29? 1989, J.C.P., 1990, I, 3433, Annexe I, n° 6. Contra R. PLAISANT & A. LUCAS, in NIMMER, FRA-102 : these authors believe that the architect does not necessarily have the right to be consulted before changes are made to their works.

¹⁹⁶ Trib. Paris, March 25, 1993, RIDA, 1993, n°157, p. 354.

¹⁹⁷ TGI Paris, 1st ch., Apr. 4, 1990, *Perret*, RIDA 1990, n°145, 386, *confirmed by* Paris 1st ch. July 11, 1990, RIDA, 1990, n° 146, 299.

¹⁹⁸ Riom, May 26, 1966, J.C.P., 1967, II, 15183.

¹⁹⁹ Cass. Crim. June 3, 1987, D.S., 1987, 301.

²⁰⁰ Cass. Civ. I, Dec. Or Apr. (?) 1, 1987, RIDA 1988, N° 136, 137, D.S., 1989, *somm.* 45.

²⁰¹ TGI Paris March 29, 1989, cited above.

²⁰² Cass. Crim. June 3, 1986, D, 1987, 301. See also Crim. May 6, 1986, D., 1987 *somm.* p. 150 (pornographic works are protected but there are some reserves if the movie shows perversions and violence).

²⁰³ Paris 1st ch., May 15, 1990, RIDA, Jan. 1991, p. 311.

²⁰⁴ Cass. Apr. 7, 1987, D., 1988, *Jur.* 97.

4. The right of modification/adaptation

The adaptation of an original work into another genre will in a certain measure infringe the moral right of integrity of the author.²⁰⁵ This measure or limit between simple adaptations and distortions of the work is difficult to draw. Two different tendencies are found between courts (the first trend being however more generalised):

i) the adapter (and a translator) has a rather large freedom of adaptation. He must respect the spirit of the work but is not obliged to respect the word of the text. As a result, the original author must prove the fault of distortion.

For instance, if someone utilises the same “pattern” of events but without the same “spirit” than in the original work, it will not be considered an adaptation.²⁰⁶ If there are differences between the two works or if the “scenario” is too “typical” to the genre, then there will not be an adaptation either.²⁰⁷ In sum, if a modification is very slight or if it is justified, the court must look if it distorts the spirit of the work, if it does not, then there is no violation.²⁰⁸

ii) there is distortion of the work when it is adapted, because it violates the author’s dignity. The spirit and the character of a work must be respected.²⁰⁹ The director of a play or a choreographer must respect the work when they adapt it for the scene.²¹⁰ Borrowing some musical notes can be an adaptation²¹¹, unless it is parody.

²⁰⁵ P.Y. GAUTIER, 1999, n° 142.

²⁰⁶ Civ. Seine, Dec. 19, 1928, *Le train de 8 h 47*, DH, 1929, p. 76.

²⁰⁷ *Boubouroche* case : Civ. Seine, July 7, 1908; Paris May 12, 1909, D., 1910, 2, p. 81, *rejected by* Cass. June 27, 1910, D., 1910, I, 296; *Normandie Niemen* case : TGI Seine, Jan. 9, 1962, RIDA, Apr. 1962, p. 135; *Françoise Sagan v. Jean Hougron* case : Paris, July 7, 1981, RIDA, Jan. 1982, p. 188, *rejected by* Cass., Feb. 23, 1983, Bull. civ. II, 1st part, n° 94, p. 65; *La bicyclette bleue*, TGI Paris, Dec. 6, 1989, RIDA, Apr. 1990, p. 146; Paris, Nov. 21, 1990, RIDA, Jan. 1991, p. 294 and 319; Cass. Feb. 4, 1992; Versailles, Dec. 15, 1993, RIDA, Apr. 1994, p. 255. See also A. BERENBOOM, p. 107 ff.

²⁰⁸ See e.g. Court of Appeals of Versailles, 12th ch. June 16, 1988, RIDA, Oct. 1989, n° 142, p. 341. See also TGI Annecy, Sept. 10, 1998, *Molinar v. Soc. Les Fromagers Savoyards*, RIDA, Jan. 1999, p. 319.

²⁰⁹ See TGI Paris, Jan. 7, 1969, *Allain*, RIDA, Apr. 1969, 166 (distortion of *Fantômas*); Apr. 18, 1979, *Christopher Frank*, RIDA, Oct. 1979, 175 (appeal : Paris, Apr. 29, 1982, RIDA, Oct. 1982, 172 (manifest distortion of a detective novel); TGI Paris, 3d ch., Dec. 1, 1983, RIDA 1984, n°120, p. 162; TGI Paris, 1st ch., Nov. 27, 1985, *Lurcenaire*, RIDA 1986, n°129, p. 166 (comedy in a sanatorium was transformed into a political satire and the characters are in a psychiatric gulag); TGI Avignon, Nov. 8, 1988, *Gens de Mogador*, RIDA, July 1989, 278.

²¹⁰ See for instance, in Belgium, *La Veuve Joyeuse*, adapted by Béjart, Bruxelles, Sept. 29, 1965, J.T., 1965, p 561. (See comments in the part on Belgium). See *Lurcenaire*, cited above. Samuel Beckett prevented his play ‘Fin De partie’ as adapted by the Comédie Française, see *Le Quotidien de Paris*, Oct. 22-23, 1988, p. 25.

²¹¹ Aix, June 3, 1957, RIDA, July 1957, p. 132 (six notes had been borrowed); TGI Paris 3D ch., Feb. 20, 1976, RIDA Apr. 1977, p. 147, Paris, 4th ch., Apr. 29, 1982, RIDA Oct. 1982, p. 172. TGI Paris (réf.), Feb. 7, 1984, RIDA Apr. 1984, 174, TGI Paris, Nov. 27, 1985, RTDCom., 1986, 397.

As regards particular contracts of adaptation, some clauses can without legal problems compel the contracting party to respect the spirit of the work or oblige him to only modify the work if the technique requires it.²¹²

²¹² TGI Bordeaux, Jan. 15, 1951, *Le don d'Adèle*, Gaz. Pal. 1951, I, Jur., p. 372; Paris, July 2, 1957, D., 1957, p. 698 ff.

5. The right to retract (droit au retrait et droit au repentir)

a. Legislation

The author can terminate a transfer, either to modify the work (droit de repentir) or to put an end to its exploitation (droit de retrait) if he justifies moral reasons to do so (art. L. 121-4).²¹³ For a great majority of authors, the right of retract can be used in any field, not only in the publishing sector. The author is the only judge of the moral reasons why he wishes to withdraw his work.²¹⁴ The reasons must be moral or intellectual, not financial. If they are financial, the author misuses his right of retract.²¹⁵ The author cannot expropriate the owner of the work. Indeed the right of retract is not the corollary of the right of disclosure.²¹⁶

This right to retract has a minor impact because the author must indemnify in advance his contracting party for the damage due to the termination of the contract (i.e. *damnum emergens* and *lucrum cessans*²¹⁷). Consequently, the author is never willing to exercise his right.²¹⁸ Furthermore, if the author wishes to re-exploit the work, he must offer this opportunity to his first contracting party in priority and at the same conditions. This right of priority is applicable in any case, even if the work has been slightly modified by the author. If this were not the case, it would be too easy to circumvent the law.²¹⁹

b. Case law

An author cannot exercise his right of retract because he thinks that the remuneration for the work is too small.²²⁰ The contracting party can pursue the exploitation of the work as long as he is not indemnified by the author.²²¹ It has been held that, in case the author misuses his right of retract, the contracting party can override the author's decision.²²² An author who is not satisfied of the prologue of his book, does not use his right of retract but breaches simply his contract, so that he must indemnify the publisher.²²³ The right of retract does not give the author the right to withdraw a painting from a museum or make some changes to a painting.²²⁴

6. The right of access (Droit d'accès)

213 A & H.J. LUCAS, 1994, contra A. DESBOIS, *Traité*, n°393, C. COLOMBET, 1994, n° 161. These two latter authors believe that repent refers to the breach of contract that occurs before the publication and retract refers to the breach occurring after the publication. However this Distinction is not crucial as all authors agree that the author can take back his work and modify it. See F. POLLAUD-DULIAN, *RIDA* 1990, p. 181.

214 Trib. Civ. Seine, Oct. 27, 1969, *RIDA*, 1970, Jan., p. 235.

215 Paris, Jan. 13, 1993, *Juris-data*, n°020603. Cass May 14, 1991, *J.C.P.*, 1991, II, 21760.

216 C. COLOMBET, 1994, p. 132.

217 P.Y. GAUTIER, p. 182. Court of Appeals of Paris, 4th ch. A, Jan. 13, 1993, *Riou v. Delthil*, *Juris-data*, n. 020603. However it has been judged that a part of the damages can be left for the contracting party to pay if the changes made by the author exercising his right of 'repent' could be expected by the contracting party, see Cass. Soc. May 8, 1980, *RIDA*, Jan. 1981, n. 107, p. 148.

218 A. STROWEL & J.P. TRIAILLE, 1997, p. 47, note 170. A. LUCAS, 1998, n° 468, p. 236.

219 A. & H.J. LUCAS, 1994. Contra, DESBOIS, 3rd Ed., n°401.

220 Cass. 1st. Civ., May 14, 1991, *Chiavarino*, *Bull. Civ.*, I, n. 157.

221 TGI Seine, 3d ch. Oct. 27, 1969, *Sartre*, *RIDA* Jan. 1970, n° 63, p. 235.

222 See *Riou v. Delthil* & *Chiavarino* cases.

223 Court of Appeals of Paris, Apr. 7, 1978, *D.*, 1978 somm. p. 303.

224 Paris, Apr. 19, 1961, *RIDA*, Jan. 1962, p. 119.

a. Legislation

The author has a right to access his work (art. 111-3 CPI). If the owner of the work prevents abusively the exercise of the author's right of disclosure, the Tribunal of First instance can take any appropriate measure.

b. Case law

A legal person refused to give access to the author to the negative of the author's unfinished film, arguing that the right of disclosure can only be exercised by the author once the film is completed. The argument was not accepted by the court which found a notorious abuse of the legal person's ownership right on the material medium embodying the work.²²⁵ In another case, the Bibliothèque Nationale de France did not refuse A. Artaud's heir to access manuscripts of the author but subordinated the access on the general rules on communication of manuscripts and on the acceptance of the legacy. This behaviour was not an abuse.²²⁶

7. Abuse of moral rights

a. Legislation

It is generally accepted that there can be an abuse of the moral right²²⁷ so that French case law and doctrine are against the absolute character of moral rights²²⁸. Moreover, as has been mentioned, the author cannot exercise his moral rights to protect his economic rights (e.g. he cannot use his right of retract to financial ends because these ends are not connected to the moral right).²²⁹ Certain authors however still defend the idea that moral rights (especially the right of integrity) are discretionary.²³⁰

b. Case law

An author can also misuse his moral right of attribution, in affirming inexact facts about his works which could depreciate their value and be detrimental for the seller.²³¹

²²⁵ Court of Appeals of Paris, Sept. 29, 1995, *Les Films de l'Atalante*, RIDA, 1997, n°168, p. 259.

²²⁶ TGI Paris, Jan. 5, 1995, *S. Malaussena v. Bibliothèque Nationale De France*, RIDA, n°168, 1997, p. 267.

²²⁷ C. DOUTRELEPONT, p. 70-71. Cass civ. May 14, 1945, J.C.P. 1945, II, 2835, D., 1945, 85.

²²⁸ A. LUCAS, 1998, p. 246, n° 489, P. SIRINELLI, note under Cass. 14 May 1991, RIDA 1992, n° 153, p. 285, C. COLOMBET, *Propriété littéraire et artistique*, Dalloz, Paris, 6th ed., 1992, n°133, P.Y. GAUTIER, *Propriété littéraire et artistique*, Paris, PUF, 1991, p. 153. Contra F. POLLAUD-DULLIAN, *Abus de droit et droit moral*, D., 1993, chr., p. 98 & Moral rights in France through recent case law, RIDA, 1990, p. 146 ff.

²²⁹ Cass. Dec. 3, 1968, D., 1969, p. 73, Cass. May 14, 1991, RIDA 1992, n° 153, p. 272.

²³⁰ A. KEREVER, *Le droit moral de l'auteur*, Geist und Geld, pp. 79-89. See also F. POLLAUD-DULLIAN, op. Cit. See also Cass. June 5, 1984, Bull. Civ. 1984-I n° 184, RIDA Apr. 1985, p. 150.

²³¹ Court of Appeals Paris, 8th ch., A, Nov. 7, 1990, Juris-data, n. 024691 & Cass. 1st civ., Dec. 2, 1992, *Giacometti*, J.C.P., 93, IV, 408, Bull. Civ., I, n. 300. See also *Bonnier v. Bull*, above; see also Court of Appeals of Paris, May 31, 1989, *Bouchard*, Cahiers du droit d'auteur, Jan. 1990, p. 14; D. 1989, inf. Rap. p. 199 (use of sculpture for advertising purposes, however there was no violation of moral right because the author was arguing on economic grounds).

8. Classification of authors rights in different categories - relationships between economic and moral rights

8.1. Rights of adaptation and integrity

Notwithstanding the transfer by the author of his right of adaptation, the adapter must respect the right of integrity. In other words, he must find “a new expression of the thought behind a work without distorting its character”.²³² But courts can “take into account transfers of rights of adaptation in limiting or precluding remedies against appropriate adaptations”.²³³

8.2. Rights of disclosure and of communication to the public

See right of disclosure. Disclosure can take place before or after the conclusion of a contract of exploitation of a work. Disclosure can take place even if there is no economic exploitation of the rights.

²³² Cass. Civ. I, Nov. 22, 1966, D.S. 1967.

²³³ Paris, 1st ch., May 31, 1988, *Les dialogues des Carmélites*, RIDA, 1989, n° 139, 183; TGI 1st ch., Nov. 27 1985, RIDA, 1986, n°129, 166. Cass. Civ. I, Dec. 17, 1991, RIDA, 1992, n° 152, 190.

III. Restrictions on moral rights protection introduced with respect to certain work categories and certain categories of rights holders

1. Software

Patrimonial rights belong to the employer ab initio but it seems that moral rights remain always vested in the author (art. 113-9), except those of adaptation and withdrawal.²³⁴

1.1. The right of disclosure

The general principles apply, so that the author remains in principle the holder of his right of disclosure.

1.2. The right of integrity

Like in Belgium, the right of integrity is limited to instances of prejudice to honour or reputation (art. L. 121-7-1°). The author must prove the prejudice. Moreover the right of respect is not totally guaranteed since the author cannot object to adaptation.²³⁵

1.3. The right of retract

The right of retract does not exist for software (art. L. 121-7-2°). This means that the author cannot exercise this right.

2. Audio-visual works

Audio-visual works are works of collaboration (see below). Authors rights can only be exercised when the audio-visual work is completed (art. L. 121-5). Thus the authors cannot exercise their moral rights before the 'final cut'.²³⁶

2.1. The right of disclosure

a. Legislation

The right of disclosure is somewhat restricted. The work is deemed completed when the director, or possibly the co-authors, and the producer have come to an agreement (final cut). This means that every author can negotiate modifications he wishes to do to the work when it is still unfinished. Although the preparative texts insisted that co-authors should have to be consulted, if they reach no agreement between them, the final word belongs to the director.²³⁷ The consent of a co-author should only be required when he has made a 'decisive' contribution.²³⁸

If one of the co-author, is unable (force majeure) or does not want to complete the work, the producer can use the contribution and can employ other authors to complete the work (art. L. 121-6). The author can nonetheless use his contribution in another genre (art. L.121-6 in fine and 113-3).

b. Case law

²³⁴ J.A.L. STERLING, 1998, p. 286; E. MICHAU, 'France' in H.D.J. JONGEN - A.P. MEIJBOOM, *Copyright software protection in the European Community*, Deventer-Boston, Kluwer, 1993.

²³⁵ E. MICHAU, 'France' in H.D.J. JONGEN - A.P. MEIJBOOM, n° 1.6. 'Moral rights'.

²³⁶ see e.g. Nov. 12, 1986, RIDA, Jan. 1987, p. 247.

²³⁷ JOLIBOIS, Rapport, Sénat, Deuxième lecture, RIDA, 1986, n°127, p. 282.

²³⁸ C. COLOMBET, 1994, p. 164, n° 178.

An author who has contributed to a film, but without completing it or approving the final version cannot object to its exploitation.²³⁹ When the transferee of the economic rights of a movie prevents, with fault, the sale of the movie to a TV station, there is infringement of the right of disclosure.²⁴⁰ In another case, the exploitation of a movie was ceased in 1981 but some years later, some co-authors wished to continue exploitation. Other co-authors refused to disclose the work abusively because they did not consider the work as of bad quality and did not give reasons for the non-disclosure, especially when they had accepted that the work be disclosed between the date of completion and 1981.²⁴¹

2.2. The right of attribution

a. Legislation

General rules apply.²⁴²

b. Case law

If the author is merely described as a technician among the credits of a documentary film when the public is not aware that the film is an abridgement of a longer one which the author has created, it infringes his right of attribution.²⁴³

2.3. The right of integrity

a. Legislation

Modifications to the last version are possible only with the consent of the director, possibly of the co-authors and the producer (art. L. 121-5, §3; L. 132-22).²⁴⁴ Authors must be consulted before the transfer of the audio-visual work on another medium for the purpose of another mode of exploitation (such as a video tape) (art. L.121-5 §4). Authors can also prevent the distortion of their contributions.²⁴⁵ The master copy of the movie cannot be destroyed (L. 121-5, § 2).

²³⁹ Cass. Civ. I, Feb.; 7, 1973, D.S. 1973, 363. The author however had a right to damages.

²⁴⁰ TGI Paris, Oct. 10, 1988, Cahiers du droit d'auteur, Feb. 1989, p. 11.

²⁴¹ TGI Paris, Dec. 13, 1989, *Vega productions et al. v. Coherie Vian & Doppagne*.

²⁴² See e.g. TGI Paris 3d ch. Feb. 21, 1979, RIDA, Oct. 1979, p. 151.

²⁴³ Cass. Civ. Jan. 17, 1995, *Collet v. Blaise*, cited by R. PLAISANT & A. LUCAS, in NIMMER, FRA-94, note 21. Contra, Paris, 4th ch. Dec. 12, 1995, RIDA 1996, n° 169, 372 (definition of film credits is up to the producer).

²⁴⁴ TGI Paris, 1st ch., March 14, 1990, D., 1991. S.C. 95. See also below.

²⁴⁵ C. COLOMBET, 1994, p. 134, n°177.

b. Case law

It has been held contrary to the right of respect to :

- colour a black and white movie²⁴⁶
- make cuts in the movie²⁴⁷ or delete several episodes of a series²⁴⁸
- make cuts in a report²⁴⁹ or in a movie to broadcast it into several episodes²⁵⁰ or conversely to broadcast all in one go the content of two separate episodes, while the author meant to broadcast them separately²⁵¹
- make cuts or shorten or reduce a movie for reasons of exploitation in other countries, unless the author gives his consent²⁵².

As for the interruptions made for purposes of showing ads, the Directive "Television without borders" allows it under strict conditions. Thus, breaks allowing the broadcasting of adverts can be made but the authors' consent is needed to know at which moment the cuts will be made.²⁵³

- tententiously present extracts of a movie²⁵⁴
- add a warning to the movie²⁵⁵
- add a music to the movie "the Kid" of Charlie Chaplin without his consent²⁵⁶
- add the logo of a TV channel during the diffusion of the work²⁵⁷
- modify the script and publish it without the authorisation of the author²⁵⁸.

²⁴⁶ See TGI Nov. 23, 1988, *Huston v. La Cinq*, Rev. Crit. DIP, 1989. 372 and Paris, July 6, 1989, Rev. Crit. DIP, 1989, 706 and Cass. civ. 1st, May 28, 1991, JCP, 1991 II, 21731, RIDA, July 1991, p. 197 and Versailles, Dec. 19, 1994, RIDA 1995, n° 164, 389. On remand, the Versailles court decided that authors shot the film in black and white by deliberate aesthetic choice and colouring is therefore a violation.

²⁴⁷ e.g. Paris, July 1, 1991, RIDA Jan. 1992, somm. comm., p. 205; TGI Paris 1st ch. March 14, 1990, *Sautet v. M6*, Juris-data, n° 43056. In like manner, a movie theatre manager cannot make cuts in a movie, see Trib. Civ. Seine, Apr. 6-7, 1949, Gaz. Pal., 11-13 May, 1949.

²⁴⁸ TGI Paris, 1st ch. March 14, 1990, *La Cinq v. Misserly*, RIDA 1990, N° 146, 320. But an author who leaves the choice of episodes to be televised to the producer, has no remedies, see Paris, 1st Ch.A, Oct. 30, 1990, Juris-data, n°024686.

²⁴⁹ TGI Paris, March 29, 1990, *Csrts Lavaux et al. v. La Cinq*; Paris, March 4, 1991, D., 1992, somm. 74.

²⁵⁰ TGI Paris May 24, 1989, RIDA, Jan. 1990, *Plouffe*, confirmed Paris, Nov. 26, 1990, Images juridiques, 15 Jan. 1991, p. 2; Paris 18 Dec. 1989, "Cremer", D., 1990, somm. 353.

²⁵¹ Paris, March 4, 1991, *La Cinq v. Misserly*, RIDA, July 1991, p. 56.

²⁵² TGI Paris, March 23, 1994, *Diên Biên Phủ*, RIDA, Apr. 1995, 401.

²⁵³ e.g. Nov. 15, 1987, Images Juridiques, n° 4, pp. 1 ff; Paris, Nov. 26, 1990, Images juridiques, n° 74, p. 2; TGI Paris, May 24, 1989, *Carle v. TF1*, RIDA, Jan. 1990, p. 353 (about the transmission of the movie 'Les Plouffes'). Moreover a French statute of January 17, 1989 makes it unlawful to interrupt a movie more than once. See A & H.J. Lucas, 1994, p. 338.

²⁵⁴ Court of Appeals of Paris, 1st ch. Dec. 14, 1987, Juris-data, n° 028411.

²⁵⁵ Cass. 1st civ. Apr. 4, 1991, Bull. Civ. I, n. 120, *confirming* Paris 4th ch. B, March 9, 1989, D., 1990, S.C.55.

²⁵⁶ Paris, Apr. 29, 1959, D., 1959, 402.

²⁵⁷ TGI Paris, June 29, 1988, *La Cinq v. Marchand*, RIDA, Oct. 1988. 328, JCP, 1989, *confirmed by* Paris Oct. 25, 1989, D., 1990, somm. 54; TGI Paris 1st ch. 1st sec., Sept. 13, 1989, unpublished. Paris, March 4, 1991, RIDA, July 1991, p. 156.

²⁵⁸ TGI Paris, Feb. 17, 1999, *Gaumont c. Clavier*, cited in RIDA, n° 181, 1999, p. 259.

It has been judged that a broadcasting organisation cannot be forced to complete a series of TV realisations.²⁵⁹ In a famous case, the author of the movie 'Thérèse', objected to its projection before a debate on faith. In his view, this debate could denature the film and classify it into the religious genre while he had conceived it in a profane approach. For the court of Appeals of Paris, there was no evidence that the public would have been influenced by the fact there was a debate after the projection.²⁶⁰

The use of the title of a movie for a company's business is a violation of the author's moral right because it depreciates the movie. The court construed the notion of distortion quite extensively because it found the movie's title was not original. But as the movie was original, the mere taking of its title by the business company was detrimental to the movie's author.²⁶¹ The translation of the original version of a film into another language must respect the text and the work in general. Alterations (such as modifications of the commentary, omission of certain dialogues, mistakes in the choice of dubbing voices) in the French version infringe the original version.²⁶² All these violations must be accompanied by the proof by the author of a damage.²⁶³

Authors of audio-visual works cannot use their moral right to violate another's author moral right.²⁶⁴ In like manner, the co-authors cannot distort another co-author's contribution.²⁶⁵

3. Radio works

Art. L.121-6 applies to radio works. For the rest, general rules apply.

4. Works of collaboration, collective works and composite works

Works of Collaboration

²⁵⁹ TGI Paris 1st ch., Dec. 14, 1983, RIDA, Apr. 1984, 172, *reformed by* Court of Appeals of Paris 1st ch., March 5, 1986, RIDA, July 1986, p. 163 (the court only admits the cancellation of the contract). The TGI had decided that only a n execution in nature (i.e. to complete the realisation) could respect the moral rights because an unfinished work is presumed created, so that it must benefit from the right of respect like any other work. Naturally if the author prefers to only have damages for non realisation by the broadcasting organisation, there is no problem (see e.g. Cass. 1st civ., Feb. 24, 1987, *Michel de Saint-Pierre v. A2*, RIDA, July 1987, p. 186.)

²⁶⁰ Court of App. Paris, March 16, 1989, Gaz. Pal., June 1989, p. 13. The court refused the analogy with the preface, see above in literary works Nov. 25, 1987.

²⁶¹ Court of Appeals of Versailles, March 19, 1998, *R. Laloux v. Chronopost* (about the title 'Les Maîtres Du Temps'), RIDA 1998, n° 177, p. 171.

²⁶² Court of Appeals of Paris, Oct. 13, 1998, *L. Mouzas v. Soc. Catalogue*, RIDA, Apr. 1999, p. 289.

²⁶³ See : Trib. civ. seine (réf.) Aug. 24, 1951, JCP 1952, II, 6819; Paris, March 16, 1989, GP, 1989 1. 438, (rejects a demand to not show "Thérèse"), TGI Paris Apr. 23, 1997, *Blier v. BNP*, RIDA, July 1997, 366. In addition, penal sanctions can be ordered for infringement of the moral right (see Cass. cited in A. FRANÇON, 'Chronique de France', RIDA July 1999, p. 225 : unauthorised disclosure).

²⁶⁴ See Paris, Nov. 12, 1986, *Modiano*, RIDA, Jan. 1987. 247, TGI Paris, Jan. 3, 1968, *Léo Ferré*, RIDA, Apr. 1968, 125, July 1969.3.

²⁶⁵ Civ. Apr. 13, 1959, *La bergère et le ramoneur*, D., 1959, 325

A work of collaboration is a work to the creation of which several natural persons have collaborated (art. L. 113-3). The contributions of the several authors have been united to contribute to the creation of one single work. A work of collaboration can be indivisible (e.g. two authors write the same book) or divisible. In this latter case, authors can exploit their contributions separately if this does not prejudice the exploitation of the common work.

All authors must agree to disclose the work and if one of them misuses his right (for example by refusing to disclose), the others can act against his refusal (L. 113-3 and L.121-3).²⁶⁶ They can exercise their rights of respect and attribution separately.²⁶⁷ But they can exercise their moral rights only on the final version of work.²⁶⁸ The name of the authors must be mentioned.²⁶⁹ The right of retract can be exercised by the author of a work of collaboration.²⁷⁰ It seems that the co-author must not indemnify the other co-authors.²⁷¹

Collective works

A collective work is a work created under the initiative of a natural or legal person, which publishes it and discloses it under its direction and name and in which the personal contribution of the authors which collaborate to the completion of the work, melts in the whole for which it has been conceived (it is not possible to attribute to each of these authors a distinct right on the whole) (art. 113-2).²⁷² Moral rights must be respected, like in any other work. For instance, the name of the authors must be mentioned.²⁷³ It is up to the person who takes the initiative to act against violations of moral rights in the interest of the authors. The authors can take action, together with him. If this person is inactive, the authors can act, in their own name, against a personal prejudice that they suffer, each one for his contribution.²⁷⁴ Indeed, the fact that the promoter has moral rights on the different contributions does not prevent the author from using his moral right on his contribution. If one of the authors decides to take action, the others must prove that the modifications were useful for the work.²⁷⁵

However, when the work is still “under construction”, the author cannot use his moral rights and must accept the corrections if they are justified. An author can be replaced if he does not want

²⁶⁶ P.Y. GAUTIER, 1999, n° 392. See Civ. 1st, May 19, 1976, Atlan, RIDA, Jan. 1977, 104, RTDcom., 1977, 326 and Amiens, Apr. 17, 1978, D., 1978, 557.

²⁶⁷ See C. COLOMBET, 1994, p. 133, n°176. TGI Paris, May 24, 1989, *Les Plouffes*, RIDA, Jan. 1990, 353; May 15, 1991, *Massenet*, JCP, 1992, II, 21919; Sept. 10, 1992, *Atalante*, RIDA, Jan. 1993, 211; Paris March 14, 1994, D., 1994, IR 116; Paris 13 Nov. 1996, *Pecnard*, D. 1997, somm. 1995, RIDA, Apr. 1997, 288.

²⁶⁸ E. LAUVAUX, ‘France’, ‘Moral rights as obstacles to the exploitation of musical works’, in C. VAN RIJ, p. 77.

²⁶⁹ TGI Paris, 3d ch. June 28, 1983, RIDA Oct. 1983, n.118, p. 251; TGI Paris (réf.), June 7, 1989, Juris-data, n° 042158.

²⁷⁰ Court of Appeals of Bordeaux, May 24, 1984, D., 1986, somm. p. 181. See also C. COLOMBET, obs. under this judgement; DESBOIS, *Traité*, n° 647; P. SIRINELLI, p. 684.

²⁷¹ F. POLLAUD-DULIAN, 1990, p. 187; contra H. DESBOIS, *Traité*, n° 647.

²⁷² See A. STROWEL, 1997, p. 164.

²⁷³ Cass. 1st civ. Apr. 15, 1986, RIDA, Oct. 1986, n. 130, Bull. Civ. I, n°89, p. 90.

²⁷⁴ The author of individual photographs inserted into a catalogue has the right to be mentioned, Versailles, 3d ch., May 20, 1988, D., 1989, S.C.44; Civ. 1st Oct. 4, 1988, D., 1989 somm. p. 50 (the author is not obliged to call the co-authors at the action); TGI Paris, May 15, 1991, JCP G. 1992-II-21919.

²⁷⁵ P.Y. GAUTIER, 1999, n° 387, p. 578. See e.g. civ. 1st Oct. 8, 1980, RTDcom. 1981.87; Cass. civ. Dec. 16, 1986, D., 1988, 173; TGI Paris, May 17, 1984, *Larousse*, RIDA, Oct. 1984, 215.

to complete the work (art. L. 121-6). The author can object to modifications that the contracting party would make to his contribution in the collective work.²⁷⁶ However, due to the nature of the collective work, the final word is left to the person who takes the initiative and moral rights of authors are more restricted because there must be a necessary co-ordination of all elements of the collective work.²⁷⁷ Courts have nevertheless restricted the hypotheses in which a legal person can be author of a collective work.²⁷⁸

Composite works

A composite work consists in the creation of a new work including some elements of pre-existing works or entire pre-existing works without the collaboration of the previous author(s). Therefore, the agreement of the previous author(s) is necessary (art. L. 113-2, L. 112-3 and L. 113-4). The previous author(s) and the authors of the derived work have concurrent rights on the derived work. The right of retract applies to composite works, as both the author of the original and the derived work benefit from art. L.121-4. The author can object to distorting adaptations of his pre-existing work, for instance when an anthology is made in a tendentious way.²⁷⁹

²⁷⁶ Cass. Civ. Oct. 8, 1980, RIDA, Apr. 1981, p. 156.

²⁷⁷ Cass. Civ. 1st, Dec. 16, 1986, *Champaud v. ELA*, RIDA, July 1987, p. 183; Paris 4th ch.B, Nov. 6, 1986, *Larousse de la Musique*, D., 1988, S.C. 205. However the publisher of a newspaper cannot denature the spirit of an article, see Court of Appeals of Paris, 1st ch., May 9, 1989, Juris-data, n° 022735.

²⁷⁸ Com. Apr. 7, 1987, RIDA, n°133, July 1987, p. 192.

²⁷⁹ TGI Seine, Apr. 15, 1964, D., 1964, 746 (parts tendentiously chosen out of "Les Misérables").

5. Performers moral rights

a. Legislation

Performers' moral rights are narrower than author's moral rights. Performers enjoy the rights of attribution and of integrity (respect of the performer's name, capacity and performance : art. L. 212-2) but not the right of disclosure nor the right of retract.²⁸⁰ "Artistes de complément" ("complementary artists") do not enjoy moral rights. However in the musical field, no artist is "complementary".²⁸¹ Thus all musicians are protected performers. Indeed the Act of July 3, 1985 defines the "artiste de complément" as a silent extra. This cannot exist in the musical field...

The rights are inalienable, imprescriptible and attached to the person of the performer, they are transmitted to his heirs. It appears that all performers enjoy this protection in France (see e.g. Rostropovitch case).²⁸² The Minister of Culture may take action to protect neighbouring rights in absence of a successor (art. L. 211-2).

b. Case law

Already in the 30's, had the French courts recognised moral rights to performers²⁸³. Courts had been able to penalise abuses on the basis of the rights of personality.²⁸⁴ In the Mylène Farmer and Badarou cases²⁸⁵, courts based their judgements on the fixation and reproduction rights of performers, because in these cases, they did not authorise the fixation and reproduction for publicity purposes. The integrity of an actor is not violated by the use of his interpretation for a bank commercial, as he accepted this use while he was alive.²⁸⁶

²⁸⁰ A. LUCAS, 1998, p. 252, n° 502. However, some courts have recognised a right of disclosure, see Paris Dec. 18, 1989, D., 1990 somm. 353; D. 1991, somm. 101; Cass. 1st civ., July 16, 1992, D., 1993 jp. 220; Paris, Nov. 10, 1992, D., 1993, jp. 418.

²⁸¹ TGI Paris April 23, 1992 (P. Dutour had performed the trumpet solo in 'Mademoiselle chante le blues', sung by Patricia Kaas). The artist was not named on the cover of the CD.

²⁸² *Rostropovitch v. Erato Disques*, TGI Paris, Jan. 10, 1990, n°145 RIDA, 368 (superimposing on extraneous sounds). See also E. LAUVAUX, 'France', in C. VAN RIJ, 1995.

²⁸³ See case law in A. BERENBOOM, 1995, n° 218, p. 272; P. CHESNAIS, 'France', in S.M. STEWART, p. 394.

²⁸⁴ TGI Paris, May 14, 1974, *Carole Laure*, RIDA, July 1974; TGI Paris, Apr. 20, 1977, RIDA Apr. 1978, p. 117 (pornographic scenes had been added in a movie without the performers' consent).

²⁸⁵ See above.

²⁸⁶ TGI Paris, Apr. 23, 1997, *Blier v. BNP*, RIDA, July 1997, p. 237.

IV. Alienability and waiver of moral rights

a. Legislation

Art. 121-1 al. 3 provides for the inalienability of the moral rights²⁸⁷ which means that the right cannot be transferred by contract.²⁸⁸ Partial waivers are nevertheless allowed. Art. 132-11 does not allow waivers in advance but posterior waivers are possible.²⁸⁹ However the doctrine is divided. Some believe that a waiver ex ante is possible.²⁹⁰ In any case, commentators all agree for the allowance of waivers ex post, if the author is aware of the effects of his waiver.²⁹¹ The waiver must be in writing.²⁹² But the consent to waive can be implied from the circumstances.²⁹³

As concerns waivers of right of disclosure, a clause which gives to the producer the right to decide of the final version without consulting the director is void, because it forces the author to waive his rights in advance.²⁹⁴

As for the right of attribution, although it is inalienable,²⁹⁵ it is possible to waive its exercise but the author will always have the right to "breach" the waiver and ask for his name to be mentioned, subject to indemnification of his contracting party²⁹⁶. If French doctrine generally accepts waivers, in this case, the motivations of the contracting parties need to be scrutinised to see if there are licit.²⁹⁷ Art. 113-6 stipulates that when the author remains anonymous or hides behind a pseudonym, he has not waived his moral rights, the editor is representing him for the exercise of his rights. Thus a waiver is legal but precarious as the author can always revoke it. Whichever of the two articles is used, the author remains in possession of his right to claim attribution. Yet the result will be slightly different as regards the effects: the contract is void under art. 121-1 and has retroactive effects (ex tunc), while under art. 113-6, it is valid and

²⁸⁷ It was first recognised by case law (before the legislation) see e.g. Trib. civ. Seine, July 10, 1946, D., 1947.98.

²⁸⁸ e.g. Court of Appeals of Paris, March 10, 1988, Cahiers du droit d'auteur, June 1988, p. 23.

²⁸⁹ Court of Appeals of Aix, Feb. 23, 1965, D., 1966 jp. 166; Court of Appeals of Nîmes, July 4, 1966, JCP, 1967-II-14691; Court of Appeals of Paris Nov. 15, 1966, G.P. 1967-I-17; Cass. Civ. Jan. 13, 1970, D., 1970, jp. 483.

²⁹⁰ R. SARRAUTE, 'De l'adaptation cinématographique des oeuvres littéraires', Gaz. Pal., 1962, 1, p. 21 et P. SIRINELLI, *Le droit moral de l'auteur et le droit commun des contrats*, Thèse, Paris II, 1985, note 22, p. 304.

²⁹¹ A & H.J. LUCAS, 1994, p. 346, C. Colombet, 1994, n° 149; P. SIRINELLI, p. 307; DESBOIS, *Traité*, n°382 & 451; F. POLLAUD-DULIAN, RIDA 1990, p. 137.

²⁹² P. SIRINELLI, p. 223.

²⁹³ A & H. J. LUCAS, p. 347. Citing Court of Appeals of Paris, 4th ch., May 31, 1989, *Bouchard*, D., 1989, inf. Rap., p. 199.

²⁹⁴ Cass. Jan. 7, 1973, *Edouard Luntz v. Fox Europa*, D., 1973, J 376.

²⁹⁵ TGI Paris (réf.), Dec. 27, 1968, RIDA, Apr. 1969, n. 60, p. 165, TGI Paris, 1st ch., May 30, 1984, RIDA, Oct. 1984, n°122, p.220. It does not matter if the author was late in his reaction.

²⁹⁶ See A. STROWEL, 1993. Paris, June 10, 1986, *Montpezat v. Flammarion*, RIDA, July 1987, n° 133, 193., Paris, 1st Feb. 1989, D., 1990, somm. Comm. 52, obs. Colombet. It is generally conceded that an author waives his right of attribution temporarily, while retaining the right to reveal himself later on, see Paris, May 17, 1969, D.S. 1969, 702; J.C.P. 1970, II, 16415; Paris 1st Ch. Dec. 18, 1990, D.S. 1993, 442 *appeal rejected*, Cass. Civ. I, May 5, 1993, *De Villiers v. Soton*, RIDA 1993, n°158, 205.

²⁹⁷ C. DOUTRELEPONT, p. 237-238.

can be revoked only for the future (ex nunc). In conclusion, a ghost-writer can always reveal his identity in France.²⁹⁸

As to the right of integrity, courts have confirmed that a contract waiver ex ante of the right of integrity was void.²⁹⁹ A waiver ex post is generally considered valid because in this case, the author can sense the modifications, as they already have been done and can agree in awareness.³⁰⁰ A court has however admitted a waiver ex ante, because the author had forced the contracting party to mention on the movie that the author (of books) was not creating the movie.³⁰¹

These general principles stated, it must be noted that there are different tendencies as regards the inalienability of the right of integrity in France. Indeed, a waiver has often the same consequences as a transfer. Indeed, when the author waives his integrity right, he agrees not to object to modifications of the work. Thus some commentators disapprove waivers of the right of integrity, as being contrary to the law stating the inalienability of the right.³⁰² A clause that would give all freedom of adaptation to the contracting party is controversial among French experts.

The author can reserve his right to approve or not the changes. In this case, abuse may be possible on the part of the author, thus the adapter would have to show that the modification is reasonable or that the refusal is abusive. He can also specify in a contract to which modifications he agrees and to which ones he does not. However, if these modifications distort his work, he will be able to object to them.

The inalienability rule does not prevent contracts giving a mandate to a society or an agent which will have the power to discuss exceptions to moral rights with users.

On a final note, one author argues that, as long as agreements are reasonably balanced, in other words as long as the author is fairly compensated for the arrangements concerning his moral rights, these agreements will exceptionally be challenged.³⁰³

b. Case law

In *Etat Gabonais v. A2*³⁰⁴, the Court of Cassation decided that it was possible to waive one's moral rights in advance in the case of a commissioned audio-visual work. This decision has

²⁹⁸ See e.g. TGI Seine, March 25, 1963, RTDcom., 1963, 573; Cass. Civ. 1st May 5, 1993, RIDA, Oct. 1993, p. 205. The majority of authors is of that opinion, see DESBOIS, *Traité*, n°438, G. BONET, *L'anonymat et le pseudonyme en matière artistique*, Thèse Paris 1966, P. SIRINELLI, Thèse, 1985; C. COLOMBET, n°140.

Contra : TGI Paris 1st ch., June 28, 1978, RIDA, Apr. 1979, 209 (Casadesus has not been allowed to reveal his attribution of the Mozart Adelaïde Concerto).

²⁹⁹ Paris, June 14, 1950, *Un seul Amour*, D., 1951, Jur., p. 9, Cass., July 7, 1973, *Grabuge*, D., 1973, Jur., p. 363; TGI, Seine, 25 May 1959, *Mistinguett*, RIDA, 1959, July, p. 148.

³⁰⁰ H. DESBOIS, *Le droit d'auteur en France*, Paris, Dalloz, 3 ed., n° 451; C. COLOMBET, *Propriété littéraire et artistique*, Paris, Dalloz, 1992, 6th ed., n° 149; P. SIRINELLI, p. 307.

³⁰¹ Paris, Nov. 23, 1970, *Fantômas*, RIDA, 1971, July, p. 74.

³⁰² Desbois is against waivers of the right of respect, Sirinelli thinks they are possible if the author knows what he is waiving, he cannot change his mind after the waiver.

³⁰³ E. LAUVAUX, 1995, p. 79.

³⁰⁴ Civ. 1st, Apr. 7, 1987, D., 1988, 2°esp. note Edelman, RTDcom., 1988, 224, obs. FRANÇON

been widely criticised. It is argued that the court confused the freedom of creation and the moral right. Further decisions have decided otherwise.³⁰⁵ An agreement which precludes the author from exercising his right of attribution is void.³⁰⁶

The Court of Appeals of Paris found that an employed American ghost-writer who had waived his right of attribution under U.S. law, could exercise his right in France, because the waiver was against the French 'ordre public'.³⁰⁷ In other words, the rule is that a foreign contract of transfer will have no effect on French territory.³⁰⁸

V. Duration of moral rights protection

a. Legislation

Moral rights of rights of integrity and attribution are perpetual (art. L 121-1, al. 3 CPI).³⁰⁹ The right of retract might only be exercised during the author's lifetime.³¹⁰ Indeed, this prerogative disappears with the author, because it is the manifestation of a change in his convictions. Once he is deceased, he cannot change his mind anymore.

b. Case law

Each heir has the right and the duty to act against violations of the honour and reputation of the deceased author.³¹¹ Deceased authors are entitled to have their right of attribution respected³¹², as well as their right of integrity.³¹³ For instance, the unique heir of the painter Deveria sued 'L'Express' magazine for having published a reproduction of a painting of Lizst with added colours and without mentioning Deveria's name.³¹⁴

Heirs can prevent the disclosure of works that the author considered unfinished or poorly executed.³¹⁵ If the heirs are inactive, any person having an interest can act to have the moral

³⁰⁵ See for criticisms : F. POLLAUD -DULIAN, 'Moral rights in France through recent case law', RIDA 1990, p.135; A. FRANÇON, RTDCom. 1988, pp. 224-227. Civ. 1st, Apr. 4, 1991, *Boyer v. Béart*, Bull. civ., I, n° 119, RIDA, oct. 1991, 125.

³⁰⁶ Cass. Civ. I, Apr. 4, 1991, *Boyer v. Béart*, RIDA 1991, n° 150, 125.

³⁰⁷ Paris 1st ch., Feb. 1 1989, *Anne Bragance, La Nuit du Sérail*, RIDA, 1989, n°142, 301. See also *Huston*, cited above.

³⁰⁸ Cass. 1st civ., Feb. 7, 1973, D., 1973, p. 363; TGI Paris May 30, 1984, RIDA Oct. 1984, p 220. See also *The Kid* case, op. Cit. See also *Huston*, above.

³⁰⁹ A. STROWEL, 1997.

³¹⁰ A. LUCAS, *Traité*, 1994, paragraph 391.

³¹¹ Trib. Civ. Seine, July 1, 1936, G.P. 1936-II-584; TGI Paris (réf.), Jan. 14, 1988, *Rachmaninoff*, RIDA Oct. 1988, p. 321.

³¹² Cass. 1st civ. Jan. 11, 1989, *Utrillo*; see also *Rachmaninoff* and *Deveria* case, below.

³¹³ Court of Appeals of Paris, June 14, 1972, *Féval*, RIDA Oct. 1972, p. 164; TGI Paris May 11, 1988, *Hergé*, D., 1989, somm. p. 46.

³¹⁴ Court of Appeals of Paris, Oct. 31, 1988, Cahiers du droit d'auteur, Apr. 1989, p. 22.

³¹⁵ Court of Appeals of Paris, Feb. 17, 1988, *Staël*, JCP, 1989-3376. See *Lacan*, above (TGI Paris Dec. 11, 1985); Trib. civ. Seine, Nov. 20, 1956, *Bizet*, RIDA, July 1957, p. 136.

rights of the deceased respected.³¹⁶ However, neither collecting societies nor cultural organisations can act to defend the moral rights of deceased authors.³¹⁷

VI. Practical effects of moral rights protection with respect to authors, on the one hand, and with respect to performers

"Neighbouring rights do not interfere with author's rights. Consequently, no provision of this title can be interpreted as to limit the exercise of the author's right." (Art. L. 211-1)

P.Y. Gautier bases this on the principle of the "secondary, incidental" as opposed to the "main" : no interpretation is possible without a pre-existing work. The author must win unless he misuses his right.³¹⁸ Questions of conflicting moral rights must be solved in such a way as to cause the least damage.³¹⁹

If the author is dead and there is no heir entitled to inheritance, anyone who has a justified interest, can take action (e.g. the Minister responsible for Culture) (art. L. 211-2). In the Rostropovitch case, cited above, the moral right of integrity of Rostropovitch could not supersede the right of the director of the movie. As a result, changes to the movie could not be made as requested by Rostropovitch. Instead, the court ordered the insertion of a warning immediately after the credits.

