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Moral rights in the 21st century

The changing role of the moral rights in an era of information overload

QUESTIONNAIRE

REPORT BELGIUM

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Moral Rights in the 21st Century – The changing role of the moral rights in an era of information overload

National Report for Belgium

By Alexis Hallemans

1. Please describe the origin, the objectives and the underlying philosophy of the moral rights in your country.

The **origin** of moral rights in Belgium comes from France and more particularly from French scholar literature. The first Copyright Act of 1886 in Belgium did not contain anything regarding moral rights. However in the preparative work of this Act, reference was made to moral rights, although the concept as such was not at all clearly defined[1]. In 1934 the Belgian Parliament voted the ratification Act for the Convention of Berne in which Article 6bis determined the right to claim authorship and the integrity right. However there was no stipulation determining the direct application in Belgium of the Convention of Berne until 1953, when Belgium approved the 1948 Version of the Convention of Berne, mentioning the direct application. Belgium had to wait the Copyright Act of 1994 to have for the first time an explicit legal provision covering the protection of moral rights. It is still this Act that is in force today.

The **underlying philosophy** of the existence of moral rights in Belgium is that these rights constitute a particular link between on the one side the work and on the other side the person of the author[2]. Moral rights are the expression of the special bond between the work and the author of this work, giving him the right and the possibility to control the personal character of his work. He can exercise these rights as he sees fit (limited by some general rules as we will see later) and in function of the way he conceives his work. However this does not mean that moral rights are personality rights. Moral rights protect the work and not the author, as for personality rights, they protect persons as such.

Finally the **objectives** of the moral rights are in the first place private, as they protect the work as such. But moral rights also serve a public purpose, namely they ascertain that a work is authentic and available in its original form[3].

[1] F. VAN ISACKER, « Lex ferenda na honderd jaar auteurswet », in Jan CORBET (ed.), *Honderd Jaar Auteurswet*, Den Haag, Kluwer, 1986, p. 20-21

[2] F. DE VISSCHER en B. MICHAUX, *Précis du droit d'auteur*, Brussels, Bruylant, p. 63

[3] M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 102

2. What do the moral rights consist of in your country:
- right of disclosure (divulgation)
- right to claim authorship (paternity right)
- right to respect and integrity
- right to repent or to withdraw
- other elements: …?

In Belgium there are three moral rights, as stated in Article 1, §2 of the Belgian Copyright Act:

- First of all there is the **right of disclosure (divulgation).**

  This moral right consists in the right for the author to decide whether or not he will divulge or disclose his copyright protected work. The decision whether or not to divulge or disclose the work is irrevocable and can only be made once and only by the author (exhaustion theory). An interesting application of this right in the Belgian Copyright Act is that undisclosed or not divulged works cannot be seized. This impossibility to seize relates as well to the work as such as to the copyrights related to the work.

- The second moral right in Belgium is the **right to claim authorship**.

  This right implies the following concrete applications[4]: the possibility (i) to claim authorship on the work at any given moment, (ii) to determine how a name is mentioned on the work, (iii) to claim that another name or pseudonym of the author, or even that no name is to be mentioned on the work (this last part is not mentioned in Article 6bis of the Convention of Berne, but is mentioned in Article 1, §2 paragraph 5 of the Belgian Copyright Act), (iv) to prohibit third parties to use their names on the work, (v) to claim that the work is put on the market under the name of a third person, if the latter agrees of course, (vi) to oppose to the use of his name on a work of which he is not the author[5] and (vii) to oppose to the misspelling of the name chosen or to the use of a wrong name.

- The third and the last moral right existing in Belgian law, is the right to **respect and integrity**.

  The Belgian Copyright Act states that the author is entitled to respect and integrity for his work which entitles him to oppose to any adaptation or modification of the work. The terminology *"every modification"* is rather extensive. However this does not mean that the author, deciding not to enforce this moral right, has allowed the adaptation or modification of his work. He can always exercise this right as he sees fit. In Belgian scholar literature, two aspects of this moral right are emphasized. First the author must prove that he suffered damages due to an adaptation or modification of his/her work (this is the core of the moral right to respect and integrity).

[4] E. CORNU, « België – De afzonderlijke morele rechten », in E. CORNU (ed.) *Bande dessinée et droit d'auteur - Stripverhalen en auteursrecht*, Larcier, p. 25 - 29

[5] A minority of the scholar literature states that in such a case one cannot base himself on the right to claim authorship, because he/she is indeed not the author: RICKETSON, *International Copyright and Neighbouring Rights*, Oxford, OUP, 2006, no 10.02, p. 587, note 40. The majority is of the opposite opinion: M.C. JANSSENS, « Morele rechten : een algemeen overzicht met bijzondere aandacht voor de auteurs van stripverhalen », in E. CORNU, *Bande dessinée et droit d'auteur – Stripverhalen en auteursrecht*, Larcier, Brussels, 2009, p. 30 ; F. DE VISSCHER en B. MICHAUX, *Précis du droit d'auteur*, Brussels, Bruylant, nr. 198.

Furthermore it is also possible to invoke this right, if no prejudice can be proven[6]. This was illustrated in a recent judgment of the Belgian Supreme Court ("Cour de Cassation"/"Hof van Cassatie"), where the Court confirmed that even the immaterial modification or adaptation of the work, such as f.i. the use of the work in an environment that modifies the spirit of the work, also falls under the right of integrity and respect[7].

3. Can the moral rights be transferred or waived in your country?

Article 1, paragraph 2, the first sentence of the Belgian Copyright Act determines that moral rights are not transferrable. According to article 3 of this Act moral rights are not transferrable or cannot be waived. This general statement is somewhat nuanced by the second sentence of Article 1, paragraph 2of the Belgian Copyright Act stating that the *global renunciation* of the *future exercise* of moral rights is void. Based on an *a contrario* argumentation, Scholars in Belgium generally defend that the *concrete renunciation* in *a particular case* should therefore be possible and only a general and global waiver or renunciation for the future is not allowed[8]. As a consequence, the general renunciation of moral rights stipulated in a contract is void, but, at a given moment, the author is entitled not to exercise his moral rights in a specific case. This specific renunciation can even be provided in a contract.

With regard to the transferability of the right of divulgation, it must be noted that according to Belgian law it is impossible for the author to commit himself to *never* divulge his work. In the same sense the author may not authorize, already before its creation, third parties to divulge the work after its creation[9].

The prohibition to transfer the right to claim authorship implies that the author cannot unilaterally oblige himself to never claim the authorship. On the other hand the author is entitled to not exercise his right to claim authorship in a specific case and even to authorize a third party to use his name or a pseudonym on the work. In this last case, the author is not entitled anymore to require that his name is mentioned on the work, but he can still make his authorship known in another way.

Concerning the transferability of the right of respect and integrity, the last paragraph of article 2 § 2 of the Belgian Copyright Act states that even if the author has expressly relinquished his exercise of the right of integrity and respect, he remains entitled to oppose to any distortion, mutilation or other modification and even to any action in relation to the work which would be prejudicial to his honor or reputation[10]. This stipulation has as a consequence that for these modifications, not only no global renunciation can be done, but even the specific renunciation of the exercise of this moral right of respect and integrity will be void. Therefore an author can e.g. never convene that his work can be modified in a way that it would be mutilated.

In scholarship, two opinions are defended regarding the validity conditions of such a specific renunciation to exercise a moral right. The first states that although the renunciation must be certain,

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[6] M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 120
[7] Cass. 8 May 2008, A&M 2009, p. 102, note F. GOTZEN
[8] M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 105
[9] F. DE VISSCHER en B. MICHAUX, Précis du droit d'auteur, Brussels, Bruylant, p. 160
[10] F. DE VISSCHER en B. MICHAUX, Précis du droit d'auteur, Brussels, Bruylant, p. 160

it can be done orally and no specific formal validity conditions must be met[11]. The other opinion defends that the very strict conditions for transferring copyrights, as mentioned in Article 3 of the Belgian Copyright Act must be met, a.o. the requirement that the renunciation must be done in writing[12]. In every case, the renunciation must be certain and undisputable, as copyrights must be interpreted in favor of the author and acts of transfer of copyrights must be restrictively interpreted according to Article 3 of the Copyright Act.

> *4. Which is the term of protection of the moral rights in your country? Is it identical to the term of protection of the economic rights? Can the moral rights be exercised after the death of the author and by whom? Are works in the public domain still somehow protected under moral rights?*

The term is indeed identical to the term of protection of the economic rights, i.e. 70 years after the death of the author. This term is not mentioned in the Copyright Act in Belgium for moral rights, but merely for economic rights. Scholars deduct this term from article 7, §2 of the Belgian Copyright Act[13].