³¹⁶ This is based on the use of the word 'notamment' in art. 20 of 1957 Act. See above *Montherlant* and '*Les misérables*'.

³¹⁷ F. POLLAUD-DULIAN, 1990, p. 243, does not agree and thinks this right should be given to collecting societies. See TGI Paris, March 5, 1997, *Cinémathèque française*, RIDA n° 172, 1997, p. 297.

³¹⁸ Paris, Feb. 13, 1992, *Telefono*, D., 1993, 402; TGI Paris, Nov. 26, 1997, *Jean Ferrat*, RIDA, July 1998, 284; TGI Paris, Jan. 10, 1990, *Rostropovitch*, D., 1991, 206.

³¹⁹ P. CHENAIS, in S.M. STEWART, *International Copyright law and neighbouring rights*, 1989, p. 391, citing, TGI Paris, May 14, 1974, D., 1974, 766.

Summary

Legislation is dualistic. The right of disclosure is quite detailed and is absolute. The right of attribution is described in similar terms as in Belgium. The right of integrity is absolute. The right of retract is very detailed and the law stipulates very stringent obligations for its exercise. There is a right to access. Moral rights are non transferable and partial waivers are allowed under very strict conditions.

Case law is extensive in France. The right of disclosure being absolute, courts are very protective of authors. The importation of a work which would not have been disclosed or would have been disclosed on a medium but not on another would be easily be blocked in France. As to the attribution right, French courts are stricter for architectural works than Belgian for instance but the right of attribution can be limited for works of applied arts. There is much to say of the right of integrity cases. First of all, destruction is prohibited. Secondly, case law is very protective of authors in general. For sculptures and architectural works, courts are more willing to make a balance of interests. Therefore, an author could easily block the importation of a modified work except maybe for sculptures and architectural works (which are anyway less easy to transport...).

As to the right of retract, it is interesting to note that there is no decision in favour of the author. It seems in general, that authors misuse their right of retract. Last but not least, several cases have demonstrated that a foreign contract allowing alienability of moral rights will have no effect in France. This question (which relates more to the applicability of private international law rules) can have a major impact on the internal market.

Part IV. Germany

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection

I. Legal framework

The German Copyright and Neighbouring Rights Act dating from September 9, 1965³²⁰, amended by Art. 5 of the Act of July 19, 1996,³²¹ has implemented all five directives. The last modification to the Copyright Act was the Information and Communication Services Act which came into force on August 1, 1997³²² and implemented the Database Directive on from December 11, 1996. This modification did consequently not introduce any changes on moral rights provisions.

II. Analysis of the different moral rights : characteristics

Section 2 of Chapter 4 of the Copyright Act (art. 12-14) deals with “author personality rights”. Indeed, in Germany, moral rights are called “Urheberpersönlichkeitsrechte”, but it bears the same meaning as the expression “moral rights”.³²³ Germans have a monist conception of authors' rights (art. 11). Authors' rights are not purely patrimonial, not purely personal. They are one and indivisible. Because of their mixed nature, economic and moral rights both influence each other.

³²⁰ Federal Law Gazette [BGBl.] Part I, p. 1273.

³²¹ BGBl. Part I, p. 1014.

³²² Full name : Federal Bill Establishing the General Conditions for Information and Communication Services (IuKDG).

³²³ A. STROWEL, *Droit d'auteur et copyright, convergences ou divergences*, Bruylant, Bruxelles, 1993, n° 401-410.

1. The right of disclosure or “dissemination right” (Veröffentlichungsrecht)

a. Legislation

The author has the right to decide whether and how³²⁴ the work must be published and to communicate publicly or describe the content of his work, as long as neither the work nor the content have been published with his consent (art. 12 §§1 & 2).³²⁵ “This latter right would appear to protect the author against the public description of the elaborated plot of a play”.³²⁶ The disclosure right will generally be exercised through the economic right of reproduction. The right of disclosure applies to transformations/modifications of the work (art. 23). This means that the author has a right of disclosure on the modifications of a previously disclosed work.

b. Case law

According to art. 12, a lawyer can prevent the publication of a copyrighted file without his authorisation.³²⁷ Indeed it is not possible to consider there is publication when a document has only been communicated to a person bound by professional secrecy.

2. The right of attribution

a. Legislation

The right of attribution is defined in the same terms as art. 6 bis of the Berne Convention (right to bear the name or signature of the author) and adds the right to determine whether the work must hold an author’s designation and if so, which one (art. 13). The author can also choose to remain anonymous or choose a pseudonym (art. 10 & 66). It has both negative and positive aspects : it allows the author to claim authorship and gives him the ability to take action against usurpation of authorship by other parties. There are certain exceptions. In the field of design, the right of attribution is reduced : the name of the author is not affixed on objects which are made in more than one copy.³²⁸ The designation chosen by the author is protected by the right of integrity as well, in the sense that the economic right holder cannot modify it. There is a presumption of authorship in favour of the person whose name is affixed on the work and on copies of the work in a customary manner. In case the name of the author does not appear, the editor will be entitled to assert the author’s rights (art. 10).

There is an obligation to indicate the source in cases of limitations of copyright (i.e. the exceptions to the economic rights) (art. 63). The obligation to cite the source is not general but it is only imposed for the limitations set forth in art. 62.³²⁹ In certain cases of public communication, the indication of the source need only be stated if the standard practice so

³²⁴ BGH GRUR 1971, 35 : *Maske in blau*; 1982, 107, 371 (the author has the right to decide in which form or aspect he wishes to disclose his work).

³²⁵ A. STROWEL, 1993, p. 533, n° 414.

³²⁶ J.A.L. STERLING, *World Copyright law*, p. 287.

³²⁷ BGH, April 17, 1986, cited by G. POLL, C. VAN RIJ, 1995. See also A. DIETZ, ‘Lettre d’Allemgane’, *le Droit d’auteur*, 1990, p. 80, fn. 128 referring to fn. 43 ad 122.

³²⁸ E. ULMER, *Urheber- und Verlagsrecht*, Berlin, Heidelberg, New York, Springer Verlag, 1980, 3è ed.,p. 214-215.

³²⁹ i.e. the exceptions stated in art. 45-48, 50, 51, 58-59, 61. See A. DIETZ, in M.B. NIMMER - P.E. GELLER, *International copyright law and practice*, New York, Matthew Bender, October 1996, GER-87. These include, among others, copies of works for judicial use, instructional use, use of public speeches, quotations.

requires (art. 63 §2).³³⁰ Art. 63 § 3 specifies what elements of a source have to be indicated in cases of reproduction of press articles and broadcast commentaries.

b. Case law

Only a natural person can be the creator of a work, in particular for works such as photographs. In the case of satellite photographs, it is difficult to prove that such natural person took the photographs.³³¹ The presumption of attribution governs the relationships between authors and third parties but also between co-authors.³³² The author has a right to receive damages for the economic loss incurred by not being named the author and the consequential loss of recognition.³³³

Architectural works

The Supreme court decided that architects have a right of attribution even if the building has an utilitarian function or a practical function.³³⁴ Indeed the wording of art. 13 grants the right to apply the author's designation without restriction. The author's name can appear on the façade. The power of the architect as to the manner in which his name should be mentioned is not unlimited. Indeed, the owner can object to a too obtrusive form of designation and the designation must not have an advertising character.³³⁵

When there is a conflict between the owner and the architect, a balance is done by courts. For instance, the interests of the owner were taken into account in the case where he wanted to modify the building by adding dormers and mansard roofs while the architect objected to it.³³⁶ An architect (interior designer) does not have the right to affix his name and address to the room decoration he designed.³³⁷

Literary works

The quality of the author must be respected, i.e. the author of a script cannot be mentioned as the author of the manuscript.³³⁸ A co-editor who has elaborated the plan of a textbook and directed the contributing authors has the right to be named as the co-editor even if he later was dismissed for an important reason.³³⁹ The author of a script for a film has the right to be named in the posters, adverts and other information relative to the film (but not in the

³³⁰ A. DIETZ, in NIMMER, GER-87.

³³¹ Aug. 29, 1988, Archiv für Presserecht, 1989, p. 596.

³³² Court of Appeals of Munich, Nov. 24 1988, ZUM 1990, p. 186; see fn. 83, RIDA 1993, p. 198.

³³³ Local Court of Hamburg, Dec. 30, 1997, 36 a C 3007/97.

³³⁴ BGH June 16, 1994, BGHZ 126, 245 = ZUM 1995, p. 440 = GRUR 1995, p. 671; English version, IIC, 1996, p. 130 (a library), see A. DIETZ, 'News from Germany, Copyright law developments in Germany from 1993 to mid-1997, Part II', fn 112, RIDA 1998, n°176, p. 166 and 168.

³³⁵ BGH June 16, 1994, BGHZ 126, 245. See also IIC, N° 1/1996, p. 130.

³³⁶ OLG Munich March 16, 1995, ZUM, 1996, p. 165.

³³⁷ RGZ 110, 393 (397).

³³⁸ OLG München Schulze OLGZ Nr. 4).

³³⁹ Court of Appeals of Berlin, July 5, 1991, GRUR 1992, p. 167, NJW RR 1992, p. 758; cited in RIDA 1993, p. 196, fn. 79. See also Aug. 29, 1988, Archiv für Presserecht, 1989, p. 596; see RIDA, 1993, fn. 80, p. 196. (similar).

credits).³⁴⁰ The author of a poem for a chorus had no right to be named in the case of an orchestra representation without the song.³⁴¹

Works of plastic art

In the Emil Nolde case, a third party had copied the style and motives of the painter and the painting bore a false signature of Nolde. There was violation of the right to be protected against confusion of identity.³⁴² In case of photographic works, if the name of the author is not mentioned, courts tend to grant additional damages to the immaterial damage. The damage incurred by the author is thus both pecuniary (material) and immaterial.³⁴³ This illustrates the German monist conception. Economic rights can serve moral rights and moral rights have a pecuniary content.³⁴⁴

3. The right of respect or right of integrity

a. Legislation

Art. 14 lays down the principle : the author can object to any modification of his work which can prejudice his legitimate intellectual and personal interests in connection with his work. An author can also object to modifications which do not distort the work, and which can be known by a high number of people, when non principal interests can be seen as necessary. Art. 14 goes beyond art. 6 bis of Berne, because it contains potentially more hypotheses than violations to honour and reputation.

Two types of limitations to the right to object to modifications are set forth in the Copyright Act (art. 39 §2 and art. 62). Art. 39 § 1 reiterate this principle but art. 39 § 2 allows limitations to it. No modification to the work, its title or the designation of author, can be made without the author's consent (art. 39 §1). Modifications are however possible if the author could not refuse them in good faith (art. 39 §2). This provision applies to the contracting party and to the owner of the work. Reh binder is nonetheless of opinion that a modification in the private sphere cannot be prevented by the author (art. 23 §1)³⁴⁵. Translations, extracts or changes of key are allowed if the aim of the work's use requires it. Modifications to the title or to the work itself are allowed when the author cannot reasonably refuse and a balance of the respective interests is performed (art. 39). This latter rule is valid whether there is a contract or not, thus towards users in general as well as towards contracting parties.

The second category of limitations to moral rights is limitations which arise from the exceptions to copyright itself (such as uses for research, education, private purposes...) (art. 62 & 63). In all these cases, the integrity must nevertheless be respected. The principle is that no

³⁴⁰ LG München, I UFITA 23, 1957, 345.

³⁴¹ Schulze KGZ nr. 18).

³⁴² June 8, 1989, ZUM 1990, p. 180 = IIC 1991, p. 273 = BGHZ 107, p. 384; cited in RIDA 1993, p. 194, fn. 78.

³⁴³ LG Munich, July 26, 1995, ZUM-RD 1997, p. 249 and LG Munich, March 5, 1993, ZUM 1995, p. 57; LG Düsseldorf, July 14, 1992, GRUR 1993, p. 664 = ZUM 1994, p. 52; LG Münster, May 18, 1995, NJW-RR 1996,p. 32 and see RIDA 1998, p. 170.

³⁴⁴ This is also illustrated by cases in which the artist acts against false affixing of his signature to protect his economic interests, see e.g. OLG Frankfurt Schulze OLGZ 201, 10; OLG München GRUR 1969, 146; LG München I Schulze LGZ 173, I, 15 and LGZ 184, 3).

³⁴⁵ REHBINDER, p. 179.

modification can be done when the use of the work is free, even if the use is private (art. 62). Art. 62 allows other modifications, such as modifications of photographs if required by the reproduction mechanism (art. 62 §3), or modifications necessitated by churches or schools (art. 62 § 4) but the consent of the author is needed. If the author does not respond in the month of the notification informing him that the modification is envisaged, his consent is presumed.³⁴⁶

In sum, there is a possible control of the authors' motivations and a possible balance of the authors' and users' interests. The control exercised by courts can be described as follows. The judge firstly examines whether objectively, there is a violation of the author's rights. In the affirmative, he determines whether there is a prejudice and if it is the case, whether the interests of the author are balancing out the interests of the other party. The nature and intensity of the violation, the affected elements, the level of originality of the work etc. are taken into account in the balance. In conclusion, the test to assess whether there is infringement of the right of integrity is objective (i.e. the author needs to prove violation of reputation or honour).

b. Case law

Case law can be distinguished between allowed and prohibited modifications.

Have been allowed:

- modifications by the holder of the economic rights, if usual or secondary but in any case, the spirit or tendency of the work can never be altered.³⁴⁷
- the correction of orthographic or typing mistakes by the editor or the change of tone of a song in order to adapt it to the voice range of the singer are allowed.
- shortenings by newspapers' editors.³⁴⁸
- modifications which are required by the goal of the work's interpretation or reproduction.
- modifications of a design dictated by the use of the work.
- changes required by censorship for movies.³⁴⁹
- changes by the editor to the contributions of authors, when they are usually allowed in the case of works of collaboration of the same kind, in case of periodicals (such as reviews and journals) which publish articles without mentioning the names of authors (art. 44 of the Act on Edition).³⁵⁰
- modifications when the author has implicitly or expressly stated his approval (art. 39 § 1). The typical case of an implicit approval is when an author has allowed an exploitation of the work, and must have expected that transformations will be necessary.³⁵¹ The court in this case also stated that interests of the author should be given less weight years or decades after his death.

Have not been allowed :

- changes to a manuscript by another person on the order of the editor.³⁵²
- addition of music to a play.

Restoration of the work

³⁴⁶ A. DIETZ, in NIMMER, GER-85.

³⁴⁷ BGH GRUR 1971, 35; *Maske in blau*; OLG Frankfurt GRUR 1976, 199, *Götterdämmerung*).

³⁴⁸ REHBINDER, p. 181.

³⁴⁹ OLG Frankfurt am Main, GRUR 1989, 203.

³⁵⁰ BGH GRUR 1954, 80.

³⁵¹ BGH ZUM 1989, 84 : Oberammergauer Passionsspiele II.

³⁵² OLG Dresden UFITA 3, 1930, 201.

The right of integrity applies in case of restoration of a work. The interests of the author and the person asking for the restoration have to be balanced. There seems to be no case law on the point yet as regards plastic and graphic arts.³⁵³ As for architectural works, it was held that an architect can only prevent the restoration of a building designed by him, including its partial demolition, if there are no substantial reasons justifying the restoration.³⁵⁴ This implies that the interests of the owner generally prevail over the interests of the architect.

Destruction of the work

Courts have not recognised that destruction amounts to mutilation under art. 14. In contrast, legal doctrine affirms that the destruction is the most serious impairment to a work. Commentators argue that if the owner intends to get rid of the work, he should at least inform the author if he knows his address and knows that the author has an interest to preserve his work³⁵⁵, and others go as far as saying that the owner should offer the author to take the work back while the author should compensate the owner for the material value of the work.³⁵⁶ On the other hand, Reh binder notes that the author can only forbid the destruction of his work, if this destruction would prevent him from exercising his right of access.³⁵⁷

As regards architectural works, the functional aspect of the building will generally weigh in favour of the owner. The law nonetheless obliges the owner to come to an acceptable solution for the architect. In a case where the architectural work had been completely destroyed, a court held that as the work was totally destroyed, the reputation or honour of the author could not longer be prejudiced.³⁵⁸ As mentioned, German doctrine expresses doubts as regards this statement; indeed the author depends on the existence of his works for his reputation and honour.

In case of destruction of an art work by J. Beuys (a children's bathtub), a court awarded damages to the artist.³⁵⁹

Architectural works

The balance of interests test is best illustrated in the case of architectural works. On most cases, the owner's interest, which is based on the functional aspect of the building, generally outweighs the interests of the architect. This is exemplified by a number of decisions in favour of the owner, in diverse types of situations. The functional aim of the building, for instance, the respective functions of a church³⁶⁰ or a school³⁶¹, is important in assessing the interests.

³⁵³ S. VON LEWINSKI, 'Rapport Arts graphiques et plastiques', *The moral right of the author*, ALAI Antwerp Congress, 1993, p. 410.

³⁵⁴ Court of Appeals of Frankfurt, January 1, 1989, cited by G. POLL, in C. VAN RIJ, p. 103.

³⁵⁵ S. VON LEWINSKI, ALAI, 1993, p. 411.

³⁵⁶ See A. DIETZ, 'The artist's right of integrity', *IIC*, vol. 25, n°2/1994, p.191.

³⁵⁷ REHBINDER, p. 179.

³⁵⁸ June 8, 1912, 79 RGZ 379. The court relied on the famous 'mermaids' case where the court ruled that a full destruction of the work does not amount to a violation of the integrity right.

³⁵⁹ See A. DIETZ, 'The artist's right of integrity', *IIC*, vol. 25, n°2/1994, p. 193; "Urheberrechtsprobleme um Beuys-Badewanne", 1976 *Film und Recht*, 176.

³⁶⁰ Church interior case : an architect complained that the installation of an electronic organ in his Modern protestant church was a distortion of his work. The court ruled that the placement of an organ was a liturgical necessity and rejected the architect's claim, see Oct. 2, 1981, 1982 *GRUR* 107 and A. DIETZ, 'Letter from the Federal Republic of Germany', 1984 *Copyright* 426 et seq., at 431 & 437 et seq.; A. DIETZ, 'The artist's right of integrity', *IIC*, vol. 25, n°2/1994, p.188.

With respect to transformations and extensions, the owner of a building can make transformations and extensions (within the limits of the interdiction of mutilations) if the balance of interests concludes that these transformations are required. The author cannot object to the extension of a functional building, nor can he object to an extension if the urban authorities require it. The possibility to undertake transformations and extensions depends on the one hand, on the type and the dimension of the transformation and, on the other hand, on the dimension of the moral rights affected.³⁶² For instance, an architect could not object to the addition of a saddle-roof dormer, the interests of the owner were heavier in the scale.³⁶³

Modifications due to repair or reconstruction are allowed under the conditions of good faith.³⁶⁴ The owner can rebuild a building's façade with another and cheaper material than the original, even if it is not the same aspect but has only a similar aspect.³⁶⁵ He is allowed to rebuild the totally or partially destroyed building in another form or aspect.³⁶⁶ The owner of a building is also allowed to rebuild it at the same or another place, using the blue prints, without informing the architect unless it was otherwise provided in the initial contract.³⁶⁷ In case of emergency (such as the reconstruction of buildings after the war), the interests of the owners prevail on the interests of the architects. Thus architects did not have the right to object to reconstruction of buildings, which was not made on the original blue prints.³⁶⁸ If the author's rights have been adjusted in the contract between an architect and the future owner, the owner must be allowed to repair the work and to rebuild it in case of total destruction. This is valid also in case the contract does not adapt the author's rights. In this latter case, both interests must be weighed in order to determine whether the modifications can be imposed on the author.³⁶⁹ Finally, while the owner has a right to rebuild, he also has a negative right not to rebuild. For instance, the owner has no obligation to rebuild the destroyed building into its original form or to preserve the non destroyed parts of the building.

In contrast, the sole taste or convenience of the owner does not justify a modification of the building. In *Treppenhausgestaltung*, the court ruled in favour of the architect because the owner wished to modify the building only for aesthetic reasons. The owner cannot replace the architect's aesthetic judgement by his own.³⁷⁰ The right of integrity protects architects against deterioration and misrepresentations of the characteristics of the work. For example, the addition of a floor on a hotel without the architect's consent is not allowed.³⁷¹ The architect can

³⁶¹ May 31, 1974, 1974 GRUR 675; A. DIETZ, IIC, 1994, p.188.

³⁶² OLG Saarbrücken, 'Verbindungsgang', Urt. V. 10.12.197 - 1 U 101/97-34, GRUR, 1999, p. 421.

³⁶³ OLG Munich, March 16, 1995, ZUM 1996, p. 165. See Dietz, RIDA 1998, p. 172; OLG Frankfurt - 6 U 69/85 Oct 24 1985, Schu OLGZ 286 (Gerstenberg) = GRUR 1986, 244 = ZUM 1986, 397 (The balance weighed again in favour of the owner in the case of a roof modification).

³⁶⁴ Art. 39 UrhG, and see OLG Nürnberg, UFITA 25, 1958, 361.

³⁶⁵ LG Berlin Schulze LGZ 65.

³⁶⁶ REHBINDER, p. 180.

³⁶⁷ REHBINDER, p. 180. See Paschke, GRUR 1984, 858, 864.

³⁶⁸ See e.g. OLG Nürnberg Schulze OLGZ 28.

³⁶⁹ BHGZ 62, 331: Schulerweiterung; OLG Hamburg, UFITA 81, 1978, 263. OLG Frankfurt, GRUR 1986, 244.

³⁷⁰ A. DIETZ, 'L'évolution récente du droit d'auteur allemand (à partir du milieu de 1997)', A & M, 1999/3, p. 351; *Treppenhausgestaltung*, BGH, Urt. V. 1.10.98, I ZR 104/96, OLG Stuttgart, GRUR, 1999, p. 230 (to decide if a suppression can be ordered, the interest of the owner of the building to maintain the new work must be taken into account).

³⁷¹ LG Berlin, UFITA 4, 1931, 258. Comp. With French decision 'Champs-Élysées'.

also object to transformations (such as the inclusion of a sculpture) which can be considered as the creation of a new work.

Musical works

A German TV channel which bought the right to exploit a series, including the rights of adaptation and modification, made a shortened version of the series and replaced the original music by another one. Even if the exploitation rights had been alienated, the original composer's right of integrity was infringed.³⁷²

It has been held that although the work was not altered, its transfer in another context, which can be prejudicial to the author's moral interests, infringes his integrity right. For instance, a pop group did not have to tolerate the fact that its songs were marketed with titles holding a neo-fascist tendency.³⁷³ The use of a musical work in advertisements is not a modification to the music and thus not contrary to the integrity right.³⁷⁴ It is interesting to note that this case ruling is not in harmony with the former court's ruling that a transfer of environment infringes the right of integrity. In case modifications (modifications of the notes' accentuation of a musical piece by the editor) are of the kind a composer can expect to be carried out by the editor, there are not an infringement of the right of integrity.³⁷⁵

Literary works

A poem had been used for a song without the author's consent and edited in a 'false edition' of the ex-GDR paper 'Neues Deutschland' in which were included satirical writings on the GDR. There was infringement of the right of integrity as the poem had been placed in a context which was not conform to the author's will.³⁷⁶ When a literary text is reproduced (without the consent of the author) in journal or magazine other than the original, with important modifications (the vocabulary was changed and comments were added) and with a citation that the author was the author of the particular book but also a collaborator in another journal, it violates the reputation and honour of the writer.³⁷⁷ This decision contrasts with a case which dealt with the reproduction of a photograph in a pseudo-scientific journal concerning The Virgin Mary's apparitions. The fact that the photograph was published upside down was not considered a distortion. Secondly, the tribunal did not take account of the author's disapproval with the magazine's ideas.³⁷⁸ A newspaper was condemned to pay damages to a journalist because it published an article under the journalist's name with many changes.³⁷⁹

Plastic and visual arts

³⁷² Court of Appeals of Munich, Sept. 26, 1991, *Cristoforo Colombo*, ZUM 1992 p. 307 = GRUR int. 1993, p. 332; see RIDA 1993, p. 200, fn. 84. Supreme Court judgement to be rendered.

³⁷³ OLG Frankfurt am Main, Dec. 20, 1994, *Springtoifel*, GRUR 1995, p. 215. and see fn. 126, RIDA 1998, p. 180-182.

³⁷⁴ LG Düsseldorf - 12 O 438/83 Feb. 13, 1985, ZUM 1986, 158. Comp. With French case law which holds the contrary and with *GDR* case (fn. 378).

³⁷⁵ KG Berlin - 5 U 2928/83 March 29, 1985, ZUM 1986, 470.

³⁷⁶ Court of Appeals of Berlin, RIDA 1993, p. 200 and 202.

³⁷⁷ p. 178, OLG Munich, Feb. 23 1995, NJW 1996, p. 135, *Herrenmagazin*, see also A. Dietz, RIDA 1998, fn. 123.

³⁷⁸ OLG Munich, March 21, 1996, NJW-RR 1997, p. 493 and see fn. 125, RIDA 1998, p. 180.

³⁷⁹ Municipal Court of Cologne, March 1998, cited by A. L. SCHELIN, 'EFJ Seminar report, Moral rights in the information society, a need for harmonization', Rome, October 1998.

The Berlin Court of Appeals tried a case where the author of a statue of Lenin objected to his removal in East Berlin. The court weighed the interests of both sides (the author and the city authorities) and decided that it was no longer tolerable to keep the statue and mentioned that the author should have been aware of the propagandistic purposes of the work.³⁸⁰

For safety reasons and without informing the author, a municipality had filled with material, the hollow parts of a sculpture which had several sections open in parts. These reasons did not justify the municipality's act, because it was the municipality and not the author, which decided to erect the sculpture in that specific place. The court ruled that the municipality could have at least informed the author of its intention.³⁸¹

A sculpture, placed in a public place, which has been painted, tagged, wrapped in packaging material several times, cannot be reproduced on a photograph, manipulated with technical photographic means and then sold. Even if art. 59 allows the reproduction of works exposed permanently on public places, art. 62 forbids any modification. Such a reproduction is against the moral right of integrity of the artist, because by distributing calendars, postcards etc. of the sculpture, the sculpture would be made known to a number of persons who would never had known the sculpture otherwise.³⁸²

An artist who had decorated an administrative building with paintings and sculptures could object to the partial removal of these elements of his work by the owner to carry out transformations of the building, as this was a distortion.³⁸³ The owner of a staircase painting who masks the nudity of mermaids thereon depicted, by painting clothes on them, infringes the right of integrity of the author.³⁸⁴

In the Oberammergauer Passionspiele case, modifications to theatrical decorations could not be allowed if prejudicial to the moral interests of the author. However, in his case, the author had died a long time ago and the court decided that his interests did not hold the same weight several years after his death. Thus it refused the heirs art. 14 protection.³⁸⁵ Another court refused to forbid a theatrical representation because of modifications to the libretto without the author's consent in view of the enormous economic and moral disadvantages that the performers of the play would suffer.³⁸⁶

In *Maske in blau*, the court "expressed the opinion that it is not possible to establish universally valid guidelines as to what modifications the author cannot refuse in good faith to allow a licensee to make".³⁸⁷ The balance that needs to be done between the rights of the licensee and the moral rights of the author gives leeway to the licensee as to modifications.

³⁸⁰ Nov. 8, 1991, cited in A. DIETZ, 1994, p.193.

³⁸¹ OLG Celle, March 16, 1994, ZUM 1994, p. 437 and LG Hildesheim Oct. 12, 1993, ZUM 1994, p. 437. See Dietz, RIDA 1998, p. 174.

³⁸² LG Mannheim, Feb. 14, 1997, GRUR 1997, p. 364 and see A. DIETZ, RIDA 1998, fn. 122.

³⁸³ Dec. 8, 1981, 1982 Film und Recht, 510, *Hajek* case.

³⁸⁴ RGZ 79, 397.

³⁸⁵ BGH - I ZR 15/87 Oct 13, 1988, GRUR, 1989, 106 (Loewenheim) = ZUM 1989, 84. See also A. DIETZ, 'Lettre d'Allemagne', Le droit d'auteur, 1990, p. 81.

³⁸⁶ Frankfurt Court of Appeals, - 6 W 1/89 Jan. 5, 1989, NJW 1989, 408.

³⁸⁷ A. DIETZ, in NIMMER, GER-90.

The partial reproduction of a photograph and its distribution was a distortion contrary to art. 14, because the surrounding spatiality had been “cut away” from the photographed work.³⁸⁸

4. The right of modification/adaptation

German law does not provide a positive right of modification. However, art. 12 of the editing Act, gives the author a restricted right to modify his work. There is an economic right of adaptation which requires the author’s consent (art. 23).

5. The right to retract

German law recognises a right to retract (art. 42). Yet courts can control the motivations of the retract. The author must show that the work does not correspond to his beliefs anymore. It seems that this article applies to all contracts involving author’s rights. The author must equitably indemnify the holder of the exploitation right (art. 42 §3). The indemnification must cover at least the costs he had incurred before he was notified of the revocation. If the author wishes to resume the exploitation, he must offer to the previous holder the same type of right on reasonable conditions (art. 42 § 4). The term 'in priority' cannot be found in the Act, so that it seems that the author does not have choice and must contract again with his previous contracting party. As soon as the author has exercised his right to retract, the contracting party’s right of exploitation ceases to have effect (art. 42 § 5). The right of retract cannot be exercised by authors of pre-existing works and by co-authors (art. 90 referring to art. 88 §1, 2°-5° and 89).

6. The right of access

German law classifies authors’ rights in three categories : exploitation rights, personality rights (art. 12-14) and other rights (art. 25-27). The right of access falls under the ‘other rights’ category. Thanks to this right, the author can force the possessor of the original or a copy of his work to give him the possibility to access it in order to proceed to reproductions or adaptations as long as it is necessary and as long as it does not prejudice the legitimate interests of the possessor (art. 25). The Act insists on the fact that this right must be put in balance with the interests of the owner,³⁸⁹ for instance the respect of the intimacy of the owner. Moreover, the right of access is limited to the exercise of very specific economic rights. The right of access does not impose on the owner an obligation to take care of the work in the interest of the author.³⁹⁰

³⁸⁸ District Court Munich, March 5, 1993, ZUM 1995, p. 57 and see A. DIETZ, RIDA, 1998, p. 174.

³⁸⁹ KG GRUR 1983, 507.

³⁹⁰ REHBINDER, p. 183.

7. Classification of authors rights in different categories - relationships between economic and moral rights

7.1. Rights of adaptation and integrity

The modification of a work is possible if the author transferred his adaptation right. Normally, the reduction or enlargement as well as the suppression of faded colours or unclear/out of focus effects can be done without the author's consent (art. 39 §2).³⁹¹ If the author has alienated his right of adaptation, he must "suffer" modifications which could infringe his right of integrity.³⁹²

III. Restrictions on moral rights protection introduced in certain Member States with respect to certain work categories and certain categories of rights holders

1. Software

The moral rights of programmer are the same as of any author. "Up to now, there is no Supreme Court precedent dealing with moral rights of the author of a computer program".³⁹³

1.1. The right of integrity

The software may not be adapted or changed without the author's authorisation (art. 23). The author has the exclusive right to publish and exploit the adapted program. The exclusion of guarantee by the software provider does not amount to a prohibition to make modifications but is only an exclusion of guarantee.³⁹⁴ The use of foreseen, but not 'configured' functions is not a violation of the author's moral right.³⁹⁵

2. Audio-visual works

2.1. The right of disclosure

The Act does not state who are the authors of a cinematographic work. It has been held that, according to art. 12, a film director is entitled to review the final cut of the motion picture before it is released to his film distributors, more precisely to check if the 'zero copy' is not defective.³⁹⁶

2.2. The right of integrity

a. Legislation

The authors of a cinematographic work have the sole right to object to gross distortions or other gross mutilations of his work or contribution (art. 93). This is valid during the realisation of the work as well as during the exploitation phase. This provision gives the producer a large leeway as to modifications. The authors will have to show that the modifications are gross, concretely,

³⁹¹ W. MAASSEN, *Urheberrechtliche Probleme der elektronische Bildverarbeitung*, ZUM, 7/1992, p. 350.

³⁹² A. STROWEL, 1993, p. 536-537.

³⁹³ SOMMERBLAD, 'Intellectual Property Protection for Software in Germany' (1997) 1 CTLR 13.

³⁹⁴ Court of Appeals of Munich, OLG Munich - 13 U 2458/86 Oct. 27, 1987, CR 1988, 378 (Chrocziel).

³⁹⁵ Bielefeld, See A. DIETZ, 'Lettre d'Allemagne', Le droit d'auteur, 1990, p. 82, fn. 141.

³⁹⁶ Court of Appeals of Berlin, Oct. 25, 1985, 5 U 580/85, Schu KGZ 86, *Movsessian*, cited by G. POLL, in C. VAN RIJ, p. 103. See also A. Dietz, 'Lettre d'Allemagne', Le droit d'auteur, 1990, p. 80.

that there is a total change in the meaning of the film or a radical transformation of the essential parts.³⁹⁷ Each author shall take into account the others and the producer while exercising the right.

b. Case law

It has been held to be an infringement to cut a movie by about one third.³⁹⁸

Ende, the author of a book 'The never ending story', could not prevent the distribution and showing of the film based on his novel even though the court found that the screen play and the film mutilated severely his novel. The reasons were that as art. 93 had not been waived by producer, the author could therefore not prevent (within certain limits) changes to the film if they led to better economic results of the exploitation of the film. Concretely, the author had given his consent to a similar ending of the film and had not provided an alternative ending. The author had also withdrawn his name from the credits.³⁹⁹ Moreover, he had had knowledge of the screenplay before the production of the film and only took action much later.⁴⁰⁰

2.3. The right to retract

Authors of audio-visual works cannot exercise their right of retract (art. 90 and 95).

3. Joint works

A joint work is a work in which several authors have participated jointly and their contributions cannot be separated (art. 8). Co-authors enjoy the right of public dissemination jointly. Alterations are only possible with the consent of all joint authors. However a joint author may not, without good reason, refuse to give the other co-authors his consent to the dissemination or alteration of the work. If he refuses to do so without good reason, the other co-authors can act against his refusal.⁴⁰¹

German law also recognises the category of compound works (art. 9).

4. Performers moral rights

a. Legislation

A performer has the right of integrity, but not of attribution. Nevertheless, in the audio-visual sector, performers can enforce the right to be named as performers on the basis of the industry practice.⁴⁰² A performer can prohibit any distortion or other alteration of his performance in such a way it can prejudice his standing or reputation as a performer (art. 83). "When a performance is being given jointly by several performers, they will have to show a reasonable

³⁹⁷ C. DOUTRELEPONT, p. 319.

³⁹⁸ Court of Appeals of Frankfurt, Dec. 22 1988, GRUR 1989, p. 203 = NJW-RR 1989, p. 1007; see RIDA, 1993, p. 200, fn. 85.

³⁹⁹ See A. DIETZ, in NIMMER, GER-90-91.

⁴⁰⁰ Court of Appeals of Munich, August 8 (or 1 ?), 1985, GRUR 1986, 460; cited by G. POLL, p. 104.

⁴⁰¹ V. SPITZ, *Intellectual Property Laws of Europe*, 1995, p. 176.

⁴⁰² G. POLL, in C. VAN RIJ, p. 102.

degree of consideration for one another in the exercise of this right."⁴⁰³ This right lasts for the lifetime of the performer or 25 years after the performance if that is later, in which case the right is exercised after the performer's death by his next of kin (art. 83 § 3).

b. Case law

The musical group U2 has been admitted, as a performer, to prevent the distribution of bootleg recordings of its performances on the basis that technical quality of the illegal recordings was so poor that it infringed its right of integrity.⁴⁰⁴

IV. Alienability and waiver of moral rights

The moral right, as the author right in general, is inalienable between living persons; it is only transferable upon the death of the author (art. 29). For Fromm, Nordemann and Vinck, only the waiver of the exercise of a specific moral right is possible, if indispensable for the use of the work, so that the substance of the right stays with the author.⁴⁰⁵ In other words, the core of the moral rights can never be waived or transferred.⁴⁰⁶ In their opinion, in case the author and the holder of the exploitation rights disagree, the opinion of the author must prevail.⁴⁰⁷

The author can waive certain of his rights if he is fully aware of the extent of what he waives (for instance, when he accepts a modification a posteriori). Waivers ex ante are possible but they are not absolutely binding. However, the right to retract cannot be waived in advance (art. 42 §2). For instance, art. 39 §1 states that an author can allow his contracting party (who has acquired the exploitation rights) to modify the designation of the author. This means that he can waive his right of attribution (i.e. publish anonymously) yet he can decide in the future to publish under his name. In other words, a ghost-writer can always reveal his identity (art. 66 §2). Thus a ghost-writer's contract is illegal if there is a waiver of the right to claim attribution (art. 13 §1) and of the right to be designated as the author (art. 13 §2). In conclusion, German commentators agree that the waiver is legally binding on the author, except in special circumstances where such an author can assert a legally protectable interest in becoming known as the creator of his work.⁴⁰⁸

It is also possible to concede different moral rights, when third parties' use of the work requires it. Thus an author can allow a third party to disclose his work. If the author has alienated his right of adaptation, he must "suffer" modifications which could infringe his right of integrity.⁴⁰⁹

⁴⁰³ E. ULMER & H.H. VON RAUSCHER, 'Germany' in S.M. STEWART, *International copyright and neighbouring rights*, 1989, p. 436.

⁴⁰⁴ Court of Appeals of Munich, July 18, 1991, cited by G. POLL, p. 103.

⁴⁰⁵ FROMM, NORDEMANN, VINCK, 1994, p. 135.

⁴⁰⁶ See A. DIETZ, in NIMMER, GER-89, citing E. ULMER, Berlin, 3d ed. 1980, and FROMM, NORDEMANN, VINCK, 8th ed. Stuttgart, 1994.

⁴⁰⁷ FROMM/NORDEMANN/VINCK, 1994, p. 135.

⁴⁰⁸ See A. DIETZ, NIMMER, GER-89, citing ULMER and FROMM/NORDEMANN/VINCK.

⁴⁰⁹ A. STROWEL, 1993, p. 536-537.

An author can authorise third parties to exercise his moral rights in his name.⁴¹⁰ Moreover, an author can empower a collecting society or a publisher to enforce his moral rights in case of infringement. However, if there is conflict between the two, the author will prevail, because the author retains his own power of enforcement. The right to claim damages from an infringement of the moral rights can be waived in favour of a collecting society.⁴¹¹

Status of the employed author

Only the creator of the work qualifies as the author of a work (art. 7). Employers cannot be initial owners of moral rights and cannot acquire them. This also means that a licensee cannot act on the behalf of an author for infringement of moral rights (art. 97 §2).⁴¹² As has been mentioned, certain prerogatives of the Urheberpersönlichkeitsrecht can be granted if necessary for the exploitation of rights. Thus the author can allow his employer to disclose the work.⁴¹³ Another rule states that the author cannot use his moral rights in a manner that would seriously impede the interests of the employer.

410 A. DIETZ, in NIMMER, GER-90.

411 BGH GRUR 1987, 128, *Nena*.

412 OLG Hamburg, Schulze OLGZ 109, 7.

413 C. DOUTRELEPONT, p. 198.

V. Duration of moral rights protection

a. Legislation

The authors' moral and economic rights form a unique entity. Therefore the duration of moral prerogatives is the same as the duration the economic prerogatives : 70 years after the author's death (art. 64).⁴¹⁴ The right of retract may only be exercised by the heir if he proves that the author would have been, prior to his death, entitled to exercise the right (art. 42).

b. Case law

The works of a 19th c. German writer were in the public domain since 1963. A historical and critical edition of his works were published. However the writer had expressly forbidden to publish certain works under his own name. The Court of Appeals of Munich prevented the publication on that basis, whereas in Germany the moral rights are not perpetual. This decision therefore contradicts the wording of the Act.⁴¹⁵

⁴¹⁴ ULMER, p. 347-349.

⁴¹⁵ May 30, 1996, GRUR 1997, p. 68 = ZUM 1997, p. 56. See also A. Dietz, RIDA 1998, p. 170.

Summary

Legislation is monistic. The right of disclosure is stated in quite simple terms. The right of attribution is very similar to Belgium legislation. The author only has the right to object to modifications which are prejudicial. Like in France, the exercise of the right of retract is subject to many strict obligations. There is a right to access the work. Moral rights are not transferable but waivers are allowed under certain conditions.

Case law in general, is much less protective than in France for instance. German courts use the balance of rights for almost each right. The best cases illustrating this balance of interests are architectural works cases (especially for the attribution and integrity rights of architects). Concerning the right of attribution, German courts are more protective for other types of works and find for authors in most cases. As regards the right of integrity, case law is not very favourable to authors. For instance, destruction is not considered as a mutilation. The use of music for an advert is not a violation of the integrity right. These few examples show the very contrasting differences between France and Germany in this regard. These differences can be analysed in light of the potential effects on the internal market. Certain works legally modified in Germany could not be sold in France. Conversely, an author could not bar the importation of his modified work in Germany if German law applies and the court decides there is no violation of the author's moral rights.

Part V. Greece

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection
- VI. Relationships between moral rights protection of authors and of performers

I. Legal framework

Copyright, Related Rights and Cultural Matters Act n° 2121/1993 of March 3, 1993, last amended by law n° 2435 of Aug. 2, 1996. Software, rental and lending directives are implemented. Satellite and cable, and term directives have been taken into account to the extent possible as the new Greek Act was drafted at the time these directives were still under consideration. The full harmonisation of Greek legislation of these two directives has been achieved by Law n° 2557/1997. The Database Directive has not been implemented yet but a bill is now in Parliament.⁴¹⁶ With the entry into force of the new 1993 Act, moral rights are now part of author's rights. Previously, moral rights were protected under the Civil code as rights of personality (art. 57).

II. Analysis of the different moral rights : characteristics

Art. 1 by stating that author's rights consist of two types of rights, economic and moral, clearly chooses the dualistic tradition. Moral rights have the same characteristics as the right in one's own personality as recognised by Greek Civil Code art. 57.⁴¹⁷ The case law developed with regard to the right of personality may, in appropriate cases, apply to moral rights.⁴¹⁸

Art. 4 §1 enumerates 5 moral rights : the rights of publication, authorship, integrity, access and withdrawal. This list is not exhaustive but merely exemplative.

1. The right of disclosure

⁴¹⁶ G. KOUMANTOS, 'Chronique de Grèce', *RIDA*, 1999, n°182.

⁴¹⁷ G. KOUMANTOS, 'Greece', in M.B. NIMMER - P.E. GELLER, *International copyright law and practice*, New York, Matthew Bender, October 1996, §7, 1, a.

⁴¹⁸ See Supreme Court, Arios Pagos, dec. N° 171/1957, in *Journal of Greek lawyers*, 1958, vol. 25, p. 265. Cited by G. KOUMANTOS, in NIMMER.

The author has the right to decide the conditions, the time and the place in which the work will be made accessible to the public.

2. The right of attribution

The right of attribution is phrased generously (art. 4 §1, b). The author has positive and negative rights. However, the act states that the author has the right of attribution “insofar as it is possible”. This expression “insofar as possible” reduces the strength of moral rights. Consequently, the contracting party can invoke this statement to reduce the constraints of moral rights.⁴¹⁹ The power of the author to affirm his attribution is also the power to decide to use a pseudonym or to remain anonymous.

There is a rebuttable presumption of authorship in favour of the person whose name is written on the material medium embodying the work (art. 10). There is also a presumption in favour of the publisher of anonymous and pseudonymous works (art. 11 §1) and of works of deceased authors (art. 11 §2). The editor of a pseudonym or anonymous work may exercise some moral rights such as the right of integrity and attribution (to prevent a third party from falsely claiming authorship) (Art. 11(3)).⁴²⁰

3. The right of respect or right of integrity

The author can object to any deformation, mutilation or other modification of his work, and to any offence to the author due to the circumstances of the public presentation of the work (art. 4). Like in France, the author does not have to show a violation of his honour or reputation.

Limits to the right : architectural works

In case of architectural works, courts use the criterion of the “interests in presence” (balance of interests). This means that the integrity and even the existence of a work may be sacrificed if the owner of a building in which a work is embodied wants to alter or demolish the building (a fresco for instance).⁴²¹

In a decision of 1971, an architect was opposed to the owner of a big hotel, because the latter wished to add a fourth floor to the building.⁴²² The court distinguished between pure works of architecture like ‘monuments’, to which no modification can be done and works which have an utilitarian function. In the case of functional buildings, the interests of both parties must be examined. The fact that the hotel, without the addition of a fourth floor, could not respond to the clients’ needs prevailed on the integrity right of the architect, because the violation to the moral right was of lesser seriousness than the damage to that the owner would suffer if he could not add a floor.

4. The right of modification/adaptation

⁴¹⁹ C. DOUTRELEPONT, *Le droit moral de l’auteur et le droit communautaire*, p. 249.

⁴²⁰ G. KOUMANTOS, in NIMMER.

⁴²¹ G. KOUMANTOS, in NIMMER, p. GRE- 30.

⁴²² Trib. Athens, dec. 4717/1971, cited by MELAS, ‘Lettre de Grèce’, *Le D.A.*, 1975, p. 227.

There is a right of adaptation and translation (art. 3). Greek law does not explain in further detail the different economic rights.

5. The right to retract

The right to rescind from a contract of exploitation of the work is provided only for scientific and literary works. The right to retract must be exercised due to a change in the author's beliefs or in relevant circumstances and is subject to the payment of pecuniary loss to the other party. It seems then that the Greek legislator does not oblige the author to indemnify for the expected profit.