The heirs or legal successors of the author can exercise his/her moral rights. In case of dispute between the different heirs, the Copyright Act in Belgium provides in its Article 7, §2 and 3 that the matter can be decided before courts.

As moral rights concern the personal link between the author and his/her work, these rights are not transferred to its heirs or legal successors, as they did not create the work. Therefore the heirs or legal successors do not become owners of the moral rights, but are merely entitled to exercise the moral rights of the author after his/her death. It is defended in scholar literature and case law, that this exercise should be strictly delimited by the respect of the exercise of the moral rights by the author during his live[14].

But also after the term of 70 years, when the works are in the public domain, a somewhat similar protection as that of the moral rights could exist in our opinion. We think mainly about a contractual protection, as parties are able to foresee in a contract a similar protection to the one related to moral rights protection. Furthermore, also Belgian common civil law will still apply. In Belgium Article 1382 Civil Code states that the one causing damage due to its fault can be condemned to pay indemnities. The mutilation of the work, or the false claim of authorship f.i. could cause damage to the heirs of the author and they could claim for material and moral indemnities. We did not find case law on this.

[11] A. BERENBOOM, *Le nouveau droit d'auteur*, Larcier, Bruxelles, 2005, p. 192

[12] M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 107; F. BRISON and others, « De Nieuwe Auteurswet », *R.W.* 1995, p. 528 ; A. STROWEL, « Le régime des œuvres audiovisuelles dans la loi relative au droit d'auteur », *L'Ingénieur-Conseil,* 1995, p. 328

[13] M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 103

[14] Courty of Appeal Liège, 13 January 2003, *A&M* 2003, p. 213, note Bernard REMICHE; M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 105

5. Do other types of rights (such as “personality rights”, “civil rights”, “publicity rights”, “portrait rights” or other, depending on the jurisdiction) complement the protection of the moral rights in copyright?

In principle the protection of moral rights can be complemented by any other legal protection in Belgium, as long as the legal conditions for that protection are fulfilled.

As described in the answer to question 4, **Article 1382 Civil Code** can complement the moral rights protection. According to this Article indemnities can be claimed for any fault committed. The fault can be (i) the violation of a legal obligation or (ii) the violation of the general due diligence obligation, meaning an act that a reasonable and cautious person in the same circumstances would not have committed. The fault must have caused the damages suffered and damages must be proven.

Also the **unfair trade practices** protection can complement moral rights. These rules are based on the Unfair Trade Practices Directive nr. 2005/29 of 11 May 2005, which is implemented in the Belgian Unfair Trade Practices and Consumer Protection Act of 6 April 2010 and now in Book VI of the new Belgian Code of economic law. These rules a.o. protect misleading and confusing commercial practices, which f.i. could consist in using its own name in relation with a copyright protected work in such a manner that a third person could wrongly think that it is the name of the author. Also comparative publicity is forbidden if the 8 strict and cumulative legal conditions are not met. In general any undiligent act causing damages to consumers or enterprises can be forbidden based on this Act.

Moral rights are also complemented by **personality and portrait rights**. The right to use or mention his name and/or his picture exclusively belongs to the author, meaning that he can invoke these rights to protect and prohibit the use of its name or portrait by a third party. These rights are however somewhat limited for public persons, of which the name and/or portrait may be used to a certain extent even without their authorization.

6. Does the legislation or case law in your country provide sanctions or other mitigating mechanisms for the abusive exercise of the moral rights, in particular by the author and/or his/her heirs?

Indeed. In Belgium the exercise of moral rights is limited by (i) the theory that everyone must act in good faith as a “**bon père de famille”/”goed huisvader**” according to Article 1382 Civil Code[15], (ii) the abuse of rights and (iii) the principle that every contract, also contracts dealing with moral rights, must be executed in good faith according to Article 1134, par. 3 Civil Code.

According to the first theory, moral rights must be exercised in a normal and diligent way, as any other author would have done in the same given circumstances. If the specific exercise of moral rights exceeds the limits of such diligent use, the author will not have acted as a “bon père de famille”/”goed huisvader” and will have made a fault. He or she will be liable for the damages caused by his acts.