The author who wishes to conclude a new exploitation contract after having used his right of retract must offer in priority to his former contracting party the possibility of concluding the same contract or at least under similar terms (art. 4 § 2).⁴²³

6. The right to access

The right to access covers the right to access the work, even if the material object incorporating the work or the economic rights on the work belong to someone else, provided this causes the least inconvenience to the owner or right holder of the work (art. 4 1, d)). The author can access his work for any reason (to see his work for sheer pleasure or exercise one of his economic rights...).

III. Restrictions on moral rights protection introduced in certain Member States with respect to certain work categories and certain categories of rights holders

1. Software

The Greek copyright Act has not enacted particular moral rights provisions in favour of authors of software⁴²⁴. However some questions remain unanswered : it is not sure whether the right to decompile a programme to adapt it in order to achieve interoperability falls under the scope of economic or moral rights.⁴²⁵

The 'common law' of disclosure (art. 4 §1, a)) applies. The employee remains the owner of his moral rights.

2. Audio-visual works

2.1. The right of disclosure

⁴²³ G. KOUMANTOS, in NIMMER, §7, p. GRE-30.

⁴²⁴ C. DOUTRELEPONT, p. 200.

⁴²⁵ L. KANELLOS, 'Greece' in H.D.J. JONGEN - A.P. MEIJBOOM, *Copyright software protection in the European Community*, Deventer-Boston, Kluwer, 1993.

Moral rights of authors can only be exercised on the definitive audio-visual work, as approved by its author (art. 34). The principal director of the audio-visual work is considered as the author (art. 9).⁴²⁶ Only the director has the power to decide that the work is completed (art. 34 §1). The director can exercise the disclosure right during the realisation of the audio-visual work and even the exploitation of the film, unless he has consented not to exercise it.⁴²⁷

2.2.. The right of integrity

No modification of the definitive form of the film can be made without the author's consent. Consequently, the producer cannot modify the work. The right to modify the definitive version belongs exclusively to the director and the "co-directors". They can object to any modification, be it a violation or not of the work.

3. Works of collaboration, collective works and composite works

Works of collaboration or work of joint authorship

Joint authorship works are the result of direct collaboration between several authors. All co-authors are original authors of the work, with equal parts, unless otherwise provided (art. 7 § 1).

Collective works

In the case of a collective work, authors contribute separately to a work under the intellectual direction and co-ordination of a natural person. This person is deemed the original author of the collective work. However, the authors remain original authors of their contributions if they can be exploited separately (art. 7 § 2).

Composite works

The work is constituted by different parts created separately. Authors of these parts are original co- right holders of the rights in the composite work and are exclusive original authors of their own parts, provided that they are capable of separate exploitation (art. 7 § 3).⁴²⁸

⁴²⁶ This is a rebuttable presumption.

⁴²⁷ C. DOUTRELEPONT, p. 203.

⁴²⁸ G. KOUMANTOS, 'The New Greek Law On Authors' Rights and Neighbouring Rights', RIDA, January 1994, p. 233.

4. Performers moral rights

Performers have the right to be identified and the right to object to any alteration of their performances (art. 50).⁴²⁹

IV. Alienability and waiver of moral rights

Moral rights are inalienable between living persons (art. 4 (3) & art. 12 §2 of the Copyright Act, art. 57 and 59 of the Civil code). Nonetheless, art. 14 & 16 make it possible to waive moral rights in certain specified cases and only by way of written contracts.⁴³⁰ Any acts relating to the exercise of moral rights which are not in a written form are void. Only the author can invoke nullity. An author can enter in a contract in which he agrees that his name will not be mentioned but he cannot be forced by contract not to reveal his name. Such a contract would be void. Thus, it seems that a ghost-writer can always reveal his identity.

In an employment contract, the author can waive his right of disclosure but this does not empower the employer to exercise the right of disclosure in lieu and place of the author-employee.

Performers enjoy the protection of art. 12 §2 and 16.

V. Duration of moral rights protection

Moral rights last 70 years after the author's death (art. 29 (1)). Moral rights are then exercised by heirs (art. 12 § 2). After the expiry of the 70 years term, the rights of attribution and integrity are exercised by the Minister of Culture (art. 29 (2)). Performers moral rights are also exercised by heirs (art. 50 §2).⁴³¹

VI. Practical effects of moral rights protection with respect to authors, on the one hand, and with respect to performers

Neighbouring rights may not affect the protection of authors' rights. In this respect, no provision of the Act can be interpreted in such a manner as to lessen the protection (art. 53).⁴³²

Summary

⁴²⁹ G. METAXAS-MARANGHIDIS, in *Intellectual Property laws of Europe*, 1995.

⁴³⁰ The new Greek law seems to have implemented the case law on the point, see C. DOUTRELEPONT, p. 294, note 748.

⁴³¹ Art. 12 §2 applies to performers.

⁴³² G. KOUMANTOS, in NIMMER, § 9; G. KOUMANTOS, *RIDA*, 1994, p. 259.

Legislation seems to be dualistic in view of the wording of art. 1. The right of disclosure is stated in very simple terms. The right of attribution seems less protective, as it gives only the right to be named "insofar as possible". The right of integrity is like in France stated in very general terms and a prejudice must not be invoked. The right of retract only applies to scientific and literary works. There is a right to access. Alienability is prohibited and waivers are allowed under certain conditions.

Greek case law does not reveal any effect on the internal market. Authors generally use their moral rights to have their economic rights respected. One thing to note is that even if the statute provides for an absolute right of integrity, in one case concerning an architectural work, the court used the balance of interest and found against the architect.

Part VI. Ireland

I. Legal framework

I. Legal framework

Ireland is the only country of the European Community which has not recognized moral rights to authors and performers. Copyright and related rights are currently governed by the Copyright Act, 1963, the Copyright Amendment Act, December 11, 1987, the Performers' Protection Act, 1968, the Intellectual Property (Miscellaneous Provisions Act, 1998) and a variety of Statutory Instruments (i.e. two regulations (S.I. n° 26 of 1993 and S.I. n° 158 of 1995) transposing the Software and Term directives. In addition, the Performers Protection (Foreign countries) Order 1978 (SI 134 of 1978) extends the benefit of the performers' protection act 1968 to records and films of performances made in any country which is a party to the Rome Convention.⁴³³

In 1999, a Draft bill on Copyright and Related Rights was introduced in the upper House of the Parliament. It has passed the Senate (Seanad Eireann) on Oct. 19, 1999. The bill should be enacted in early 2000 and will provide for moral rights for the first time in Irish law. It will also implement the rental and satellite-cable Directives, as well as bring Irish law on copyright and related rights into conformity with international obligations under the Paris Act of the Berne Convention, Rome Convention, TRIPS, WCT and WWPT.

Present situation

To date, there is still no moral right like in the other countries of the European Union. Accordingly, there is no Irish case law on this issue. The author must base his action on other rights derived from the common law, such as the law of contracts, the right to privacy, certain provisions of the Copyright Act of 1963 or introduce actions in defamation or passing off.

Irish law is in some respect similar to British law. As regards the right of attribution, art. 54 of the 1963 Copyright Act makes it unlawful for any person to insert the name of the author on a work of which is not his. It makes it unlawful for any person who, with scienter, publishes, sells, rents, offers, presents commercially with the aim of selling or renting, or exposes to the public with commercial aims, a work on which the name of a person which is not the author is written; and for any person who represents, executes for the public or makes a radio diffusion of a work with knowledge that the attribution is falsely attributed to a person who is not the author.

The right to privacy recognized in the Irish Constitution could be used to protect the right of the author to the respect of his choice to remain anonymous. The right to publish under a pseudonym, anonymously or under another denomination is also recognized (art. 15 Copyright Act). The law of defamation can protect against someone who puts the name of a person as the author of an obscene or pornographic work, when this person is not the author and has no connection to the work. The false attribution can also be attacked under injurious falsehood. In Irish law, there is also an obligation to mention the sources.⁴³⁴

⁴³³ A. BURKE - K. HOY, 'Ireland', in *Intellectual property laws of Europe*, G. METAXAS-MARANGHADIS (ed.), 1995, p. 251.

⁴³⁴ C. DOUTRELEPONT, n° 299-303, p. 213-215.

As regards the right of integrity, art. 54 § 4 of the Copyright Act makes unlawful (only for works of plastic art) to publish, sell, rent, offer to sell or rent with knowledge, the work under a modified form, as if it had not been modified. This provision indirectly protects the author's reputation. The common law can also protect the integrity of the work.

The future Copyright Act

A few words should be said on the new draft bill. Chapter 7, sections 102-114 treat of moral rights. Firstly, like in the United Kingdom, the Bill does not provide for a right of disclosure. Chapter 7 provides in substance for an attribution and an integrity right, as well as a right to object to false attribution of the work and a right to privacy in photographs and films. These provisions resemble very much the British CDPA 1988 provisions. The rights are conferred but numerous exceptions are limiting them. Waivers are possible for all rights (art. 111) although the Bill states that such rights are incapable of assignment (art. 113).

Summary

Moral rights are not recognised in Ireland and thus there is no case law. However a new statute should be voted soon which resembles very closely the British CDPA.

Part VII. Italy

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection

I. Legal framework

The law relating to copyright is found in two different texts : articles 2575-2583 of 1942 Civil Code (version of April 1984) and the Act n° 633 of April 22, 1941, amended Nov. 16, 1994.⁴³⁵ Several amendments have implemented the Rental and lending directive⁴³⁶, the Term directive and the TRIPs agreement⁴³⁷. There also have been three legislative Decrees : the first one concerning the right of lease and other copyright related rights (n° 204), and the second, of March 15, 1996 to implement Software Directive (n° 205), and a third Decree n° 154 of May 26, 1997. Currently, further proposals to revise the Copyright Act are under study.

⁴³⁵ Act on the Protection of Copyright and Other Rights Connected with the Exercise Thereof (Legge del 22 aprile 1941 sulla protezione del diritto d'autore e di altri diritti connessi al suo esercizio).

⁴³⁶ N° 685, implementing Rental Directive and consolidating anti-piracy measures.

⁴³⁷ N° 747 of December 27, 1994 (TRIPs ratification) and Decree-Law N° 544 of December 23, 1995 (extending terms of protection).

II. Analysis of the different moral rights : characteristics

Moral rights are stated in art. 20 to 24. The prevailing literature considers the list of moral rights provided in the Act (authorship, disclosure, integrity and withdrawal) to be non exhaustive.⁴³⁸ Moral rights apply to both published and unpublished works.⁴³⁹

1. The right of disclosure

The right of publication (to decide whether, when, how to publish) is not expressly mentioned in the Act but commentators and case law have always recognised it.⁴⁴⁰ The law recognises a right to prevent the work from being published (*diritto di inedito*). Art. 112 states that the rights of the author (which belong to him during his life) can be expropriated in the interests of the state. Nevertheless, this provision does not prejudice the author's right of non disclosure (*inedito*), so that the right not to publish remains in the author's power (art. 111). In addition, the Act makes it a criminal offence to publish an undisclosed work (art. 171).

2. The right of attribution

a. Legislation

The right of attribution is the right to claim authorship of the work (art. 2577 al. 2 of the Civil Code and art. 20 of Act). The author has the right to remain anonymous or choose to publish under a pseudonym.

Holders of exploitation rights cannot commercialise records or analogous mediums without the indication of the author's name and the work's title (art. 62). The author also has the right to be mentioned in a work derived from his. For instance, the author of a novel, which has been adapted for a movie, has the right to have his name mentioned in the film credits.⁴⁴¹ If the work is completed by another person than the employed author, the employer has the obligation to indicate that the work has been completed by another person. If the original author does not want to have his name associated with the name of the other author he can remain anonymous.⁴⁴²

The author of a pseudonymous or anonymous work can always reveal his identity at any time and exercise his rights (art. 21, al. 1). The contracting parties of the author so revealed, will have to indicate the author's name in all publications, reproductions, transcriptions, executions,

⁴³⁸ G. JARACH, *Diritto d'autore*, Mursia, Milano, 1983, p. 45; E. PIOLA CASELLI, *Il diritto morale d'autore*, *Dir. Aut.* 1930, p. 22 ff.; G. AULETTA, *Marchio, Diritto d'autore sulle opere dell'ingegno*, Commentario-Scialoja-Branca, Zanichelli, Bologna-Roma, 1977, cited by A. FRIGNANI and P. CERINA, 'Italy' in H.D.J JONGEN - A.P. MEIJBOOM, *Copyright software protection in the European Community*, Deventer-Boston, Kluwer, 1993. See also G. MONDINI, in C. VAN RIJ, ed., *Moral rights, reports presented at the meeting of the International Association of the Entertainment lawyers MIDEM*, Cannes, 1995, pp. 105-113. This author cites a case where an artistic work has been exhibited by its owner in a way considered prejudicial to the author's reputation (exhibition of the work with pornographic objects).

⁴³⁹ G. MONDINI, p. 110.

⁴⁴⁰ G. MONDINI, p. 110.

⁴⁴¹ See e.g. Trib. Rome, July 15, 1980, *D. Aut.*, 1981, p. 420; Cass., 5 Sept. 1990, *Foro it.*, 1990, voce diritti d'autore, n° 52-53. See also G. MONDINI, p. 107.

⁴⁴² Pretore, Roma, Aug. 30, 1966, *D. Aut.*, 1966, p. 396.

representations, recitations and diffusions in any other form of communication of the work to the public (art. 21 al. 2).

The author also has a right (not moral but personal) to deny authorship of works falsely attributed to him.⁴⁴³ In this case, he can act to obtain damages against misappropriation of his name and reputation.⁴⁴⁴

In addition to these general rules, there are special rules concerning the right of attribution :

- Unless otherwise agreed, the author of a contribution to a collective work, which is not a journal or a review, can request that his name be mentioned on the reproduction of his work, according to the customary rules (art. 40 al. 1).
- The name of the author and the work's title must be broadcast simultaneously with the broadcasting of the work (art. 54).
- The name of the photographer must be mentioned on the reproduction of photographs in anthologies for school use and more generally in scientific or didactic works (art. 91).
- The editor must indicate the author's name or pseudonym on copies of the work, or publish the work anonymously if so provided in the contract (art. 126 al. 1).
- Similarly, the party who has been granted the right to represent and execute the work, must mention the name of the author and the title of his work, and possibly of the translator and adapter (art. 138 al. 1).

b. Case law

Colgate Palmolive had included tapes of songs of famous Italian artists in packs of detergents. Authors sued because they did not authorise the use of their names and works to advertise a product.⁴⁴⁵ The court held that the exploitation of the fame of these authors could be detrimental to their name and image. Consumers could deduce that authors had given their consent to this advertising campaign, which they did not. Authors could secure their right to have an exact representation of their personality.

3. The right of respect or right of integrity

a. Legislation

The right of integrity is defined as the right to object to any distortion, mutilation or any other modification of, and any derogatory action in relation to the work, which would be prejudicial to the honour or reputation of the author. (art. 20 §2, similar to art. 6 bis of the Berne Convention and art. 2577 al. 2 : to object to modification, mutilation etc. if there is a prejudice to honour or reputation). The terms 'reputation and honour' have been interpreted in the broad sense by courts : they include the author's moral, political, artistic, and scientific ideals and principles and more generally the author's overall prestige and personality.⁴⁴⁶

The holder of the economic rights cannot communicate the work to the public if he has made additions, cuts or modifications without the consent of the author. Naturally, if the author has

⁴⁴³ G. MONDINI, p. 107.

⁴⁴⁴ M. FABIANI, in NIMMER, § 7.1. A, p. ITA -53.

⁴⁴⁵ Pretore Roma, Nov. 15, 1986, D. Aut., 1987, p. 155. See M. FABIANI, 'Lettre d'Italie', Le droit d'auteur, 1989, p. 27.

⁴⁴⁶ G. MONDINI, p. 108.

consented in a contract to adaptations, he cannot object to it (such as a contract of adaptation).⁴⁴⁷

Limits to the right of integrity

The right of integrity is not absolute. In several fields, like journalism or music, the right of integrity can be reduced. For instance, the editor of a journal has the right, unless otherwise agreed, to modify the journalist's article if it is necessitated by the nature or purpose of the journal (art. 41). Similarly, the authors of musical works must suffer modifications requested by the technical necessities of the recording (art. 63). Special rules apply to contracts of representation and execution. The contracting party cannot make additions, suppressions or variations to the work without the author's consent, nor can he replace the main performers and the conductor and the chorus, if they were designated with the author's agreement. He can only replace them if there are serious reasons (art. 138 al. 2).

Destruction

The destruction by the owner of the original and unique work is for certain authors, not a violation of the right of respect.⁴⁴⁸ Others say that the destruction of the only copy of an author's work can be a violation of his honour or reputation.⁴⁴⁹ This question has never been raised in court. For Mondini, there is no rule that may oblige the owner to maintain the work in good condition.

b. Case law

The use of musical compositions for their synchronisation with TV adverts and the distribution of records within the context of promotional campaigns in association with consumer products constitute an infringement of the right of integrity.⁴⁵⁰ The fact that organisers of an exhibition chose paintings which were, in the author's opinion, not sufficiently representing the author's art is not a violation of the right of integrity. No authorisation is required from the author to organise a public exhibition of his works.⁴⁵¹

Art. 5 of the Act states that official documents are not protected by copyright. Consequently, a court has ruled that a judge does not have moral rights on his judgements. The judge could not prevent a journal from cutting passages in her judgement even if she believed these cuts modified the meaning of her judgement.⁴⁵²

Architectural works

⁴⁴⁷ The Court of Appeals of Rome has nevertheless reaffirmed that the author keeps his moral right after the transfer of his right of adaptation, see Rome, March 25, 1985, D. Aut., 1986, p. 74. (Contra : Trib. Rome, Feb. 21, 1970, Dir. Aut., p. 103). See C. DOUTRELEPONT, p. 295. This might mean that the author can object to modifications which violate his honour or reputation.

⁴⁴⁸ The Court of Cassation ruled in 1951 that the destruction of a work of the plastic arts is not within the scope of art. 20 §1: Cass. 21 July 1951, Foro it., 1952, I, 1061. For M. FABIANI, this question is controversial; see FABIANI, in NIMMER).

⁴⁴⁹ G. MONDINI, p. 110.

⁴⁵⁰ G. MONDINI, p. 109. See also Colgate case discussed in the right of attribution section.

⁴⁵¹ Court of Appeals of Venice, Feb. 8, 1955, Dir. Aut., 1955, p. 48 and Giust. civ., 1955, I, 984; see also Roma, May 13, 1961, Dir. Aut., 1961, p. 366, *Stradone v. Exposition quadriennale de Rome*.

⁴⁵² Pretore Roma, Apr. 19, 1989, Dir. Aut., 1991, p. 391, cited and commented by M. Fabiani, RIDA, 1994, n° 161, p. 173-177.

The author cannot object to necessary modifications during the construction of the work (art. 20 al. 2). If the work has an "important artistic character", the architect must be committed to the study and execution of these modifications (art. 20 al. 2).⁴⁵³ In 1979, the Court of Appeals of Bologna has clarified the extent of the modifications and the moment at which they can be done as well as the concept of necessity.⁴⁵⁴ "Once the architectural project is submitted to the contracting party, it can be modified, as long as it does not prejudice the honour or reputation of the author. On the contrary, if during the realisation of the project, modifications are needed, they can be done, even if it prejudices the author's honour or reputation. The necessity to modify can result from technical or normative reasons, or an incorrect prevision of the cost of the work's completion. The Court of Cassation approved this decision.⁴⁵⁵ In 1991, the Court of Cassation has in turn clarified the meaning of the word "necessary".⁴⁵⁶ Necessity can justify modifications which can even alter the conceptual harmony or functionality of the building. The appreciation of the violation of the reputation or honour cannot result from negative global opinion of non-experts or in other words, from citizens of good faith.

4. The right of modification and the right of adaptation

Two rights are recognised to authors : the exclusive right of the author to modify his work and the right of adaptation (modify and transform the work in any other way). The author has also a right of translation.

The right of modification is categorised as an economic right (art. 18, 4). The author has the right of modification for the first but also for the subsequent publications of the work (art. 129). The modifications (which do not prejudice the author's honour or reputation) must be authorised by him (for the editing sector, see art. 126, 1 a).

With respect to architectural works, the author cannot object to modifications rendered necessary in the course of the realisation of the work and even after the work has been completed (art. 20 al. 2). However, if the competent state authority decides that the work has an important artistic character, the author has the right to modify the work (art. 20 al. 2). It is to be noted that the author who has known and accepted modifications of his work cannot act to prevent their execution or to demand their suppression (art. 22).

5. The right to retract

The right to retract is defined as the right to withdraw the work from commerce for serious moral reasons, subject to the obligation to indemnify anyone who has purchased the economic rights to the work which is withdrawn (art. 142).⁴⁵⁷ This right extinguishes at the death of the author. The "serious moral reasons" include political, religious, ethical, intellectual or artistic reasons. The seriousness is showed by the fact that the circulation of the work would seriously contradict

⁴⁵³ C. DOUTRELEPONT, p. 311.

⁴⁵⁴ Bologna, April 23, 1979, *D. Aut.*, 1980, p. 446.

⁴⁵⁵ Cass. Nov. 3, 1981, *Foro it.*, 1982, I, p. 72.

⁴⁵⁶ Cass. Oct. 18, 1991, *Foro. It.*, 1992, I, p. 2480. C. DOUTRELEPONT, p. 312.

⁴⁵⁷ G. CUONZO and J. HOLDEN, *Intellectual Property Laws of Europe*, G. Metaxas-Maranghidis, 1995, p. 272.

his change in personality or would expose him to criminal sanctions or political or religious persecutions.⁴⁵⁸

Some authors think that in case it is the unique original exemplary of the work which has been alienated, the author can prevent the owner from exploiting the work commercially, thanks to his right of retract. However, the author cannot prevent the owner from using the work in a private sphere.⁴⁵⁹ The author who has exercised his right of retract and decides to transfer his economic rights once more, is not obliged to grant the right of exploitation in priority to his former contracting party. The existence of serious moral reasons is sufficient. The author must nevertheless send to his contracting party, all his sub-contracting parties and to the public an express declaration in which he states that he wishes to use his right of retract. He must have the retract published (art. 142 §2). In the year of the publication, users can act to obtain indemnification or judicially object to the exercise of the right of retract. The judge must then appreciate the seriousness of the moral reasons. If the author does not pay the indemnity during the time allocated, the effect of the decision ceases (art. 143).

6. The right of access

The right of access does not exist.

⁴⁵⁸ G. MONDINI, p.110.

⁴⁵⁹ L. C. MARCHETTI & L. UBERTAZZI, *Commentario breve alla legislazione sulla proprietà industriale e intellettuale*, Padova, Cedam, 1987, p. 142, IV. Trib. Milan, Jan. 27, 1975, D. Aut., 1975, p. 94.

7. Classification of authors' rights in different categories - relationships between economic and moral rights

7.1. Rights of adaptation and integrity

If the author has contractually consented to adaptations, he cannot object to them.⁴⁶⁰

III. Restrictions on moral rights protection with respect to certain work categories and certain categories of rights holders

1. Software

The Italian legislator has not enacted different provisions regarding moral rights of software creators. Thus moral rights remain vested in the author, unless otherwise provided. For instance, the right of disclosure as to software works is the same as for other works.⁴⁶¹

2. Audio-visual works

The co-authors of a cinematographic work are the artistic director, the author of the subject, the author of the script and the author of the music (art. 44). The Act does not say if audio-visual works fall into the category of works of collaboration but it seems by the wording of the Act that they indeed are. The Act does not state at which moment the work must be deemed completed and thus there is no rule stating that the authors can only exercise their moral rights on the completed work.

⁴⁶⁰ See above, as discussed in the right of integrity and right of modification sections.

⁴⁶¹ Similar in Belgium, see C. DOUTRELEPONT, p. 201.

2.1. The right of disclosure

In case the film as modified needs to be disclosed, the author can demand not to be mentioned as the author. In this respect, the right of attribution influences the right of disclosure.

The Act does not treat of the problem of the impossibility for the director to complete the work for unforeseeable reasons (*force majeure*). This issue is regulated only for publishing contracts. However, legal doctrine and courts admit that the rule applying to the publishing sector can also be applied to the audio-visual sector. Thus the producer can have the work completed by another director, with the obligation to mention that the work was completed by another person.⁴⁶² Yet subsequent case law has ruled that the director can object to the producer's attempt to have him replaced and to the attempt to modify the spirit of the work.⁴⁶³

2.2. The right of attribution

Authors of cinematographic works have the right that their names, with the indication of their professional quality and of the contribution to the work, be mentioned during the projection of the movie (art. 48).⁴⁶⁴

2.3. The right of integrity

a. Legislation

The producer cannot carry out modifications, transformations or translations of the work without the authors' consent (the authors described in art. 44) (art. 47). Restrictions to the right of integrity are limited to the ones that are necessary. In this sense, the producer has the right to modify the work in the extent necessary (art. 47). The statute provides for arbitration if there is a disagreement between the producer and certain co-authors on the necessity of the modifications. The role of the arbitrator is performed by a college of "technicians" who are designed by the Ministry of Culture. Its decisions are definitive.

The right to object to publication of the modified work, as compared to the definitive version, can be invoked if it causes a prejudice to the honour or reputation of the author (art. 20). The author can demand the destruction of the modified version of the work only in extremely serious cases (art. 161).

The authors of literary or musical parts of a movie can use their works separately, provided it does not prejudice the rights of utilisation which belong to the producer (art. 49).

462 C. DOUTRELEPONT, p. 325-326. See FABIANI, *La protezione giuridica dell'opera audiovisiva*, Dir. Aut., 1991, p. 428. Trib. Roma, Aug. 22, 1957, Dir. Aut., 1958, p. 82; Pretore Roma, Oct. 8, 1968, Foro it., 1968, I, 3107.

463 Pretore Roma, Jan. 20, 1970, D. Aut., 1970, p. 80.

464 See e.g., Trib. Milan, July 29, 1965, Dir. Aut., 1967, p. 63; Trib. Rome, Aug. 11, 1958, Riv. Di diritto industriale, 1959, II, p. 109.

b. Case law

A lot of cases involved the interruption of broadcasting of movies by adverts. A line of case law appreciated subjectively in each case if the adverts prevented viewers to evaluate the quality of the work.⁴⁶⁵ The courts found that interruptions could constitute derogatory acts and prejudice the authors' reputation but a number of factors had to be taken into account such as the nature of the film, the frequency and duration of the interruptions, and any resulting unfavourable opinion of the character of the work by the audience.

In 1989, the Court of Appeals of Rome overruled this trend.⁴⁶⁶ The court ruled that any interruption of a broadcast movie does in any case alter the unity of the work. The court did not examine if the ads constituted a violation of the author's honour or reputation. The interruption by ads is in itself a prejudicial act, unless proof of the contrary is given, for instance if the author has consented to it. The frequency or duration of the interruptions cannot be a criterion to evaluate the prejudice. This decision was rendered before the enactment of the new Act regulating the public and private broadcasting. Art. 8 § 2-4 of the Act allows interruptions inside protected works. This provision originates from the Directive on Television without borders.⁴⁶⁷

As regards case law on the colouring of black and white films, commentators' opinions diverge. Some believe colouring is only an adaptation, so that it should be comprised in the rights of the producer, while the majority believes that the colouring is always an alteration subject to the application of the right of integrity. Such colouring would only be an infringement of the integrity right if it is detrimental to the author's reputation or honour.⁴⁶⁸

3. Works of collaboration and collective works

Works of collaboration

The work of collaboration is defined as the work created by several authors whose contributions cannot be separated. Moral rights can be exercised by all authors separately but the work cannot be disclosed nor modified nor used in a different form than the one of first publication, without the consent of all authors. In case of unjustified refusal by one or several authors as to the disclosure, modification or new use of the work, courts can authorise the other co-authors to disregard the refusal (art. 10).

Collective works

The author of a collective work is the person who organises and directs the creation of the work (art. 7). Within the limits of his contribution, the person who has elaborated a work shall be deemed to be the author of such contribution. However, the person who only provides the means to produce the work and takes care of its diffusion, such as in the case of radio plays created and broadcast with the aid of broadcasting organisations, cannot be considered as the author of the work.⁴⁶⁹

⁴⁶⁵ Tribunal, Rome, May 30, 1984, Dir. Aut., 1985, p. 68; Pretore, Rome, Dec. 30, 1982, Dir. Comm. 1983, 349.

⁴⁶⁶ App. Roma, Oct. 16, 1989, Serafino II, Foro. It., 1989, p. 3201; Dir. Aut. 1990, p. 98.

⁴⁶⁷ C. DOUTRELEPONT, p. 272-273.

⁴⁶⁸ G. MONDINI, p. 109.

⁴⁶⁹ A. Roma June 30 - Sept. 12, 1955, Dir. Aut., 1956, 42.

As mentioned earlier, the author of a contribution to a collective work, which is not a journal or a review, can request that his name be mentioned on the reproduction of his work, according to the customary rules (art. 40 al. 1). A newspaper is a collective work so that the publisher who collects the articles is the right holder of author's rights. Journalists are consequently deprived of their right of attribution.

The author of the text of a dramatico-musical work, of a musical composition with words, of choreographic works or pantomimes, cannot use it in conjunction with other musical works except in certain cases (art. 35).

4. Performers moral rights

a. Legislation

Performers have less strong moral rights than authors. The right of attribution is granted only to performers who take the leading parts of dramatic, literary or musical works (art. 83). The right of integrity is recognised to performers only in cases where there is a prejudice to their honour or reputation (art. 2579 of the civil code and art. 81 of the Act). Soloists, conductors, whole choirs and orchestras who perform works have the right to object to publication of their performance which may be prejudicial to their honour or reputation. Additionally, performers can invoke the civil code or other articles on rights of personality to protect other personal interests.⁴⁷⁰

b. Case law

In this respect, performers such as film actors, have been recognised the right to object to the dubbing of their voice if detrimental to their honour or reputation.⁴⁷¹ An artist can also object to a remix of one of his records reproducing his performance.⁴⁷² If nude scenes, not previously foreseen, are introduced in a movie, there is a violation of the artist's right of integrity, yet only if these scenes alter the meaning and the goals of interpretation.⁴⁷³ The reproduction of a piece of clothing and an accessory which always have characterised an actor and which are susceptible to introduce in the public's mind an association between the product subject of the advertising and the actor himself, is a violation of the author's personality rights.⁴⁷⁴ An artist can object to the commercialisation without his consent, of a calendar with reproductions of his signature and of photographs representing him.⁴⁷⁵

IV. Alienability and waiver of moral rights

Moral rights of attribution and integrity are inalienable (art. 22 and for the right of retract, art. 142, al. 2). They cannot be transferred and are independent of pecuniary rights.

⁴⁷⁰ M. FABIANI, in NIMMER, § 9. 1.a.i, p. ITA-72. Art. 7-10 Civil Code.

⁴⁷¹ Pretura Roma, Jan. 22, 1972.

⁴⁷² G. MONDINI, p. 111.

⁴⁷³ Pretura Roma, July 30, 1978.

⁴⁷⁴ Pretura Roma, April 18, 1984.

⁴⁷⁵ Pretura Roma, Feb. 18, 1986.

The author cannot be forced to renounce to the attribution of his work (art. 21 al. 2). The doctrine sees in this provision the nullity of the contract by which the author accepts that his work be published under the name of a third party.⁴⁷⁶ Thus it seems that a ghost-writer will always be able to reveal his identity.

The right of respect can be waived but the transfer of the exercise of the right to another person is forbidden.⁴⁷⁷ A contract which would transfer the right to prohibit adaptations and would prejudice the author's honour or reputation under art. 20 §1 would be void.⁴⁷⁸ Notwithstanding the principle of inalienability of moral rights, an author who is aware of and accepts modifications of his work, shall not longer be entitled to prevent a performance of its modified form or demand its suppression (art. 22).⁴⁷⁹ "An author may not assign the benefits deriving from future rights or future technical developments and may join in the legal proceedings regarding his works even after the assignment of his economic rights (Art. 119 and 165)."⁴⁸⁰ Moral rights cannot be exercised by collecting societies.

Status of the employed author

Rights of disclosure and attribution

The Italian 1941 Act does not treat of the status employed authors.

Yet the doctrine is of opinion that the inalienability of the moral right constitutes an implicit contractual clause to which parties cannot derogate.⁴⁸¹ Moral rights' strength is however reduced, once the author has transferred his economic rights. The employer cannot receive the work before it is completed and only the author has the power to decide of the completion of his work. The work cannot be published without the consent of the author but this consent can be implied if the author delivered the work to the employer. If the work is not completed and the author cannot finish it and a substantial part of it has been made, the employer can have it completed by someone else and disclose the whole completed work. The right of attribution of the first author must nevertheless be respected (art. 121).⁴⁸² However, the original author may require his name not be mentioned together with the second author's.⁴⁸³

Right of integrity

The employer cannot modify the work without the consent of the author, once the employer has accepted it. Technical modifications are allowed when necessary to adapt the work to the use for which it is intended, for example, in the fields of architecture and audio-visual exploitation (art. 20, 22, 41 and 47).⁴⁸⁴

⁴⁷⁶ L.C. MARCHETTI & L. UBERTAZZI, 1987, p. 472. Cass. July 14, 1956, Foro padano, 1957, p. 421.

⁴⁷⁷ See Trib. Rome, June 12, 1989, Diritto dell'informazione e dell'informatica, 1990, p. 186. The doctrine agrees with the tribunal that moral rights can be waived but not transferred. See MARCHETTI & UBERTAZZI, 1987, p. 476.

⁴⁷⁸ See MARCHETTI & UBERTAZZI, 1987, p. 476.

⁴⁷⁹ G. CUONZO and J. HOLDEN, 1995, p. 272. See above, right of integrity and of modification.

⁴⁸⁰ G. MONDINI, p. 106.

⁴⁸¹ C. DOUTRELEPONT, p. 196.

⁴⁸² These considerations have been developed by the doctrine; see M. FABIANI, 'Le droit d'auteur en Italie', 33.1, *Droit des affaires dans les pays du marché commun*, Tome IX, Paris, Navare, éd. Juris-classeur, Jupiter, mise à jour, 1977-1978.

⁴⁸³ Pretore, Rome, Aug. 30, 1966, Dir. Aut., 1966, p. 396.

⁴⁸⁴ M. FABIANI, in NIMMER, § 7.4, p. ITA-57.

V. Duration of moral rights protection

The rights of attribution and integrity last perpetually and can be exercised by heirs (art. 23). If a public purpose requires it, the action can be exercised by the President of the Council of Ministers, upon the advice of the competent association (art. 23 al. 2). The right to withdraw the work from commerce can only be exercised by the author in person, and thus it expires with the author. At the death of the author, the rights of attribution and integrity and the right to prevent the works to be published are asserted without limitation of time to the author's spouse, children in the absence thereof, to other relatives (art. 23 and 24). If there is no agreement between the heirs, the judge decides after having heard the 'prosecutor' (pubblico ministero). The judge always respects the author's will, when it has been expressed in a document (art. 24 al. 4).

Summary

Legislation is dualistic in Italy. The right of disclosure is not recognised but most commentators agree that it is implicitly comprised in the legislation. The right of attribution is stated in similar terms as the previously discussed countries with additionally, specific rules applying to different types of works. The right of respect is not absolute : the author only has the right to object to prejudicial modifications. The right of retract is granted under strict conditions and there is no right of access. Alienability is prohibited but waivers of rights of attribution and respect are possible and terminable at will.

There is a certain amount of case law in Italy, all of which has not been accessible. The cases show no effects potential or existent on the internal market. The courts have largely interpreted the notions of honour and reputation in the case of the right of respect. In the sector of audio-visual works they even have been as far as not requiring a showing of violation to either one of these notions.

Part VIII. Luxembourg

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection
- VI. Relationships between moral rights protection of authors and of performers

I. Legal framework

The Copyright Act of 29 March 1972⁴⁸⁵ was first amended on April 24, 1995 to implement the Software Directive. It was subsequently modified to implement the term, cable-satellite and rental directives on September 8, 1997. There is currently a draft bill (n°4 431) on copyright, neighbouring rights and databases and to allow the alienability of moral rights. The Copyright Act is completed by the Act of September 23, 1975 on the protection of performers, producers of phonograms and broadcasting organisations.⁴⁸⁶ Luxembourg has in 1975 approved the 1971 version of the Berne Convention.

There is also a regulation of October 26, 1972 concerning the execution of art. 48, par VI. Of the 1972 Copyright Act, as amended and completed by regulation of January 16, 1998 on Copyright law.

II. Analysis of the different moral rights : characteristics

In Luxembourg, the moral rights provision is formulated similarly to art. 6 bis of Berne. Moral rights are stated in art. 9.

1. The right of disclosure

The statute is silent as regards the right of disclosure. Indeed the statute, in its art. 9, rewrites art. 6 bis formula which does not treat of the right of disclosure. Thus it seems that the right of disclosure does not exist in Luxembourg. However, the statute mentions “communication to the public” in several articles (art. 8 §1 al. 2, 13 § 1 & 2, 14 §1, 24 §1, 27 §2) to give the starting point of the duration of the protection for instance.⁴⁸⁷ The intent of the legislator to ban completely the concept of publication from the new Copyright Act has not totally succeeded. In

⁴⁸⁵ See J.O. N°23, April 12, 1972, p. 810.

⁴⁸⁶ See J.O. n°62, Sept. 30, 1975, p. 1354.

⁴⁸⁷ E. BUNGEROTH, 'Luxembourg', in MÖHRING, SCHULZE, ULMER, ZWEIGERT, (ed.) *Quellen des Urheberrechts*, 1977, p. 4.

each of these dispositions, the term 'publication' must be understood as only meaning the diffusion of material copies.⁴⁸⁸ However, article 82 protects the right of disclosure.

2. The right of attribution

There is a rebuttable presumption of authorship in favour of the person whose name is affixed on the work according to the customs (art. 5). The editor of a pseudonymous or anonymous work is considered to represent the author in his relations with third parties (art. 8). The author of an anonymous or pseudonymous work can always reveal his identity and exercise his rights. Third parties must then respect the author's will to reveal his identity (art. 8 §2).

3. The right of integrity

The Act formulates the right of integrity similarly to art. 6 bis of the Berne Convention as the right for the author to protect his work against any action that might be detrimental to his honour or reputation (art. 9 §1).

4. The right of modification or adaptation

The author of a musical, dramatic or literary creation has the right to authorise translations, arrangements, adaptations or other transformations of these creations. The author of a cinematographic reproduction has the exclusive right to authorise the adaptation and the cinematographic reproduction of his works as well as the commercialisation of these adapted or reproduced creations (art. 16).⁴⁸⁹ These rights are of an economic nature.

5. The right to retract

6. The right of access

These two rights do not exist.

III. Restrictions on moral rights protection introduced in certain Member States with respect to certain work categories and certain categories of rights holders

1. Audio-visual works

The rules applying to works of collaboration do not apply to audio-visual works. The producer is at the outset and exclusively the owner of the copyright in the audio-visual work (art. 27). The

⁴⁸⁸ E. BUNGEROTH, in *Quellen des Urheberrechts*, p. 4.

⁴⁸⁹ P. FELTGEN, 'Luxembourg', in *Intellectual Property Laws of Europe*, G. Metaxas-Maranghidis, 1995, p. 297.

producer is the person whose name is written on the work as being the producer, according to the customs (art. 27). Nevertheless, it cannot be construed, neither from the statute nor from case law, that the producer owns the moral rights. The question of waivability is thus open.⁴⁹⁰ However, a possible attribution waiver is subject to the rule under which the author of an anonymous or pseudonymous work can always reveal its identity and exercise his rights (art. 8).

2.1. The right of disclosure

See above.

2.2. The right of attribution

There are no specific rule concerning the right of attribution of authors of audio-visual works. Reference is to be made to article 9.

2.3. The right of integrity

If the contract between the producer and the authors of pre-existing works (except the author of musical works used in the movie making) does not state otherwise, all exploitation rights belong to the producer and he can modify the work if it is indispensable to its exploitation, as long as these modifications do not violate the honour or reputation of the authors.

The producer of the movie can also modify previous works (except musical works) as long as the moral rights of these authors are not infringed (art. 28).

3. Works of collaboration and collective works

Works of collaboration (Gemeinschafts werke) (art. 6 & 7)

Works of collaboration are works made by several authors, in which their single contributions cannot be separated. The authors must regulate their rights in an agreement; if they did not do so, courts shall settle disputes. Each author separately has the right to act in his name (and without the co-operation of the other authors) against violations of the author right, and ask for damages (art. 7 § 2). The authors cannot use their contribution in others works of collaboration.⁴⁹¹

If the works are composed of words or music, the composer or the author cannot work with a new collaborator but can exploit his/her contribution separately as long as it is not detrimental to the exploitation of the joint work (art. 17 which relates to musical, literary, dramatic and dramatico-musical works).

Collective works

These works are not the product of work made in collaboration between authors but the result of a collection of previous works. The author's right (if there is one) belongs in exclusivity to the producer of the collective work (art. 1 §5).⁴⁹²

⁴⁹⁰ C. DOUTRELEPONT, N° 375, p. 250.

⁴⁹¹ E. BUNGEROTH, *Quellen*, 1977, p. 5.

⁴⁹² E. BUNGEROTH, *Quellen*, 1977, p. 6.

4. Performers moral rights

The rights of performers are set forth in the September 23, 1975 Act (art. 3-6). However the statute is silent concerning their moral rights.

IV. Alienability and waiver of moral rights

The moral right is inalienable and remains to the author even after transfer of his economic rights (art. 9 §1). A waiver of the exercise of specific moral prerogatives is in principle possible. The statute does not state whether the right of integrity is alienable or waivable, but the act can be construed such as to outlaw inalienability due to the “personal character” of the rights. There is no case law on the point. In this respect, French case law and doctrine should be used to determine the extent and the limits of this right.⁴⁹³

V. Duration of moral rights protection

The moral rights duration is the same as the economic rights duration (70 years) (art. 9 §2 al. 2). After the author’s death, the author’s rights are exercised by his/her heirs or the person so designated in the author’s will (art. 9 §2 al. 2).

⁴⁹³ C. DOUTRELEPONT, *Le droit moral de l’auteur et le droit communautaire*, Bruylant, Bruxelles, 1997, n° 472, p. 304.

VI. Practical effects of moral rights protection with respect to authors, on the one hand, and with respect to performers

Art. 11 of the 1975 Act provides that no provision of the 1975 Act can infringe any provision of the Copyright Act.

Summary

Legislation is not clearly dualistic or monistic. There is no moral right of disclosure. The right of attribution is stated in simple terms and in similar way than other Member States. The exercise of the right of respect is subject to prejudicial acts. There are no rights to retract nor access the work. Inalienability is the rule but waivers are possible. As far as we know, there is no case law on moral rights in Luxembourg.

Part IX. The Netherlands

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection
- VI. Relationships between moral rights protection of authors and of performers

I. Legal framework

Copyright Act of September 23, 1912 (Auteurswet 'AW') as amended on July 3, 1989 (Stb. 282)⁴⁹⁴ and last amended September 1, 1996 and Neighbouring Rights Act of March 18, 1993 (Wet op de naburige rechten 'WNR'), in force July 1, 1993. All copyright directives have been implemented into Dutch law.

II. Analysis of the different moral rights

The moral rights are set forth in the Act in a formulation similar to art. 6 bis of the Berne Convention. The dualistic approach prevails in the Netherlands, as the Act clearly distinguishes between economic rights (art. 1) and moral rights (art. 25). Nevertheless, some authors believe that both types of rights are closely connected.⁴⁹⁵ For Gerbrandy, the Act's list of moral rights is not exhaustive, case law can provide for more rights.⁴⁹⁶ There is also a trend in Dutch legal doctrine in favour of a practical and rational application of moral rights.⁴⁹⁷

1. The right of disclosure

The right of disclosure is not stated as a moral right of the author. This right is included in the economic rights. The author has the right to make certain corrections to the work before its re-edition, in other words, the author of a book, for instance, can prevent an unchanged re-edition of his book.⁴⁹⁸

⁴⁹⁴ July 3, 1989, J.O. 1989, p. 282.

⁴⁹⁵ See A. QUAEDVLIEG, 'Authenticity of authorship and works', in ALAI Study days 4-8 June 1996, *Copyright in Cyberspace*, Amsterdam, p. 224, fn. 6.

⁴⁹⁶ A. J. VAN DER MAREL & J. SCHAAP, in C. VAN RIJ, 1995, p. 115.

⁴⁹⁷ A. QUAEDVLIEG, p. 223.

⁴⁹⁸ See also below, Right of modification/adaptation.

2. The right of attribution

a. Legislation

The author has two types of rights. Firstly, he has the right to require to be mentioned as the author or creator of the work. He can object to publication without mention of his name or quality of author unless the objection is not reasonable (art. 25, 1. a). The author has the burden of proof to show that the omission of his name is unfair.⁴⁹⁹ Secondly, the author has the right to object to the publication of his work under another name than his own, as well as to object to adaptations of the title of the work or of the designation of the author (art. 25, 1. b).⁵⁰⁰ Designation of an author includes pseudonyms. The illegality of false attributions as regards works of art is regulated by Art. 326 bis of the Penal law.

There is a rebuttable presumption of attribution in favour of the person whose name is written on or in the work or if there is no such designation, in favour of the person who makes it public (art. 4). This presumption does not include mentions which do not concern the quality of being the author. Thus the editor cannot be the author if his name is written on or in the work. The editor or the publisher (if the editor is not mentioned) can nonetheless exercise the author's rights in case of an anonymous or pseudonymous work (art. 9). This implies that the author can choose to publish under a pseudonym or remain anonymous. He can always reveal his identity and exercise his rights himself.⁵⁰¹

b. Case law

In addition to the moral rights basis, an author can also act on the general tort basis. This is especially interesting for authors who are not protected in the Netherlands due to the treaty ratification situation.⁵⁰²

The claim of a professor who had written two out of 11 chapters of a book to be named together with the other authors, was dismissed.⁵⁰³ An author cannot intentionally choose a pseudonym which is the same name as another author of books in the serious genre, to publish a book in a light genre. This practice violates the reputation of the author.⁵⁰⁴ To publish the same article without the author's permission in another journal, without mentioning his name, infringes his right of attribution.⁵⁰⁵

3. The right of respect or right of integrity

a. Legislation

Again the formulation of the right of integrity is similar to the one found in art. 6 bis of Berne. The 'rule' is stated in three different paragraphs (25 §1, b, c and d). The author has the right to

⁴⁹⁹ S. GERBRANDY, *Auteursrecht in de steigers*, p. 63.

⁵⁰⁰ A.J. VAN DER MAREL & J. SCHAAP, p. 116; H. COHEN JEROHAM, 'National report on moral right in the Netherlands', ALAI 1993, p. 180 and H. COHEN JEROHAM, in NIMMER, NETH-45.

⁵⁰¹ See below, inalienability.

⁵⁰² H. COHEN JEROHAM, in NIMMER, NETH-46.

⁵⁰³ Pres. Dis. Court The Hague, Jan. 25, 1965, NJ 1965, 76.

⁵⁰⁴ Pres. Rb. Zutphen, Dec. 4, 1996, *P.M. Legêne v. J.P. Geelen*, IER, 1997, p. 69.

⁵⁰⁵ Kantonrechter te Haarlem, Aug. 13, 1997, *Hendriks v. Media Plus*, Informatierecht /AMI, 1998, p. 29.

object to changes to the essence of his work (art. 25 §1, b) (e.g. an architect cannot object to every modification in his building). Yet he can object, only if his objection is reasonable (art. 25 §1 c). Generally “objections to corrections of mistakes or to replacement of outdated information will fail because of their unreasonable character.”⁵⁰⁶ He can object to any deformation, mutilation, impairment of the work to the extent it could prejudice his honour or reputation (art. 25 §1 d). It has been held that impairment covers the publication of the work in an environment of lesser standing, the impairment of the status of the work or the non-publication thereof.⁵⁰⁷ The criterion of reasonableness does not apply to art. 25 1 d), but only the criterion of violation of honour or reputation. Courts can qualify the infringement under art. 25 §1 c or under 25 §1 d, in relation of the seriousness of the violation. Under art. 25 §1 d, the author must prove that his reputation or honour is violated. Even if reasonableness is only required in cases subject to art. 25 §1 c, the appreciation of the violation also seems to be objective in case of a violation of art. 25 §1 d.

The Act also imposes a right of respect when users make a free use of works (such as the reproduction by the written or audio-visual press, of works which subject is related to current events, reproduction for teaching purposes, in publications, sound or visual recordings, broadcasting programs and citations of literary, scientific and artistic works).

A legal person can invoke the moral rights set forth in art. 25.⁵⁰⁸ That person has an interest that the character of her work be maintained.

⁵⁰⁶ A.J. VAN DER MAREL & J. SCHAAP, in C. VAN RIJ, p. 116.

⁵⁰⁷ *Frenkel v. KRO*, Hoge Raad, July 1, 1985, NJ, 1986, 692 (non-publication). See below, audiovisual works for full discussion.

⁵⁰⁸ District Court Utrecht, Nov. 19, 1997, *Lancôme et al. v. Kruidvat et al.*, IER, 1998, p. 126.

b. Case law

Literary and dramatic works

An author has successfully objected to the reunion, in a single book compilation, of several previously separately published stories, under a title not desired by the author.⁵⁰⁹ In the Beckett case, it was held that, as neither the text nor the scenic indications of a play had been modified, the work was respected, even if the male roles had been interpreted by women. For the judge, the author had considered the human fate in general not the male destiny in opposition to the female destiny.⁵¹⁰ In a recent case, the Volkskrant had made a CD-Rom and a web site with freelance journalists' articles without their consent. The fact that these journalists had contracted in the 80's made it unforeseeable for them to imagine such an exploitation. The publishing of their articles without their consent in such a form violated their economic and moral rights.⁵¹¹ To add cartoons to a political program without the author's consent is prejudicial to the author's reputation.⁵¹²

Musical works

A lyricist was granted injunction against the addition, by a cabaret singer, who had interpreted his songs, of 'low brow humour' passages at the end of the song which destroyed the whole atmosphere of the song.⁵¹³ A lyricist could also object to the combination of her songs in a medley or to their partial performance.⁵¹⁴ The disco and house versions of O'Fortuna from Carl Orff's Carmina Burana were considered as mutilations.⁵¹⁵

Works of visual and plastic art

There are numerous cases in this area. When illustrations of a book are not in conformity with the story (the author of the drawings made obvious mistakes in representing the traits of Santa Claus and his assistant), the publication of the book could violate the reputation of the author of the text and an injunction could be granted.⁵¹⁶

In another case, a painter claimed that his painting was hung too high so that it violated his integrity right. The owner had to hang it 90 cm above the ground only. This prevented people to pass from one room to another. It seems here that the balance went too far towards the interests of the author.⁵¹⁷ The reproduction of a modified painting (cuts in forms of a cross) and the modification of the work's title (Who's afraid of Red, Yellow and Blue, III into Who's afraid of God) violates the painter's right of integrity.⁵¹⁸ To remove the code affixed by the author on the perfumes boxes and add a white sticker upon it, is a violation of the reputation of

⁵⁰⁹ *Beckman v. Rest Boek*, District Court of Assen, Nov. 17, 1987, Informatierecht/AMI, 1988, p. 61.

⁵¹⁰ Informatierecht/AMI, 1988, p. 83.

⁵¹¹ Arr. rb. Amsterdam, Sept. 24, 1997, *Heg, Mulder & Stam v. De Volkskrant*, Informatierecht/AMI, 1997, p. 194.

⁵¹² Rb. Utrecht, Dec. 28, 1989, Informatierecht/AMI, 1991, p. 123.

⁵¹³ Pres. Dis. Court Amsterdam, Dec. 21, 1978, Auteursrecht, 1979/2, 34. See also H. COHEN JEROHAM, in NIMMER, NETH-48.

⁵¹⁴ Dis. Court of Amsterdam, Dec. 21, 1978, Informatierecht/AMI, 1979, p. 32, *Tekstpiëremet*.

⁵¹⁵ Dis. court of Amsterdam, Feb. 24, 1992, Informatierecht/AMI 1992, p. 112; cited by A. VAN DER MAREL & J. SCHAAP.

⁵¹⁶ Pres. Dis. Court, Utrecht, Nov. 27, 1975, NJ, 1976, 481.

⁵¹⁷ Pres. Dis. Court Zwolle, Apr. 14, 1989, Informatierecht/AMI, 1989/4, 100.

⁵¹⁸ Gerechtshof te Amsterdam, Aug. 6, 1998, *Het Rooms-Katholiek Aartsbisdom Utrecht v. Stichting Beeldrecht*, Informatierecht/AMI, 1998, p. 136.

the author under art. 25 § 1 d. Indeed these modifications break the link between the author and his work and deteriorate the personal stamp of the author.⁵¹⁹

In a case involving "street art", a municipality had, for reasons of efficiency, removed the traffic arrows that the artist had drawn. The court ruled there was no violation or mutilation.⁵²⁰ Freelancers, who had designed Dutch banknotes, sued third parties who used the banknotes for advertising purposes.⁵²¹ The graphic artists did not win, as the public interest in 'talking money' outweighed their interest to defend their moral right. An artist who had designed a special multicolour light work for an arcade passage was granted damages and injunction against the owner who had decorated the pillars with paintings and switched off the light work, replacing it by continuous white light.⁵²²

Architectural works

Like in Germany, the functionality of the building generally outweighs the interest of the architect on the preservation of integrity. In the Netherlands, the test is based on the reasonableness of the objection while in Germany, courts proceed to a balance of both sides' interests.

An architect could not object to the building of dormer windows in small houses which had to be converted into family homes.⁵²³ In like manner, the addition of a new classroom to a school building does not infringe the right of integrity.⁵²⁴ An architect cannot reasonably object to the addition of two new rooms to the building he designed for the sole reason that he was not chosen as the architect for this addition.⁵²⁵ An architect could not "in all reason" require the restoration of the front of his building in its former shape, but the court ordered the defendant to pay damages.⁵²⁶

In three cases, courts were favourable to architects. In a first case, an architect contested important structural modifications to his work (drastic structural renovation of a multifunctional cultural centre built in the sixties). The judge based his reasoning on art. 25 §1 c : modifications can be forbidden only if they modify the essence and appearance of the building when these changes are not necessary to the functionality demands of the building.⁵²⁷ In another case, a tribunal ruled condemned a municipality which wanted to put an exterior blind in front of the building. The municipality's reason for the blind was that the black glass exterior of the building made it impossible for employees to work when the sun was shining due to heat

⁵¹⁹ District Court Utrecht, Nov. 19, 1997, *Lancôme et al. v. Kruidvat et al.*, IER, 1998, p. 126.

⁵²⁰ Rb. Groningen, Apr. 7, 1989, NJ, 1990, 342. Court of Appeals Den Bosch, Dec. 17 1990, NJ 1991, 443.

⁵²¹ Court of Appeals of Arnhem, March 2, 1993, *OHRA v. Oxenaar and Kruit*, Informatierecht/AMI 1993, p. 90-93.

⁵²² Pres. Van Arr.rb. Van Rotterdam, Sept. 10, 1998, *P. Struyken v. Stichting Nederlands Architectuur Instituut (NAI)*, Informatierecht/AMI, Dec. 1998, p. 178.

⁵²³ Pres. Dis. Court, Utrecht, *Dakkapel*, Oct. 18, 1977, Auteursrecht, 1979/1, 16, cited by H. COHEN JEROHAM, ALAI 1993, p. 184.

⁵²⁴ Dis. Court Middelburg, *Krabbendijke*, Jan. 14, 1970, NJ 1970, 297.

⁵²⁵ Dis. Court Middelburg, Jan. 14, 1970, NJ., 1970, 297; Pres. Utrecht, 18 Oct. 1977, Auteursrecht, 1979/1, p. 16.

⁵²⁶ D. Court, Assen, Nov. 17, 1992, Informatierecht/AMI, 1993/10, 191. See also *Beurspassage*, Amsterdam Court of Appeals, cited above.

⁵²⁷ Pres. Dis. Zwolle, *Van Klingereren v. Dronten*, March 2, 1988, Informatierecht/AMI, 1988/6, 128.

it created. The court granted the injunction because the blind was mutilating the building.⁵²⁸ However one could argue that the architect should have taken account of the light and the heat that this light could cause to inhabitants before choosing the place of the building. The architect's proposed solution, although more expensive than the municipality's solution, was preferred because it respected the moral right of the architect.⁵²⁹ This was a rare case where the court did not use the 'rule of reason'. In a third case, the modification of the colour of panels placed next to the windows of a building was held to be a violation of the honour and reputation of the architect. The court ordered that the original colour be maintained.⁵³⁰

An sculptor can prevent the owner of his work to transfer the work into another environment if the sculpture was designed or commissioned for that precise setting.⁵³¹ A sculptor convinced the Court of Maastricht that the construction of a fountain next to his environmental sculpture was an infringement of his integrity right.⁵³² The court noted that an art work is also determined by the author's intent, e.g. an art work may take its meaning from the environment or site in which it is placed. In an interesting case, the Hoge Raad had to balance the moral rights of the author with moral rights of third parties. A sculptor had designed a monumental neon sculpture to be installed on the roof top of an old people's home. The text of the sculpture was 'the ninth of OMA' (the acronym of the architect of the building). The irony was that 'oma' in Dutch also means 'grandmother'. Consequently, a number of old people were offended by the sculpture. The judge found the moral interests of the old people not to be offended outweighed the moral interests of the sculptor.⁵³³

The use of a work of art for advertising purposes can be against the right of integrity.⁵³⁴

Restoration of works of art

A normal obligation of maintenance is disputed among commentators. The failure to maintain a work in good condition can be actionable if it amounts to mutilation, distortion or other derogatory act against the reputation or honour of the author.⁵³⁵ Modifications resulting from bad restoration are actionable rather under art. 25 §1 d.

⁵²⁸ Pres. Leeuwarden, *Bonnema v. Tietjerksteradeel*, July 12, 1988, BIE 1990, blz. 54. For another example where an architect won against the owner, see pres. Zwolle, March 2, 1988, KG 1988, 144, Informatierecht/AMI 1988, 128.

⁵²⁹ S. GERBRANDY, p. 68.

⁵³⁰ Court of Appeals s'Hertogenbosch, Nov. 1997, *Politie Regio Limburg Zuid, et al. v. Snelder*, EIR, 1998, p. 13.

⁵³¹ Court of Appeals s'Hertogenbosch, Dec. 17, 1990, NJ, 1991, 444, IER, 1991, blz. 63: "The particular circumstance that the artistic conceptions in the municipality circles had changed does not free the municipality from its obligations." (the contract obliged the municipality to maintain the intended location and execution of a fountain); see also H. COHEN JEROHAM, ALAI 1993, p. 181 (a sculpture called 'The Hands' was transferred in a place where people would not recognise it as hands but more as a spider).

⁵³² Pres. Maastricht Dis. Court, March 11, 1992, Informatierecht/AMI 152.

⁵³³ P. B. HUGENHOLTZ, 'Dutch Copyright Law, 1990-1995', RIDA, 1996, n° 169, p. 184, fn. 50.

⁵³⁴ See e.g. Dis. Court Amsterdam, July 3, 1985, *Boin/Jedezet*, Informatierecht/AMI, 1986, p. 83. Comp. With French case law which holds the same.

⁵³⁵ See e.g. Court of Appeal s'Hertogenbosch, Dec. 17, 1990, *Lenartz v. Sittard*, NJ 1991, 443; Court of Appeals Amsterdam, June 16, 1977, *Koetsier v. Schiphof*, NJ 1977, NJ 1978, 218. In this case, the court said that the concepts of mutilation, distortion or other act prejudicial to honour or reputation do not only refer to acts directly intended to the said results.

Destruction

For the majority of courts, the destruction of the work does not amount to a violation of the right of integrity.⁵³⁶ In *Miletic v. Amsterdam III*, the Supreme court decided that the fact a municipality does not take care of artistic works (works of art were lost by the action of a third party), cannot be a violation under art. 25, implying that the mere destruction of a work does not amount to mutilation.⁵³⁷ Other decisions confirm this trend.⁵³⁸ The *Van Schijndel* decision exemplifies this trend. In this case, the court decided that an architect cannot claim that his (international) reputation is violated by the destruction of his work. A Museum hall, which became too small, had to be destroyed to be replaced by a bigger hall. For the court, the destruction was then justified, it was not useless. After the destruction, the architect's reputation will perpetuate in photographs, designs, documents and in the memory of the people who have known the building.⁵³⁹

Contrary to this trend, the Court of s'Hertogensbosch ruled that art. 25 does not allow the destruction of the work, so that destruction is absolutely forbidden.⁵⁴⁰ In another case, the destruction of a part of a building has been considered to be contrary to the right of integrity.⁵⁴¹ In again another more recent case, it was held that transforming a building does not amount to destruction so that it can be a mutilation prejudicial to the architect's reputation.⁵⁴² J. Kabel believes that it can be argued from the *Koetsier/Schiphol* and *Ulrich/De Haas* decisions that a general obligation to inform the author of the intention to remove the work, can be imposed to the owner if he knows the identity and location of the author, if the work is unique and the owner is aware of this uniqueness. The destruction of a wall painting required by the justified modification of the building by the owner is possible because the owner's interest in the modification of the building outweighs the painter's interests over the destruction of his painting. Moreover, the painter can make a photograph of the painting to keep it for posterity.⁵⁴³

4. The rights of modification and adaptation

Adaptation and translation rights are included in the reproduction right.

The author can only make modifications that he could be entitled to make, in good faith, in accordance with the rules of social conduct (art. 25 al. 4).⁵⁴⁴ This amounts to recognise a sort of right to retract. When an author has alienated his work without conditions, he cannot modify

⁵³⁶ In this sense : see e.g. *Amsterdam*, June 16, 1977, NJ., 1978, 218; *Den Bosch*, Dec. 17, 1990, NJ., 1991, 443, Informatierecht/AMI, 1992/2, 34 (destruction of a building which is not conform to the norms required for his utilisation, is not detrimental to the author's honour or reputation). Contra : Trib. *Amsterdam*, Nov. 15, 1978, Auteursrecht, 1979/2, 32.

⁵³⁷ Hoge Raad, Nov. 16, 1984, NJ 1985, 270.

⁵³⁸ For references see B. HUGENHOLTZ, 'Dutch Copyright law 1990-1995', RIDA, n°169, 1996, p. 182, fn. 48.

⁵³⁹ Dis. Court of Utrecht, June 3, 1998, *Van Schijndel v. Municipality of Utrecht*, Informatierecht/AMI, 1999, p. 39.

⁵⁴⁰ Gerbrandy thinks this decision is too absolute.

⁵⁴¹ Court of Appeals Amsterdam, June 11, 1992, *Staal/Beurspassage*, IER 1992, p. 20.

⁵⁴² Pres. Arr. rb. Leeuwarden, Nov. 29, 1994, *Vegter v. Stichting Spaarbank der Coöperative Vereniging Friesland Bank*, Informatierecht/AMI, 1996, p. 14.

⁵⁴³ Pres. Rb. Groningen, Oct. 22, 1993, *van den Berg v. RU Groningen*, Informatierecht/AMI, 1994, p. 102.

⁵⁴⁴ Pres. Dis. Court Assen, Nov. 17, 1987, Informatierecht/AMI 1988/3, 61.

it (e.g. when a painter has sold his painting, he cannot afterwards make some changes). Indeed commentators think that this article does not apply for works of visual arts.⁵⁴⁵ Similarly, the author of a literary work, cannot modify it except in the case of re-edition, to update the work. If the editor does not let the author change the work, the author can prevent him from re-editing the work.⁵⁴⁶

5. The right to retract

See above, Right of modification.

Case law

A cartoonist of books for children thought one of his old works was outdated in view of his new conceptions. The publisher nonetheless wished to publish it with the present date. The author forbade with success the publication of the work without the original date of the creation of the work.⁵⁴⁷

6. The right of access

The right of access does not exist.

7. Classification of authors rights in different categories - relationships between economic and moral rights

As some authors believe that economic and moral of rights are closely connected, a majority of authors recognise that moral rights can serve pecuniary interests.⁵⁴⁸

III. Restrictions on moral rights protection with respect to certain work categories and certain categories of rights holders

1. Software

The principle is that the moral rights stay with the employee.

1.1. The right of disclosure

Works which have not been made public (or disclosed) are not part of the author's bankruptcy estate so that they cannot be attached. ⁵⁴⁹

⁵⁴⁵ J. KABEL, 'The application of copyright in the realm of visual arts', (The Netherlands), in *The moral right of the Author*, ALAI Congress of Antwerp 1993, p. 391.

⁵⁴⁶ VAN LINGEN, 'Le droit d'auteur aux Pays-Bas', in *Le droit des affaires dans le marché commun*, ed. Jupiter, Mise à jour, 1980, n°33.3.

⁵⁴⁷ Pres. D. Court Amsterdam, Aug. 27, 1962 (3), *Geesink v. Terra Nostra*, NJ 1963, 419, Court of Appeals of Amsterdam 1964, , NJ 453.

⁵⁴⁸ A. QUAEDVLIEG, p. 224.

1.2. The right of integrity

There would not be a violation of the moral right of integrity of the user of a program would adapt for his own use.⁵⁵⁰

2. Audio-visual works

2.1. The right of disclosure

The audio-visual work shall be deemed completed once it is ready for showing. It is up to the producer to decide when it is ready, unless otherwise agreed (art. 45 c).

2.1. The right of attribution

A special provision details the right of attribution of audio-visual creators (art. 45e). In addition to the rights stipulated in art. 25 §1, b, c and d, the author is entitled to have his name appear at the usual place in question, together with his capacity or the nature of his contribution to the work, to require that the part of the film of which he is the author, be shown and he can oppose to indication of his name in the cinematographic work, unless such objection is unreasonable. If an author refuses or cannot complete his contribution, the producer is entitled to use his contribution to complete the audio-visual work. For this contribution, the author will be considered the author of his unfinished contribution (art. 45 b).

2.3. The right of integrity

a. Legislation

Film makers can invoke art. 25. The author is presumed to have waived his right to object to modifications (art. 25 §1 c) in favour of the producer (art. 45f), unless a written document alleging the contrary has been agreed upon between the two. Consequently, all changes are possible, apart ones which prejudice the author's reputation or honour or which modify the title of the work. The author can also exploit his contribution in another genre, in the respect of the rules governing works of collaboration and if it is separable from the whole work (art. 45 g). This use cannot be detrimental to the audio-visual work.

b. Case law

In a case of a transfer of the adaptation right from a novel to a movie, the author had transferred the right to modify the novel and the right to combine it with other works. The movie established a friendship (which was not present in the book) between the main character, a Jewish girl, and two members of the National Social Youth movement. The author of the novel was not granted injunctive relief. Indeed the Jewish girl did not lose her integrity and credibility at no time in the movie and the author of the book herself declared she did not see her in the movie as a traitor. The author of the novel was granted the right, however, to announce at the

⁵⁴⁹ H.D.J JONGEN, 'The Netherlands' in H.D.J. JONGEN - A.P. MEIJBOOM, *Copyright software protection in the European Community*, Deventer-Boston, Kluwer, 1993, n° 1.7.3.

⁵⁵⁰ H.D.J JONGEN, 'The Netherlands' in H.D.J. JONGEN - A.P. MEIJBOOM, *Copyright software protection in the European Community*, Deventer-Boston, Kluwer, 1993, n° 1.6.

beginning of the movie that she considers the relationship of the girl to be conflicting with her novel and not conforming to her ideas regarding the Second World War.⁵⁵¹

In another case, the Dutch broadcaster KRO had agreed that Frenkel (director) would make a documentary to be broadcast by KRO. There was a clause giving the right to KRO not to broadcast the documentary. When Frenkel delivered the documentary, KRO refused to broadcast it due to a change of the head of programmes. The Supreme Court accepted Frenkel's claim and obliged KRO to broadcast the film. The basis was that the freedom of KRO to broadcast or not cannot ignore the moral rights of the author.⁵⁵²

3. Works of collaboration and collective works

The legal person who publishes the work as if it were created by himself, without making reference of the author, is also entitled to the moral rights, unless such communication is proven unlawful (art. 8).⁵⁵³

⁵⁵¹ Pres. Dis. Court Amsterdam, Feb. 28, 1985, *Het Bittere Kruid*, KG 1985, 81, AMR 1985, p. 7.

⁵⁵² HR July 1, 1985, NJ 1986, 692.

⁵⁵³ See also below, alienability. Gerbrandy does not agree with this because of the highly personal nature of moral rights.

Joint works

a. Legislation

The copyright in a work, when it belongs jointly to different persons, may be enforced by one of them, unless otherwise agreed (art. 26). Courts have admitted that there is a joint work even if the several parts are separable.⁵⁵⁴

a. Case law

Two artists had designed several features of a stamp, one, the Queen and the other, the lettering. The court considered that changes in the lettering alone could infringe the moral right of both artists, as each had contributed to the same joint work.⁵⁵⁵

Collective works

If a work consists of separate works by two or more persons, the person under whose direction the works as a whole has been made shall be deemed the author of the whole work, without prejudice to the copyright in each of the works separately (art. 5 §1).

4. Performers' moral rights

Art. 5 of the Neighbouring Rights Act offers to performers the same moral rights as art. 25 does for authors. The Act gives more room for contractual waivers.⁵⁵⁶

These rights are :

- the right to object to disclosure of his performance without mention of his name
- the right to object to disclosure of his performance under name other than his own
- the right to object to any modification of the performance, unless this modification is of such a kind that the objection is not reasonable
- the right to object to any deformation, mutilation or other change to his performance that would prejudice his reputation or honour.

IV. Alienability and waiver of moral rights

a. Legislation

The principle is that moral rights cannot be waived or transferred. The author can contractually waive the right of attribution (the two rights, i.e. the positive right of attribution and the right to object to false attribution) and the right to object to changes to the essence of the work. So can be waived rights referred in art. 25 §1 a, b and c. Only the right set in 25 §1d is not waivable. This is known as the 'partial waiver'. The waiver can be implicit; indeed the author cannot abuse of his right in a unreasonable manner. The waiver of the right of attribution is restricted to the mention of he being the author. The "waiver rule" does not apply to the mention of someone else as the author of the work and the modifications to the indication of his quality as

⁵⁵⁴ See H. COHEN JEROHAM, NETH-28.

⁵⁵⁵ Supreme Court, May 29 1987, *Informatierecht/AMI*, 1987/5, 105.

⁵⁵⁶ H. VAN DER SAAG & R. C. CRAMER, *Intellectual Property Laws of Europe*, 1995, p. 314.

an author.⁵⁵⁷ Therefore, the ghost-writer can always reveal his identity, even if this remains rare in practice.⁵⁵⁸

As for modifications to the work, the author can waive them in advance and rather broadly, but he can never waive the exercise of this right to oppose modifications which would prejudice his honour or reputation. The agreement in which rights are waived is controlled by the law of contracts.⁵⁵⁹ Notwithstanding the transfer of his copyright, the author retain the right to sue infringers of the copyright (art. 27).

Performers can waive their rights of attribution and right to object to modifications of the performance, but only in writing (art. 5 §3 Neighbouring Rights Act).

Collecting societies cannot own moral rights; however, the author can designate a collecting society in his will and enable it to exercise his moral rights. An author can give a 'power of attorney' to his employer in order for the employer to defend the author's moral rights in court.⁵⁶⁰

b. Case law

An author who has authorised the adaptation of his work, without having reserved his right to object to the definitive form of the derivative work, cannot reasonably object to the exploitation of the derivative work, arguing that it is mediocre.⁵⁶¹

Status of the employed author

Art. 7 of the statute stipulates that the employer is the owner of author's rights on the work, unless otherwise agreed. However, it is not clear from the wording of art. 7 whether fictitious authors such as employers and legal entities can claim protection of moral rights.⁵⁶² Some authors believe that due to the personal character of moral rights, they cannot belong to another person than the author.⁵⁶³ Others believe the contrary and the majority of the case law follows this trend.⁵⁶⁴ The Supreme Court has never been called to rule on this matter.

Art. 8 stipulates the same rule for 'corporate copyright'. This means that the corporation is the holder of the moral rights. Some authors have recognised that a legal entity can be insulted like a physical person so that it could be possible for this legal person to exercise moral rights.

⁵⁵⁷ C. DOUTRELEPONT, p. 246.

⁵⁵⁸ D.W.F. VERKADE & J.H. SPOOR, *Auteursrecht*, Amsterdam, Kluwer-Deventer, 1st ed., 1985, p. 239.

⁵⁵⁹ VAN DER MAREL & SCHAAP, p. 118. Comp. With Belgium, waivers are not considered as contracts.

⁵⁶⁰ QUAEDVLIEG, p. 228.

⁵⁶¹ Pres. Rb. Amsterdam, April 25, 1985, *Filmmusiek Het bittere Kruid*, K.G., 1985, p. 46.

⁵⁶² H. VAN DER SAAG & R. C. CRAMER, 1995, p. 314.

⁵⁶³ GERBRANDY, PFEFFER, *Kort commentaar op de auteurswet*, n° 48, p. 40; VAN LINGEN, *Auteursrecht in hoofdlijnen*, 3d ed. Alphen aan den Rijn, Samson H.D. Tjeenk Wilink, 1990, p. 191.

⁵⁶⁴ H. COHEN JEROHAM, in NIMMER, §4, 1, b, ii; D.W.F. VERKADE & J.H. SPOOR, *Auteursrecht*, Amsterdam, Kluwer-Deventer, 2d ed., n° 208, p. 306. See also C. DOUTRELEPONT, p. 247. See e.g., District Court of Amsterdam, Aug. 20, 1987, *Zeinstra v. Van den*, Informatierecht/AMI, 1988, p. 18 and Court of Appeal s'Hertogenbosch, May 24, 1978, *Van Gunsteren v. Lips*, BIE, 1985/4, 96. Contra : Court of Appeals of Amsterdam, Feb. 10, 1970, NJ, 1971, 130.

This question is still being debated.⁵⁶⁵ For Quaedvlieg, the fact that employers and legal entities in general can be entitled to moral rights is good but it cannot prevent the 'real holders of moral rights' (the original authors) to exercise them. It would be better to grant a distinct 'commercial moral right' to producers.⁵⁶⁶ An important rule which stems from these two articles on inalienability is that the employer or the corporation cannot transfer the moral rights to third parties.⁵⁶⁷ Up to now, Dutch employers have not exercised the right of integrity extensively. They just enjoy the fact they hold the moral rights to prevent authors from exercising them.⁵⁶⁸

V. Duration of moral rights protection

a. Legislation

Moral rights expire with the author's death unless he has designated someone in his will, who is entitled to exercise them. In such a case, the designated heir can exercise the rights until the copyright in the work expires. In sum, if the author did not mention a special person to exercise the moral rights, his heirs are not entitled to such exercise. The right to make modifications of the work can be exercised by the heir only if it is likely that the author would have approved the amendments.⁵⁶⁹ However, if an economic right is infringed as well as a moral right in the same time, heirs can act for the infringement of the economic right, thus protecting the moral right indirectly and simultaneously. Heirs can also act on the basis of general tort law (art. 6:162 of the Civil code). But this article of the Civil code is not a strong basis for heirs because they will have to prove that the impairment or modifications constitute a tort vis-à-vis them.⁵⁷⁰

As to performers rights, they can be exercised by the person designated in the will for 50 years after the end of the year in which the performance took place (art. 5 of the Neighbouring Rights Act).

⁵⁶⁵ A. QUAEDVLIEG, p. 229.

⁵⁶⁶ A. QUAEDVLIEG; p. 229 and n. 32.

⁵⁶⁷ A. QUAEDVLIEG, p. 223.

⁵⁶⁸ Quaedvlieg states that to his knowledge, until 1996, there has not been any case as far as it concerns employees.

⁵⁶⁹ VAN DER MAREL & SCHAAP, P. 119.

⁵⁷⁰ VAN DER MAREL & SCHAAP, p. 119.

b. Case law

Carl Orff's widow obtained an injunction against the disco-house hit made with Carmina Burana songs, although there was no formal document transferring the exercise of the moral rights, because the judge applied the choice-of-law rule of 'locus regit actum'.⁵⁷¹

VI. Practical effects of moral rights protection with respect to authors, on the one hand, and with respect to performers

The Netherlands have signed the Rome Convention.

⁵⁷¹ Pres. Dis. Ct Amsterdam, Feb. 24, 1992, Informatierecht/AMI 1992/6, 112. See also H. COHEN JEROHAM, in NIMMER, NETH-52. See also above,

Summary

Legislation is clearly dualistic in the Netherlands. There is no right of disclosure but there is an equivalent economic right. The right of attribution is completed by a right to object to false attributions. The right of respect allows the author to object in two situations : when it is reasonable and when it violates the reputation or honour of the author. There is no right to retract but the right of modification has the same effects in practice. There is no right to access the work. No waivers nor transfers are permitted although waivers of rights of attribution and integrity are technically possible (except a waiver of the right to object to modifications violating honour or reputation).

Case law is rather extensive in the Netherlands. Examples from right of respect cases show that potentially effects on the internal market could be possible (see in particular the Beckett case compared with opposite decision in the same case in France). But again these effects are only potential and not evidence exists. In the field of plastic and visual arts, courts are rather protective of authors while in architectural cases, courts draw a balance between authors' and owners' interests.

Part X. The Nordic Countries

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection

I. Legal framework

The protection of author's moral prerogatives as provided in the Article 3 of Nordic copyright statutes, is similar in all the Nordic countries. All Directives have been implemented in the three countries.

II. Analysis of the different moral rights : characteristics

Moral rights are dualistic in Denmark, Sweden and Finland.

1. The right of disclosure

In the Nordic countries, the right of disclosure does not exist as an independent legal concept but is included in the author's exclusive right to make the work available to the public. This right is regarded as one of the author's economic rights and it covers basically the same prerogatives as the German *Veröffentlichungsrecht*.⁵⁷² The legal nature of the right of the author to decide how the work is disclosed to the public was discussed during the preparation of the current Nordic laws. ⁵⁷³

The Swedish Copyright Committee has explicitly stated that it is not necessary to institute a special moral right for the author to decide over making the work available to the public, since this prerogative is already contained in the broadly defined author's exclusive right to control

⁵⁷² Cf. STRÖMHOLM (1966), pp. 15 ff. Ulmer also emphasizes the two sides of the *Veröffentlichungsrecht*. The author's right to control the first publication of the work by putting copies of it into circulation (*Verbreitungsrecht*) and author's right to control the public performance of the work (*Aufführungsrecht*) form the economical side of the *Veröffentlichungsrecht* whereas the author's right to decide when the work is ready and in which form it is to be communicated to the public constitutes the personal side of the protection.

⁵⁷³ M.SALOKANNEL, *Ownership of Rights in Audiovisual Works*, Kluwer Law International, 1997, pp. 273 ff.

the exploitation of the work (förfoganderätt).⁵⁷⁴ According to the Committee, the work may not be made available to the public in any form without the author's consent. This right is based on the author's right to make the work available to the public by any means. The author may always refuse to communicate the work to the public for reasons having no economic bearing.⁵⁷⁵

The prevalent Nordic doctrine seems to agree that the author's exclusive right to make the work available to the public as stated in art. 2 of the Nordic copyright laws includes both economic and moral elements. The same is equally true for France and Germany, even though the right itself is classified as belonging to the moral rights of the author. The legal qualification of the right is important to the extent that only moral rights are inalienable⁵⁷⁶ and other rights may be assigned contractually. But from the very nature of the right of disclosure, it seems to follow that it may not be exercised by anyone else besides the author⁵⁷⁷ or after the author's death, by her legal heirs.

2. The right of attribution

According to the Article 3 Paragraph 1 of the Nordic Copyright Acts

“When copies of a work are made or when the work is made available to the public in its entirety or in part, the name of the author shall be stated in the manner required by proper usage”.

According to the Nordic author's rights laws, the name of the author must be mentioned, both in the copies of the work and when the work is made available to the public, in accordance with the requirements of proper practice.⁵⁷⁸ In practice, this means that in areas where mentioning the name of all the involved authors is not a common professional practice, for example in many commercials or in the software industry, the law does not require the mentioning of the name of all authors. This does not of course mean that if the practice in a certain area neglects the mentioning of the names of the creative and performing persons, that this could be done merely by claiming that it is the common practice.⁵⁷⁹ A good example of this is the decision of the Swedish Supreme Court obligating the Swedish Broadcasting Company (Sveriges Television) to transmit a cultural television program with the name of the composers whose music was performed in the program.⁵⁸⁰

3. The right of respect

⁵⁷⁴ According to art. 2(1) of the Swedish Copyright Act "copyright shall include, with the limitations stated hereinafter, the exclusive right to control a work (*uteslutande rätt att förfoga över verket*) by producing copies thereof and by making it available to the public, be it in the original or a changed form, in translation or adaptation, in another literary or artistic form, or by other technical means.

⁵⁷⁵ SOU 1956:25, pp. 98 and 129.

⁵⁷⁶ For the inalienability of moral rights, see M. SALOKANNEL, 1997 pp. 283 ff.

⁵⁷⁷ M. KOKTVEDGAARD & M. LEVIN, (1996), p. 111.

⁵⁷⁸ Art. 3 of the Nordic copyright laws.

⁵⁷⁹ Ibid., pp. 127 ff.

⁵⁸⁰ *Sveriges Television Aktiebolag v Torgny Björk*, Supreme Court (Högsta Domstolen), June 1996.

According to the Article 3 Paragraph 2 of the Nordic copyright laws :

"[t]he work must not be altered nor made available to the public in a manner or in a context which is prejudicial to the author's literary or artistic reputation, or to his individuality."

See also below, right of modification and adaptation.

4. The right of modification and adaptation

Other rights closely related to the protection of the integrity of protected works are the right of modification and the right of adaptation. Following the Article 6 bis of the Berne Convention, the author's right to safeguard the integrity of her work covers the author's exclusive right to permit or prohibit any adaptation or other modification of the work (art. 12) as well as the author's right, by virtue of the author's moral rights, to oppose any alteration of the work which would undermine the author's personality (art. 6bis). An independent right of adaptation as stated in art. 12 of the Convention has not so far existed in the Nordic laws. The author's exclusive right of disposal over a work by producing copies thereof and by making it available to the public, whether in the original or in an amended form, in translation, adaptation into another literary or artistic form or into another technique⁵⁸¹ has so far been deemed to be sufficient to guarantee authors' right to control adaptations of their works.⁵⁸²

In the Nordic countries author's rights laws, there is an additional safeguard for reinforcing the author's position with regard to preserving the integrity of the work when assigning the rights.

⁵⁸¹ Art. 2(1) of the Nordic laws.

⁵⁸² In connection with the revision of the Danish copyright legislation, the authors' need for an independent right to control adaptation or any other modification of their works was raised. It was noted that the current regulation covered only modifications of the work which took place in connection with either making copies of it or making the work otherwise available to the public. According to the Government's draft proposal, this would not cover alteration of the work in circumstances when it was not subject to reproduction or dissemination to the public. This is susceptible to occur, for example, in connection with the adaptations of computer programs. This is why it was proposed that an independent right of adaptation be included among author's other exclusive rights (proposed ' 2(5)). However, the proposal of the Committee was not included in the final Government proposal. Cf. Forelobigt departementalt udkast til lov om ophavsret, 20.5.1992, p. 55.

In the part of the law regulating the assignment of rights it is stated that :

"[i]n the absence of an agreement to the contrary, the person to whom a copyright has been transferred may not change the work or transfer the work to others".⁵⁸³

In the Danish law it is provided that :

"[a]ssignment of copyright does not give the assignee any right to alter the work unless the alteration is usual or obviously presumed".⁵⁸⁴

In other words, alteration of a work without author's consent is not in principle allowed unless the assignment itself presupposes or implies a certain alteration of a work.

4. The right of retract

There is no specific provision in the Nordic laws on the author's possibility to pull back an already published work from the market. Under certain conditions this may, however, be possible according to the general principles of civil law.⁵⁸⁵

5. The right of access

In 1995 right of access was introduced in the § 52a (446/1995) of the Finnish law.

The author of a work of fine art shall have the right to access the work he has transferred, unless this causes unreasonable inconvenience to the owner or holder of the work, and provided this is necessary:

(1) for the author's artistic activity;

or

(2) for the purpose of effectuation of his economic rights, as defined in Article 2.

Whatever is provided in Article 41 shall be applied to the right referred to above in the first paragraph, second subparagraph.

So far there exists no case law on the application of this article.

The right of access does not exist in the Swedish or Danish copyright legislation.

⁵⁸³ Art. 28 of the Finnish and Swedish laws and art. 39 b(1) of the Norwegian law.

⁵⁸⁴ Art. 56(1) of the Danish law no. 395/1995.

⁵⁸⁵ *Haarmann, Pirkko-Liisa*, Tekijänoikeus ja lähioikeudet, Kauppakaari, 1999, p. 112.

III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders

1. Audio-visual works

There are no particularities in this sector. General rules apply.

2. Software

There are no particularities in this sector. General rules apply.

3. Performers moral rights

In principle the same protection applies both to authors and performers. There is however a difference between the Nordic countries in this respect because Denmark and Sweden confer the performing artists the same level of protection as for the authors whereas Finland (and to a certain extent Norway) only provide performers the minimum level of protection as harmonised within the European Union.

IV. Alienability and waiver of moral rights

The general rule under Nordic copyright laws is that moral rights are inalienable. However, the demands of particularities of different exploitation modes have been accommodated in the law by allowing a partial specific waiver of the exercise of moral rights. According to art. 3 §3 of the Nordic Copyright Acts :

"The author may waive his rights under this Article with binding effect only in relation to use that is limited in character and extent".

V. Duration of moral rights protection

The duration of moral rights protection under Nordic copyright laws follows the general protection of author's economic rights, i.e. 70 years from the death of the author.

However, in addition to the above mentioned provisions relating to the protection of moral rights under Nordic laws, which will extinguish at the same time the work falls into public domain, there is a specific for protection of public domain works called the protection of classics. It confers special powers to the government, usually the Ministry of Culture, to safeguard the cultural interests related to public domain works against abusive or depreciatory uses.

For example, in Finland the article 53 of the law provides⁵⁸⁶

⁵⁸⁶ Art. 51 in Sweden and 75 in Denmark.

“If, after the death of the author, a literary or artistic work is the subject of public action in a manner which violates cultural interests, the authority designated by decree shall have the right to prohibit such action, notwithstanding the fact that the copyright is no longer in force, or that copyright may not even have existed.

The person who is the object of such measures may, if he opposes them, have the question submitted to the decision of a court of justice.”

This provision gives the Government the possibility to intervene if it sees that some fundamental cultural values are threatened by a certain use or adaptation of a public domain work. In practice the significance of this provision is small in all the Nordic countries.

Summary

Legislation is dualistic. The right of disclosure does not exist but can be said to be included in the author's exclusive right to make the work available to the public. The name of the author must be mentioned according to the usual practice in the sector. The author has the right to object to detrimental treatment of his work. There is no right of retract. The right of access exists in Finland but not in Denmark nor Sweden. Transfers are not allowed but specific and limited waivers are nonetheless possible.

There is not much case law in the Nordic countries. It seems that facts situations in these cases have not had an impact on the internal market.

Part XI. Portugal

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection
- VI. Relationships between moral rights protection of authors and of performers

I. Legal framework

Copyright and Neighbouring Rights Code (Codigo do direito de Autor e dos direitos conexos) March 14, 1985 (DL n°63/85) as amended, September 17, 1985, n°45/85 and September 3, 1991, n°114/91. Portugal has also implemented the software directive in a separate Act n° 252/94 of Oct. 20, 1994. All directives are implemented except the Database directive, but its implementation is imminent, as it is discussed in Parliament at present.⁵⁸⁷

II. Analysis of the different moral rights : characteristics

Art. 9 and 56 state that moral rights are recognised and in particular the right of attribution and of integrity.

1. The right of disclosure

The right of disclosure is the right not to publish the work. Portuguese law does not provide directly for a specific moral right of disclosure.⁵⁸⁸

2. The right of attribution

Portuguese law recognises different aspects of the right of attribution. First, the author has the right to be named and recognised as the author (art. 27 and 56). This right is reinforced by art. 97 for the publishing contract, art. 115 §4 for the contract of scenic representation, art. 121 §2 i), art. 122, art. 134 for the authors of a movie, art. 142 for the fixation of phonograms and videograms, art. 154 for the broadcasting contract, art. 160 for contracts in the plastic arts

⁵⁸⁷ Rental and term directives have been implemented by Decree-Law n° 332/97 (implementation of the Directive n° 92/100/CEE) and Decree-Law n° 334/97 (implementation of the Directive n° 93/98/CEE).

⁵⁸⁸ A. DIETZ, 'Portugal/I', in *Quellen des Urheberrechts*, p. 14.

sector, art. 161 for plans and works of architecture, art. 167 §1 and 168 §2 for photographs and finally art. 171 for translations.⁵⁸⁹

Art. 27 § 2 sets forth a presumption in favour of the person whose name is indicated as such in the work or the person who is mentioned as such during the use or communication to the public of the work.⁵⁹⁰ Conversely, there is a presumption that the right does not belong to the author if his name is not mentioned on the work or cannot be seen on the universally and usually accepted place where his/her name should appear (art. 14 §3).

Second, the right to disclose the work anonymously is also protected (art. 30).

In addition, two special rules need to be mentioned. The first provides that the author of an architectural work can demand that his name be omitted if the owner has modified the building. The second rule stipulates that the use of a similar name or sign which could lead to confusion with that of another author is prohibited (art. 29 § 3). This means that someone cannot necessarily use his/her patronymic as a 'literary name'. Indeed there cannot be any confusion between the name used and the name previously used by another author.⁵⁹¹ In such cases, there is a special procedure enabling an author to obtain the immediate cancellation of the illegal use of his name and to claim compensation for any damages caused.⁵⁹²

3. The right of integrity

The right of integrity is the right to object to the modification of the work if detrimental to the author's reputation or honour (art. 9 §3). The right is completed by certain other specific rules pertaining to the state of completion of the work and to certain types of works. The right of respect is very strong in Portuguese law because modifications without the author's consent are prohibited even if the use of the work is legal (art. 59 §1). Only parody is allowed (art. 39).

If a work is incomplete, someone else can complete it if that person has a written document from the author which authorises him to do so. The editor of dictionaries, encyclopaedia and didactic works can complete these works if he indicates that they are being completed or modified (art. 96 §3).⁵⁹³

In addition to the right to object to modifications, the author has the right, since 1991, to object to the destruction of his work (art. 56). J. Ascencao believes that this right only exists for works which have a strong artistic character. The right to object to the destruction of the work does not exist in relation to architectural works (art. 60).

Rules relating to certain types of works

Functional works and adverts

⁵⁸⁹ Penalties are provided for the violation of these rights (art. 205 §2). See also art. 198 and right of integrity.

⁵⁹⁰ C. DOUTRELEPONT, p. 223; similar to art. 15 §7 of Berne.

⁵⁹¹ C. DOUTRELEPONT, p. 211.

⁵⁹² M. DE NORONHA E ANDRADE & F. MANUEL ANDRADE BALTAZAR, *Intellectual Property Laws of Europe*, 1995, p. 357. See also C. DOUTRELEPONT, p. 211.

⁵⁹³ C. DOUTRELEPONT, p. 306.