According to the theory of the **abuse of rights**, moral rights may not be exercised in such a manner that it would cause harm to a third person exceeding the advantage for the holder of the moral

[15] F. DE VISSCHER en B. MICHAUX, Précis du droit d’auteur, Brussels, Bruylant p. 160

rights[16]. The sanction of an abuse of right can be a prohibition to enforce the moral right or the payment of indemnities. Scholar literature generally emphasizes that if the author exercises his moral rights so as to try to obtain a financial advantage, this could be seen as an abuse of rights, as the finality of moral rights is not financial[17].

Another limitation to the free exercise of moral rights in Belgium is the principle that every contract must be executed in **good faith,** which is a specific application of the abuse of rights doctrine. In the answer to the following question, we will refer to several decisions where the principle of abuse of rights and/or the execution of contracts in good faith was applied.

7. How would a conflict between the exercise of a moral right and of any other proprietary right, such as the right to "material" property on the "carrier" of the work, be solved in your country? (e.g. mention of the name of the author on a building, modification of a utilitarian work, demolition of an artistic work, graffiti on a building,…)

Article 544 Belgian Civil Code protects the right of property. This protection can only be limited by law. The Belgian Copyright Act constitutes such a legal act. In order to answer this question, we have to make a distinction between the three moral rights in Belgium and their respective specific relation to property rights.

- Conflicts between property rights and the **moral right of respect and integrity of the work**

The Belgian Copyright Act does not contain a provision dealing with these conflicts, but in case law and scholarship literature, we find two theories regarding such conflicts. According to a first opinion, the author cannot rely on the moral rights in order to oppose a modification or even a destruction of the work. This a minority opinion[18]. The second opinion insists on the balance between the two rights, based on a case by case assessment. The concrete circumstances of the exercise of both rights will be decisive to determine which right prevails[19]. This opinion is predominant in Belgium. Some interesting examples in case law and literature exist in this respect. If modifications of a building are necessary for technical reasons or because of public security or health or even for hygienic reasons[20], the moral rights of the author will normally not prevail[21]. But also less "important" elements, such as commercial or economic reasons, can have as a consequence that the moral rights of the author may not be enforced[22]. It is also possible that the exercise of moral rights is reduced by the court to an indemnity

[16] Cass. 20 October 2006, *RW* 2008-2009, p. 1661

[17] F. DE VISSCHER en B. MICHAUX, Précis du droit d'auteur, Brussels, Bruylant, p. 63, 149 and 159; F. GOTZEN, "Badende nimfen, morele rechten en voorzichtige rechters", *A&M* 2001, p. 365; A. PUTTEMANS, "Les auteurs sont-ils responsables de leurs actes?", Journées du droit d'auteur, Brussels, 1989, p. 312; J. CORBET en A. STROWEL, "Belgium", in International Copyright Law, l.c. 1996, BEL-43.

[18] B. VAN BRABANT, « Les conflits susceptibles de survenir entre l'auteur d'une œuvre et le propriétaire du support », *Ing.-Cons* 2004, p. 101

[19] Court of Appeal Liège, 4 December 2000, not published; Brussels, 23 February 2001, J.T., 2002, p. 171; Court of Appeal Brussels, 21 March 2003*, J.T.,* 2003, p. 512; *A&M*, 2003, p. 366., note B. VINCOTTE, « Conflit entre droit d'auteur et droit de propriété »

[20] Court of Appeal Brussels, 23 February 2001, *A&M*, 2002, p. 515

[21] Court of Appeal Brussels, 21 March 2003*, J.T.,* 2003, p. 512

[22] B. VAN BRABANT, « Les conflits susceptibles de survenir entre l'auteur d'une œuvre et le propriétaire du support », *Ing.-Cons* 2004, p. 113

for violation of the moral rights, while not prohibiting the modification as such. In the scrutiny to be done, the following factors could play a role in case law : the characteristics of the work; the nature and the impact of the modifications of the work, that must be proportionate; the existence of contractual stipulations and the notification of the author[23].

- Conflicts between property rights and the **moral right to claim authorship**

The Belgian Supreme Court and the majority of scholars are of the opinion that the moral right to claim authorship can prevail over the proprietary right, if the exercise of the moral right does not constitute an abuse of right or an execution in bad faith of a contract[24]. This principle was long contested as an old Supreme Court decision upheld that the proprietary right prevailed over the moral right of the architect to claim that his name was to be mentioned on a building[25]. This decision had been heavily criticized[26].