For functional works and commercials, the right of integrity is reduced, in the sense that modifications are allowed if necessary to exploit the work, unless they are detrimental to the author's reputation or honour.

Architectural works

As regards architectural works, the author has a right of control and a special right to prevent modifications (art. 60). This means that the owner of a building cannot modify it without the author's consent (be it during or after the construction of the building) (art. 60 §2). This rule also applies to works of plastic art which are incorporated in the architectural work (art. 60 §1). Some commentators argue that the architect cannot object to the modifications but can obtain damages if he was not informed before the modifications took place.⁵⁹⁴

If there is no agreement between the owner and the architect, the architect can remove his name from the work and the owner cannot, in the future, mention the name of the initial architect (art. 60 §3). In addition, if the owner wishes to make modifications that the architect does not want to carry out himself, the owner must ask for the architect's consent and then he can decide to have the building modified by another architect.

a. Case law

As far as we have been researching, we only have found one case in Portugal, dealing with the integrity right of a singer.⁵⁹⁵ The singer has transferred his economic rights in all his albums. He conceived each of his albums on a certain theme. The transferee had some of his songs put into a medley together with other artists' songs. The author claimed that this practice would violate his right of respect as the songs were taken out of their original environment, i.e. the themes. The court granted him the action.

⁵⁹⁴ J. ASCENSAO, *Direito de autor e direitos conexos*, Coimbra, Editora Limitada, 1992; contra L. F. REBELLO.

⁵⁹⁵ C. Fausto Bordalo Gomes Dias c. Moviplay Portuguesa, S.A., 14a Vara Cível da comarca de Lisboa, 1a secção, Palácio da Justiça, Oct. 12, 1999.

4. The right of modification

In Portugal, the right of modification is a moral right.⁵⁹⁶ The right to modify is provided for publishing contracts (art. 93), contracts of scenic representation (art. 115 §3)⁵⁹⁷, contracts of exploitation of a movie (art. 129 §1), phonographs and videograms (art. 146). The author can introduce modifications which he deems necessary “provided they do not prejudice the general structure of the work, do not reduce their dramatic or spectacular interest, and do not prejudice the rehearsals and representation scheduling” (art. 113 relating to contracts of representation). As regards literary works, the author has a right of correction which must be exercised within 60 days after the author has received the proofs. The editor must support the cost of such typographical modifications (art. 94 § 4).⁵⁹⁸ It is to be noted that modifications which are positive and enhance the work are not automatically authorised. For instance, teaching books can be modified in relation to their aim, if the author does not object to it.

5. The right to retract

The ‘direito de retirada’, the right to withdraw works from circulation, can only be exercised if the author has valid moral reasons (art. 62). The author must indemnify his contracting party for the damage. The author has a special right of retract in case of scenic representation if a part of the work is suppressed so that the meaning of the work is compromised or misrepresented (art. 114). Like in Italy, in case of re-exploitation, the author is not obliged to offer the rights preferentially to his former contracting party.⁵⁹⁹

6. The right of access

A right to access the work does not exist.

7. Classification of authors' rights in different categories - relationships between economic and moral rights

7.1. Rights of adaptation and of integrity

The author who allows the adaptation of his work, cannot object to necessary modifications.⁶⁰⁰

III. Restrictions on moral rights protection with respect to certain categories of works and certain categories of right holders

⁵⁹⁶ M. DE NORONHA E ANDRADE & F. MANUEL ANDRADE BALTAZAR, 1995, p. 357. Formula similar to art. 6 bis Berne.

⁵⁹⁷ The contracting party, who agreed to represent the work, cannot modify it.

⁵⁹⁸ C. DOUTRELEPONT, p. 264.

⁵⁹⁹ This obligation to offer re-exploitation in priority exists in Spain, France, Greece and Germany.

⁶⁰⁰ J. ASCENSAO, *Direito de autor e direitos conexos*, Coimbra, Editora Limitada, 1992, p. 183, n° 121.

1. Software

The employer is presumed to be the owner of the rights relating to the program. This presumption is very vague. Case law will have to clarify whether moral rights belong to the employer or remain to the employed author. J. A. Veloso notes with Ascensao that "legal opinion has so far denied the possibility of moral rights over computer programs."⁶⁰¹ Moreover, the general rule stipulating that the employer can only modify a commissioned work with the author's consent is not applicable to software.⁶⁰²

2. Audio-visual works

Audio-visual works are works of collaboration. Co-authors are : the director, the authors of the script and dialogues, the author of the music and the author of the adaptation of a pre-existing work (art. 22).

2.1. The right of disclosure

The audio-visual work is deemed to be completed when the definitive version is agreed upon between the author and the producer in common.

2.2. The right of integrity

The producer is obliged to preserve the master copy of the film, which he may not destroy (art. 130 and 137).⁶⁰³ The written consent of authors is needed to dub, translate or transform the work (art. 129). The adaptation of any work, to make a fixation, transmit it, execute it or present it by mechanical, phonographic, videographic means must be authorised by the author in a written document, which must detail the aims of the transformation(s) (art. 146).

3. Collective works and works of collaboration

Works of collaboration or joint works

A joint work or work of collaboration is a work in which the individual contributions of the authors cannot be separated (art. 16 §1 a). Any of the authors can require the disclosure, publication or modification of the joint work. Each author can exercise his rights (relating to his individual contribution) separately (art. 18). If a joint work is disclosed solely under the name of one author, it shall be presumed that the authors not mentioned have assigned their rights to the author in whose name the work has been disclosed or published, unless otherwise agreed (art. 17 §3).

Collective works

A work is collective when it has been carried out by a single or collective entity and has been disclosed or published in its name (art. 16 §1 b). The legal person is vested with the author's rights (art. 19 §1). When it is possible to distinguish the individual contributions in the collective work, the dispositions of art. 18 relating to collaboration works apply.

⁶⁰¹ J.A. VELOSO, citing J. ASCENSAO, *Direito Civil - Direito de autor e direitos conexos*, Coimbra Editora, Coimbra, 1992, pp. 228 ff.

⁶⁰² L.F. REBELLO, 'Copyright in Portugal', *RIDA*, April 1996, p. 219.

⁶⁰³ L. F. REBELLO, 'The New Portuguese Legislation on Copyright', *RIDA*, 1986, n°129, p. 28.

Composite works

A composite work (*obra composita*) is a work which incorporates totally or partially, but does not transform, a work from another author, with this author's consent. The rights pertaining to a composite work shall belong exclusively to its author, without prejudice to the rights of the author of the pre-existing work (art. 20).

4. Performers moral rights

Performers have a limited right of identification (which can be waived by agreement) and have the right of integrity in their performances (art. 180). The right to be mentioned does not apply in case of musical audio programs without any form of speech and in case customs enable such identification to be omitted (art. 154).

IV. Alienability and waiver of moral rights

Moral rights of attribution and integrity are non transferable, imprescriptible and non waivable (art. 56 §2). When the author is employed or creates a commissioned work (art. 13-15), the moral rights remain his in principle.⁶⁰⁴ However, a waiver might be possible under art. 13 and 14 (i.e. in case of commissioned works and works financed by somebody other than the author).

As regards the right of attribution, no one can use, for his/her own work, the name of another author even with this latter author's consent (art. 29 §3). Thus ghost-writer's conventions are void under Portuguese law.⁶⁰⁵ There is no exception to this rule even in the case of a collective work.⁶⁰⁶ Waivers of the right of integrity are possible only for particular types of exploitation, but even with such a waiver, the author can at any time exercise his right if he indemnifies his contracting party.⁶⁰⁷ As the law only provides for the inalienability of the rights of respect and attribution, it is not clear if the author can waive his right of retract. Case law will have to clarify this issue.

V. Duration of moral rights protection

Moral rights are perpetual. They are exercised by the author's heirs for 70 years after his death. If heirs do not exercise the right of integrity and the work is endangered by a violation, the Minister of Culture can, when the work is still protected, exercise this right. When the works are

⁶⁰⁴ L. F. REBELLO, 1986, p. 19.

⁶⁰⁵ J. ASCENSAO, n° 68, 1.

⁶⁰⁶ J. ASCENSAO, n° 68, IV.

⁶⁰⁷ J. ASCENSAO, p. 194, II.

in the public domain, rights are exercised by the Minister of Culture. Thus moral rights are vested with the Portuguese state⁶⁰⁸ (art. 56 §2 and 57).

The duration of performers moral rights is not explicitly expressed in the Act but art. 183 provides that the protection lasts 50 years from the first day of the year following the event which generated the protection.

VI. Practical effects of moral rights protection with respect to authors, on the one hand, and with respect to performers

The grant of related rights shall in no way affect the protection of authors over the work used (art. 177).

⁶⁰⁸ M. DE NORONHA E ANDRADE & F. MANUEL ANDRADE BALTAZAR, 1995, p. 357.

Summary

Legislation seems dualistic but there is no clear indication in the Act. No right of disclosure is directly recognised; the right of attribution is stated in simple terms with specific additional rules. The right of respect can be exercised if violations are prejudicial and the Act stipulates specific rules for certain types of works (authors of functional works and advertisements have a reduced right of respect). The right of retract is allowed under strict conditions and no access right is recognised. Inalienability and waivers are prohibited. Waivers can be allowed in certain cases, there are terminable at will.

As far as we have been researching, we are only aware of one case in Portugal, dealing with the integrity right of a singer. The fact that the "medley CD" could be exported and be admitted in other countries because the protection of the right of respect is lower, could potentially have an effect on the circulation of the work in the Community. It would be forbidden to sell it in certain countries while allowed in others. However, again and as stated above concerning other countries' case law, this is only speculative and there is no evidence of any problems in this respect.

Part XII. Spain

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection
- VI. Relationships between moral rights protection of authors and of performers

I. Legal framework

Intellectual Property Act 22/1987 of November 11, 1987, last amended on April 12, 1996, now called Revised Act on Intellectual Property regularising, clarifying and harmonising the applicable statutory provisions.⁶⁰⁹ The four directives are implemented. The Spanish Act shows both the French and German influences.⁶¹⁰

II. Analysis of the different moral rights

Art. 2 of the Spanish Copyright Act states that the intellectual property is formed by patrimonial and personal rights. Art. 14 enumerates moral rights. Commentators diverge as to the classification of authors right into the monist or dualistic theory.⁶¹¹ The Supreme court in its June 3, 1991 ruling stated that copyright has unitary nature including both economic and moral rights.⁶¹²

1. The right of disclosure

The right of disclosure presents positive and negative aspects or prerogatives. It is defined as the right for the author to decide if the work is published and in what form (art. 14 §1), and particularly if it is to be published under the author's name, pseudonym or anonymously (art. 14

⁶⁰⁹ It can be of interest to note that J. M. MOLINA points out that Spanish law is recent and adapts other states legislation, could be an example to harmonise moral rights at the European level; see J. M. MOLINA, in ALAI, 1993, p. 197.

⁶¹⁰ F. POMBO, in C. VAN RIJ, *Moral rights, reports presented at the meeting of the International Association of the Entertainment lawyers MIDEM*, 1995, p. 143.

⁶¹¹ F. POMBO, p. 143. J. M. Molina believes it is dualistic.

⁶¹² Supreme Court, June 3, 1991, *Aranzadi* 1991, 4407.

§2). The author also has the negative right to decide not to publish.⁶¹³ The right to publish expires with the first disclosure. When a work is published under a pseudonym or anonymously, the moral rights are exercised by the legal or natural person who published the work with the author's consent (art. 6.2).

As regards works of plastic arts, the owner of the original work can communicate the work to the public if the author, in the alienation contract, did not state he did not wish it to be exhibited. Indeed the alienation of the original by the author is an act of disclosure. Nevertheless, the author keeps the right to object to the exhibition if his honour or reputation is violated (art. 56, n° 2 i, f) and he can be indemnified (art. 123 and 125).⁶¹⁴ Uncompleted works cannot be attached (art. 50 §1).

2. The right of attribution

a. Legislation

The right of attribution also presents positive and negative aspects : positively, it is the right to claim recognition of authorship (art. 14 § 3 and 15 §1). The negative aspect of the right of attribution is the right to object to any omission or false attribution (art. 534 bis b1, al. C Penal Code and art. 64 §1 of Copyright Act).⁶¹⁵ The false attribution must always take place with a (literal or non-literal) infringement.⁶¹⁶

There are also two other aspects of the right of attribution : moral and economic. The moral aspect is materialised by the establishment of a link between the author's person and his/her work. On the economic side, the authorship claim can have an impact on the profit that author will make.

The author can reveal his identity at any time (art. 27 §2). In publishing contracts, the editor is obliged to write the name or identification of the author on the work (art. 64, 1°).⁶¹⁷

⁶¹³ S. MÜLLER, 'SPANIEN,' In MÖHRING, SCHULZE, ULMER, ZWEIGERT, (ed.) *Quellen des Urheberrechts*, v. *Spanien*, March 1997, p. 20.

⁶¹⁴ D. ESPIN CANOVAS, 'Le droit moral de l'auteur d'oeuvres plastiques dans le système de droit civil', in ALAI Congress, *The moral right of the author*, 1993, p.368.

⁶¹⁵ J. M. MOLINA, , 'De l'évolution du droit moral de l'auteur dans la législation espagnole', in ALAI Congress, *The moral right of the author*, 1993, p. 195.

⁶¹⁶ VEGA, *Derecho de autor*, Madrid, 1990, p. 217.

⁶¹⁷ C. DOUTRELEPONT, p. 220.

b. Case law

The 'tribunal supremo' (Spanish Supreme Court) has recognised the violation of the right of attribution in two decisions⁶¹⁸ (violation of art. 14 §3). In the case Herederos of Mr Jose v. Maria del Valle, a project for a theatre had been created by several architects and an article describing the project falsely attributed the project to only one of them. According to the court, no damage was proven and thus that art. 125 did not apply. However, it can be argued that the ruling of the Tribunal Supremo went against art. 125, under which a moral damage causes itself a claim for damages even when there is no proof of an economic damage.⁶¹⁹ It must be noted that there is a controversy in Spain as to whether nominal damages are allowed.

3. The right of respect or right of integrity

a. Legislation

The right of respect is negative : it is a right to prevent. It is "the right to claim respect for the integrity of the work and to prevent any distortion, modification, alteration or any act that may prejudice the author's legitimate interests or impair his reputation (art. 14 §4)."⁶²⁰ Alteration covers any translation, adaptation and modification.⁶²¹ Making cuts in a movie is under the scope of art. 14 §4. For F. Pombo, this formulation signifies that the quality or artistic merit of a work affects the right of integrity, as the right to object to modification will be recognised only if the modification is detrimental to the author's reputation or honour.

Some commentators argue that the right of respect is unconditional and does not suffer exceptions. The author could then in theory object to a modification which would be an amelioration.⁶²² Despite these opinions, the right of respect is not absolute. There should be possibilities to accept modifications if they are minor or at least non prejudicial to the author's honour or reputation. Such a consent can be drawn from the nature of the contract (contract which transfers the right of adaptation for instance). Therefore, the contracting party who acquired the right of adaptation will be able to modify the work as long as he does not change the chronology of events of the novel, the characteristics of the characters, ... The Act regulates this obligation more precisely in the editing contract and the contracts of theatrical representation and of musical execution (art. 64 § 1 ad 78).⁶²³ These articles prevent the contracting party from making cuts, additions or changes to the work. Art. 78 provides that the technical conditions of the communication must not violate the integrity of the work.⁶²⁴

Destruction

The statute is silent as regards the destruction of the work. Some authors argue that if the owner wants to destroy the work, he must let the author access the work in order for him to

⁶¹⁸ Dec. 14 (Act. Civ. 1994 Bd.2, p. 1062-1063) and Dec. 29, 1993 (RAJ, 1993, 10161). See also a comment by L. GIMENO, in EIPR 1996, D-24.

⁶¹⁹ S. MÜLLER, in *Quellen des Urheberrechts*, 1997.

⁶²⁰ E. DIAZ-BASTIEN & P. PERNAN DOMEQ, *Intellectual Property laws of Europe*, G. Metaxas-Maranghidis, Stanbrook and Hooper, Brussels, John Wiley and sons, 1995, p. 374.

⁶²¹ E. DIAZ-BASTIEN & P. PERNAN DOMEQ, 1995, p. 374.

⁶²² F. BONDIA ROMAN, *Propiedad intelectual, su significado en la sociedad de la informacion*, Madrid Trivium, 1988, p. 209.

⁶²³ See also art. 64 §2, 65 §3, 66, 78 §2 and 80 §1).

⁶²⁴ C. DOUTRELEPONT, p. 305.

exercise his right of reproduction.⁶²⁵ As regards architectural works, administrative rules can cause the modification of the building, as well its destruction in case of deterioration or non-use due to its decay.⁶²⁶

Damages

The author has the right to obtain compensation for material and moral damages in case of infringement (art. 123 and art. 125 § 2 particularly for moral rights). As stated above (while discussing case law on the right of attribution), the moral damage is indemnified even if there is no material damage. It is important to note that only the author is judge of the damage caused by an alteration.

b. Case law

Paintings a painter had lent for an exhibit to a local authority, were returned to him in a deteriorated state. The painter sued for violation of his right of integrity. The Supreme Court decided that if there are no particularly high demands on the prejudiced interests, then no detailed balance of interests must be undertaken.⁶²⁷ The artist was indemnified for the damage due to the violation of his right of integrity.

4. The right of modification

The right of modification is positive : it is right for the author to modify his work. It is a moral right. The author can modify his work but must respect the rights acquired by any third party over the work, particularly when the work is being exploited (art. 14 § 5).⁶²⁸ During the correction of proofs, the author can introduce indispensable corrections to his work, if they do not alter the work's nature or purpose and do not substantially increase the cost of publication (art. 65 and 66).⁶²⁹ The contract can provide for a maximal percentage of corrections.⁶³⁰

The right of modification is subject to two limitations : the protection of cultural protected assets and the right of exploitation (and thus modification) acquired by third parties (see also below, n° 7). First, the right to alter the work is subject to the 'protection requirements of goods of cultural interest'. Art. 36 §1 of the Act on the Historical Heritage of June 25, 1985⁶³¹ obliges owners, possessors and users of these works to maintain and protect works declared "works of cultural interest" by the State. This law consequently makes it impossible to change the work.⁶³² However, the work of a living author cannot be declared of cultural interest without the author's

⁶²⁵ D. ESPIN CANOVAS, 'Le droit moral de l'auteur d'oeuvres plastiques dans le système de droit civil', in ALAI, 1993, p. 319. It is interesting to note that a decision denied the right of integrity as regards the destruction of the work, but this decision was prior to the enactment of the 1987 statute (See Spanish Supreme Court, 21 June 1965, in ARANZADI, Repertorio de Jurisprudencia, 1965, n° 3670).

⁶²⁶ D. ESPIN CANOVAS, in ALAI, 1993, p. 371.

⁶²⁷ June 3, 1991, ADI, Bd. 14, (1991-1992), p. 494-498). See also comment by L. Gimeno in EIPR 1995, D-286.

⁶²⁸ E. DIAZ-BASTIEN & P. PERNAN DOMECCQ, *Intellectual Property laws of Europe*, 1995, p. 374.

⁶²⁹ F. POMBO, p. 147.

⁶³⁰ C. DOUTRELEPONT, p. 264.

⁶³¹ Ley de Patrimonio historico Espanol, see A. DELGADO, 'The New Spanish law on Intellectual Property', RIDA, 1988, p. 214.

⁶³² S. MÜLLER, 1997, p. 22.

express consent. Second, in case of contracts of exploitation, the author's right of modification is restricted (for instance in editing contracts).

5. The right to retract

This right is defined as the right to recall the work from the market place because of a change of the author's moral or intellectual convictions (art. 14). The exercise of this right is subject to prior indemnification of the contracting party for the damage caused (direct damages and lost profits). The right of withdrawal does not affect copies acquired by third parties but only the relationships between the contracting party and the author. If the author decides to resume exploitation of his work once again after having it withdrawn, he must preferentially offer this opportunity to the previous holder and under comparable conditions to those previously enjoyed.⁶³³

6. The right of access

The right of access is large : it is the right to have access to any rare or unique copy of the work when it is possessed by a third party (art. 14 §7) in order for the author to exercise the right of disclosure or any of his rights. The author must cause as little disturbance as possible to the possessor and indemnify him for any damages (art. 17, 2°). The author is not allowed to demand from the owner to move the work from one place to another (art. 14 § 7, 2°).⁶³⁴ The balance of rights between the possessor and the author is not mandatory in Spanish law. This right expires with the author's death. It must be noted that it is illogical to give heirs the right of disclosure, but to refuse to grant them the right to access a work which is not yet disclosed. ⁶³⁵

7. Classification of authors rights in different categories - relationships between economic and moral rights

7.1. Rights of adaptation and of integrity

A right holder to whom the exploitation rights have been granted, has a legitimate interest to transform the work in order to adapt it and exploit it in a reasonable manner. This interest must be weighed against the author's right of integrity.⁶³⁶ The necessity of the modification to exploit the work must be considered. For instance, in publishing contracts, the right of modification is reduced. Another example is the adaptation of a book into a movie : the author cannot object to structural modifications involved in adapting the novel to a film. On the contrary, as regards theatrical and musical performances, the grantee is forced to communicate the work to the public without variations, additions, abridgements, cuts or suppressions to which the author has not consented (art. 78 §2).

⁶³³ E. DIAZ-BASTIEN & P. PERNAN DOMEQ, 1995, p. 374.

⁶³⁴ E. DIAZ-BASTIEN & P. PERNAN DOMEQ, 1995, p. 374.

⁶³⁵ S. MÜLLER, p. 23.

⁶³⁶ F. POMBO, p. 145.

III. Restrictions on moral rights protection introduced in certain Member States with respect to certain work categories and certain categories of rights holders

1. Software

General provisions apply. Consequently, all moral rights granted in art. 14 belong to the author. However, from a practical point of view, it is awkward to apply moral rights in the sector of software. Art. 98 provides that the assignee of the exploitation rights may authorise, except for the express prohibition by the author, the making of successive versions (releases) or derivative programs. This would mean that the alteration of the integrity of the program is limited with regard to whom it is applicable (only to the assignee of the exploitation rights or the person by him so authorised) and as to the material (only for successive or derived programs).⁶³⁷

The employer can be the owner of the moral rights if the work is collective. Art. 51 § 4 can apply also (see above).

1.1. The right of integrity

The author cannot object (unless otherwise agreed) to the making by the contracting party of further versions of the software (art. 98 & 100 § 4). In addition, the author cannot object to the software adaptation by the user for his own use (art. 99 b).

2. Audio-visual works

Audio-visual and cinematographic works are works of collaboration (art. 7 and 87). The choice of this classification holds several consequences. Firstly, co-authors of the audio-visual work have the right to use their contribution separately, without time limits and with the condition that this use does not prejudice the normal exploitation of the audio-visual work.⁶³⁸ Secondly, authors of pre-existing works (used in the movie) can exploit their works in a graphic form or for theatre representation (art. 89 § 1 and 88), but they cannot use their contribution for the creation of other audio-visual works for 15 years after the realisation of the movie.

2.1. The right of disclosure

Co-authors of the movie (the director, the author of the script, the author of the plot and adaptation, the author of the dialogues, as well as the authors of the especially composed music, with or without texts (art. 87)) can exercise their moral rights only when the work is completed (art. 93 §1). The work is deemed completed when it is in a state conform to the terms of the contract between the director and the producer. The producer and the director can decide to let co-authors appreciate whether the work is completed (art. 92 §1).⁶³⁹ When an author, without justification, does not complete his contribution or cannot complete it because of 'force majeure', the producer can employ a third party to complete the movie (art. 91). If the

⁶³⁷ F. BONDIA ROMAN, Spain, in H.D.J JONGEN - A.P. MEIJBOOM, *Copyright software protection in the European Community*, Deventer-Boston, Kluwer, 1993, n°1.6.

⁶³⁸ C. DOUTRELEPONT, p. 322-323.

⁶³⁹ C. DOUTRELEPONT, p. 205.

author precludes disclosure without good reason, the producer can either disclose the work as is or allow disclosure (art. 91).

2.2. The right of integrity

Any modification of the completed work requires the consent of the authors who have decided its completion (art. 92 §2, al. 1). However art. 92 §2, al. 1 does not apply to contracts concerning the production of audio-visual works which are to be mainly broadcast (art. 92 §2, al. 2). For works made to be broadcast and unless otherwise agreed, "changes may be made as are strictly dictated by the manner of programming the medium, without prejudice to the author's personal interest or reputation".⁶⁴⁰ Art. 93 precludes the destruction of the definitive version. All provisions which apply to audio-visual works apply in like manner to radio works (art. 94).

3. Works of collaboration - Collective works - Composite works

Works of collaboration

To fall under the category of work of collaboration, the work must be made by several authors and be an inseparable unit. The rights belong to the authors collectively. An agreement is required to divide the several authors' rights between themselves. The consent of each is required for the disclosure and modification of the work.⁶⁴¹ If a dispute arises, courts settle the issue (art. 7 §2). Courts however cannot evaluate the moral rights but must take account of the interests of the author who objects to disclosure or modification.⁶⁴² Once the work has been disclosed, none of the authors can reasonably withhold his consent to the exploitation of the work in the form in which it was disclosed. "Subject to agreement among the authors, each may separately exploit his contribution, unless this is harmful to exploitation of the work as a whole" (art. 7 §3).⁶⁴³

Collective works

Certain conditions must be fulfilled : (1) creation under the initiative of a legal or natural person, (2) publication under the name of that person, (3) the work is constituted of a bunch of different contributions which create a unique work and (4) it is impossible to ascribe the author's rights on the whole work to a single author (art. 8). In this case, the authors' rights (including the moral rights) belong to the natural person or legal entity who publishes the work under her name (art. 8 al. 2), unless otherwise agreed.

Composite works

Certain conditions must also be fulfilled : (1) creation of a new work which incorporates a previous work without modifying it, (2) with the consent of the previous author and (3) the latter is not an author of the second work (art. 9 §1). The author of the previous work can exercise his

⁶⁴⁰ A & G BERCOVITZ, 'Spain', in M.B. NIMMER.- P.E. GELLER, *International copyright law and practice*, New York, Matthew Bender, October 1996, p. SPA-51.

⁶⁴¹ E. THOMSON, 'Spain', in S.M. STEWART, *International copyright and neighbouring rights*, Second ed., 1989, Butterworths, p. 365.

⁶⁴² A. DELGADO, The new Spanish law on Intellectual Property, *RIDA*, 1988, n°3, p. 210.

⁶⁴³ E. THOMSON, in S.M. STEWART, 1989, p. 365; A. DELGADO, 'The new Spanish law on Intellectual Property', *RIDA*, 1988, n°3, p. 210.

moral rights in the new work, if a part of his work in the new work is concerned. However, as he has authorised the making of the new work, his right of disclosure will be exhausted.⁶⁴⁴

An independent work is deemed to be a work created separately from other works, though it may be published together with them⁶⁴⁵ (art. 9 §2).

4. Performers moral rights

Performers have the right to be named in connection with their performances or interpretations and they have the right to object to acts which prejudice their reputation or honour. These rights lasts 20 years after the performer's death and are exercised by heirs (art. 113).⁶⁴⁶

IV. Alienability and waiver of moral rights

The moral rights protect the personal and individual nature of creative works. They are imprescriptible. They cannot be waived or transferred (art. 14 §1). This is the principle but it remains to be seen how courts will interpret this principle. Some authors argue it is possible for the author to be a 'ghost-writer', others (Bondia Roman) argue the contrary.⁶⁴⁷ Collecting societies cannot exercise moral rights.⁶⁴⁸

Employed authors

The employed author remains the owner of his moral rights but the economic rights are vested in the employer ab initio so that the right of adaptation belongs to the employer. As regards collective works, the employer is the holder of moral rights ab origine. In addition, under art. 51 § 4, the author must suffer a looser application of the moral rights rules, as his rights can be weakened in relation to the aim and object of the contract.⁶⁴⁹

V. Duration of moral rights protection

The duration of moral rights varies from right to right.

Moral rights of attribution and integrity last beyond the death of the author perpetually. Art. 41 confirms that these rights are perpetual : once the works fall into the public domain, they may be used by anyone, provided that the rights of attribution and integrity are respected.⁶⁵⁰

⁶⁴⁴ S. MÜLLER, 1997, p. 11.

⁶⁴⁵ E. THOMSON, 'Spain', in S.M. STEWART, 1989, p. 365.

⁶⁴⁶ A & G. BERCOVITZ, in NIMMER, p. SPA-63.

⁶⁴⁷ C. DOUTRELEPONT, p. 242-243.

⁶⁴⁸ F. POMBO, p. 155.

⁶⁴⁹ C. DOUTRELEPONT, p. 198.

⁶⁵⁰ F. POMBO, p. 149.

The right of disclosure extinguishes at the same time than patrimonial rights (art. 15). "The exercise of the right of disclosure may also be limited by legal intervention against a decision by the author's heirs not to disclose the work when such a decision prevents the exercise of the rights of citizens to have access to culture (art. 44 of the Spanish constitution). This provision preserves against potential abuses of the right of disclosure by heirs. In other words, if the author's heirs exercise the publication right on terms which breach art. 44 of the Constitution, courts can impose suitable measures in order to publish the work.⁶⁵¹ Such an intervention may be granted at the request of a public institution of a cultural nature or any other person who has a legitimate interest (art. 40)."⁶⁵² It is difficult to evaluate when the rights of citizens are prejudiced in the case a work has never been disclosed to the public.⁶⁵³

The right to exercise the right not to publish a work lasts 60 years following the death of the author.

The rights of retract and of access last until the author's death.⁶⁵⁴ So do the right to modify and rectify the work (art. 14 §5-7).

The persons named in the author's will or if not, his heirs, are entitled to exercise his rights after his death (art. 13 and 15 §2). If there are no heirs, the rights can be exercised by the public administrations or cultural institutions (art. 16). This article creates the danger that the state exercises a sort of 'censorship' in the name of the author's personality. It is interesting to note that the positive rights expire with the author's death while the negative ones can be exercised by the heirs.⁶⁵⁵

VI. Practical effects of moral rights protection with respect to authors, on the one hand, and with respect to performers

Neighbouring rights must be understood as being without prejudice of authors' rights (art. 131).

⁶⁵¹ F. POMBO, p. 150.

⁶⁵² A. DELGADO, *RIDA*, 1988, p. 216.

⁶⁵³ A. DELGADO, *RIDA*, 1988, p. 216.

⁶⁵⁴ This is the interpretation of BONDIA ROMAN, *Propiedad intelectual*, p. 214.

⁶⁵⁵ J.M. MOLINA, ALAI, 1993, p. 196.

Summary

There is a controversy as to the dualistic or monistic nature of moral rights in Spain. The right of disclosure comprises both positive and negative prerogatives. The right of attribution is stated in generally very similar terms as stated in other European laws. The prejudice is needed to object to violation of the right of respect. There are more detailed rules for specific sectors (music, theatre) as regards the right of integrity. The author has a right to retract the work under certain conditions. The access right is rather large. Transfer is not allowed under Spanish law and rights cannot absolutely not be waived.

From what we are aware of, case law is not abundant in Spain and it is thus very difficult to draw any conclusions from the very little amount of cases we have at hand. Nothing on a potential impact on the internal market can be said on their basis.

Part XIII. United Kingdom

- I. Legal framework
- II. Analysis of the different moral rights : characteristics
- III. Restrictions on moral rights protection as regards certain work categories and certain categories of rights holders
- IV. Alienability and waiver of moral rights
- V. Duration of moral rights protection
- VI. Impact of certain other areas of law on moral rights protection

I. Legal framework

Moral rights were introduced in British law only in 1988, with the Copyright, Designs and Patent Act of November 15, 1988 (CDPA).⁶⁵⁶ Previously, no moral rights were recognised to the author, only contract law or other types of protection were available to the author to defend his personality. The British CDPA does not simply state the principles of art. 6 of the Berne Convention but has enumerated a series of exceptions to the several moral rights. J. Phillips, R. Durie and I. Karet note that until harmonisation takes place, moral rights will have little practical impact in most areas of copyright law.⁶⁵⁷

The enactment of the 1988 Act has been followed by the implementation of the five Directives. There have been several other 'regulations' on certain aspects of copyright law, such as the Regulations n° 1006 of 1989 and n° 3297 and n° 2990 on Copyright Rights in Performances of 1995 and the Copyright (Computer Program) Regulation n° 3233 of 1992.

II. Analysis of the different moral rights

Characteristics of moral rights

The right of identification and of respect are only recognised to certain categories of authors : authors of literary, dramatic, musical, architectural or artistic works and film directors (even if they have transferred their copyright). Thus the right only belong to authors whose copyright rests on creativity rather than investment. The right to object to any abusive attribution of the work belongs to anyone; the right to privacy belongs to the person who commissioned the work. So only the rights of attribution and integrity are 'real author's rights'. The rights of attribution and privacy apply in relation to any substantial part of the work and in relation to the whole work, while the integrity right and the right to prevent against false attribution apply in

⁶⁵⁶ included are the Copyright and Rights in Databases Regulations, 1997, into force 1st January 1998 and the Librarians and Archivists Regulations of June 13, 1989 and July 14, 1989.

⁶⁵⁷ J. PHILLIPS, R. DURIE, I. KARET, *Whele on Copyright*, 5th ed., Sweet and Maxwell, 1997.

relation to the whole or any part of the work.⁶⁵⁸ The action against an infringement of moral rights is a breach of statutory duty (art. 103). The author can ask for damages for non-economic prejudice and ask for injunctions.

1. The right of disclosure

a. Legislation

The right of disclosure is not yet fully recognised in the British law but it can be said that the disclosure right is contained in part in the economic right of publication. This economic right applies to all works, including broadcasts and sound recordings in which right holders have no moral rights. It is alienable like any economic right. It is limited to the first issue of the work (or in other words, exhausted with the first publication), so that there is no “right of retract”.⁶⁵⁹

b. Case law

As long as the author retains his copyright on his work, he has the power on the decision to publish or not. For instance, when an author has disclosed a manuscript confidentially to some of his friends, there is no disclosure to the public so that it is an infringement of the right of publication to publish it in full in a newspaper.⁶⁶⁰ Similarly, a newspaper infringes the right of publication when it publishes the detailed plot of a comic opera before its first public performance.⁶⁶¹ In *Prince Albert v. Strange*, the court stated that the author has to right to prevent others from publishing any of his unfinished works⁶⁶². Even if the author has ceded his copyright, he still has some power on publication. In another case, an author had transferred his copyright for all songs he would write in the five years to come. The contracting party published the songs. The terms of the contract did not allow the author to do anything.⁶⁶³

There is also a right to privacy (or of non-disclosure) for certain movies and photographs. This right belongs to the person who commissioned the work and not to the person who is portrayed or represented (art. 85).⁶⁶⁴

2. The right of attribution

a. Legislation

Principle

The CDPA establishes two rights under the category of the ‘right of attribution’ : the right to be identified as the author or director and the right to object to any false attribution.

⁶⁵⁸ E.P. SKONE JAMES, *SKONE JAMES on Copyright*, London, Sweet and Maxwell, 1999, n° 11-05, p. 608 (emphasis added).

⁶⁵⁹ J. PHILLIPS, R. DURIE, I. KARET, 1997, p. 57.

⁶⁶⁰ *Doyle v. Wright* (1928-35) H.C.C. 243.

⁶⁶¹ *Gilbert v. Star Newspapers* (1894) 11 T.L.R. 4.

⁶⁶² (1849), 3 DeGex & Sm. 652, 64 E. R. 293.

⁶⁶³ *Schroeder Music Publishing Co. v. Macaulay* (1974) 3 All E. R. 616 (H.I); 1 W.L.R. 1308

⁶⁶⁴ See below, right to privacy.

Firstly, the right of identification is formulated as “the right to be identified as the author of a copyright literary, dramatic, musical or artistic (and architectural) work and the right to be identified as the director of a copyrighted movie” (art. 77 (1) and (7)). This means that authors of literary and dramatic works have the right to be mentioned when the following acts are performed : publication, public performance, broadcasting (including by cable), sale of copies of records and films. Directors have this right when the film is shown or broadcast and when copies are sold.

“The right to be identified at public exhibitions goes further than the copyright right in artistic works, which does not provide an exclusive right of public exhibition or performance.”⁶⁶⁵ Indeed there is no copyright in a public exhibition of a work of art or a copy of such a work. Yet if the person who wishes to exhibit the work has notice that there is an assertion, he must respect the right to be identified. An architect has the right “to require his name to be displayed on a building in a manner appropriately visible to persons entering or approaching the building.”⁶⁶⁶ He also has the right to be identified on models, drawings, photographs of the building issued to the public. This right does not apply where the model or building is only incidentally included, for instance as background in another work (such as an artistic work, a movie or broadcast).⁶⁶⁷ In addition, the name of the author of an artistic work must be mentioned on reproductions of the work (such as photographs or a graphic work representing it).

Assertion

The right of identification must be expressly asserted in the contract of transfer of copyright or any other document written and signed by the author (art. 78(1) and (2)). The latter method has one major disadvantage for the author : “it is binding only on persons to whose notice the assertion is brought”.⁶⁶⁸ This means that if no document is signed, the contracting party does not violate the right of attribution if he does not mention the name of the author. The assertion can be of a pseudonym. Assertion must take place as soon as possible as in an infringement suit, the court will take account of the date of assertion to calculate damages. “Collective bargaining by a trade union will not secure the general assertion of the attribution rights of all of its members”.⁶⁶⁹

Exceptions

There are numerous exceptions to the right of identification (art. 79). The right does not apply :

- to computer programs, typeface designs, computer-generated works;
- when the initial ownership vests in another person (e.g. the author’s employer) (art. 79 (3));
- in relation with an act which does not amount to an infringement of copyright by virtue of various exceptions contained in art. 30, 31, 32 (3), 45, 46, 51, 52 and 57 (see art. 79 (4));
- if the work reports current events (art. 79 (5));
- if the work is to be published in a newspaper magazine or similar periodical, or an encyclopaedia, dictionary, yearbook or other collective work or reference book when the work

⁶⁶⁵ J. PHILLIPS, R. DURIE, I. KARET, p. 59.

⁶⁶⁶ J. PHILLIPS, R. DURIE, I. KARET, p. 59. “When more than one building is constructed on the same design, the right applies to the first building constructed.”

⁶⁶⁷ M. LUCKMAN, 'Moral rights in the United Kingdom, a short review and discussion of problems', Copyright World, Issue Five, July 1989, p. 26.

⁶⁶⁸ E.P. SKONE JAMES, n° 11-21, p. 618.

⁶⁶⁹ M. LUCKMAN, p. 26.

was either made or made available for the purposes of such publication by or with the consent of the author (art. 79 (6));

- to works in which the Crown has copyright or to works which copyright belongs to international organisations (art. 79 (7)).⁶⁷⁰

Industrial designs and anonymous works are also excluded from the benefit of the right of attribution. Moreover the exceptions to copyright (i.e. 'fair dealing') apply to the right of attribution.⁶⁷¹

In addition to these exceptions, there is no right of attribution as regards public execution and broadcasting of musical works and words accompanying them. In other words, the broadcaster or the organiser of a public representation cannot be forced to cite the names of the authors of such works (art. 77 (3)). Conversely, the right to object to false attribution exists in this precise case. In practice, the right to have the name and title announced is commonly given to the author in a contract and enforced by collecting societies.⁶⁷² Composers have the right to be identified on records, sheet music and films. When a work is adapted, the original author has the right to be cited as such.

Second, the CDPA sets forth a right to object to any abusive attribution of a work, which can be seen as the "converse right of the right of identification". Some argue that it is not a moral right *stricto sensu*.⁶⁷³ It overlaps to some extent the action of passing off. The right to object to any abusive attribution of a work consists of the right not to have a literary, dramatic, musical, cinematographic or artistic work falsely attributed to a person as author and not to have a film falsely attributed to a person as director (art. 84 (1)). The right covers the copies issued to the public, public exhibition and reproduction of an artistic work, public performance, showing, broadcast or cable-cast of a literary, dramatic or musical film (art. 84 (2)). This right does not only belong to the author but also to any person whose name has been affixed on the work.⁶⁷⁴ When a person has also registered his/her name as a trademark, the false attribution may also constitute trademark infringement.⁶⁷⁵ The right to object to false attribution extends to cases in which a work is falsely represented as being an adaptation of a work of a person.⁶⁷⁶

A false attribution is also possible in presence of joint works. For instance, if one person only is named as the author of a work of which two persons have collaborated, the person who is named has the right to complain of false attribution, but not the unnamed person. This latter can act on his attribution right.⁶⁷⁷

⁶⁷⁰ There is Crown Copyright when the work is done by Her Majesty or by an officer or servant of the Crown.

⁶⁷¹ J. TURTON & M. ALLEN, in C. VAN RIJ, 'United Kingdom', 1995, p. 160. For more details, see E.P. SKONE JAMES, n° 11-33, p. 624.

⁶⁷² J. PHILLIPS, R. DURIE, I. KARET, p. 59.

⁶⁷³ G. DWORKIN, 'The moral right of the author, Moral rights and common law countries', ALAI Antwerp Congress, 1993, *The Moral right of the author*, p. 96.

⁶⁷⁴ C. DOUTRELEPONT, p. 211; G. DWORKIN, ALAI Congress, 1993, p. 97.

⁶⁷⁵ J. PHILLIPS, R. DURIE, I. KARET, p. 59.

⁶⁷⁶ E.P. SKONE JAMES, n° 11-61, p. 637.

⁶⁷⁷ E.P. SKONE JAMES, n° 11-64, p. 638.

Finally, the act makes it a secondary wrong (requiring proof of knowledge or reason to believe that there is false attribution) for anyone in possession or dealing with a falsely attributed copy of the work in the course of business.⁶⁷⁸

b. Case law

There is sometimes overlap between the right to object to false attribution and the right to object to derogatory treatment. For instance, "the singer Dorothy Squires, obtained damages on account of a newspaper item allegedly by her, when she actually said only about 10 % of it to the journalist concerned."⁶⁷⁹ "Examples of false attribution include a newspaper article in the first person attributing to a person words which that person did not in fact use, an article which in addition to quoting the actual words of the plaintiff added to the quote a further 17 words which were not his."⁶⁸⁰

3. The right of respect or right of integrity (right to object to derogatory treatment)

a. Legislation

Principle

The right is defined as the right to object to any modification of the work which can be detrimental to the work or the right of the author of a literary dramatic, musical or artistic work and a director of a film to object to derogatory treatment (art. 80). These two terms need to be further explained. 'Treatment' means that there must always be a material modification of the work, be it minor, for the right to be violated. Modifications are 'any adjunction, suppression, transformation or adaptation of the work' (art. 80(2) (a)). Second, the treatment must be derogatory. This includes distortion or mutilation of the work, or other acts prejudicial to the author's reputation or honour. Put differently, the distortion or mutilation must be prejudicial to honour or reputation as well as any other derogatory act.⁶⁸¹ The words 'reputation and honour' are to be interpreted in the sense of the laws on defamation and passing off.⁶⁸² In contrast with the right of attribution, the right to object to derogatory treatment does not end to be asserted before it can be claimed.

A derogatory use does not amount to a derogatory treatment.⁶⁸³ Colouring could amount to treatment.⁶⁸⁴ Authors and directors can object to derogatory treatment occurring in copies being published, copies of a sound recording being communicated to the public, performance,

⁶⁷⁸ W. R. CORNISH, *Intellectual Property*, London, Sweet and Maxwell, 1996, n° 11-83, p. 397.

⁶⁷⁹ W. R. CORNISH, n° 11-84, p. 397. *Moore v. News of the world* (1972), 1 Q.B. 441, and *Noah v. Shuba* (1991) F.S.R. 14.

⁶⁸⁰ See *Moore v. News of the World, Ltd* (1972) 1 Q.B. 441 and *Noah v. Shuba* (1991) F.S.R. 14, at 32. For other examples, see E.P. SKONE JAMES, n° 11-60, p. 637.

⁶⁸¹ E.P. SKONE JAMES, n° 11-43, p. 627. Contra, see M. LUCKMAN, p. 27 : prima facie, it would seem that a distortion or mutilation is automatically prejudicial to the author.

⁶⁸² E.P. SKONE JAMES, p. 628.

⁶⁸³ E.P. SKONE JAMES, n° 11-48, p. 631.

⁶⁸⁴ G. DWORKIN, ALAI, 1993, p. 100. However as the black and white films were made before the entry into force of the 1988 Act, they could not be protected under the new law...

playing and showing in public, broadcasting and cable-casting (art. 80 (3)-(6)) For artistic works, the right covers public exhibition (art. 80 (4) (a)).

If the work is placed in another context or environment, the author cannot act on the right of respect as formulated in the British Copyright Act.

Destruction

The legislation is silent on destruction and there is no case law on the point yet⁶⁸⁵, but it seems that the author cannot prevent the destruction of the work.⁶⁸⁶ A destruction is a treatment but not detrimental to the author's honour or reputation. There might be "an exception where a work such as painting is destroyed publicly as part of a statement about the artist, or the act of destruction is filmed and later broadcast".⁶⁸⁷ A private act of destruction will not be an infringement. Only an express contract could secure the right to prevent destruction.⁶⁸⁸

There is no obligation on the owner to keep the work safe from degradation or destruction. In the same way, if reparation or restoration of the work was carried out without the artist's consent, he cannot act on the basis of his right of integrity. It seems by the wording of the statute (the word 'prejudicial') that the modification must be defamatory, so that the subjective point of view of the author will not be taken into account but an objective test will be conducted by the judge.⁶⁸⁹

"The court has discretion to enjoin acts unless a disclaimer dissociating the author or director from the derogatory treatment is made in terms and a manner it approves" (art. 103 (2)).⁶⁹⁰

In summary, this right seems much less protective than art. 6 bis of the Berne Convention. Sadly, the integration of moral rights into British law has changed little in practice, especially as regards the damages for infringement of the right of integrity.⁶⁹¹

Exceptions

There are exceptions to the right of respect (art. 81-83) : authors of computer programs, computer-generated works, works reporting current events, works published in a magazine (art. 81), translations, musical arrangements limited to a change of tone or key (art. 80 (2) (a) (i) and (ii)) do not enjoy a right of respect. There is no exception for typefaces. There is no exclusion of protection for design rights, so that the right of integrity in a design can be infringed, while the copyright in the same design is not.⁶⁹² The fact that translations are excluded from the treatment means that no matter how damaging the translation might be to the author, he will not be able to sue the translator based on the right of integrity.⁶⁹³

The architect cannot object to any modification which could be detrimental to his work. He can only ask that his name be removed from his work if it has been modified abusively (art. 80 (5)).