- Conflicts between property rights and the **moral right to divulge**

In Belgium very few literature and case law exists regarding this question. One scholar considers that an undisclosed work cannot be the object of a property right, as the work would be out of the commerce[27].

8. How would a conflict between the exercise of a moral right and the exercise of the right to freedom of expression or other fundamental rights be solved in your country?

As fundamental rights are in the hierarchy of legal norms higher than moral rights, the non-abusive exercise of fundamental rights will normally prevail over the moral rights. According to the European Treaty on Human Rights, fundamental rights such as the freedom of expression in Article 10 of the Treaty, can be restricted and limited if the following three conditions are met: the limitation must be (i) provided for in an legal act, (ii) necessary in a democratic society and (iii) proportionate to the legal purposes it serves.

An interesting example of the conflict between fundamental rights and moral rights is found in Belgian case law. The Court of Appeal of Ghent decided that the personality right of a tattooed person to show his tattoos in public and to be photographed prevails over the moral (and economic) rights of the author of the tattoos[28]. Also the right to move freely, being part of the personality rights, prevails over the author rights. The Court decided that the author of the tattoos “does not dispose any more” of his moral rights because of the fact that his work is “carried” on a human body. Therefore the author of the tattoo cannot claim the authorship, nor the right to divulge his work. According to the Court, the

[23] B. VAN BRABANT, « Les conflits susceptibles de survenir entre l’auteur d’une œuvre et le propriétaire du support », Ing.-Cons 2004, p. 108-119
[24] Cass., 22 May 1980, Dali vs. Forani, as referred to in B. VAN BRABANT, « Les conflits susceptibles de survenir entre l’auteur d’une œuvre et le propriétaire du support », Ing.-Cons 2004, p. 129
[25] Cass., 16 January 1941, Pas. 1941, I, p. 11
[26] F. DE VISSCHER en B. MICHAUX, Précis du droit d’auteur, Brussels, Bruylant, no 195 ; F. BRISON, «Architectuur : de assepoester van het auteursrecht », *R.W.* 1991 – 1992, p. 318-319
[27] B. VAN BRABANT, « Les conflits susceptibles de survenir entre l’auteur d’une œuvre et le propriétaire du support », Ing.-Cons 2004, p. 121
[28] Court of Appeal Ghent, 5 January 2009, *A&M* 2009, p. 413

moral right to prohibit any modification of the work cannot be exercised by the author of the tattoo either. However the Court does not precise the legal basis of its reasoning, as it merely states that the author “lost” his rights. In our opinion it had to examine if the use of the moral rights in this case complied with the three conditions following which fundamental freedoms can be restricted. Furthermore it was decided in this case that the author of the tattoos is not entitled to reproduce or to claim authorship via the use of a picture of the tattooed body, as also the portrait rights of the tattooed person prevail over the reproduction right and the right to claim authorship by the author. Therefore the author could not use a picture of the tattoos he created for publicity, if on this picture the tattooed person is identifiable (except if this person consented to such use of course).

As to the question how to solve a conflict between these rights, in literature the following interesting opinion was defended: If moral rights were to be qualified as proprietary rights, which could be defended based on the first Protocol of the European Treaty on Human Rights, they could be qualified as human rights as such. For conflicts between two human rights, a balance must be found in consideration of the concrete circumstances and use that is made of these rights[29]. In such case, the same criterion to solve such conflicts as mentioned under question 7 could be helpful.

9. How do authors exercise their moral rights in practice? Do they consider this a matter of importance? How do they want to be acknowledged (which modalities exist for the exercise of the rights of authorship and integrity)? How do they impose respect of their moral rights when they are faced with derivative works? Do licenses (in particular via creative commons) commonly provide a prohibition to create derivative works? Are there in your country model contracts per sector (such as the literary, audiovisual, musical, graphic arts or artistic sectors) that are made available by professional organisations or by collective management organisations and that contain clauses regarding the moral rights? If so, which ones?

In Belgium, the right on integrity and respect is the moral right that is claimed the most by authors[30]. A long list of case law decisions exists concerning architects claiming moral rights, but also authors of cartoons, a famous art in Belgium, increasingly claim their right on integrity and respect[31]. In most of these cases the authors have won the case and the defense arguments of the opposite parties, mainly based on the exception of the parody was not followed by the courts[32]. Therefore it can be stated that the protection of the moral rights is quite efficient in Belgium and also considered as important, although economic rights are still invoked much more[33].

In Belgium moral rights are mainly exercised through injunctions and claims for indemnities. In injunction proceedings courts can also sanction an omission to comply with a moral right, by enjoining

[29] S. FEYEN, “Auteursrecht en vrije meningsuiting Een verhouding uit balans ?”, *A&M* 2009, p. 591

[30] M.-C. JANSSENS, “De beschermingsomvang in het auteursrecht: een balans na tien jaar toepassing van de Wet van 1994”, *A&M* 2004, p. 454; F. GOTZEN, “Overzicht van rechtspraak. Auteurs- en modellenrecht 1990-2004”, *TPR* 2004, p. 1485.

[31] E. CORNU, *België – De afzonderlijke morele rechten, Bande dessinée et droit d'auteur - Stripverhalen en auteursrecht*, Larcier, p. 34

[32] Court of First Instance Brussels, 29 June 1999, *A&M* 1999, p. 435; Court of Appeal Antwerp, 11 October 2000, *A&M* 2001, p. 357, note D. VOORHOOF; *IRDI* 2001, p. 137, note V. CASTILLE; Court of First Instance Brussels, 29 June 1999, *A&M* 1999, p. 435; Court of First Instance Brussels (summary proceedings) 17 October 1996, *IRDI* 1997, p. 32; Court of First Instance Brussels 8 October 1996, *A&M* 1997, p. 71

[33] M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 124

a person to act (here to respect moral rights), f.i. to mention the name of the author on a work, against penalties if the judicial order is not respected. Indemnities are mainly granted as lump sums, as the concrete and precise determination of moral indemnities is very hard to prove. Belgian case law is rather restrictive in the amounts granted as moral indemnities.

The main goal of the authors in claiming their moral rights in Belgium is somewhat to obtain the recognition of their work and of their authorship.

Licenses are a valid tool to make a derivative work, however as the rule is, as explained above, that moral rights are not transferable, but their renunciation is possible in specific cases, the practice of granting licenses regarding moral rights seems in Belgium not that common.

However in the audiovisual sector, it became common to foresee in audiovisual contracts that the author would not exercise his moral rights to respect and integrity of the work regarding the interruption of a television program for publicity reasons[34]. A clause in that sense was for instance included in a model contract between the collective society SABAM and scenarists of audiovisual works.

10. Do collective management organisations play a role in the exercise of the moral rights in your country?

Given the wide formulation of the affiliation contracts of collecting societies in Belgium (f.i. Article 1 of SOFAM; Article 1 of SABAM; Article 7 of SACD/SCAM), stating in principle that they can act in favor of *all interests regarding copyrights* of their members, one could think that the moral rights are covered by these contracts. However, case law and scholarship are of the opinion that, as moral rights are not transferable and as they are personal and closely linked to the relation between the author and his work, the affiliation contracts do not cover the right to manage and collect all moral rights of its members as is normally the case for economic rights[35]. However case law retains that it is possible for a collecting society to act *in the name and for the account* of an author regarding the collection of indemnities due to a specific violation of his moral rights, on the condition that it was granted a specific mandate by this author[36]. The majority of Belgian scholars is of the same opinion[37]. In case law and scholar literature it is emphasized that such mandate must be specific and cannot leave it at the discretion of the collecting society to decide whether or not to claim indemnities[38]. The opposite minority case law is in our opinion not to follow[39]. The author must indeed instruct the collecting