⁶⁸⁵ J.A.L. STERLING, *World Copyright Law*, Moral rights, n° 8.05, p. 283.

⁶⁸⁶ G. DWORKIN, ALAI 1993, p. 100.

⁶⁸⁷ E.P. SKONE JAMES, n° 11-47, p. 630.

⁶⁸⁸ W. R. CORNISH, in NIMMER, UK-53.

⁶⁸⁹ W. R. CORNISH, 'Moral rights under the 1988 Act', *EIPR*, 1989, p. 450. Contra, J. PHILLIPS, R. DURIE, I. KARET, p. 61. For the authors, it is not sure if an objective or subjective test of the treatment must be done.

⁶⁹⁰ W. R. CORNISH, in NIMMER, UK-55.

⁶⁹¹ J. TURTON & M. ALLEN, 'United Kingdom', in C. VAN RIJ, p. 162.

⁶⁹² J. PHILLIPS, R. DURIE, I. KARET, p. 61. For an extensive discussion, see M. LUCKMAN, p. 28-29.

⁶⁹³ E.P. SKONE JAMES, n° 11-40, p. 626.

"This should satisfy the honour of the architect yet protect the substantial investment by the builder".⁶⁹⁴ Nevertheless, if there is a contract, the architect can demand that it be respected.⁶⁹⁵

If the work is made for hire, or is subject to a Crown copyright, the author can only require a sufficient disclaimer of association with the altered work (art. 82). The right may not be invoked when the infringing act is made in order to avoid the commission of an offence or to comply with a statutory duty. The right is not infringed if the treatment amounts to justified censorship by the BBC. In these three cases, if the author is identified, there must be a sufficient disclaimer of authorship.

Similarly to what the dispositions on the right of attribution state, the Act makes it a secondary wrong to deal with or possess an infringing article in the course of his business (sale, hire, exhibit, distribute or distribute otherwise than in the course of his business so as to affect the reputation or honour), where the person knows or ought to know that the right of integrity is being infringed.⁶⁹⁶

b. Case law

There is no derogatory treatment when the work is juxtaposed with offensive material, or when a serious musical work is used for a trivial commercial advertisement, when the work is performed in a derogatory way, while remaining totally faithful to the text of the work.⁶⁹⁷

The first reported case involving the integrity right is Morrison Leahy Music Ltd and Another v. Lightbond Ltd and others⁶⁹⁸. This case was concerned with transitional provisions. In this case, George Michael's songs had been integrated in a medley together with "fill-in" music and the lyrics of his songs had been changed. The publishing company argued they had the copyright and that there was an adaptation of their works and G. Michael argued his moral right of integrity had been violated. However, defendant won on the basis that they had obtained clearance but that the clearance obtained was not a license.⁶⁹⁹

The first case on the interpretation of 'derogatory treatment' was judged last year.⁷⁰⁰ In this case a leaflet on the Plymouth Dome had been reworked by the holder of exploitation rights and according to plaintiff, it distorted his work. The judge decided that the plaintiff must establish that the treatment is either a distortion or a mutilation which prejudices his honour or reputation. "It is not sufficient that the author is himself aggrieved by what has occurred." He concludes that the alterations were so slight that there was no derogatory treatment. The reduction of the size of the drawing is not derogatory treatment. The change in the colours of the drawing does not amount to derogatory treatment because it is due to the technicalities of reproduction and do not violate the author's reputation or honour. In a sort of obiter dictum, the

⁶⁹⁴ M. LUCKMAN, p. 28.

⁶⁹⁵ G. DWORKIN, ALAI, 1993, pp. 100-101.

⁶⁹⁶ J. PHILLIPS, R. DURIE, I. KARET, p. 61. See also E.P. SKONE JAMES, n° 11-54, p. 633.

⁶⁹⁷ G. DWORKIN, 'United Kingdom', in S.M. STEWART, *International copyright and neighbouring rights*, p. 513.

⁶⁹⁸ (1993) E.M.L.R. 144.

⁶⁹⁹ J. TURTON & M. ALLEN, p. 163.

⁷⁰⁰ Plymouth County Court, March 9 & 10, 1998, *Pasterfield v. Denham and another*, 1999 F.S.R. 168.

judge also rules that the grant of the copyright to use the drawings does not imply a waiver of the moral rights.

4. The right of modification/adaptation

See below n° 7, relation between the rights of adaptation and integrity.

5. The right to retract or right of withdrawal or right of reconsideration

6. The right of access

These two rights do not exist. A right of withdrawal could only be secured by contract.⁷⁰¹

7. Classification of authors rights in different categories - relationships between economic and moral rights

7.1. Rights of adaptation and integrity

The case *Holland v. Vivian Van Damm Productions Ltd* “illustrates the extent to which the adaptation right is also a right against distortion.”⁷⁰² Defendant’s ballet was found to infringe Oscar Wilde’s story (*The Nightingale and the Rose*) because the ballet, while reproducing the tale substantially, also departed from it in many respects. In this case, which was of a purely economic nature, the moral rights were not discussed as they did not exist at that time but the court ruled in a way as to safeguard Oscar Wilde’s reputation and name, because defendant advertised her ballet as inspired by Wilde’s story. Although the court used the right of adaptation in this particular case, it does not mean that the right of adaptation will always be used and can be used in general to defend an author’s right of integrity.

III. Restrictions on moral rights protection introduced in certain Member States with respect to certain work categories and certain categories of rights holders

1. Software

Rights of attribution and integrity do not apply in relation to computer programs and computer-generated works (Art. 79 (2) and 81 (2)). For *W. R. Cornish*, there are no moral rights at all for

⁷⁰¹ Old cases show that courts have been reluctant to recognise such a right of retract, see e.g. *Southey v. Sherwood* (1817) 2 Mer. 435 (35 E.R. 1006); *Chaplin v. Leslie Frewin (Publishers) Ltd.* (1966) Ch. 71.

⁷⁰² (Ch. 1936), MCGILLIVRAY, *Copyright cases 1936-1945*, 69 (1949). See P. GOLDSTEIN, ‘Adaptation rights and moral rights in the United Kingdom, the United States and the Federal Republic of Germany,’ *IIC*, N°1/1983, p. 43.

computer programmers.⁷⁰³ For C. Millard, moral rights will not be available to 'package' programs or programs owned automatically by an employer but will be available if the program is a commissioned work. A freelance technical author could object to modifications made to the manuals.⁷⁰⁴ However, as programs are once for all excluded from the moral rights protection, the rights should not be protected in any situation.⁷⁰⁵

⁷⁰³ W. R. CORNISH, n° 11-80 and 13-54.

⁷⁰⁴ C. J. MILLARD, 'United Kingdom' in H.D.J. JONGEN - A.P. MEIJBOOM, *Copyright software protection in the European Community*, Deventer-Boston, Kluwer, 1993. Millard does not mention the status of moral rights in the programs themselves in this latter situation.

⁷⁰⁵ C. DOUTRELEPONT, p. 333.

2. Audio-visual works

2.1. The right of attribution

Directors have the moral rights. But there is no definition of a director of a film. Thus it appears that where there are directors of a film which do not fall within the description of principal director, each will have moral rights provided that the film was jointly directed.⁷⁰⁶

2.2. The right of integrity

The BBC can alter a work to avoid any element which could be contrary to good taste or decency or which may encourage disorders or hurt the public feeling (art. 81 (6) (c)). However, in this case, if the author or director are known, mention must be made that they were not in agreement with the alteration. In M. Flint's opinion, it is generally the case in the United Kingdom (and in the US) to grant "directors who have proven success at the box office and who are effectively authors, contractual rights which are equivalent to the moral right of integrity."⁷⁰⁷ Generally cuts made by the producer which the director refuses, are commercially good and the film hits the box office as cut, while if cuts are not made, the opposite occurs...

3. Joint authorship

A work of joint authorship is defined as a work of collaboration of two or more authors whose contributions are not distinct from each other (art. 10 (1)), for instance a broadcast (art. 10 (2)).⁷⁰⁸ "No special definition of "joint authorship" is applied to sound recordings, cable programs, or published editions, nor to films as yet".⁷⁰⁹ Every joint author has independent moral rights and any assertion, waiver or consent can be done by each joint author for himself. The publisher must be cautious, as in theory, under copyright rules, he can only identify the sole author who has made an assertion but, it will be considered as an act of passing off and of false attribution if he does so. In sum, he will have to name all authors.⁷¹⁰

4. Performers' moral rights

Performers have no moral rights. The entry into force of the WPPT will force Great Britain to adopt rights of integrity and attribution for performers of literary and artistic works, as well as for performers of works of folklore. Indeed a consultation paper was issued from reactions of interested parties in January 1999.

5. Theatre

⁷⁰⁶ E.P. SKONE JAMES, n° 11-05, p. 608, 1999.

⁷⁰⁷ M. F. FLINT, 'Moral rights in theatre and some comments on moral rights and audio-visual works', ALAI Congress, *the Moral right of the author*, 1993, p. 472.

⁷⁰⁸ Thus there are separate copyrights for : the words and music of an opera or song; for the script, the decor and the incidental music of a play; for an original text and its translation. See W.R. CORNISH, in NIMMER, UK-33.

⁷⁰⁹ W.R. CORNISH, in NIMMER, UK-33.

⁷¹⁰ E.P. SKONE JAMES, n° 11-26, p. 621.

It has long been the practice to observe the right of integrity of the living dramatist in the United Kingdom. If the playwright is relatively new, the producer will try to have the right to adapt the words and generally it is the author who will suggest the changes if needed. He will always have the right to object to any changes that would be derogatory. The producer cannot make changes to the play and to the original musical work unless absolutely necessary. As regards the costumes and other accessories used in theatre, if the designer is well known, he has power to bargain and he will not allow changes; on the contrary, if the designer is not yet established, he will accept the modifications, because he will fear not to be employed. According to the opinion of M. Flint, the introduction in English copyright law of the attribution right, has made no difference in the theatre world, as the artists have always been granted the right to appear on posters and adverts for the play.⁷¹¹ Following the letter of the law, theatre producers have no moral rights.

IV. Alienability and waiver of moral rights

Moral rights are inalienable between living persons (art. 94). They can be waived (art. 95), in a written document, signed by the person who waives his right (art. 87(2)). They can be waived either generally or by reference to specific works and either conditionally or unconditionally. Such waivers can also be for future works, and can be revocable (art. 87(3)). Any other waiver is possible on the basis of the common law of contracts (art. 87(4)). If the waiver is made for future works, it is implied to extend to licensees and heirs of the contracting party. If the moral rights are waived generally and in an irrevocable manner, there are lost but only to the contracting party. If the waiver is revocable, the author can revoke it and try to obtain the cessation of the violation from the copyright holder. Therefore, the British system forces the author to detail the extent of the waivers and the revocations. A consequence is that ghost-writers can never reveal their identity if they have waived their attribution right.⁷¹²

In addition to the waiver, a special rule provides that acts do not either violate any of the four moral rights if there is a consent (oral or written, formal or informal, and express or implied) by the author (art. 87 (1)). The difference between the waiver and the consent is that an author can always withdraw his consent but never withdraw his waiver.⁷¹³

To comment on remedies that authors could use, when moral rights are of no help, mention must be made of an old case, which struck down a contractual practice which "prevented a film star who had built up a reputation under a pseudonym from using that name when appearing in films produced by other companies."⁷¹⁴ The clause was considered unreasonable.

Status of the employed author

Authors of works published in newspapers, magazines, periodicals, encyclopaedias, dictionaries, year books, collective works of reference, free lance as well as commissioned and

⁷¹¹ M. F. FLINT, ALAI 1993, p. 471.

⁷¹² For extensive discussion on ghost-writers' rights, see M. LUCKMAN, p. 25.

⁷¹³ M. LUCKMAN, p. 31.

⁷¹⁴ *Hepworth Manufacturing Co. Ltd v. Ryot* (1920) 1 Ch. 1, cited by G. DWORKIN, 'Moral right and English Copyright Law', *IIC*, Vol. 12, n°4, 1981, p. 482.

employed authors have no moral rights (art. 11).⁷¹⁵ The employer is not obliged to identify his employee on the work. Therefore, the right of attribution of an employed author remains discretionary, in the hands of the employer. If the author is not identified, then he does not have the right of integrity either. The employer has the right to make modifications. Conversely, if the employer agrees to identify him, he has a right of integrity.⁷¹⁶ This right is however less strong than the right to object to any derogatory treatment, it only amounts to dissociate himself from it by disclaimer. This means that he has the right to oblige the employer to indicate sufficiently clearly on the work that the work has been subject to treatment to which the author has not given his consent (art. 82).⁷¹⁷

So, to be concrete, as regards journalists, for instance, several provisions must be combined, namely, art. 11 and art. 79 and 82. For journalists, it is not purely a moral rights issue⁷¹⁸ but also an authorship one, as they are not considered as authors in the United Kingdom (art. 11 states that if an author is employed, the employer is the author of all copyright rights on the work at the outset, except otherwise stated). Actually, the question of employment erases the question of moral rights, as it comes first (one must first be employed and then create a work to have moral rights, but when the author signs the contract, he is employed and thus automatically has no moral rights, unless otherwise stated in the contract). Journalists could have a case if they could prove that this employment issue attracts production to the United Kingdom. But this is hard to prove. None of the case law proves this.

⁷¹⁵ S. M. STEWART, p. 514.

⁷¹⁶ S. M. STEWART, p. 514.

⁷¹⁷ G. DWORKIN, ALAI 1993, p. 102; S. M. STEWART, p. 514.

⁷¹⁸ TO BE REMINDED : Journalists have no rights of attribution nor of integrity (art. 79 (5)) states that the right cannot be exercised as regards a work created to report current events or news. Art. 79 (6) further states that the right cannot be exercised as regards publications in journals, magazines and other periodicals; see art. 82 (3) & (4) in similar terms for the right of integrity).

V. Duration of moral rights protection

Rights of attribution, integrity and to privacy have the same length than the copyright in the work. The right to object to any abusive attribution of the work extinguishes 20 years after the death of the author (art. 86). Moral rights are transmissible on death by a will. If there is no will, the author's personal representative is entitled to exercise his rights.⁷¹⁹ These rights cannot be transferred or divested by personal representatives after administration of the estate is complete.⁷²⁰

VI. Impact of certain other areas of law on moral rights protection

1. Personality rights protection and right of a person on his/her image

The United Kingdom recognises "personal rights". There are some decisions which apply the personal rights to the field of copyright law (e.g. in 1816, Byron obtained a decision which forbade the publication of a book which was attributed to him but where other texts of other authors were included).⁷²¹

2. The right to privacy

a. Legislation

Art. 85 introduces a right to privacy for the person who commissions the taking of photographs or the making of a video for private and domestic purposes.⁷²² The right of privacy is not a moral right *stricto sensu* as the author does not enjoy the right but the commissioner.⁷²³ According to this provision, the commissioner does not acquire the copyright in the work but can restrain use that the copyright owner could make. An exception is the incidental inclusion of the work in another. According to the wording of the Act, there is no right of privacy for commissioners of painted portraits. It is curious however that the right is given on the commissioner and not to the person whose image is subjected to publicity. The reason seems to be that it would be so difficult to require permission of all in a group photograph that the commissioner is put in their stead.⁷²⁴ The right does only apply to the whole or a substantial part of the work. The words should be construed in a sense favourable to the protection of a person's privacy in a domestic sphere.⁷²⁵ If it is a joint commission, a waiver by one of the commissioners does not affect the rights of others (Art. 88 (6) (b)). Thus when one

⁷¹⁹ J. PHILLIPS, R. DURIE, I. KARET, p. 63. For more details, see also E.P. SKONE JAMES, n°11-75, p. 643.

⁷²⁰ Ibid. P. 644. As to joint authorship and transmission after death, see E.P. SKONE JAMES, n°11-80, p. 646.

⁷²¹ *Byron v. Johnston* (1816) 2 Mer. 29, 35 E.R. 851.

⁷²² The words "*private and domestic*" are conjunctive. See E.P. SKONE JAMES, n°11-68, p. 640. The contract of commission does not need to be for money to enjoy the right to privacy, see W. R. CORNISH, n° 11-85, p. 398.

⁷²³ G. DWORKIN, ALAI 1993, p. 97.

⁷²⁴ W.R. CORNISH, n° 11-86, p. 398.

⁷²⁵ E.P. SKONE JAMES, n° 11-70, p. 641.

commissioner agrees to the publication of a photograph, the rights of the other cannot be affected.

b. Case law

A couple who had commissioned a photographer to take pictures of their wedding restrained successfully the photographer from selling such family pictures to the press for publication, where a member of the family had been murdered.⁷²⁶

3. Action in defamation and action in passing-off

Both actions of defamation and passing off can complement actions based on moral rights. The action in defamation is useful when the work falsely represented is minor and there is a violation of the author's reputation. The action in defamation can be undertaken together with the action in passing off. The action in passing off is more adapted to works known by the public. This action can be undertaken when a third party passes off his goods as the ones of his competitor, when a third party uses illegally the mark or name of another, when a competitor confuses a consumer. This action is only possible in the commercial sector.⁷²⁷ These actions can result in protecting the work's integrity.

For instance in *Lee v. Gibbens*, a scholarly work which had been published in a smaller and cheaper form and where the preface, the introduction and the bibliography and index had been omitted was considered defamatory.⁷²⁸ In like manner, the publication a book in an offensive and vulgar paper jacket, which suggests that the book is of the same quality is also defamatory.⁷²⁹

In *Humphreys v. Thomson*, an author won against an editor who had cut and added passages in his text. This was against the reputation of the author.⁷³⁰ Frank Harris obtained that the mention 'My Life and Loves' be not indicated on an abridged version of his work, because the public could be confused and think it was the original version.⁷³¹ In *Samuelson v. Producers' Distributing Co. Ltd*, the author of dramatic sketch won against a producer who wished to adapt the sketch into a movie and present it to the public. It was an infringement of his exclusive right to adapt the sketch.⁷³² In another case, a known writer obtained damages for the false

⁷²⁶ *Williams v. Settle* (1960) 2 All ER 806, (1960) 1 WLR 1072; see S.M. STEWART, p. 515.

⁷²⁷ See e.g. *Archbold v. Sweet*, (1832) 5 Car. & P. 219 (both actions (defamation and passing off) were available; editor had prepared a new edition but there were errors and inaccuracies and he presented the work as having been edited by original author); 172 E.R. 947, *Wood v. Butterworth* (1901-04) M.C.C. 91; *Landa v. Greenberg* (1908) 24 T.L.R. 441 (a journalist who had used a pseudonym in newspaper articles and established a reputation in that name, could prevent other journalists to use his pseudonym after he left the newspaper).

⁷²⁸ *Lee v. Gibbens* (1892) 67 L.T. 263.

⁷²⁹ *Moseley v. Stanley Paul & Co.* (1917-23) M.C.C. 341; E.P. SKONE JAMES, p. 629, n° 11-44.

⁷³⁰ (1905-10) Mac. C.C. 148

⁷³¹ *Allen v. Brown Watson* (1965) R.P.C. 191.

⁷³² (1932) 1 Ch. 201; 48 R.P.C. 580.

attribution of a work which had no style nor humour.⁷³³ A false attribution can also be an 'injurious falsehood', if the conditions of the action are met.⁷³⁴

For certain authors, there is a substantial difference between this action and an action on the right of integrity because the test for the action in defamation is objective (while the test for the right of integrity is subjective) so that there is much less chances to win an action in defamation.⁷³⁵ As said beforehand, other authors consider that the test to judge of a violation of integrity is objective.

4. Action based on the contract

Actions based on contracts can be undertaken against the contracting party only and not against a third party.⁷³⁶ The author can, in a contract, specify the modifications that he does not authorise. On the basis of the contract, the author can then act against the contracting party who would make unauthorised modifications. For instance, in *Frisby v. BBC*, the BBC had agreed, by contract not to structurally alter the dramatic work. The court judged that the BBC could not suppress a sexual allusion.⁷³⁷

⁷³³ *Ridge v. English Illustrated Magazine* (1911-1916) Mac. C.C. 91.

⁷³⁴ W.R. CORNISH, *Intellectual Property : Patents, Copyright, Trade Marks and Allied Rights*, 1st ed., pp. 501-504.

⁷³⁵ A STROWEL, 1993, citing G. DWORKIN, 'The moral right and English Copyright law', in *IIC*, 1981, 12, p. 476-492 and W.R. CORNISH, 'Moral rights under the 1988 Act', *EIPR*, 1989, p. 450.

⁷³⁶ See e.g. *Frisby v. BBC* (1967) 2 All E.R. 106; 1 Q.B. 349 and *Joseph v. National Magazine Co.* (1959) 1 ch. 14. In these two cases, the authors took action against alterations (cuts, changes of conclusion, etc.) of their texts by the contracting party; refusing these modifications, they acted on the contract and won.

⁷³⁷ (1967) All E. R. 106; 19 B. 349.

Summary

Legislation is dualistic. There is no right of disclosure but an economic right of publication. The right of attribution consists of two prerogatives : the right to be identified and the right to oppose false attributions. The right to be identified necessitates an assertion in writing. In addition, there are numerous cases in which the right will not apply. The right of integrity is the right to object to any derogatory treatment detrimental to the author's honour or reputation. These terms "derogatory treatment" are to be interpreted very strictly. The right of integrity is equally packed full of exceptions. All moral rights are fully transferable under British law. In addition large waivers are permitted.

Case law arising after the 1988 CDPA is not abundant. The only case which could potentially have an impact on the free circulation of works within the Union is the George Michael case. However, in such a speculative situation, it seems reasonable to believe on the basis of the several member states case law analysed in this study that no or very few courts would have judged differently.

II. Tables of comparison

I - types and characteristics of moral rights

Countries	Disclosure	Paternity	Integrity	Modification adaptation	Retract
Austria MONISTIC	<ul style="list-style-type: none"> • Right to decide whether by whom & how the work is disclosed. • Right is not expressly stated in Act. • Right not distinct from economic publication right. 	<ul style="list-style-type: none"> • Right to claim authorship. • Right to decide if a designation & which designation. • Pseudonymous & anonymous designations possible. 	<ul style="list-style-type: none"> • against contracting & 1/3 parties • if author expressly allowed modifications, objection only to modifications seriously harming • respect due even if use is free 	<ul style="list-style-type: none"> • Adapter must respect rights of original author 	Does not exist
Belgium DUALISTIC	<ul style="list-style-type: none"> • Right to decide when work is completed & when to disclose it • Right not to disclose even if completed • Right to prevent the disclosure • Disclosure right is not exhausted by the first means of disclosure • undisclosed works cannot be attached • Right distinct from economic publication right 	<ul style="list-style-type: none"> • Right to publish under his name • Right to remain anonymous or to use a pseudonym • Right to object to false attributions • presumption of authorship for person whose name appears on work • presumption only valid towards third parties 	<ul style="list-style-type: none"> • Right to object to distortion, mutilation, modification or other derogatory act • no need to prove prejudice to honour or reputation, except when work is changed of its context • right to object to destruction of original work (not specifically stated in Act) 	<ul style="list-style-type: none"> • Adapter must respect rights of original author 	Does not exist

Countries	Disclosure	Paternity	Integrity	Modification adaptation	Retract
France DUALISTIC	<ul style="list-style-type: none"> • Right to decide whether & how to disclose • There must be an INTENT to disclose • Right of disclosure enables author to force contracting party to publish • Right to refuse to disclose even if contract of publication (subject to indemnification) • Disclosure right is not exhausted by the first means of disclosure 	<ul style="list-style-type: none"> • Right to have his name & quality respected • Right to remain anonymous or use a pseudonym • Rebuttable presumption of authorship in favour of person whose name appears on the work • Right to object to false attribution? (controversy) 	<p>Right to object to any modification violating the integrity of the work or modifying its spirit</p> <p>No need to prove prejudice</p>	<ul style="list-style-type: none"> • adapter must respect rights or original author; in particular, he must ask authorisation to disclose the original work • adapter must respect the spirit of the work 	<ul style="list-style-type: none"> • Right to modify the work or to put an end to exploitation because of moral reasons • Obligation to offer possibility to re-exploit the work in priority & at same conditions to former contracting party <p>Obligation to indemnify contracting party</p>

Countries	Disclosure	Paternity	Integrity	Modification adaptation	Retract
Germany	<ul style="list-style-type: none"> • Right to decide whether & how work must be published & to communicate publicly or describe the content of his work • Right of disclosure on modifications of a previously disclosed work 	<ul style="list-style-type: none"> • Right to be named & right to decide whether the work must bear an author's designation & if so, which one • Right to object to false attribution • Right to choose a pseudonym or be anonymous • Presumption of authorship in favour of person whose name is affixed on work (or copies) in a customary manner • Obligation to cite source in certain cases (art. 63) 	<ul style="list-style-type: none"> • Right to object to any distortion or mutilation prejudicial to his legitimate intellectual & personal interests in connection with his work • Right to object to modifications if the work's use is free, even if use is private 	<p>Modifications</p> <ol style="list-style-type: none"> 1. modifications are possible if author cannot object to them in good faith 2. Translations, extracts or change of key are allowed if the work's use requires it 3. modifications of photos are possible if required by the reproduction mechanism <p>Adaptations the author's consent is required to adapt or transform his work</p>	<ul style="list-style-type: none"> • Right to revoke the exploitation of works if it no longer reflects his conviction • obligation to indemnify contracting party • obligation to offer previous contracting party the same type of right on reasonable conditions • right cannot be exercised by co-authors & by authors of pre-existing works

Countries	Disclosure	Paternity	Integrity	Modification adaptation	Retract
Greece	Right to decide when, how & where work is disclosed to the public	<ul style="list-style-type: none"> • Right to be named "insofar as possible" • Right to choose a pseudonym or to remain anonymous • presumption of authorship in favour of person whose name appears on works or copies • editor of pseudonymous & anonymous works can exercise moral rights 	Right to object to any distortion, mutilation or other modification of work & to any offence due to a public presentation of work	Right to prevent adaptation, arrangement & translation	<ul style="list-style-type: none"> • Right to retract only for scientific & literary works only if change of conviction • Obligation to indemnify contracting party & offer him in priority the possibility to contract in similar terms
Ireland	Does not exist	<ul style="list-style-type: none"> • Right to object to false attribution • Right to publish anonymously or under a pseudonym • Obligation to mention source 	Unlawful to publish (...) a work under a modified form, as if it had not been modified only for works of plastic arts		Does not exist

Countries	Disclosure	Paternity	Integrity	Modification adaptation	Retract
Italy	<ul style="list-style-type: none"> • Right to decide whether, when & how to disclose • Not expressly stated in Act • Right to prevent the disclosure • Right of employer to have the author replaced & disclose the whole work if author does not want or cannot complete it 	<ul style="list-style-type: none"> • Right to claim authorship • Right to remain anonymous or choose a pseudonym • Right to be mentioned on derived works • Right to act against false attribution • Right to be named if author could not complete work • Right to request not to be named on uncompleted work completed by second author 	Right to object to any distortion, mutilation or modification and any derogatory action prejudicial to honour or reputation	<ul style="list-style-type: none"> • Right for translator and adapter to be named • Right of author to prevent modification, translation or adaptation • author who has accepted modifications cannot prevent them 	<ul style="list-style-type: none"> • Right to withdraw the work from commerce for serious moral reasons • Obligation to indemnity right in obligation to offer to previous contracting party to contract at same conditions • Obligation to declare expressly that author intends to retract
Luxembourg	Does not exist	<ul style="list-style-type: none"> • Right to be anonymous or to choose a pseudonym • Rebuttable presumption in favour of person whose name is affixed on work according to customs 	Right to object to acts which violate honour or reputation	Right to prevent adaptations, arrangements and translations (economic right)	Does not exist

Countries	Disclosure	Paternity	Integrity	Modification adaptation	Retract
Netherlands DUALISTIC	<p>Does not exist, but economic right of publication</p> <ul style="list-style-type: none"> • Right to prevent unchanged re-edition of work 	<ul style="list-style-type: none"> • Right to be named • Right to object to publication if he is not named unless objection is unreasonable • In this case, author has burden of proof that omission is unfair • Right to publish under a pseudonym • Right to object to false attribution • Rebuttable presumption in favour of person whose name is written on work or if there is no designation in favour of person who makes it public • Editor can exercise authors' rights when author is anonym or has a pseudonym 	<ul style="list-style-type: none"> • Right to object to modifications which alter the essence of work unless unreasonable • Right to object to any deformation, mutilation or impairment if prejudicial to honour or reputation & author has burden of proof • Right of respect applies even if work's use is free 	<ul style="list-style-type: none"> • Economic rights of translation & adaptation (including right of reproduction) • Right to make modifications in good faith in accordance with rules of social conduct • This right is similar to a right of retract 	<p>Does not exist but see right of modification</p>

Countries	Disclosure	Paternity	Integrity	Modification adaptation	Retract
Portugal	Right not to publish not expressly stated	<ul style="list-style-type: none"> • Right to be named • Right to remain anonymous • presumption in favour of person whose name is written on work or mentioned during communication of work • Right to prevent someone to use same name to publish 	<ul style="list-style-type: none"> • Right to object to modifications if prejudicial to honour or reputation • Right to object to destruction • Right to object to modification even if use of work is legal 	Right of modification is moral right: right to introduce modifications if not prejudicial to work	<ul style="list-style-type: none"> • Right to retract for valid moral reasons • Obligation to indemnify • No obligation to offer preferentially to previous contracting party in case of re-exploitation
Spain MONISTIC ? (controversy)	<ul style="list-style-type: none"> • Right to decide whether to publish, and if so, how • Right not to publish • Rights of pseudonymous or anonymous author are exercised by publisher • Right to disclose Right to disclose first disclosure • Unfinished works cannot be attached 	<ul style="list-style-type: none"> • Right to remain anonymous or choose a pseudonym • Right to be named • Right to object to false attribution 	Right to object to distortion, modification, alteration or any act prejudicial to legitimate interests or to reputation	<ul style="list-style-type: none"> • Moral right of author to modify work but must respect rights acquired by third parties • Exceptions: not possible to change work if work is declared of "cultural interest" 	<ul style="list-style-type: none"> • Right to withdraw work from commerce because of change of moral or intellectual convictions • obligation to indemnify • obligation to offer preferentially to previous holder & under comparable conditions to those previously enjoyed

Countries	Disclosure	Paternity	Integrity	Modification adaptation	Retract
United Kingdom DUALISTIC	<ul style="list-style-type: none"> • Not expressly recognized but comprised in economic right of publication • Exhausted with first issue of work 	<ul style="list-style-type: none"> • Right to be identified & obligation to assert the right in writing • Right to choose a pseudonym • Right to object to false attribution belongs to author & any person • Right to object to false attribution if work is falsely represented as being an adaptation of work 	<ul style="list-style-type: none"> • Right to object to any modification prejudicial to honour or reputation • modification must be material (i.e. adjunction, suppression, transformation or adaptation) • modification must violate honour or reputation • No obligation to assert the right to be protected 	Paternity: Right of author of adapted work to be named	Does not exist
Nordic Countries	Not expressly stated in the Act but included in right to make available to the public	Right to be named according to the practice in the sector concerned	<ul style="list-style-type: none"> • Right to object to prejudicial acts • if assignment of economic rights, it does not give power to alter unless assignment implies it 	No independent right of adaptation	No specific right but possible under civil law rules

Countries	Access	Performers	Alienability/Waiver	Duration
Austria MONISTIC	author must take into consideration the interest of the owner while exercising his right of access owner is not obliged to return work to author in order to make reproductions nor is he obliged to keep the work in good condition	<ul style="list-style-type: none"> • Right to be named 	<ul style="list-style-type: none"> • Non transferable • non waivable • collecting society can exercise moral rights insofar as necessitated for exercise of economic rights 	<ul style="list-style-type: none"> * Author: 70 years after death • heirs can exercise right of paternity only * Performer = never expires before death of holder of economic rights; after his death exercise by next holder of economic rights
Belgium DUALISTIC	Right to access only to exercise economic rights in a reasonable measure	<ul style="list-style-type: none"> • Right to be named in conformity with loyal professional practices • Right to object to inexact attribution • Right to object to acts prejudicial to honour or reputation only • Right of integrity cannot violate author's rights 	<ul style="list-style-type: none"> • non transferable • global waiver prohibited • no writing required (controversed) • if transfer of adaptation right, author can still act against violations of honour or reputation • collecting society can have mandate to exercise moral rights 	<ul style="list-style-type: none"> * Author: 70 years after death

Countries	Access	Performers	Alienability/Waiver	Duration
France DUALISTIC	<ul style="list-style-type: none"> • Right to access the work • Right to ask tribunal to order owner to give access to work 	<ul style="list-style-type: none"> • Right to be named • Right of respect of performance • Complementary artists have no moral rights • performers'rights cannot interfere with authors'rights 	<p>* Author :</p> <ul style="list-style-type: none"> • non transferable • partial waivers allowed • waivers <i>ex ante</i> prohibited; waivers <i>ex post</i> allowed • writing required but waiver can be implied from circumstances • ghost-writer can always reveal his identity <p>* Performer : inalienable</p>	<p>* Author: perpetual rights Exception : right of retract: only author's life</p> <p>* Performer • Heirs can exercise rights, & Minister of Culture if there are no heirs</p>
Germany	Right to access work to reproduce or adapt it, as long as necessary and not prejudicial to interests of possessor	<p>Paternity= No, but in audiovisual sector, they can be named on basis of practice</p> <p>Integrity Right to object to any distortion or alteration prejudicial to his standing or reputation</p>	<ul style="list-style-type: none"> • non transferable • waivers ex post possible • waivers ex ante possible but not absolutely binding • a ghost-writer can always reveal his identity • authors can authorise collecting society to exercise their moral rights 	<p>* Author: 70 years after death</p> <p>* Performer: life or 25 years after performance if it is later</p> <p>Heirs of authors & performers are entitled to exercise rights</p>

Countries	Access	Performers	Alienability/Waiver	Duration
Greece	Right to access work, provided it causes the least inconvenience to owner	<ul style="list-style-type: none"> • Right to be named • Right to object to any alteration • Performers rights cannot encroach on author's rights 	<ul style="list-style-type: none"> • non transferable • waiver possible in certain cases • writing required 	<p>* Author: 70 years after death</p> <ul style="list-style-type: none"> • heirs can exercise the rights during these 70 years; afterwards, Minister of Culture <p>* Performer : life time After death, heirs exercise rights</p>
Ireland	Does not exist	Does not exist	<ul style="list-style-type: none"> • alienable 	
Italy	Does not exist	<ul style="list-style-type: none"> • possibility to replace main performers & conductor of chorus only for serious reasons • Paternity: Only for performers having leading parts of dramatic, literary or musical works • Integrity: right to object to alterations if prejudicial to honour or reputation 	<ul style="list-style-type: none"> • non transferable • waivers of paternity right are void • waivers of right or respect are possible but if adaptations would be prejudicial to honour or reputation, contract is void • moral rights cannot be exercised by collecting societies 	<p>* Author: perpetual, except right of retract, which expires with author</p> <ul style="list-style-type: none"> • rights are exercised by heirs <p>* Performer: 20 years since the end of year of performance</p>
Luxembourg	Does not exist	Does not exist	<ul style="list-style-type: none"> • non transferable • specific waiver possible • anonymous or pseudonymous authors can reveal their identity 	70 years after death. Heirs or person designated in will, can exercise rights

Countries	Access	Performers	Alienability/Waiver	Duration
<p>Netherlands</p> <p>DUALISTIC</p>	<p>Does not exist</p>	<ul style="list-style-type: none"> • Right to be named • Right to object to false attribution • Right to object to modification, unless unreasonable • Right to object to modifications prejudicial to honour or reputation 	<p>* Author :</p> <ul style="list-style-type: none"> • non transferable • partial waiver of right of paternity & integrity, except right to object to modifications prejudicial to honour or reputation • waiver can be implicit • waivers ex ante possible • ghost-writer can always reveal his identity • collecting societies cannot own moral rights • employer is holder of authors' rights (controversy about moral rights) <p>* Performer :</p> <ul style="list-style-type: none"> • partial waiver of right of paternity & integrity, except prejudicial alterations • must be in writing 	<p>* Author:</p> <p>expire with death, unless someone is designated in will; in this case, heir can exercise for 70 years</p> <p>Author can designate in will a collecting society to exercise his moral rights</p> <p>* Performer :</p> <p>50 years after death if person designated in will</p>

Countries	Access	Performers	Alienability/Waiver	Duration
Portugal	Does not exist	<ul style="list-style-type: none"> • Right to be named • Right to object to modifications • Rights of performers cannot interfere with authors' rights 	<ul style="list-style-type: none"> • non transferable • waivers possible (i.e. if work is commissioned or financed) • ghost-writer can always reveal his identity • waiver of right of retract controversial 	<p>* Author: Perpetual & heirs exercise rights 70 years after death. When work is in public domain, Minister of Culture exercises rights</p> <p>* Performer: 50 years from first day of year following performance</p>
Spain MONISTIC ? (controversy)	<ul style="list-style-type: none"> • Right to access rare or unique copies when they are possessed by third parties to exercise any of his rights • Must cause the least inconvenience • Must indemnify if damages • No right to ask to move work 	<ul style="list-style-type: none"> • Right to be named • Right to object to acts prejudicial to honour or reputation • Performers' rights cannot cause prejudice to authors' rights 	<ul style="list-style-type: none"> • non transferable • non waivable 	<p>* AUTHOR : Paternity & Integrity : perpetual</p> <p>Disclosure : 70 years after death</p> <p>Right not to publish 60 years after death</p> <p>Retract, access right to modify expire with author. Rights are exercised by heirs; if no heirs, public administrations or cultural institutions</p> <p>PERFORMER: 20 years after death; rights are exercised by heirs</p>

Countries	Access	Performers	Alienability/Waiver	Duration
<p data-bbox="185 276 383 308">United Kingdom</p> <p data-bbox="185 387 338 419">DUALISTIC</p>	<p data-bbox="497 276 656 308">Does not exist</p>	<p data-bbox="893 276 1066 308">No moral rights</p>	<ul style="list-style-type: none"> <li data-bbox="1308 276 1621 347">• transferable between living persons <li data-bbox="1308 355 1536 387">• waivable in writing <li data-bbox="1308 395 1523 427">• waivers possible: <li data-bbox="1308 435 1503 467">- for future works <li data-bbox="1308 475 1514 507">- global or specific <li data-bbox="1308 515 1588 547">- irrevocable or revocable <li data-bbox="1308 555 1632 587">- conditional or unconditional <li data-bbox="1308 595 1641 667">• ghost-writer can never reveal his identity <li data-bbox="1308 675 1635 746">• if author consents to the act, no violation <p data-bbox="1308 770 1615 834">* Contract of employment (works made for hire)</p> <ul style="list-style-type: none"> <li data-bbox="1308 842 1518 874">• NO RIGHTS of: <li data-bbox="1308 882 1424 914">- paternity <li data-bbox="1308 922 1637 1098">- integrity but author can ask the removal of his name BUT if author is identified, he has a right to dissociate himself from work by disclaimer <p data-bbox="1308 1137 1592 1241">* Free lance & commissioned authors: no moral rights</p>	<p data-bbox="1666 276 2024 347">PATERNITY, INTEGRITY & PRIVACY :</p> <p data-bbox="1666 355 1883 387">70 years after death</p> <p data-bbox="1666 427 2024 499">Right to object to false attribution : 20 years after death</p>

Countries	Access	Performers	Alienability/Waiver	Duration
Nordic Countries	<p>FINLAND: yes, unless unreasonable inconvenience</p> <ol style="list-style-type: none"> 1. only if works of fine arts 2. necessary for author's artistic activity 3. to exercise economic rights <p>DENMARK & SWEDEN: no right of access</p>	<p>DENMARK & SWEDEN: same protection as authors</p> <p>FINLAND: minimum level of protection as harmonised within the European Union</p>	<ul style="list-style-type: none"> • non transferable • specific & limited waivers allowed 	<p>70 years after author's death</p> <p>+ FINLAND: specific protection after work has fallen into the public domain</p>

II - types of works

Country	Literary & dramatic	Musical	Plastic works -photos -paintings -sculptures	Architectural
Austria			<p>Paternity: adaptations and copies of graphic & plastic art works may not be credited in a way that creates impression it is the original</p> <p>Integrity: respect due even if use is private for graphic & plastic art works</p>	
Belgium				<p>Integrity: architects can waive their right as long as modifications do not violate their honour or reputation</p>
France				
Germany			<p>Works of applied arts The author of objects of design does not have the right to be named on objects made in more than one exemplary</p> <p>Integrity modifications of photographs are allowed if required by the mechanism of reproduction</p>	

Country	Literary & dramatic	Musical	Plastic works -photos -paintings -sculptures	Architectural
Greece				
Ireland			right to act against publication or sale of a modified work if it is presented as if it had not been modified	
Italy	<p>Integrity editor of journal has the right to modify journalist's article if necessitated by nature or purpose of journal</p> <ul style="list-style-type: none"> • possibility to replace main performers and conductor of chorus only for serious reasons • authors of texts for movies can exploit their contributions separately if not prejudicial to producer's rights 	<p>Integrity</p> <ul style="list-style-type: none"> • modifications can be made if requested by the technical necessities of recording • authors of music for movies can exploit their contributions separately if not prejudicial to producer's rights • author of dramatico-musical work, of musical composition with words, of choreographic works or pantomimes cannot use their contribution in conjunction with other musical works (except in certain cases) 	Right of photographer to be mentioned on copies of his works in scientific or didactic works	<p>Integrity</p> <ul style="list-style-type: none"> • architect cannot object to modifications rendered necessary in the course of realisation of work or after work is completed • if state decides that work has important artistic character, author can modify
Luxembourg		<ul style="list-style-type: none"> • co-author of collaboration work can use contribution separately if not prejudicial to exploitation of joint work 		
Netherlands				

Country	Literary & dramatic	Musical	Plastic works -photos -paintings -sculptures	Architectural
Portugal	<ul style="list-style-type: none"> • Right of editor of dictionaries, encyclopedia and didactic works to have the work completed by another if editor indicates that work is being completed by someone or modified • Special right to modify if not prejudicial to structure of work, if does not reduce dramatic or spectacular interest and does not prejudice rehearsal or representation • Right to correct before publication • Special right of retract if part of dramatic work is suppressed and meaning is compromised or misrepresented 	<ul style="list-style-type: none"> • Special right to modify phonograms if not prejudicial • No right for performer to be mentioned if audio program is without speech or if customs allow name to be omitted 	Right to object to any modification of work of plastic art incorporated in architectural work	<ul style="list-style-type: none"> • Right to demand that his name be omitted on building if owner has modified it • No right to object to destruction • Right to object to any modification

Country	Literary & dramatic	Musical	Plastic works -photos -paintings -sculptures	Architectural
Spain	<p>Integrity in theatrical representations, specific prohibition to make cuts, changes, etc.</p> <ul style="list-style-type: none"> • author can correct proofs if indispensable, do not alter the work's purpose or nature & do not increase cost of publication 	<p>Integrity specific prohibition to make cuts, alterations, etc.</p>	<p>Disclosure alienation of the work (object), by e.g. a sale, amounts to disclosure: author can only object to exhibition if prejudicial to his honour or reputation</p>	

Country	Literary & dramatic	Musical	Plastic works -photos -paintings -sculptures	Architectural
United Kingdom	<p>Paternity Exceptions:</p> <ul style="list-style-type: none"> • if work reports current events • if work published in newspaper, magazine, periodical, encyclopaedia, dictionary, year book • crown copyright or copyright belongs to international organization <p>Integrity Exceptions:</p> <ul style="list-style-type: none"> • if work reports current events • if work published in newspapers • if crown copyright author can ask removal of his name • if act avoids offence or complies with a statutory duty • Theatre producers have no moral rights 	<p>Paternity</p> <ul style="list-style-type: none"> • Right to object to false attribution • Right to be named on records & sheets of music & films <p>Paternity Exceptions:</p> <ul style="list-style-type: none"> • if work reports current events • if work published in newspaper, magazine, periodical, encyclopaedia, dictionary, year book • crown copyright or copyright belongs to international organization • if public execution or broadcasting <p>Integrity Exceptions: change of tone or key</p>	<p>Paternity & integrity Rights covers public exhibition</p> <p>Paternity Right to be named on copies of artistic works (i.e. photographs representing work)</p> <p>No right of paternity for industrial designs</p> <p>Paternity Exceptions:</p> <ul style="list-style-type: none"> • if work reports current events • if work published in newspaper, magazine, periodical, encyclopaedia, dictionary, year book • crown copyright or copyright belongs to international organization <p>Integrity right exists for industrial designs</p>	<p>Paternity Right to be identified on building in a manner appropriately visible</p> <p>Integrity architect cannot object to detrimental modifications but only ask the removal of his name</p>

Country	Software	Audiovisual	Collaboration (joint works)	Collective	Composite
Austria		<ul style="list-style-type: none"> • works of collaboration (indivisible) <p>Paternity :</p> <ul style="list-style-type: none"> • producer has right to be named as producer • co-authors right to be named <p>Integrity authorisation of co-authors needed for modifications</p>	<p>* <u>indivisible works:</u></p> <ul style="list-style-type: none"> • each author: right to act against violation • agreement between co-authors needed for modifications <p>* <u>divisible works</u></p> <ul style="list-style-type: none"> • agreement between co-authors needed for modifications • each author can use his contribution separately 		

Country	Software	Audiovisual	Collaboration (joint works)	Collective	Composite
Belgium	<p>Disclosure: controversy: either no right, either possible partial waiver</p> <p>Paternity = general rules</p> <p>Integrity: right to object only to acts prejudicial to honour or reputation</p> <p>All rights alienable & waivable</p>	<p>• works of collaboration</p> <p>Disclosure: work can be disclosed when agreement between director & producer</p> <p>• if co-author doesn't want to complete his contribution, he cannot object that it is used</p> <p>Paternity : right can only be exercised after agreement between director & producer</p> <p>Integrity right can only be exercised after agreement between director & producer</p>	<p>Authors can act separately against violations of their rights</p> <p>Authors can act against other authors to disclose the works to omit a name or have the work completed by another person</p>	Does not exist	authors of new work must respect moral rights of authors of pre-existing works

Country	Software	Audiovisual	Collaboration (joint works)	Collective	Composite
France	<p>Integrity right to object only to acts prejudicial to honour or reputation</p> <p>Paternity & disclosure = general rules</p> <p>Right to modify & right to retract do not exist</p>	<ul style="list-style-type: none"> • Works of collaboration <p>Disclosure work can be disclosed when agreement between director, or possibly the joint authors & director</p> <ul style="list-style-type: none"> • if a co-author doesn't want to complete his contribution, he cannot object that it is used • co-authors can use contributions for another genre <p>Integrity</p> <ul style="list-style-type: none"> • modifications to the last version require consent of director, possibly co-authors & producer • master copy can never be destroyed 	<ul style="list-style-type: none"> • all co-authors must agree to disclose the work. Co-authors can ask tribunal to force other co-authors to disclose • co-authors can exercise rights of paternity, of respect & of retract individually • if work is divisible, co-author can exploit his contribution separately if does not prejudice the exploitation of the work of collaboration 	<ul style="list-style-type: none"> • the legal person has the power to act against violations of moral rights • authors can act with legal person or separately • authors cannot exercise rights when work is not completed • author can be replaced if does not want to complete his contribution 	<ul style="list-style-type: none"> • authors of new work must respect moral rights of authors of pre-existing works • right of retract can be exercised both by authors of pre-existing works & of composite works

Country	Software	Audiovisual	Collaboration (joint works)	Collective	Composite
Germany	<p>Discrosure & paternity general rules</p> <p>Integrity software can be adapted without author's consent</p>	<p>Disclosure right of director to review final cut before releasing it to distributors</p> <p>Integrity right to object to gross distortions or mutilations of movie only, during the realisation & exploitation</p> <p>Retract cannot be exercised</p>	<p>Disclosure</p> <ul style="list-style-type: none"> • right must be exercised jointly • modifications need agreement of all co-authors • if co-author refuses to disclose without good reasons, other co-authors can act to have him disclose 	Does not exist	Does not exist but there are "compound" works (art. 9)
Greece	No particular provision : general rules apply	<p>Disclosure rights can only be exercised on final version approved by director</p> <p>Integrity right to object to any modification belongs to director & co-directors only</p>	all co-authors have equal moral rights unless otherwise provided	the legal person is the original author but if contributions can be exploited separately, authors are entitled to do so	Authors are original holders & can exploit their rights separately if capable of separate exploitation
Ireland					

Country	Software	Audiovisual	Collaboration (joint works)	Collective	Composite
Italy	No special provisions : general rules apply	<p>Paternity</p> <ul style="list-style-type: none"> • general rules apply • if movie was modified, author can have his name removed <p>Integrity</p> <ul style="list-style-type: none"> • Right of author to object to modifications, translations & transformations by producer • Right of author to object to publication of modified work if prejudicial to honour or reputation • Right of author to ask destruction of modified version in extremely serious cases • Right of producer to modify work in the extent necessary • Arbitration procedure if no agreement on modifications between authors & producer 	<ul style="list-style-type: none"> • moral rights can be exercised by co-authors separately • Agreement of all co-authors is needed to disclose & modify • co-authors can act against refusal of other author to disclose 	<p>Paternity</p> <p>right to be mentioned, according to customary rules (except for a contribution in a journal / review)</p>	

Country	Software	Audiovisual	Collaboration (joint works)	Collective	Composite
Luxembourg		<ul style="list-style-type: none"> • not collaboration works • producer owns rights : seems not possible that owns moral rights <p>Paternity : general rules</p> <p>Integrity : producer can modify work if indispensable for its exploitation, as long as non prejudicial to honour or reputation</p>	<ul style="list-style-type: none"> • each author has an individual right to act against violations • authors cannot use their contribution in other works of collaboration 	<ul style="list-style-type: none"> • authors' rights belong exclusively to producer 	

Country	Software	Audiovisual	Collaboration (joint works)	Collective	Composite
Netherlands	<p>No specific rules</p> <ul style="list-style-type: none"> • Disclosure = undisclosed works cannot be attached • Integrity = no violation if user adapts program for its own use 	<p>• Collaboration work</p> <p>Disclosure</p> <ul style="list-style-type: none"> • producer only decides when work is completed <p>Paternity</p> <ul style="list-style-type: none"> • Right of author to be mentioned at usual place with his capacity & nature of contribution • Right to require that his contribution be shown • Right to object to be named unless unreasonable • Right to be named for uncompleted contribution <p>Integrity</p> <ul style="list-style-type: none"> • presumption to have waived right to object to modifications not prejudicial to honour of reputation • Right to exploit contribution in another genre if not detrimental to audio-visual work 	<p>Right to enforce one's rights individually; unless otherwise agreed</p>	<p>Legal person which directs work is presumed the author, without prejudice to copyright in each work separately</p>	

Country	Software	Audiovisual	Collaboration (joint works)	Collective	Composite
Portugal	Rights belong to employer (controversy about moral rights)	<ul style="list-style-type: none"> • Collaboration work <p>Disclosure: work is completed when agreement between author and producer</p> <p>Integrity:</p> <ul style="list-style-type: none"> • Right to object to modifications; written consent needed to modify • Master copy cannot be destroyed 	<p>Disclosure & paternity if work is disclosed under name of only one author, others are presumed to have assigned rights to author in whose name work is published</p> <ul style="list-style-type: none"> • Each author can exercise rights individually & require disclosure or modification of work 	<ul style="list-style-type: none"> • Legal person owns rights • If individual contributions can be separated, rules of joint works apply 	Author of new work must respect rights of authors of pre-existing works

Country	Software	Audiovisual	Collaboration (joint works)	Collective	Composite
Spain	<p>No specific rules</p> <ul style="list-style-type: none"> • No right to object to subsequent versions of software by holder of economic rights • No right to object to adaptation by user for its own use 	<ul style="list-style-type: none"> • collaboration work • Right to use contribution separately if not prejudicial to normal exploitation of audio-visual work <p>Disclosure work is completed when conform to contract between director & producer but director & producer can let co-authors appreciate if work is completed</p> <ul style="list-style-type: none"> • Moral rights can only be exercised when work is completed • Producer can replace co-author if cannot or does not want to complete contribution <p>Integrity Modifications require consent of authors who decided its completion (Exception: audio-visual works mainly broadcast but must not be prejudicial to honour or reputation)</p> <ul style="list-style-type: none"> • Master copy cannot be destroyed 	<p>Disclosure & integrity:</p> <ul style="list-style-type: none"> • Consent of all is needed to disclose & to modify • Right to exploit contribution separately if not prejudicial to normal exploitation of work 	Moral rights belong to legal person unless otherwise agreed	Right of author of pre-existing work to exercise moral rights in new work if his work is concerned in new work

Country	Software	Audiovisual	Collaboration (joint works)	Collective	Composite
United Kingdom	<p>No rights of paternity for computer programs nor for computer-generated works nor for typefaces.</p> <p>No right of integrity for computer programs, computer-generated works but right of integrity for typefaces</p>	<p>Paternity for directors</p> <p>Integrity for directors</p> <p>Exception: BBC can alter work to avoid elements contrary to good taste or decency or which can encourage disorders or hurt the public feeling. In this case, BBC must mention that author does not agree with alteration</p>	<ul style="list-style-type: none"> • Every author has independent moral rights • Right to object to false attribution 	No right of paternity	

III. Contractual practices and views of rights holders organizations with regard to problems relating to the protection of moral rights in the digital environment

Sector-specific survey

1. General

In order to find out how moral rights protection is handled in different sectors of copyright related industries a survey was conducted among European and international rights holders organizations. The purpose of the survey was to establish whether digital technologies had brought about any new problems relating to moral rights protection of authors and performers in a given sector and whether the eventual problems had, according to the organization, any impact on the functioning of the Common Market.

The questionnaire sent to rights holders organizations and the list of organizations contacted is attached to the report.

2. VIEWS OF RIGHTS HOLDERS ORGANIZATIONS

2.1. General

At the general level the overall majority of rights holders organizations did not find any reason to harmonize the moral rights legislation in the European Community. All rights holders organizations were unanimous in confirming that digital technology as such has not had any major impact on moral rights protection. The divergences in the existing national statutory moral rights protection were recognized and in particular authors and performers organizations emphasized **the deficient level of moral rights protection in the UK (and Ireland)**. However, no compelling reasons, with the exceptions described below, were presented as to what impact these divergences in statutory protection would have upon the Internal Market.

2.2. Specific problems in certain sectors

2.2.1. Press

According to *the European Federation of Journalists* (EFJ)

The advent of digital technology has led to a number of problems. One of the reasons is that computer specialists are often asked to handle journalistic material, and having no qualifications in this field many infringements of moral rights take place. Some examples of this are:

- *Satirical cartoons are separated from the text that is an integrated part of the work.*
- *Independent editorial material is mixed with advertisements in such a way that the public cannot see which is which.*
- *Sensitive material intended for publication in a serious and sober context only is used in a frivolous or detrimental way.*
- *Independent editorial material is put on the Net without any safeguards, and is thus beyond the control of any editorial guidelines and open to misuse in a fashion that traditional newspaper cuttings or analogue copies of radio and television programmes have never been.*

In the area of press the problems seem to relate to the low level of protection in the UK and Ireland. In particular the fact that news journalists are not recognized as authors under UK law appears to be of great concern to them. According to EFJ

In these countries it is quite common for publishing houses and producers to make ultimative demands on all authors to sign over all authors' rights (moral as well as economic) with no limitations with regard to type of use, expansion over time, territory etc. On the whole, the balance has tipped so far over in favour of the publishers and producers that it is virtually a question of existence for the journalists and their media colleagues if they attempt to muster enough strength to say no to these contracts.

According to EFJ

In countries with a strong protection of moral rights, these rights are normally only mentioned in collective agreements and individual contracts on further use (and secondary use) of editorial material, and not in agreements concerning primary use. This is due to the fact that the legislation protects authors (and performers) by unwaivable moral rights (unless very specific and very limited use of a work is involved).

The reason moral rights are stressed in contracts, agreements and licenses for further use is that there is a special need to stipulate that the material must only be re-used by third parties who guarantee to abide by moral rights.

With respect to the use of their material in databases the EFJ states

In the Nordic countries, Germany, France and other EU member states where journalists are well protected, many different agreements have been entered into concerning how to handle the use of editorial material in multimedia databases and how to clear rights for and handle the way such material is made available in digital networks. Some of these agreements are in-house regulations for proper handling, while others are collective licensing agreements etc. Some agreements are handled collectively by the various journalist unions, some by special clearing houses, and others by individual freelancers and staff journalists or shop stewards.

At the general level it seems that there are problems relating to the low level of protection in the UK and Ireland in the area of press. These problems do not, however, concern the protection of moral prerogatives of journalists but, rather, **it is a question of authorship** and in particular the **status of employed authors**. Under UK law all rights of employed authors are directly attributed to the employer. Journalists claimed that there is a tendency in the publishing sector to concentrate in the UK and Ireland because of the low level of copyright protection in these countries. This could, in turn, have an impact on the Internal Market.

In contrast, publishers' organizations showed that in the contractual practice moral rights are safeguarded. *European Newspaper Publishers' Association (ENPA)* did acknowledge that

the exceptions permitted in the UK Copyright Act with respect to the integrity right mean in practice that staff journalists, freelancers and readers who have submitted letters for publication, as well as agencies which have submitted illustrations or text in advertising copy, cannot (subject to contractual agreements) object to the editing of their contributions. Photographers cannot sue in respect of alterations to the size, colour or proportions of their published photographs.

If the position was otherwise, the clarity of representation of newspapers could be affected, and the flexibility of editors and publishers to determine an appropriate format and an appearance which will attract readers could be hindered.

Some employment contracts contain waivers of the integrity right because a situation could arise where a work has been published previously by the employer with an attribution to the

author. In this situation the Act stipulates that the integrity right could apply and this would mean, for example, that an employed journalist could object to a work being converted into digitised form and then subjected to derogatory treatment.

According to the ENPA

The publisher must have the right to define the editorial line of his newspaper and editors must have the ability to edit the newspaper in conformity to that editorial policy. Moral rights cannot be used as a tool to jeopardize the newspaper by destroying its editorial character and disrupting publication.

National legislation should be able to determine whether rights for a journalist to be named are decided by contract or by general law and what exceptions should exist.

The employed journalist should not be able to oppose modifications of his works by the employer, unless such modification is prejudicial to the honour or the reputation of the employed journalist. Modifications of journalist's work during normal editing and sub-editing are a necessary practice in newspaper production.

Publishers organizations did not see any need for harmonization at the Community level. However, they did ask for a general regulation with regard to the transfer of rights to the employer in employment relations.

Summary

<p>In the sector of the press, journalists do have complaints with at least the English and Irish copyright systems, but, in our mind, the problem is not so much linked to the low level of protection of moral rights, it is rather the consequence of the rules on authorship and contracts. Publishers do not recognize any need for harmonisation of moral rights but agree that common rules should be drafted for the transfer of the rights.</p>
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2.2.2. Audiovisual sector

The problems relating to moral rights protection in the audiovisual sector do not arise in the relation between the authors and performers, on the one hand, and the producer, on the other hand. Rather, the infringements of moral rights are committed by broadcasting companies,

distributors or other third parties in the process of adapting the given audiovisual work to suit their particular commercialization requirements. The European case law provides us with ample examples with respect to violation the director's right to preserve the integrity of the audiovisual work by, for example, interrupting long feature films with commercial breaks,⁷³⁸ or by inserting the logo of the television company on a long feature film.⁷³⁹

Case law

In the 1990's there have also been two leading cases regarding protection of certain moral rights related questions in US feature films in Europe: *the Asphalt Jungle* by *John Huston* concerning colorization of a black and white feature film and the Danish case concerning transferring of a feature film onto a video format in a pan-scanned form (the *Three Days of the Condor* by *Sydney Pollack*). The fundamental question in both of these cases was not so much moral rights protection as such but rather recognition of authorship for the US director of the film under a continental European law. In both cases the director was recognized as the author of a film under French and Danish laws respectively.

The French cour de cassation applied the French legislation relating to the status of foreigners and stated that

"aucune atteinte ne peut être portée à l'intégrité d'une oeuvre littéraire ou artistique, quel que soit l'Etat sur la territoire duquel cette oeuvre a été divulguée pour la première fois; que la personne qui en est l'auteur du seul fait de sa création est investie du droit moral institué à son bénéfice par (l'article 6 de la loi du 11 mars 1957); que ces règles sont des lois d'application impérative."

The Appellate Court of Versailles, to which the Cour de cassation had returned the judgment for retrial gave its decision in December 1994 affirming the decision of the Cour de cassation.⁷⁴⁰

⁷³⁸ See for example, Judgment of the Rome Appellate Court 16 November 1989 in the case "*Germi v. Reteitalia*," published in RIDA no. 144, 1990, p. 191 and the decision of the Milan Court from 13 December 1984 concerning the film *Romeo e Julietta*, directed by *Zeffirelli*. See also *Collova, Taddeo*, Les interruptions publicitaires lors de la diffusion de films à la télévision, 146 RIDA 1990, pp. 124-245.

⁷³⁹ "*Hélène Misserly, Rober Guez et SACD v. Société La Cinq*", tribunal de grande instance de Paris, 14 March 1990, published in 146 RIDA 1990, pp. 320-324.

⁷⁴⁰ *Angelica, Daniel and Walter Huston, la SACD c. Turner Entertainment, La Cinq, la Société des réalisateurs de films (SRF), le Syndicat français des artistes interprètes (SFA), la Fédération européenne des réalisateurs de l'audiovisuel (FERA), le Syndicat français des réalisateurs de télévision CGT, le Syndicat national des techniciens de la production cinématographiques et de télévision*, Cour de cassation, première Chambre civile, 28 May 1991, Decision no. 861 P, published in J.D.I. 1, 1992, pp. 133-148, commented by *Edelman, B.*; *Cour d'appel de Versailles*, Arrêt du 19.12.1994, R.G. no. 615/92.; published in RIDA, April 1995, p. 389, note *Kerever, A.*

In its decision the French cour de cassation confirmed that moral rights protection under French law was part of the *ordre public*. From the point of view of the European Community this would seem to entail that **the European Union cannot harmonize downwards the provisions of the French law relating to moral rights protection.**

The Danish court applied the general rules of private international law and stated that, because all the rights in question had been unequivocally transferred to the producer of the film in the original production contract, and because transferring the film onto a video recording in a pan-scanned format was permitted in the contract, making a pan-scanned version of the film did not infringe director's rights under Danish law.

Point of view of rightholders

Authors of audiovisual works (AIDAA) did not encounter any specific problems in the audiovisual sector with respect to moral rights. As an example of a balanced and well-functioning system of moral rights protection in the European Union they presented the French law which contains detailed regulation with regard to protecting moral rights in audiovisual works (see also Belgium, *supra*).

However, in spite of the fact that moral rights protection did not cause any problems in the audiovisual sector in general, the inferior level of protection afforded by the UK and Irish copyright laws was brought forward also in the audiovisual sector. To quote the answer given by the UK Directors and Producers Copyright Society (DPRS):

Any paternity right is not enforceable unless it has been specifically asserted. For instance, authors of books have always been recognised as authors under UK law. However, so that book authors can benefit from the new moral rights legislation, the frontispieces of books published since 1988 invariably carry the inscription 'The right of xxx to be identified as the author of this work has been asserted in accordance with the Copyright Designs and Patents Act 1988'.

Rights of integrity do not need to be asserted in the same way. However, taking advantage of the possibility that authors can waive their moral rights under Section 87, this action is invariably required of directors and screenwriters as a contractual pre-condition. Only on very rare occasions is a creative audiovisual author able to withstand this contractual pressure. Dorothy Viljoen, a noted UK rights lawyer, has put the case for the British producers association producers PACT⁷⁴¹:

⁷⁴¹ 'Art of the Deal' Dorothy Viljoen, PACT 1997.

'As will be appreciated, this moral right can be a sensitive issue. The expression 'moral rights' is of itself emotive, and the rights they bestow on the creators of copyright material go to the heart of creative endeavour. However, the demands of commercial production and distribution do not accommodate this sensitivity. All UK (and US) production financiers insist that moral rights waivers are secured in each and every production contract involving an assignment or licence of copyright material. Without this waiver they run the risk of their overall editorial control being challenged, and programmes cannot be sold unless purchasers are permitted to adapt the material to fit the schedules and other requirements of their markets. Productions could be put at risk or in limbo if an author or director were to claim that even very minor cuts or additions to his or her work constituted derogatory treatment, and took the producer and/or the broadcaster and/or the distributor to court.'

*Moral rights are apparently of no concern to the producers, because they are in possession of the creators' copyrights (and so have complete control over the content of the work) at the point of publication. **It is the assertion that purchasers be 'permitted to adapt material to fit the schedules and other requirements of their markets' that is hotly disputed by the creators** (emphasis added).*

A recently published guide to UK Screen Law published by Lawyers D.J. Freeman on behalf of PACT⁷⁴² describes the situation in a subtly different way:

"It is standard practice in the UK film and television industry for directors and authors to waive their moral rights. This ensures that the production company is able to deal with their contributions to the programme in any manner which it thinks fit. It is, however, customary for contracts with writers and directors to include special provisions relating to credits, notwithstanding any waiver of moral rights." Needless to say this so-called 'standard' practice is strongly opposed by organisations representing both writers and directors. Their moral rights have been rendered worthless by the very possibility of their being waived. British director' contract are often wholly inconsistent in that they contain references to US 'work for hire' legislation, while at the same time specifying that it is the director's services that are being employer, rather than the director (under UK law directors with the protected status of employee have no rights as authors, and therefore no possibility of securing moral rights.)

Summary

⁷⁴² A short guide to small screen law. PACT & D.J.Freeman. October 1999

Despite divergences between Member States laws on moral rights in the field of audiovisual works, the rightholders do not favor any harmonisation at Community level.

2.2.3. Photography and visual arts

According to *Pyramide Europe*, authors of still images are confronted with two main problems regarding the protection of their moral rights.

According to *Pyramide* images are often reproduced without mentioning the author's name, or even stating someone else's name. Although regularly arising in the analogous environment too, **infringements against the right of paternity have multiplied due to the digital technologies**. It seems, however, that some improvements in this respect have occurred in, e.g. Finland.

Infringements against the right of integrity are almost exclusively caused using the new technologies: images are altered, adapted, cropped, items are added, etc.

Both cited problems often arise in combination with each other. According to *Pyramide* the **new technologies largely facilitate the infringements against moral rights**, and are a growing issue of concern for any individual author.

The contractual practice in the field of photography seems to adequately safeguard the protection of authors' moral prerogatives. *Pyramide* gave us evidence that since 1995, PYRAMIDE EUROPE's standard contracts, including General Terms for Delivery and Sale, include i.a. the following terms : “ *Unless otherwise expressly agreed, we retain the intellectual property on all works* “ and “ *The client has to respect the moral rights linked to our works. The client promises to respect the integrity of our works and notably to render faithfully their colours and not to truncate or distort them. Our name must be clearly and unequivocally mentioned under each reproduction. Failing that, we reserve the right to claim damages. ...* “. If used correctly these General Terms are binding upon both parties.

According to *Pyramide* these standard clauses and practices are very widely used by most professional authors (photographers, graphic designers, architects, etc.) and they are very generally accepted by users and publishers throughout Europe.

With respect to particular problems relative to digitization and storage of works in databases Pyramide stated that their members usually check and approve the digitized image personally before its release, in order to preserve the original level of quality.

Moreover, with regard to use of works in digital databases Pyramide stressed several problems:

The database manager's wish to provide the public with a high-quality viewable picture that is not digitally protected, often conflicts with the author's wish to protect a digital image as much as possible by means of watermarking, encryption or any other process.

1) *The circulation of uncontrolled copies of low quality (due to illegal digitisation), can prejudice the author's reputation, and indirectly have financial consequences due to negative publicity. **Unauthorised copying must be prohibited and a system of sanctioning should be installed.***

2) ***Moral rights are intimately linked with the economic exercise of author's rights :** whenever an image is (illegally) made available without the name of its creator, it becomes almost impossible to remunerate the authors for the reproduction of their work, and a unsigned work will be even more subject to illegal copying.*

*At present it is scientifically impossible to develop a system of recognition of visual forms, whereas text and music are digitally retraceable. Images are the only repertoire that is not retraceable once the name of the author is erased from the file. Therefore, **the indication of the name of the author should be ensured, and serious sanctions should be applied in case of non-observance of this obligation.***

Visual artists encounter problems with regard to the protection of their moral rights in particular in connection with personal web-pages. Wide-spread scanning of art works and photographs from all kinds of media and their subsequent use and manipulation in personal web-pages leaving out the name of the author has become a serious problem for visual artists world-wide. Taking into consideration the global nature of digital networks, in particular internet, this kind of use may no longer be regarded as private, the fact which is often ignored by the general public. Scanning mostly neutralises any identification methods and combined with the overwhelming number of web-pages and sites it is in practice impossible to control and track down the infringing copies of works.

Visual artists have also problems with respect to advertisement and packaging of products in which connection works are often modified in order to circumvent the fact that the permission to

use them in original form was not granted by the rights holders.

With regard to the use of art works in data bases visual artists encounter problems with respect to the works stored in data bases of broadcasting organizations and newspapers when works have been stored under a legal exemption for a particular kind of use, such as reports of current events. In these cases authors have had no control over the eventual manipulation of works through editing, colorization or alike modification. In the analogue world the effect of such damages was limited because of the temporary nature of use but the digital technology opens possibilities to infinite re-uses which could be extremely prejudicial to authors moral prerogatives.

Summary

In the field of photography and visual arts, problems of integrity of works do arise, but the solution does not seem to depend on the level of protection of moral rights. The issue is not so much a legal one, it is rather a practical matter : how to ensure control of the uses ? Therefor, it appears that the legal protection of technological measures of protection is a more crucial issue for the area of visual arts.

2.2.4. Music

According to the *International Federation of Phonogram Producers' Organizations (IFPI)* specific moral rights problems facing the recording industry today are

- Use of works in the context of advertisements and commercials
- Making of cover versions and re-mixes of sound recordings
- Use of low quality fixations or copies, e.g. bootlegs by third parties

If this kind of use is not covered by existing contract terms an individual permission is being asked for or the use is terminated.

IFPI also emphasized the role of digital technology in safeguarding moral rights by providing increased control through the means of encryption, use of digital signatures, watermarks, and other copy-control techniques. According to the IFPI there is a considerable increase in quality of transmission of circulated copies and thus less need for adaptation and reductions of any kind, because digital transmission facilitates transmission in unabridged form and in good sound quality.

Piracy, one of the biggest negative side-products of digital technology, is, according to IFPI, a threat not only to rights holders economic rights but also to their moral rights by envading the market with low quality copies of protected works.

At general level when trying to set moral rights protection into context in a given sector, it should, according to IFPI, be taken into consideration that

[m]oral rights protection is known to use subjective criteria which are of normative character using general terms open to interpretation. Moral rights standards thereby refer to established usage customs, traditions, and traditional rules on the market. For any change

made to a work, the borderlines between irrelevant change and adaptation on the one hand and adaptation and deformation on the other hand are determined by notions of what is acceptable and where a change starts to constitute a grave impediment to the personal relation of the author to his creation or to his reputation. The same problem of open normative criteria occurs regarding the relationship of the performer to his performance. All the mentioned determinations are based on specific and historically grown circumstances and cannot and should not be circumscribed in general terms. The same is true for the right of attribution where the question whether and how the author or artist is named depends on technical feasibilities, business practice and the general custom.

Other rights holders in the field of music did not see any particular problems brought about by digital technologies in their area.

Summary

In the field of music, piracy and control of uses are real problems. The issue of moral rights should not focus the attention of the European Commission.

It seems not adequate to tackle the issues of attribution and integrity at the level of the Community, as the traditional moral rights issues depend on a mix of legal as well as other, more practical, norms (codes of conduct, deontological rules, etc.).

2.2.5. Performers rights

According to the International Federation of Actors (FIA)

[t]he new digital era represents both a challenge and an opportunity: modern technologies offer a wide spectrum of means for performers to express their talent in the global market. But the digital age also brings forth an increased exposure to manipulation and to the theft of their intellectual property, creating the possibility of serious economic loss. Performances can now be channelled by state-of-the-art technology to reach millions of households at a reasonably low price and easily gain a life of their own as perfect digital copies, far from the reach of their creators.

Because of its peculiar nature, digitalisation makes it simple to reproduce, distribute, change and recreate a performance. Moral rights can easily be circumvented by digitalisation and infringements carried out at a global scale, with little effort and in a very short time

FIA emphasizes the importance of collective union agreements as a tool for safeguarding and enforcing performers rights. With respect to different ways of protecting performers rights, FIA notes that

[i]f statutory laws operate smoothly in this respect, equivalent levels of protection are often enforced through union collective agreements. As a matter of fact, union agreements are important to reinforce and make entirely unambiguous the kinds of abuses which are of principal concern to performers, addressed by moral rights.

FIA also demonstrated how moral rights of performers have been safeguarded in standard agreements in the United Kingdom, Denmark and France.

Sections of collective agreements:

A. *British Actors' Equity Association* - *the information relates to three television collective agreements (with the BBC, with ITV - the independent broadcasters - and PACT - the independent producers), as well as the PACT Cinema Film agreement. Considering that UK does not have moral rights protection enshrined in its statutory law, there are three possible moral rights issues in these agreements:*

- *All four agreements deal with credits;*
- *All three TV agreements ask for consents from performers if extracts are used to ridicule the performer or are sexually explicit;*
- *All four agreements have clauses whereby unused recorded material of a sexual nature will be destroyed.*

B. *Danish Actors' Association* - *the information relates to an agreement on Film productions and to another on TV productions.*

- *Both agreements deal with changes in the manuscript and dubbing;*
- *Both agreements have specific rules applying to the use of nude extracts;*
- *A recent addition to the Film agreement rules on the use of computer-generated performances.*

C. *Syndicat Français des Artistes Interprètes* - *the information relates to the agreement on TV production.*

- *The agreement ensures protection in case of role modification. The same provision*

exists in the Film collective agreement.

- *The agreement protects the name of the artist.*

It would seem that performers moral prerogatives are protected quite satisfactorily in these agreements.

The musicians (*Fédération internationale des musiciens*, FIM) also noted how digital technology makes it easier to manipulate, alter and modify their performances and use them in different context and gender than originally. They also note *that musicians are obliged to waive the exercise of their moral rights when dealing with the big multinational companies unless there is a specific statute prohibiting this.*

Since digital technology has made the use of works global, in particular through Internet, FIM emphasizes the need to find global solutions to rights protection problems. According to FIM *WIPO Phonograms and Performances Treaty should be made the basis for any regulation relating to moral rights of performers.* FIM also wants to make it clear that it will oppose any implementation of the WPPT in Europe unless it includes moral rights protection for performers.

A somewhat different view with respect to the protection of moral rights of performers under UK law is expressed by *D.J. Freeman* in his guide to the UK Screen Law. According to him

“Performers’ paternity rights should be subject to the same assertion provisions, as described in S.77 (7)(a) and (c) and S.77(8) of the CPDA Act. It is however imperative that such rights’ assertions are not capable of being dismissed by successors in title, as is currently commonly the case when audiovisual authors wishing to assert their paternity rights are denied the opportunity under contract. Performers’ paternity and integrity rights should be subject to similar sets of exceptions and circumstances of application as relate to authors in S.79 - 83 of the CDPA.

As authors have painfully discovered to their cost, the provision of S.87 of the CDPA permitting paternity and integrity rights to be waived has wholly undermined the intrinsic value of their moral rights. However, the fact that British authors have been made to suffer the consequences of S.87 since 1988 should not constitute a precedent. Compulsory waivers of performers’ moral rights should be made inadmissible, and an equivalent amendment should be made to UK copyright law to the benefit of authors at the earliest possible opportunity.”

Pennant Roberts (DPRS) discusses performers moral rights in audiovisual works in the following terms :

Because performers have little real control over which excerpts of 'takes' of their film performances are included in the finished product, they are not party to what shall be considered as the definitive version of the film. It becomes all the more imperative therefore that the definitive version is regarded as a constant, to guard against further distortions of their performance. Films have historically included the use of doubles - either body doubles for action sequences of various kinds, or voice doubles where the performers own voice is deemed unsuitable for whatever reason. This 'doubling' process is usually designed to enhance the basic performance, although occasionally it may be unsuccessful. Since any 'doubling' will have the appearance of being part of the actors' own performance, any such scenes should not be included in the finished film without the foreknowledge and agreement of the performer.

Summary

<p>As regard performers, union collective agreements appear as one of the best solutions to the problems. The conclusion of such collective agreements which can tackle the practical problems encountered by performers should therefore be supported (at least at national level). The implementation of WPPT is a good occasion to deal with the moral rights protection of performers.</p>
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2. The relationship between authors' moral rights regulation and performers' moral rights regulation

When asked about the relation of moral rights protection of authors, on the one hand, and performers, on the other hand, the answers varied considerably. Photographers (Pyramide), authors of audiovisual works (AIDAA), certain authors' collecting societies (SABAM, SGAE, SIAE) and phonogram producers emphasized the pre-eminent role of *authors'* moral rights protection. IFPI said that performers' moral rights protection should be restricted to the level afforded in the WIPO Performers and Phonograms Treaty. Other representatives of authors found no need to differentiate between the moral rights protection of authors and performers.

Performers themselves did not see any reason to differentiate between authors and performers moral rights protection and noted that at the international level this also has been now established. Moreover, FIA noted that **performers' images are perhaps even more**

vulnerable and potentially subject to abuse than the works of authors.

3. Distinction between the regulation of moral rights during the production period of the work, on the one hand, and after completion of the work, on the other hand

Because of certain problems relating to the relation of the author's right of disclosure or divulgence of the work and moral rights protection, in particular in countries where the right of disclosure is considered as an economic right, the questionnaire enquired the opinion of the interested parties in this respect and the answers received varied to some extent.

Photographers (Pyramide) made an eloquent connection between the authors right of disclosure and protection of moral prerogatives before the completion of the work by stating that

[b]oth in the analogous and digital environment, PYRAMIDE EUROPE finds it important to make a distinction between the period of time in which a work is produced and completed, and the period of time after completion.

*During the period prior to completion of the work, the authors should be sole master and have an absolute monopoly over their creation, without any exception. Therefore, **the moral right should include the right to divulge the work.** An undivulged work should not be liable for seizure.*

The issue becomes even more acute in the digital environment, as the author might only want to release a digital creation after some processes of digital protection (deposit to ensure proof of paternity, watermarking, encryption, or any other protective act).

*In respect of the principle that the moral right entails the right to divulge the work, PYRAMIDE EUROPE proposes to consider as the final version of a work, **the version that the author makes available to the public.** Once the work leaves the intimacy of the author's studio –with the author's approval – and is revealed to the world, it can be considered a final version.*

The authors of audiovisual works brought forward the advantages of the French law in which the exercise of moral rights with respect to audiovisual works is restricted during the production period and only possible with respect to the completed audiovisual work and even then by the

director, in the first place. According to DPRS

As argued previously, there can be no moral rights protection during the production period since moral rights only relate to the published work itself. Without doubt the French system containing the legal imperative that a definitive version must be agreed jointly between director and producer should serve as the model for European and international best practice.

According to FIA

Moral rights surely ought to apply to the fixation of a performance, whether it is subsequently published or not. The level of protection should be the same, as the mere act of fixation potentially exposes a performance to illegal use. We therefore do not believe that the question of production, editing, etc. is relevant in this context.

Several other groups did not see any need to differentiate between the production period and the completed work mainly because this distinction did not have relevance in their field.

5. Conclusions

The rights holders organizations stressed that digital technology enables potential new infringements of the integrity of works and performances but, as such, has no impact on moral rights protection. It was sometimes pointed out that digital technology helps to safeguard the moral rights of authors by enhancing the quality of works and by enabling to protect the integrity of works by technical means. By allowing a more generous use of space, digital technology also contributes to the respect of author's rights of attribution.

With respect to the need of the European Community to harmonize moral rights protection the overall majority did not regard it as necessary. Those who did, often associated it with the need to further harmonize economic rights, in particular with respect to status of employed authors.

According to *Pennant Roberts (DPRS)*

Unsatisfactory levels of circulation of European audiovisual works throughout the Internal Market are of grievous concern to us all. Whatever the major barriers to trade - intolerance of diverse cultures, poorly developed marketing structures, the dominant position and influence of audiovisual industries from elsewhere, etc. - the absence of harmonisation of moral rights provisions can by comparison hardly be allocated a high priority. However, to recall the terminology of clause 6bis of Berne, authors and performers rights are INDEPENDENT of economic rights, and therefore do not and cannot require justification in purely economic terms.

It is incontrovertible that rightsowners suffer prejudice in an uneven fashion throughout the EU - that for instance the work of French and German film directors is less well protected in the United Kingdom than in their own countries by virtue of the fact that British directors' moral rights are unrespected in the UK. Whatever the claims to the contrary, there is absolutely no evidence that stronger moral rights protection systems existing elsewhere have had any adverse effect on the circulation of goods and services. As far as UK audiovisual authors are concerned, harmonisation of moral rights protection throughout the EU should be achieved at the earliest practicable opportunity.

According to Pyramide Europe

First of all, PYRAMIDE EUROPE notes that illegal reproductions, infringing both economic (absence of authorisation) and moral rights (no mention of name, alteration, ...) have become a transboundary, international problem. This is largely due to the digital circulation and transportation of images (Internet, etc.).

The authors we represent are increasingly confronted with illegal reproductions, made available to the public in all countries of the European Union. The pirates responsible for the illegal reproduction are to be divided into two groups :

- *either they are located in a third country, non-member of the E.U., with no or lesser author's rights protection,*
- *or they are located in a member state of the E.U., cleverly making use of the voids and exceptions of one national legislation and playing them off against the other legislations.*

*Furthermore, **we note a shift in economic activity in our sector towards zones where legislation is laxer, and where illegal reproduction badly sanctioned by law.** It is indeed a fact that regulations regarding moral rights are less strict in some member states than in others; **users and certain publishers increasingly use differences in national law to the detriment of the author's income.***

International Federation of Phonogram Producer's Organizations (IFPI) also emphasized the effects of piracy on the proliferation of low quality copies of protected works in the market. IFPI did not, however, regard that this would have adverse impact on the Common Market but rather a negative impact on the rights of all rights holders concerned.

Journalists are also of the opinion that the current divergencies in moral rights protection within the European Community has adverse effect on the internal market. According to EFJ

Publishing houses who aim to produce e.g. magazines to cover the European market set up their publishing houses in the UK, and sign on UK authors demanding that they transfer all their rights including the moral rights. The articles are then translated into other European languages, and these and any accompanying photographs are then reused in other EU member states.

This situation distorts competition among European publishing houses, broadcasters and producers.

It also puts enormous pressure on freelances, who have an even weaker position than the smallest business enterprises of Europe. Freelances have great difficulties proving that written or unwritten agreements between big publishing houses exist on how to pressure freelances into signing over all their economic and moral authors' rights. The employers of the media industry are taking advantage of their dominant position against freelances.

EFJ further claims that divergent protection of journalists within the Common Market has already resulted in the UK being an "offshore moral rights-free zone", and has for some time caused an unequal playing field in the European Community. EFJ also alleges that many authors in countries that have proper protection of moral rights make it a condition for licensing their works that they cannot be used in the UK and Ireland (because of lack of protection of moral rights in these countries).

Swedish Journalists' Union has run into problems with respect to the re-use of their articles and photographs by UK press agencies such as Reuters. There is a local branch agreement between the local Journalists' Association on the one hand and the newspaper publishers and pictorial agency on the other hand, covering the exchange of material between different newspapers belonging to the same consortium. In this branch agreement there is a particular provision guaranteeing the safeguard of respect of journalists and photographers moral prerogatives and, moreover, the newspapers and pictorial agency also undertake to remind any further third parties of the necessity to respect authors moral prerogatives. However, the journalists are concerned about the fact that with respect to UK situated news or pictorial agencies the enforcement of any moral rights based claims is impossible because of the lack of protection for rights of journalists reporting current events.

Because of the serious danger posed by the inexistent protection for journalists moral prerogatives under UK law the Swedish Journalist's Union is currently considering of changing the branch agreement to the effect that it would forbid any exchange or sale of material to UK based companies.

The relatively extensive survey of the opinions of different interested parties in various sectors of copyright related industries has made it apparent that even those who in principle may have favored strengthening of moral rights protection within the European Community have difficulties in coming up with concrete examples for cases where the divergencies in protection of moral rights in the Member States would have affected the circulation of goods and services within the European Community.

Although, the current situation with respect to the lack of protection of news journalists under UK law does raise serious concerns also from the point of view of the Internal Market if it leads to the situation in which journalists in continental European countries forbid the use of their material in the UK because of the impossibility to protect their moral rights in the UK.

IV. Influence of digital technologies on moral rights

When considering the impact of new technologies, in particular digital technologies on the creation, production and exploitation of protected works, we have to ask ourselves several questions. First of all, what does digital technology bring with it which would be over and above of what existing technologies have made possible. Once identified, we should analyze these issues to find out their relevance in terms of copyright protection, and in this case, moral rights protection in particular.

1. Digitization of protected works

Digital technologies make it possible to transform and manipulate works, to modify and alter them in infinite ways. Digital technologies make it possible to remove works from their original context and place them into another setting in such a manner that it is impossible to detect the change. Digital technologies allow to combine different works and to create completely new works out of them either by preserving some of the elements of original works or by transfusing them entirely into the new work.

All this is possible only under the condition that the work is not technically protected against manipulation, alteration, displacement or other potentially harmful act for the rights holder.

Moreover, whenever discussing the effects of digital technology on our ways of exploiting protected works we should not forget the most encompassing change: the global and non-territorial use of works.

2. Effects of digital technology upon moral rights protection

Technology as such is neutral and has no impact on legal sphere. Rights are technology neutral and violations of moral rights are in no way different with digital technologies than with analog ones. This means that conceptually, in terms of a given statutory copyright regime, infringements of moral rights are determined in a similar way irrespective of the technological way these infringements might have been performed.

In the following we shall examine how the new ways of producing and disseminating protected works in the digital environment affect the traditional notions of copyright protection: authorship and work, and in particular, we shall ask how these effects, in turn, might affect the protection and enforcement of moral rights. As the basis of our analysis we shall take the internationally harmonized protection of moral rights as provided in the article 6bis of the Berne Convention.

Notion of authorship

As has been already established digital technology as such has no impact on author's rights or copyright protection as such. It has, however, accentuated the trends that have been on-going ever since the beginning of the 20th century. First with photography and then with cinematography, and later with computer technology, the system of copyright protection has, with some struggling, adjusted to the changing ways of creating and producing protected works. The adjustment of the system has asked for conceptual rethinking and, as in case of computer technology, political choices.⁷⁴³

With digital technology the changes brought within the system of copyright protection have reached yet another level. The way of creating protected works has changed to an extent that it has set the traditional notion of authorship, as embodied in copyright legislation under considerable strain. Today, a major part of protected works are created by collective effort and at different stages. Audiovisual production and new media production rely solely on results of collective effort. It is no longer possible to designate a single or maybe two co-authors who could be considered as 'authors' of the work. With economic rights the issue of collective work process may be solved contractually but with moral rights it becomes a more complex issue.⁷⁴⁴

It is no longer possible to pin-point a single individual who would somehow be responsible of the final form of the work, and even harder to claim that the work could somehow be regarded as 'the emanation' of a personality of a single individual as the traditional doctrine of author's rights protection would presuppose in determining the ownership of moral rights in a given work.⁷⁴⁵

Notion of a protected work

Apart with the changing notion of creative work process, and consequently, that of authorship, we are also confronted with the changing notion of a protected work. Ever since cinematography, works combining pre-existing and new works from different genres have posed difficulties for the copyright system. Today, with interactive works created with digital technology, it is no longer possible to distinguish individual works in, for example a network multimedia production in which the user may consult and combine works at different levels and maybe even from different parts of world in real time.

The multifaceted nature of digital works sets the traditional idea of moral rights protection into question. When it is no longer possible to tell where one work ends and a new one begins, even less so who has created what part of the work, it is, of course, and even more difficult to designate the person who could exercise moral rights with respect to the integrity of the work as a whole.⁷⁴⁶ It goes, however, without saying that the right of attribution remains intact also in the context of multifaceted works: everybody who has participated in the creation of the work should be entitled to have their names mentioned in connection with the work.

⁷⁴³ *Salokannel, Marjut*, Film authorship in the Changing Audiovisual Environment, in *Of Authors and Origins* (ed. *Sherman, B. and Strowel, A.*), Clarendon Press 1994, p. 58 ss.

⁷⁴⁴ *Lea, Gary* Moral Right and the Internet, in *Perspectives on Intellectual Property Rights*, p. 95 ss.

⁷⁴⁵ *Salokannel*, (1997), p. 35 ff.

⁷⁴⁶ *Lea*, p. 97

Global use of works

Global digital networks have made it possible to create open works which may be modified and re-created constantly and simultaneously from all parts of the world. We have different net games which players may play in real time everywhere in the world, and in some cases, also change the form of the game when playing it. In this kind of a setting the whole concept of moral rights protection seems anachronistic.

Even if we want to maintain a certain level of moral rights protection the global nature of creative process and use of works has to be taken into account of.

When works are created and communicated through a global network we are immediately confronted with the fact that only globally harmonized minimum standards of copyright protection may provide answers for the future. This is equally true for economic and moral rights protection, and for both aspects of protection the international standards are set in the Berne Convention and the WIPO Copyright Treaty and WIPO Phonograms and Performances Treaty respectively. It seems obvious that any legislative attempts for harmonizing moral rights protection within the European Community should also take as the basis the principles set out in these internationally agreed-upon treaties.

Digital technology as a way of safeguarding moral rights

Digital technology not only sets the current notions of moral rights protection under question but it may also help to safeguard some aspects relating to protecting moral rights of authors and performers.

Identification of works

Moral rights protection has sometimes been mentioned in connection with identifying the origin of a work, as a tool *to authenticate the work*. Superficially, it might seem so if we regard the name of the author as a means to identify the work. However, in a commercial exploitation environment, such as Internet, authentication refers to the ability to identify the origin of the work, which in most cases is the commercial or other origin of the work. For identifying the commercial origin of the work there is a long established intellectual property right, that is the *trademark*.

Quaedvlieg has, when commenting this discussion, stated that authenticity concern is a "more specifically commercial manifestation of the moral rights". Authentication is similar to a trademark because it would serve as a guarantee for "works produced under the *authorship* of a single undertaking which is accountable for the *authenticity* of the work".⁷⁴⁷ Moreover, EEC trademark law protects the trademark holder when changes have been made to the goods and re-commercialised under the trademark without the consent of its owner. In this case, there is no exhaustion.