[34] N. LOOS, « Sabam-modelcontract tussen auteur-scenarist en producent », *A&M*, 1998, p. 138
[35] Civil Court Brussels, 26 March 2004, *A&M* 2004, p. 263 ; F. DE VISSCHER and B. MICHAUX, Précis du droit d'auteur, Brussels, Bruylant, nr. 530
[36] Court of Appeal Brussels, 3 March 2010, *JLMB* 2010, p. 1564; Court of Appeal Brussels, 14 April 2011, JLMB 2010, p. 990; Civil Court Brussels, 3 February 2006, A&M 2006, p. 450
[37] F. BRISON and B. MICHAUX, «De nieuwe auteurswet», *RW* 1995, p. 524, no 127; A. HOUTART, «Droit moral en droit belge», *IRDI* 1998, p. 212; F. DE VISSCHER et B. MICHAUX, Précis du droit d'auteur et des droits voisins, Bruxelles, Bruylant, 2000, p. 149.
[38] Court of Appeal Brussels, 14 April 2011, JLMB 2010, p. 990; . DERCLAYE et A. CRUQUENAIRE, "Quelques considérations sur les modalités d'intervention en justice des sociétés de gestion collective, sur la portée de certaines exceptions au droit d'auteur et sur l'évaluation du préjudice résultant d'une atteinte au droit d'auteur", A&M 2001, p. 379
[39] Civil Court Brussels, 3 February 2006, A&M 2006, p. 450

society to represent him in the way the author wants. In respect to the validity conditions for such a mandate, in general the same rules apply as regarding copyright contracts, meaning that the mandate must be done in writing and is interpreted in favor of the author[40].

11. In your country, is it provided in legislation, case law and/or scholarly literature how the moral rights apply with regard to particular forms of use, such as:

- "artistic quotation"

Article 21, §1 of the Belgian Copyright Act states that a quotation of a work is permitted for purposes of criticism or review, provided that (i) this work has already been lawfully made available to the public; (ii) the source, including the author's name, is indicated unless this is impossible and (iii) the use is in accordance with fair practices and to the extent required by the specific purpose. This is a clear application of the moral right to claim authorship[41]. This Article is the implementation of Article 5.3.d of the Copyrights in the Information Society Directive 2001/29, where a similar exception of artistic quotation with similar validity conditions is foreseen. In Belgian scholarship it is defended that quotations should be rather short. The length is to be assessed in function of the length of the work in which the quotation is used[42]. This relies to the legal condition that the use of quotations must be in accordance with fair practices. In our opinion this could also be seen as an expression of the moral right of integrity and respect of the copied work.

- user generated content

The general principles of the moral rights do also apply to so-called user-generated content on the internet. Specific applications can be whether or not to post a picture, text, photo, … on social media. All authors indeed enjoy a moral right to divulge their works. Also the right of respect and integrity of a work will be at stake here, f.i. if a work is posted on social media and so put out of its context. According to the latest case law of the Belgian Supreme Court, as mentioned above in the answer to question 2, the use of a copyright protected work in an environment harming the (immaterial) integrity or spirit of the work, will indeed be considered as a violation of the moral right to respect and integrity.

- folklore

The application of moral rights with regard to folklore is not specifically relevant in Belgium. Traditional copyrights will be applied on expressions of folklore. There are no specific legal provisions to this respect, but eventually the legal definition of "performer" (see next question).

[40] E. DERCLAYE et A. CRUQUENAIRE, "Quelques considérations sur les modalités d'intervention en justice des sociétés de gestion collective, sur la portée de certaines exceptions au droit d'auteur et sur l'évaluation du préjudice résultant d'une atteinte au droit d'auteur", *A&M* 2001, p. 379

[41] M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 111

[42] F. DE VISSCHER and B. MICHAUX, Précis du droit d'auteur, Brussels, Bruylant, nr. 117

- performers

According to Article 2 of the WIPO Performances and Phonograms Treaty, adopted in Belgium in the Act of 15 May 2006, performers are defined as "*actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore*". According to Article 34 of the Belgian Copyright Act, performers dispose of some moral rights akin to thiose rights of authors. As to the right to claim authorship, this right must be exercised in accordance with fair commercial practices and it can merely aim to prohibit an incorrect indication of authorship. The scope of this right is thus clearly more restricted than the right to claim authorship of an author (see answer to question 2). Performers also enjoy a right of integrity and respect, which however is limited to the core aspects of this right, namely the performer must prove that the modification of the work harms his honour or reputation. No right to divulge his performance is foreseen for performers in the Copyright Act. The global renunciation of the moral rights done by the performer is void.