The best and most effective way to ensure the authentication of a work is digital technology itself. Different technological identification systems have already been established at the

⁷⁴⁷A. QUAEDVLIEG, *ibid.*, p. 227.

international level. For example, we have already or will have in the near future, a standardized code for literary material (ISBN number), for phonograms (ISRC number) and for audiovisual material (ISAN number). We also have various more hybrid coding and identifying methods, such as Digital Object Identifier (DOI), watermarking, digital signature,...

Even if the digital identification systems of works were not conceived with the aim of protecting moral rights, but rather for managing rights, they may nonetheless have such an effect.⁷⁴⁸ Identification techniques allow works to be tattooed visibly or invisibly and thus to be authenticated, and tracked when reproduced illegally. Marking can actually allow the tracking of borrowed pieces of works which if re-used, can amount to a violation of the right of integrity. In this connection it should be kept in mind that a non-disclosed work may not be marked without the author's consent.⁷⁴⁹

Digital technology as protecting the integrity of works

Technical protection method against modification of works are an important way of safeguarding the integrity of works today. In light of today's technology encryption seems like the most effective way of safeguarding the integrity of the work. Digital signature also allows for the verification of any transformation of the work in the course of utilization. Encryption and digital signature make thus possible authentication of both the *author* and/or *work* and of the work's *content*. In this way they could be regarded as protecting the rights of integrity and attribution.

Identification systems can also help the authors prove that their works have been distorted. For example, if works included in databases, have been modified without their author's consent in such a way that the modification would infringe upon their moral rights, providing works with a digital identification would provide authors with an element of proof when trying to remove the modified versions of their works from the database.

It must be emphasized that the technical protection methods cannot replace moral rights because their role is different. Their function may be seen as complementary as they may provide the rights holders some aid in tracking and proving infringements of moral rights.

⁷⁴⁸ A. DIETZ, Authenticity of authorship and work, General report, ALAI 1996, p. 171.

⁷⁴⁹F. POLLAUD-DULLIAN, France, Authenticity of authorship and work, ALAI 1996, p. 211.

Impact of digital technology on the protection of performers' moral prerogatives

With respect to protecting performers moral prerogatives digital technology may pose even more problems than for authors' rights. Different ways of digitally manipulating performers' interpretations (such as sampling, warping and morphing) make it possible to modify their images and set them into completely new contexts without their knowledge. Because of the risks posed upon performers with respect to unauthorized use of their image or identity, it may be that traditional moral rights protection can not always provide sufficient protection against this kind of use, in particular if the exercise of moral rights is waived beforehand.

It could be conceived that protecting performers against un-authorized use of their image could also be achieved through legislation outside moral rights, such as a modified version of the statutory protection of right of publicity in various states in the U.S. This would mean that performer's permission would always be necessary if their identity or image is used outside the original context and the right could not be waived beforehand by contract. FIA and Finnish musicians have favored this kind of protection in interviews.

Do moral rights have an impact on digitization ?

Moral rights may also have an impact on the multimedia environment. As producers wish to modify works to adapt them to the new digital environment (for instance modify the size of a work, or its color, add the work into an electronic database together with other types of works...), moral rights, such as the right of integrity, can hinder the exploitation of works.⁷⁵⁰ As a matter of fact, there are two important problems which can be also seen as disadvantages of moral rights in the producers' eyes. These issues are not new but as has been introduced earlier, computer technology has enhanced them considerably.

Firstly, the right of integrity can be a source of trouble because in some systems, like Belgium, France and Greece, the author can object to any mutilation or change of his work without having to prove a prejudice.⁷⁵¹ Secondly, in most legal systems, the author can always invoke the nullity of his consent even if he has alienated his moral rights. Thus a compromise, an adaptation or a balance between the author's or performer's moral interests and the interests of the author's contracting party and users' interests has to be found. It should also be kept in mind that the right of integrity can be affected by the assignment that the author has made of his or her right of adaptation.⁷⁵²

From the point of view of the French law allowing limited waivers with respect to the exercise of moral rights would already be an adjustment. This would mean only partial waivers limited to specific cases. Although, it should be kept in mind that in practice limited waivers are accepted also in France. In any event, the ultimate basis for any regulation with respect to the right of integrity should be article 6bis of the Berne Convention.

⁷⁵⁰ See e.g. A. LUCAS (1998), p. 243. A lot of companies raise criticisms toward the integrity right in particular, because it can be a barrier to the economic exploitation of works.

⁷⁵¹ For Lucas, there must be a judicial control of moral rights, because all rights can be abused. In France, a majority of courts and of the doctrine is against the absolute character of moral rights. See A. LUCAS (1998), n° 489, p. 246.

⁷⁵² A. LUCAS (1998), p. 243 ff.

In the legal literature it has also been suggested⁷⁵³ that a subtle balance between authors' interests and users' interests should be striven for. This would mean that the author could only object to transformations dictated by users' desires or tastes but could not object to modifications dictated by technological, financial or circumstantial conditions. This solution is of easy application, flexible, practical and applicable to digital as well as analogue uses of works. It also comes close to the notion of abuse or misuse of rights.

In this third scheme, criteria close to the American "fair use" could be used to remedy to the absolute character of the integrity right and thus find the correct balance between the conflicting interests of authors/performers and users. These criteria could be used for multimedia works as well as for works on analogue media.

The following criteria for moral rights protection for the new century has been proposed in the legal literature:

- the nature and intensity of modifications and their irreversible or reversible character;
- the consequences on the author's professional life and on the economic exploitation of the work.⁷⁵⁴
- the extent of efforts taken by the user of the work to communicate the modification
- the extent to which the author is identifiable in the copyrighted work, as well as the extent to which the invoking of the right of integrity will interfere with a similar interest held by co-authors or other interested co-contributors, if any
- the extent to which the invoking of the right of integrity will interfere with the legitimate expectations of an employer or commissioning party having decisive influence on the final result of the work. ⁷⁵⁵

These factors could be taken into consideration, in the first instance, by courts or other instances when solving moral rights conflicts. To introduce them into legislation seems conceivable only at a certain specific case. This has already been done in many national laws with respect to introducing special moral rights protection adapted to the specific needs of a given category of works, such as computer programs, architectural works, films.

3. Conclusion

It is obvious for everyone that new technologies have had a profound influence on the ways protected works are created, produced and exploited. However, the international system for copyright protection as embodied in the Berne Convention and in the WIPO Treaties provides us with a well-functioning framework for adjusting national and regional copyright laws to the demands of the new technologies. This is equally true for moral and economic rights of authors and performers.

⁷⁵³ See A. STROWEL et J.P. TRIAILLE, (1997), n° 586.

T. HEIDE, (1997), A. LUCAS (1998), A. DIETZ (1994), The artist's right of integrity, IIC, vol. 25, p.177.

⁷⁵⁴ See A.STROWEL et J.P. TRIAILLE, (1997), n° 587, p. 451.

⁷⁵⁵ See T. HEIDE, (1997), p. 54 ff. See also A. DIETZ, Authenticity of authorship and work, General report, ALAI, 1996, p. 175.

V. Existing differences in moral rights protection in the Member States

(?) : means that there is a controversy about the meaning of the law

A. CHARACTERISTICS OF MORAL RIGHTS

1. Duration

AUTHOR :

Author's death : France and Italy (right of retract), Netherlands (unless he designated a heir), Spain (rights of retract, access and of modification)

60 years after death : Spain (right not to publish)

70 years after death : Austria, Belgium, Germany, Greece, Ireland⁷⁵⁶, Luxembourg, Netherlands⁷⁵⁷, Nordic countries, Spain (for disclosure), United Kingdom⁷⁵⁸.

Perpetual : France and Italy (except right of retract expires with author), Portugal, Spain (only for paternity and integrity)

PERFORMER :

20 years after end of performance : Spain

Life or 25 years after performance if it is later : Germany

50 years after death : Netherlands (if person designated in will), Portugal (from first day of year following performance)

The other statutes do not specify a particular limit, but generally stipulate that after death, rights are exercised by heirs. This implies that the duration should be the duration afforded for economic rights, which is 50 years since the harmonisation of economic rights by the term Directive.

2. Alienability/waivers

Non transferable between living persons : Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Netherlands, Nordic countries, Spain

Non waivable : Austria, Spain

Transferable between living persons : Ireland, United Kingdom

Global waiver prohibited : Belgium

⁷⁵⁶ If new project is enacted. N.B. 20 years after death for false attribution.

⁷⁵⁷ If heir is designated in will.

⁷⁵⁸ Except for right against false attribution : 20 years after death.

Partial waiver allowed : Belgium, France, Luxembourg, Netherlands, Nordic countries

Waivers possible in certain cases : Greece, United Kingdom (all kinds of waivers almost possible)

Waiver ex ante prohibited : France

Waivers ex ante allowed: Netherlands

Waiver ex post allowed : France, Germany

Writing required : Belgium (?), France, Greece, Netherlands, United Kingdom

If transfer of adaptation right, action possible against modifications violating honour or reputation : Belgium, Italy, Netherlands

Ghost-writer's possibility to reveal his identity : France, Germany, Luxembourg, Netherlands

Collecting society can exercise moral rights : Belgium, Austria (insofar as necessitated by exercise of economic rights), Germany

Employer owns moral rights: Netherlands (?), United Kingdom

B. TYPES OF RIGHTS

1. Right of disclosure

Not expressly stated in Act : Austria, Italy, Nordic countries, Portugal

Does not exist : Luxembourg, Ireland, Netherlands, United Kingdom

Economic publication right : Austria, United Kingdom

Right to decide **whether** and **how** the work is disclosed : Austria (and by whom), France, Germany (and to communicate publicly or describe the content of the work), Greece (and where), Italy, Spain

Right to decide **when** to disclose : Belgium, Italy, Greece

Right not to disclose : Belgium, France, Portugal, Spain

Right of disclosure on modifications of a previously disclosed work : Germany, Netherlands

2. Right of paternity

Right to claim authorship (or to be named, to publish under his name) :

Austria, Belgium, France (to have name and quality respected), Germany, Greece (insofar as possible), Italy, Netherlands, Portugal, Spain, United Kingdom

Right to decide if a designation must be affixed and which : Austria, Germany, Ireland

Right to object to false attributions : Belgium, France (?), Germany, Ireland, Italy, Netherlands, Spain, United Kingdom (and also if work is being falsely represented as being an adaptation of work)

Right to object to publication if author is not named unless it is unreasonable to object:
Netherlands

Right to prevent someone to use same name to publish : Portugal

Right to be named according to the practice : Nordic countries

Right to choose a pseudonym or remain anonymous : Austria, Belgium, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal (only to remain anonymous), Spain, United Kingdom

Rebuttable presumption of authorship : Belgium (only valid towards third parties), France, Germany, Greece, Luxembourg, Portugal

Obligation to mention source : Germany, Ireland

Right to claim authorship even if work was not completed : Italy

Right to request not to be named on uncompleted work completed by second author : Italy

Right to be mentioned on derived works : Italy

Right need to be asserted : United Kingdom

3. Right of integrity

Right to object to distortion, mutilation, modification or other derogatory act **without proof of prejudice** : Belgium, France, Greece

Right to object to distortion, mutilation, modification or other derogatory act **if prejudicial** : Germany, Italy, Belgium (when work is changed of its context), Luxembourg, Netherlands, Nordic countries, Portugal, Spain, United Kingdom

Right to object to any modifications which alter the essence of the work unless unreasonable :
Netherlands

Right to object to destruction : Belgium, Portugal

Right only to object to seriously harming modifications if author allowed modifications : Austria

Author who has accepted modifications cannot prevent them : Italy

Right of respect due even if use is free : Austria, Germany (and even if use is private), Netherlands, Portugal (do not say free but *legal*)

4. Right to modify or adapt

Right to prevent adaptation (...or adapter must respect authors' rights or consent of author is required) : Austria, Belgium, France ('the spirit of the work'), Germany, Greece, Italy, Luxembourg, Netherlands

Right of author to make modifications : Netherlands (in good faith in accordance with rules of social conduct, similar to right of retract), Portugal (if not prejudicial to work - it is a moral right), Spain (moral right also and must respect rights of third parties while modifying)

No right of modification if work is declared of cultural interest : Spain

No independent right of adaptation : Nordic countries

Modifications by others are allowed if author cannot object to them in good faith : Germany

Translations, extracts or changes of key are allowed if work's use requires it : Germany

Right for adapter or translator to be named : Italy, United Kingdom

5. Right to access

Does not exist: Austria, Denmark, Ireland, Italy, Luxembourg, Portugal, Sweden, United Kingdom

Right to access : France, Belgium (only to exercise economic rights and in reasonable measure), Spain (to exercise all rights), Finland

Right to access to reproduce or adapt only if necessary and non prejudicial to owner's interests : Germany, Greece, Finland and Spain ("if causes the least inconvenience to owner")

Indemnification if damages : Spain

Only right to access rare or unique copy : Spain, Finland (only to works of fine art)

No right to remove the work : Spain

6. Right of retract

Right does not exist : Austria, Belgium, Ireland, Luxembourg, Netherlands, Nordic countries, United Kingdom

Right recognised in : France, Germany, Greece, Italy, Portugal, Spain

Right to *modify* the work for moral reasons : France

Right to *put an end to exploitation* of work for moral reasons : France, Germany, Greece (only for literary and scientific works), Italy (*serious* moral reasons), Portugal (*valid* moral reasons), Spain

Obligation to indemnify : France, Germany, Italy, Portugal

Obligation to offer possibility to exploit the work to same contracting party : France

Obligation to offer the contracting party the same or reasonable conditions of exploitation : France, Germany, Greece

-In priority : France, Greece

Right of retract cannot be exercised by authors of pre-existing works : Germany

Obligation to declare expressly the intention of retract : Italy

C. TYPE OF WORKS

1. Literary

Disclosure and paternity :

Right of editor of dictionaries, encyclopaedia and didactic works to have the work completed by another if indicates that work is completed or modified by another person : Portugal

Integrity :

Editor of journal has the right to modify journalist's article if necessitated by nature or purpose of journal : Italy

Authors of texts for movies can exploit their contributions separately if not prejudicial to producer's rights : Italy

Modification :

Right to correct before publication : Portugal, Spain (if indispensable, does not alter work's purpose or nature)

Exceptions to rights of paternity and integrity : United Kingdom

2. Dramatic

Integrity :

Main performers and conductors can be replaced for serious reasons : Italy

No possibility to object to modifications if not prejudicial to structure of work, does not reduce the dramatic or spectacular interest and does not prejudice rehearsal or representation scheduling : Portugal

Specific prohibition to make cuts, changes etc. in theatrical representations : Spain

Right to retract if part of dramatic work is suppressed and meaning is compromised or misrepresented : Portugal

Exceptions to rights of paternity and integrity : United Kingdom

3. Musical

Paternity :

No right to be named for performer if audio program without speech or if customs allows name to be mentioned : Portugal

Integrity :

Right to modify if requested by technical necessities of recording : Italy

Modifications of phonograms allowed if not prejudicial : Portugal

Specific prohibition to make cuts, alterations etc. : Spain

Authors of musical works for movies can exploit their contribution separately if not prejudicial to producer's rights : Italy

Authors of musical collaboration work can exploit their contribution separately if not prejudicial to exploitation of joint work : Luxembourg

Authors of dramatico-musical works, of musical compositions with words, of choreographic works and pantomimes cannot use their contribution in conjunction with other musical works (except in certain cases) : Italy

Exceptions to rights of paternity and integrity : United Kingdom

4. Plastic

Disclosure :

Alienation amounts to disclosure, i.e. author can only object to exhibition prejudicial to honour or reputation : Spain

Paternity :

Adaptations and copies of graphic art works may not be credited in a way that creates the impression that it is the original : Austria

Right to be named on copies of artistic works (e.g. photographs representing works) : United Kingdom

Right of photographer to be named on copies of his works in scientific or didactic works : Italy

No right of paternity for industrial designs : Germany (only if works of applied arts made in more than one exemplary) : United Kingdom

Integrity :

Respect due even if use is private for graphic and plastic art works : Austria

Modifications of photographs are allowed if required by their production mechanism : Germany

Right of integrity for industrial designs : United Kingdom

Right to act against publication or sale of modified work if it is presented as if it had not been modified : Ireland

Right to object to any modification of work of plastic art incorporated in architectural work : Portugal

Rights of integrity and paternity cover public exhibition : United Kingdom

Exceptions to rights of paternity and integrity : United Kingdom

5. Architectural

Paternity :

Right to be identified on building in a manner appropriately visible: United Kingdom

Right to demand that name be omitted on building if owner has modified it : Portugal, United Kingdom

Integrity :

No right to object to detrimental modifications : United Kingdom

No right to object to modifications rendered necessary in the course of realisation or after completion : Italy

Right of modification for author if state decides that building has important artistic character : Italy

Destruction :

No right to object to destruction : Portugal

6. Software

Disclosure :

- General rules apply : France, Germany, Greece, Italy, Netherlands, Spain
- No disclosure right : Belgium (controversy : no right or partial waiver)
- Undisclosed works cannot be attached : Netherlands

Paternity:

- General rules apply : Belgium, France, Germany, Greece, Italy, Netherlands, Spain

- No right for computer programs, computer generated works & type faces : United Kingdom

Integrity :

- General rules : Greece, Italy, Netherlands, Spain

- Right to object to prejudicial acts only : Belgium, France
- No right for computer programs & computer generated works : United Kingdom

All rights alienable and waivable : Belgium

Moral rights belong to employer : Portugal (?)

7. Audio-visual

General :

Audio-visual work is a work of collaboration : Austria, Belgium, France, Netherlands, Portugal, Spain

Audio-visual work is not a work of collaboration : Luxembourg

Moral rights can only exercised when work is completed : Spain

Co-authors can use contribution in another genre : France, Netherlands (if not detrimental to audio-visual work)

Right to use contribution separately if not prejudicial to normal exploitation of audio-visual work : Spain

Disclosure :

Work can only be disclosed after approval of final version by director : Greece

Work can be disclosed when agreement between producer and director : Belgium, France (and possibly with agreement of co-authors)

Work is completed when agreement between author and producer : Portugal, Spain (but director and producer can let authors appreciate if work is complete)

Producer (exclusively) decides when work can be disclosed : Netherlands

Right of director to review final cut before releasing it to distributors : Germany,

If co-author does not want to complete his contribution, he cannot object that it is used : Belgium, France

If co-author does not want to complete his contribution, he cannot object to his replacement : Spain

Paternity :

Co-authors have right to be named : Austria

Right can only be exercised after agreement between producer and director : Belgium

Right to be mentioned at the usual place, with capacity and nature of contribution : Netherlands

Right to require that contribution is shown : Netherlands

Right to object to be named unless unreasonable : Netherlands

Right to be named if uncompleted contribution : Netherlands

Right to be named as producer : Austria

Right of paternity only for directors : United Kingdom

Integrity :

Right can only be exercised after agreement between producer and director : Belgium,

Authorisation of co-authors needed for modifications: Austria, France (and of director and producer and director and possibly co-authors for modifications of last version), Portugal (written consent of co-authors needed)

If movie is modified author can have his name removed : Italy

Right to object only to gross distortions : Germany (during realisation and exploitation)

Right to object to modifications only belong to directors and co-directors : Greece

Right to object to transformations, modifications and translations by producer with authors' consent : Italy

Right for producer to modify work in the extent necessary : Italy, Luxembourg (if 'indispensable' and not prejudicial to honour or reputation)

Right to object to publication of modified work is prejudicial to honour or reputation : Italy

Right of integrity only for directors : United Kingdom

Arbitration procedure if no agreement on modifications between authors and producer: Italy
Presumption to have waived right to object to modifications not prejudicial to honour or reputation : Netherlands

Modifications require the consent of authors who decided its completion : Spain

Master copy can never be destroyed : France, Portugal, Spain

Right to ask for destruction of modified version in extremely serious cases : Italy

BBC can alter works if contrary to good taste or decency (...) : United Kingdom

Retract :

Right cannot be exercised : Germany

8. Collaboration

General :

Authors have moral rights unless otherwise provided : Greece

Each author can use his contribution separately : Austria(*divisibleworks*), France (if not prejudicial to exploitation of the work of collaboration), Spain (if not prejudicial to *normal* exploitation of the work of collaboration), United Kingdom

Each author can act against violations separately (exercise their rights individually): Austria(*indivisibleworks*), Belgium, France, Italy, Luxembourg, Netherlands (unless otherwise stated), Portugal

Authors cannot use their contributions in other works of collaboration : Luxembourg

Disclosure :

All authors must agree to disclose the work/right must be exercised jointly : France, Germany, Italy, Spain

Authors can act against other authors to disclose the work : Belgium, France, Germany (if refusal without good reasons), Italy, Portugal

Authors can act against other authors to have it completed by another person : Belgium

Paternity :

Authors can act against other authors to omit a name : Belgium

If work is disclosed under name of only one author, others are presumed to have assigned rights to author in whose name it is published : Portugal

Right to object to false attribution recognised to co-authors : United Kingdom

Integrity :

Agreement between authors needed for modifications : Austria(*divisible and indivisible works*), Germany, Italy

Authors can act against other authors to modify the work : Portugal

9. Collective

Does not exist : Belgium, Germany

General :

Authors' rights belong to legal person : Luxembourg (exclusively), Portugal, Spain (unless otherwise agreed)

Person who directs work is presumed author, without prejudice to copyright in each work separately : Netherlands

Legal person has power to act against violations of moral rights : France

Authors can act with legal person or separately : France

Authors can exercise moral rights when work is not yet completed : France

Authors can be replaced if do not want to complete contribution : France

Authors can exploit Contributions separately : Greece

If individual contributions can be exploited separately, rules of joint works apply : Portugal

Paternity :

Right to be named according customs (except for contributions in journals or reviews) : Italy

No right : United Kingdom

10. Composite

Does not exist : Germany

General :

Authors of new work must respect moral rights of authors of pre-existing work(s) : Belgium, Portugal

Authors can exploit contributions separately : Greece

Right of author of pre-existing work to exercise moral rights in new work is his work is concerned : Spain

D.PERFORMERS

Right to be named : Austria, Belgium, France, Germany (only for audio-visual works, inconformity with practice), Greece, Italy (only for performers having leading parts in dramatic, literary or musical works), Netherlands, Portugal, Spain

Right to object to inexact attribution : Belgium, Netherlands

Right to object to acts prejudicial to honour or reputation: Belgium, Italy, Netherlands, Spain

Right of respect(full) : France, Greece, Portugal

Right to object to modification if reasonable :Netherlands

Performers' rights cannot interfere with author's rights :France, Greece, Netherlands, Spain, Belgium (right of integrity cannot violate author's rights)

Same protection as authors : Nordic countries except Finland (minimum level as required by EU)

No moral rights : Luxembourg, United Kingdom, Ireland

Existing differences in moral rights protection in National legislation with respect to Common Market

Generally speaking it may be said that the moral rights protection within the European Community ranges from the protectionist French legislation to the UK legislation which provides only a minimum amount of protection for moral rights of authors to mention the two extremes.

The greatest differences in regulation concern mainly the UK legislation and possibly the Irish one, depending on the final form of the new law. The generally low level of moral rights protection in the UK may be summarized to the following features:

- ! the necessity to assert the right of attribution under UK law,
- ! complete waivability of moral rights under UK law,
- ! protection of performers moral prerogatives
- ! lack of protection of moral (and economic) rights in employment relations.

Self-employed persons seemed to encounter problems with respect to safeguarding their rights through-out the European Community, in particular in the field of press and photography.

The fact that the UK law does not protect news journalists gives rise to a potential negative impact with respect to the Common Market. There seems to be a real possibility that journalists in the continental European countries would forbid the use of their material in the UK because of the impossibility to protect their moral rights in the UK. The Swedish Journalists' Union is currently considering such prohibition in their negotiations with the newspaper publishers and the same concerns were brought up also by other Journalists Associations.

However, in spite of the significant differences in regulation between the Member States of the European Community and in particular the difference between the UK law and the regulation in Continental Europe, there seems to be no concrete evidence that this has so far resulted to adversely impact on the Internal Market.

VI. Conclusion : no need for general harmonisation at E.U. level

Some lessons from the comparative study

The comparison of the national laws makes it clear that moral rights for authors are recognised in all countries, even if the level of protection is lower in some countries, for instance in the UK and Ireland.

The situation of performers' moral rights differs more from one country to the other.

Point of view of interested parties

The analysis of the answers to the questionnaire sent to some representative organisations (see list in annexe) indicates that most interested parties are very cautious about any initiative which would be taken in order to harmonise the level of protection of moral rights in Europe.

This attitude seems motivated by the fear that a compromise on the moral right issue, if reached at Community level, would jeopardise the high level of protection already enjoyed in some countries. Indeed, the harmonisation process could end up for instance with the adoption of waivable moral rights.

Different rights holders organisations have pointed out that energy should preferably be devoted to other, more important problems.

No need of general harmonisation at E.U. level

At this point it would thus seem that there is no need to harmonize the moral right protection in the European Union, especially in the case of authors.

No decisive evidence has been found that the existing differences do affect the functioning of the internal market.

However, the Community should play a role at international level by insisting that other countries provide a form of protection of moral rights.

Support for the drafting of codes of practices

Some organisations stressed that collective agreements (for instance in the field of performers' rights) have had a very positive impact. Therefore, we think that the Community should find ways to induce the conclusion, either at national or Community level, of such agreements dealing with the definition of "good practices" in the field of moral rights. These agreements could provide for general guidelines to be followed by all parties.

Probably, the main advantage of this form of regulation of the practices is that specific solutions can be drafted for the different sectors, as important differences exist between the various sectors where authors and performers are working.

Sector specific problems: the press

The current problems, in particular in the sector of press, relate *more to the protection of journalists and status of authorship in employment relations*, not to moral rights protection as such. *Possibility of total waivers with respect to the exercise of moral rights seems to constitute a problem for UK authors and performers.*

For free-lance photographers, and probably also for journalists, the extremely unequal bargaining power vis-à-vis the often transnational media conglomerates makes it in practice impossible for them to safeguard their moral or economic rights. This is a problem for self-employed authors everywhere in the European Community, not only in the UK and Ireland.

However, there is no evidence that any of the above-mentioned problems would affect the circulation of protected works and offering of services within the Common Market. In fact, there is no clear evidence which would support the argument that the UK journalists and authors moral rights would in practice be subject to more infringing practices than the rights of authors and performers in the rest of the European Union.

Annexes

1. Bibliography
2. Professional Organizations contacted and answers received
3. Positions of the National Governments on moral rights
4. Summaries of the legislation and case law (country by country)

Annexe 1. Bibliography

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Annexe 2.

Professional organizations contacted and answers received

Questionnaire has been sent to following organizations:

Pyramide	answer received
UK Association of Journalists	no answer
European Federation of Journalists	answer received
European Federation of Newspaper Publishers	answer received
European Federation of Publishers	answer received
FERA	no answer
AIDAA	answer of SACD
FIAPF	no answer
EBU	no answer
IFPI	answer received
FIA	answer received
FIM	answer received
AEPO	no answer
European Writers' Congress	answer received
European Visual Artists	answer received
GESAC	SPA, SGAE, Hellenic Society for the protection of intellectual property
Eurocinema	no answer

Answers have also been received from

Swedish Association of Journalists, Finnish Association of Journalists, Directors' and Producers' Society DPRS

In addition the following persons have been interviewed

Katri Sipilä, Director, Mechanization Rights, Finnish Composer's International Copyright Bureau

Tom Rivers, Rivers Consultancy

Ahti Vääntänen, legal advisor, Finnish Musician's Union

Kai Nordberg, Chairman, Pyramide-Europe

Annexe 3.

Positions of the National Governments on moral rights

These are the views of officials working for the government of each Member State. Their name is mentioned if they so agreed.

Three questions have been asked to each country's government officials :

- What is the position of the various organisations : do they have problems with moral rights ? do they think moral rights are protective enough or not ? do they want harmonisation or not ?
- In the opinion of the government, do moral rights have an impact on the internal market, in other words do you think they hinder the free circulation of works within the EC ?
- What is the position of your government : should moral rights be harmonised or not ?

AUSTRIA — Opinion of Mr. G. Auer

There are no authors' complaints on moral rights.

There are no cases showing evidence that moral rights are a barrier to the free circulation of works.

It is not possible yet to give an answer to the position of Austria on harmonisation, because the new Minister has not yet given his opinion on authors' rights in general. Austria will have to implement the two new directives (on "droit de suite" and authors' rights in the information society) when it is due, and it might perhaps make additional amendments to the general Copyright Act. However, it is not possible to state if the Austrian government will want to change its moral rights regime.

Mr. Auer can only respond cautiously yes to the third question, because he does not know yet the position of the Minister on a possible harmonisation of moral rights.

BELGIUM

The Belgian government does not receive complaints from the various organisations protecting authors and authors' rights. The lobbies are more active in the framework of the Directive proposal on authors' rights in the information society. These organisations speak very little of moral rights, a fortiori the industries' lobbies.

The priority of the Belgian government is not in authors' rights and a fortiori not in moral rights. There is no intention in modifying the Belgian law to lower or level up the protection of moral rights.

FRANCE

The overall opinion of authors' organisations is that moral rights should not be modified. France has asked that in the Directive proposal on authors' right in the information society, it was specified that the rules relating to the right of distribution and to exhaustion do not violate the moral rights provisions. It seems there are not specific problems in this regard.

There is no conflict between producers and authors of audiovisual works as regards moral rights. The negotiation between contracting parties is generally clear. There is no professional group which is asking to modify moral rights. This is reflected in the negotiations at the WIPO. The overall belief of the government is that moral rights seem to be well respected. The question of moral rights is a question of regulation between contracting partners.

There is a large consensus in France not to touch moral rights and not to lower the protection. Thus it is not the position of the government that France would appreciate the idea of harmonisation moral rights because of the risk of lowering the protection.

GERMANY

There are no complaints from authors.

It is difficult to give an answer, but there is no evidence of moral rights hindering the functioning of the internal market.

In the view of officials, Germany is not really in favour of harmonising moral rights. The German government is not planning to modify its moral rights legislation.

GREECE — Mrs. Kallinikou, Copyright organisation

Moral rights have always been highly protected in Greece. There is a lot of doctrine and case law on the point. Indeed, Greek authors often use their moral rights in courts to have their economic rights respected (for instance use of the right of publication and the right of attribution). There are no lobby to modify moral rights nor any complaint that moral rights are not protected enough in Greece.

Provisions on moral rights do not hinder the functioning of the internal market.

The Greek government has no position on the issue of harmonisation of moral rights. However, in Mrs. Kallinikou's personal opinion, it would better to harmonise them, because it is necessary in the information society.

IRELAND

Not yet known. The answer has not reach us.

ITALY

There are no complaints from authors or author's organisations as regards the national protection of moral rights.

The Italian government is in favour of a harmonisation because some countries have a lower protection than in Italy. The Commission has competence to harmonise but the Italian government reckons that this harmonisation encounters a material difficulty, being the contrasting views of other Member States which are not in favour of harmonising moral rights.

At the level of the national experience, the government is not aware of problems of free circulation of works and they should not be any at the national as well as at the Community level.

LUXEMBOURG — Official position of Luxembourg : Mr. Allegrazza, Conseiller du Gouvernement Première classe, Department of Economy

Authors have no complaints on the legal situation concerning moral rights in the Luxembourg.

There is no problem of barriers to the free circulation of works in Mr. Allegrazza's opinion. If they were,

authors and associations would have mentioned it to the government. Everything has been said in Berne.

The Commission should not harmonise. First it is not in its competences but in the competences of the Member states at the national level. Second, as there is no problem of barriers to the free circulation of works, the Commission cannot harmonise.

There is a bill introduced by the government to allow the free alienation of moral rights. The Council of state's opinion is awaited on the subject. But the government fears that it will be negative, as the Council is influenced by French tradition on the subject. However, authors do not lobby against the new project. This bill is discussed on February 17 in the House. It is mandatory to take the Council of state opinion but it is not mandatory to follow it. However, if the House votes against the Council's opinion, the Council is obliged to approve a second vote. Thus the House would have to revote a modified bill within 3 months. This procedure is feared because of the first negative opinion given by the Council.

THE NETHERLANDS — Mr. E. Arkenbout

There is no clear position from the various organisations on the issue of moral rights. Most if not all moral rights problems are dealt with in collective contracts (such as those between journalists and publishers). There are numerous other issues that deserve the attention of the legislator, especially the EC legislator, such as contract law, collective management and dispute settlement. Preferably the European Commission should dedicate all of its time and attention to these issues.

There are no indications yet that the free circulation of goods and services poses any problems related to moral rights. The Dutch government has not heard of serious problems in this respect. As far as the functioning of the internal market is concerned, it is hard to believe that such divergence may constitute an obstacle.

The position of the Netherlands, although not official, is that there is no need to harmonise moral rights. The Dutch government has other priorities than moral rights. There are no serious problems concerning moral rights, as least not to the extent that courts cannot handle. There is also no justification for any harmonisation measures since there can be no relevance to the internal market. Mr. Arkenbout does not think that the Commission has any competence in this regard. In his opinion, such a proposal would be meaningless and a time-consuming discussion. If any discussion on moral rights is started, the negative consequences and impact of invoking such rights should be taken into consideration.

NORDIC COUNTRIES

It is the position of the Nordic countries not to harmonise the moral rights. They are also not planning to revise their law in respect of moral rights.

The point of view of the Nordic governments on the eventual need for harmonizing moral rights protection within the European Community may be summarized in the words of **Jukka Liedes (special governmental advisor, Finland)** :

"Never during my 25 years in copyright related work no one has come to me claiming that moral rights protection would be somehow insufficient. Moreover, at the European level, there is absolutely no evidence that the existing differences between the moral rights provisions in national laws of Members States would have, in any way, affected the internal market. Neither the Finnish government nor other Nordic governments would support any attempts of harmonising moral rights legislation in the European Union."

PORTUGAL

Portugal has no project to modify its Copyright Legislation nor moral rights in particular. Moral rights are generally well respected in Portugal; there are no complaints from authors nor any associations (authors' or producers) to change moral rights legislation.

Officials are not aware of any problems of free circulation of works caused by moral rights.

Portuguese officials do not see a need to harmonise moral rights because there are no problems concerning moral rights in Portugal.

SPAIN

This is not the official answer but views of officials of the government. The official answer should reach us next week (March 6-10).

There are no complaints of authors on the moral rights regime in Spain. The Spanish copyright Act is rather protective. There are some complaints (however not officially received by the government) in the way the courts apply moral rights legislation but not about the legislation itself (for instance, the

delay of courts to issue their judgements). Moral rights are not a controverted question.

The second question will be answered officially.

The question of harmonisation is not important. Officials have not heard from an intention or a desire from the government to harmonise moral rights.

Official answer of the Spanish government from Mr. Borja Adsuara Varela (Chef de cabinet du Secrétaire de la Culture Espagnole).

Substantially, the official answer is as follows :

1. The government has not received demands from authors to modify the Spanish legislation concerning moral rights.
2. The differences of legislation between Member states do not seem to create serious problems for the common market.
3. The harmonisation of moral rights is not a priority, even if it remains an important question. Questions relating to collective management of IPR has the government's preference at the European level.

For the moment, the UK looks at performers' moral rights implementation of WPPT treaty. The UK is not planning to change the authors' moral rights.

Diverse organisations have diverse views on moral rights : either they are opposed to them or they defend them. However, no one opposes them in their entirety.

It seems that authors are not entirely happy the way it works with authors' moral rights in the UK. There is however no evidence that there are problems of authors' moral rights in practice. In practice, even if there were no moral rights at all, one of the officials thinks that they would be respected anyways. She gives the example of the right of attribution : authors are always cited in the credits of movies.

Nobody ever mentioned anything on the possibility of moral rights having effect on the internal market. Officials are not aware that there are any problems or obstacles to the free circulation of works in the EC.

Moral rights should not be harmonised because they have no economic impact nor dimension, because by their very nature they are only "moral". It would thus not be appropriate to harmonise moral rights and it would be hard to justify a need for harmonising them. On top of that, it is not the desire of the UK, in one of the official's opinion, to harmonise moral rights.

CONCLUSION

Except the United Kingdom which has heard of complaints with the British moral rights system (however no *official* complaint has ever been made to the government), no government has received any requests or complaints of authors and authors' organisations to change moral rights. There is no lobbying to change moral rights.

With no exception, no government believes that moral rights have an impact on the internal market and more specifically on the free circulation of works inside the EC.

Except the Italian government and Mrs. Kallinikou personally (Greece) who are in favour of harmonisation because the protection of moral rights is much lower in other Member states than in theirs, no governments sees a need for harmonising moral rights.

Annexe 4.

Summaries of the legislation and case law (country by country)

These are the views of officials working for the government of each Member State. Their name is mentioned if they so agreed.

AUSTRIA

Legislation is monistic. No rights of disclosure, retract nor access. Right of attribution is simple (claim authorship, remain anonymous or pseudonymous). Right of integrity is not very detailed either. Moral rights are not transferable nor waivable. There seems to be no exception to this rule.

From the scarce Austrian case law, it seems that generally courts recognise violations quite frequently and it does not appear that courts make a balance of interests. Therefore, it seems to be rather protective of authors. When one analyses the case law in the light of specific problems of free circulation of works, the rather protective tendency could in a speculative manner have an impact on the internal market. To give an example based on the cases above mentioned, if a picture was changed from oblong format to upright format in Germany and was legal there, if the work is imported in Austria, the author could easily get a court ruling blocking the entry of such modified works in Austria. However, this does not prevent the original work from circulating freely in the Community.

BELGIUM

Legislation is dualistic. The right of disclosure is very detailed and very protective. The right of paternity is simple (right to claim authorship, to object to false attribution as and remain anonymous or pseudonymous). The right of integrity is absolute : no proof of prejudice is needed to act against violations. There is a right to access but not a right to retract. Moral rights are not transferable but partial waivers are allowed.

Case law relating to attribution is generally protective of authors, except for architectural works. As regards the right of integrity, courts are also generous for authors, as the legislation does not require the proof of a prejudice. To take the case of the comics book confusing the consumers as to the attribution, it seems that in similar cases, in the event the confusing work was produced outside Belgium and was imported in Belgium, courts would block its entry in Belgium. In like manner, if an article was legally reproduced without the footnotes in another country (or the Belgian author could not object to it in that country), the Belgian author could nevertheless bar its importation in Belgium. However the cases discussed seem to be exclusively of a purely national nature.

FRANCE

Legislation is dualistic. The right of disclosure is quite detailed and is absolute. The right of attribution is described in similar terms as in Belgium. The right of integrity is absolute. The right of retract is very detailed and the law stipulates very stringent obligations for its exercise. There is a right to access. Moral rights are non transferable and partial waivers are allowed under very strict conditions.

Case law is extensive in France. The right of disclosure being absolute, courts are very protective of authors. The importation of a work which would not have been disclosed or would have been disclosed on a medium but not on another would be easily be blocked in France. As to the attribution right, French courts are stricter for architectural works than Belgian for instance but the right of attribution can be limited for works of applied arts. There is much to say of the right of integrity cases. First of all, destruction is prohibited. Secondly, case law is very protective of authors in general. For sculptures and architectural works, courts are more willing to make a balance of interests. Therefore, an author could easily block the importation of a modified work except maybe for sculptures and architectural works (which are anyway less easy to transport...).

As to the right of retract, it is interesting to note that there is no decision in favour of the author. It seems in general, that authors misuse their right of retract. Last but not least, several cases have demonstrated that a foreign contract allowing alienability of moral rights will have no effect in France. This question (which relates more to the applicability of private international law rules) can have a major impact on the internal market.

GERMANY

Legislation is monistic. The right of disclosure is stated in quite simple terms. The right of attribution is very similar to Belgium legislation. The author only has the right to object to modifications which are prejudicial. Like in France, the exercise of the right of retract is subject to many strict obligations. There is a right to access the work. Moral rights are not transferable but waivers are allowed under certain conditions.

Case law in general, is much less protective than in France for instance. German courts use the balance of rights for almost each right. The best cases illustrating this balance of interests are architectural works cases (especially for the attribution and integrity rights of architects). Concerning the right of attribution, German courts are more protective for other types of works and find for authors in most cases. As regards the right of integrity, case law is not very favourable to authors. For instance, destruction is not considered as a mutilation. The use of music for an advert is not a violation of the integrity right. These few examples show the very contrasting differences between

France and Germany in this regard. These differences can be analysed in light of the potential effects on the internal market. Certain works legally modified in Germany could not be sold in France. Conversely, an author could not bar the importation of his modified work in Germany if German law applies and the court decides there is no violation of the author's moral rights.

GREECE

Legislation seems to be dualistic in view of the wording of art. 1. The right of disclosure is stated in very simple terms. The right of attribution seems less protective, as it gives only the right to be named "insofar as possible". The right of integrity is like in France stated in very general terms and a prejudice must not be invoked. The right of retract only applies to scientific and literary works. There is a right to access. Alienability is prohibited and waivers are allowed under certain conditions.

Greek case law does not reveal any effect on the internal market. Authors generally use their moral rights to have their economic rights respected. One thing to note is that even if the statute provides for an absolute right of integrity, in one case concerning an architectural work, the court used the balance of interest and found against the architect.

IRELAND

Moral rights are not recognised in Ireland and thus there is no case law. However a new statute should be voted soon which resembles very closely the British CDPA.

ITALY

Legislation is dualistic in Italy. The right of disclosure is not recognised but most commentators agree that it is implicitly comprised in the legislation. The right of attribution is stated in similar terms as the previously discussed countries with additionally, specific rules applying to different types of works. The right of respect is not absolute : the author only has the right to object to prejudicial modifications. The right of retract is granted under strict conditions and there is no right of access. Alienability is prohibited but waivers of rights of attribution and respect are possible and terminable at will.

There is a certain amount of case law in Italy, all of which has not been accessible. The cases show no effects potential or existent on the internal market. The courts have largely interpreted the notions of honour and reputation in the case of the right of respect. In the sector of audio-visual works they even have been as far as not requiring a showing of violation to either one of these notions.

LUXEMBOURG

Legislation is not clearly dualistic or monistic. There is no moral right of disclosure. The right of attribution is stated in simple terms and in similar way than other Member States. The exercise of the right of respect is subject to prejudicial acts. There are no rights to retract nor access the work. Inalienability is the rule but waivers are possible. As far as we know, there is no case law on moral rights in Luxembourg.

THE NETHERLANDS

Legislation is clearly dualistic in the Netherlands. There is no right of disclosure but there is an equivalent in economic rights. The right of attribution is completed by a right to object to false attributions. The right of respect is to object in two situations : when it is reasonable and when it violates the reputation or honour of the author. There is no right to retract but the right of modification has the same effects in practice. There is no right to access the work. NO waivers nor alienations are permitted although waivers of rights of attribution and integrity are technically possible (except a waiver of the right to object to modifications violating honour or reputation).

Case law is rather extensive in the Netherlands. Examples from right of respect cases show that potentially effects on the internal market could be possible (see in particular the Beckett case compared with opposite decision in the same case in France). In the field of plastic and visual arts, courts are rather protective of authors while in architectural cases, courts draw a balance between authors' and owners' interests.

THE NORDIC COUNTRIES

Legislation is dualistic. The right of disclosure does not exist but can be said to be included in the author's exclusive right to make the work available to the public. The name of the author must be mentioned according to the usual practice in the sector. The author has the right to object to detrimental treatment of his work. There is no right of retract. The right of access exists in Finland but not in Denmark nor Sweden. Transfers are not allowed but specific and limited waivers are nonetheless possible.

There is not much case law in the Nordic countries. It seems that facts situations in these cases have not had an impact on the internal market.

PORTUGAL

Legislation seems dualistic but there is no clear indication in the Act. No right of disclosure is directly recognised; the right of attribution is stated in simple terms with specific additional rules. The right of respect can be exercised if violations are prejudicial and the Act stipulates specific rules for certain types of works (authors of functional works and advertisements have a reduced right of respect). The right of retract is allowed under strict conditions and no access right is recognised. Inalienability and waivers are prohibited. Waivers can be allowed in certain cases, there are terminable at will.

As far as we have been researching, we are only aware of one case in Portugal, dealing with the integrity right of a singer. The fact that the "medley CD" could be exported and be admitted in other countries because the protection of the right of respect is lower, could potentially have an effect on the circulation of the work in the Community. It would be forbidden to sell it in certain countries while allowed in others. However, again and as stated above concerning other countries' case law, this is only speculative and there is no evidence of any problems in this respect.

SPAIN

There is a controversy as to the dualistic or monistic nature of moral rights in Spain. The right of disclosure comprises both positive and negative prerogatives. The right of attribution is stated in generally very similar terms as stated in other European laws. The prejudice is needed to object to violation of the right of respect. There are more detailed rules for specific sectors (music, theatre) as regards the right of integrity. The author has a right to retract the work under certain conditions. The access right is rather large. Transfer is not allowed under Spanish law and rights cannot absolutely not be waived.

From what we are aware of, case law is not abundant in Spain and it is thus very difficult to draw any conclusions from the very little amount of cases we have at hand. Nothing on a potential impact on the internal market can be said on their basis.

UNITED KINGDOM

Legislation is dualistic. There is no right of disclosure but an economic right of publication. The right of attribution consists of two prerogatives : the right to be identified and the right to oppose false attributions. The right to be identified necessitates an assertion in writing. In addition, there are numerous cases in which the right will not apply. The right of integrity is the right to object to any derogatory treatment detrimental to the author's honour or reputation. These terms "derogatory treatment" are to be interpreted very strictly. The right of integrity is equally packed full of exceptions.

All moral rights are fully transferable under British law. In addition large waivers are permitted.

Case law arising after the 1988 CDPA is not abundant. The only case which could potentially have an impact on the free circulation of works within the Union is the George Michael case. However, in such a speculative situation, it seems reasonable to believe on the basis of the several member states case law analysed in this study that no or very few courts would have judged differently.