- orphan works

In Belgian literature it is pointed out that mainly the right of divulgation can constitute a major problem for orphan works. If this right has not yet been exercised or if the author decided to exercise it through not divulging the work, without leaving any trace or proof of this decision, the divulgation of an orphan work will violate the moral right. In such situation, all (further) uses of the work will be illegal and potential substantial investments can be lost[43]. This negative situation is somewhat limited by the fact that the exhaustion of the divulgation right can be proven by all means, f.i. the exercise of the economic rights[44]. So if the exploitation of a work by the author can be proven, which is to be qualified as the exercise of his divulgation right meaning that this right is exhausted, the author will not be entitled to revoke this decision and cannot claim the prohibition of the divulgation of the former orphan work.

Also regarding the right to claim authorship, orphan works could be a problem. Orphan works can benefit from the presumption of authorship or copyright ownership resulting from the name or any indication appearing on the work. However, the real author or his heirs or legal successors can claim its authorship at any given moment during the term of the copyright protection.

Finally regarding the right of integrity and respect, the general rules apply to orphan works. Here again, the author can at any given moment reveal him- or herself and claim the right of integrity and respect for the orphan work.

- cloud computing

In the Belgian Copyright Act, there is no particular provision regarding moral rights and cloud computing. Generally, in Belgium moral rights are in practice not much applied for or invoked, when it

[43] R. KERREMANS; E. WERKERS en T. ROBRECHTS, *Juridische belemmeringen en mogelijkheden bij opslag en ontsluiting van multimediale data*, p. 20, http://www.vowb.be/documenten/2008/2008-10-20.BOM-VL_Beheer_van_rechten_op_digitale_objecten_versieD.4.1.pdf, last visited on 8 June 2014

[44] See foot note 30

concerns the use of protected works on the internet[45]. We do not see a reason why moral rights could not play a more important role for works on the internet, when they are used and stored in the cloud.

- alternative (free) licensing schemes (in particular open source licenses or creative commons)

Open source licenses are not mentioned in the Belgian Copyright Act, but they are generally accepted in Belgium as being compliant with Belgian copyright rules[46], if the license conditions mentioned in the Belgian Copyright Act are fulfilled.

Only one decision on creative commons is known to us in Belgian case law. The civil court of Nivelles recognized explicitly the principle of the creative commons licenses and its compliance with Belgian copyright law. It is qualified as a license under the Belgian Copyright Act and as a consequence, the rather strict Belgian copyright rules regarding transfer of copyrights are to be applied. In Belgian scholarship, it is emphasized that evidence problems could occur with creative commons licenses regarding f.i. the knowledge and acceptation of the conditions by the licensee. In this context the use of so called *browse-wrap* licenses[47], where no explicit acceptance is occurs but merely an implicit acceptance through use, is in principle accepted by case law, but the burden of proof can be difficult[48].

In this decision it concerned a work (a song) made available for free through the internet on the condition that, if used, (i) the name of the author was to be mentioned in relation to the work, (ii) the song was not to be used for commercial use and (iii) the song had to be used in its whole[49]. As the licensee used only a part of the work without mentioning the name of the author all creative commons license conditions were violated.

The court interestingly decided that the author granting such a creative commons license has ethical rather than commercial goals. If this author claims in case of a violation of the creative commons license conditions indemnities that are (much) higher than the common market license fees, he acts "illogically" and contrary to this ethical goal. The claim for indemnities was recognized in this case, but they were therefore substantially lowered by the court. Finally an amount of only 1.500 EUR was granted for the unauthorized use of the song.

- international aspects (determination of jurisdiction and applicable law)

1. Regarding the **competent jurisdiction in non-contractual matters in a European context** in principle Article 5.3. of the EEX regulation is applicable. This Article states that the court of the place where the harmful event occurred or may occur is competent. In Belgian scholar literature, it is

[45] M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 125

[46] Y. VAN DEN BRANDE and J. KEUSTERMANS, «Open source software: een analyse naar Belgisch recht», *IRDI* 2007, p. 369 a.f.

[47] Commercial Court Tongeren, 5 October 2004, *DAOR* 2007, 156-157

[48] Gerrit VANDENDRIESSCHE and others, "Creative Commons licenties naar Belgisch auteursrecht" , note under Court of First Instance Nivelles, 26 October 2010, *A&M* 2011, p. 537

[49] Court of First Instance Nivelles, 26 October 2010, *A&M* 2011, p. 533, note Gerrit VANDENDRIESSCHE and others

defended that the recent eDate Advertising and Olivier Martinez CJEU case law[50] on the one hand and the Pinckney CJEU case law on the other do not apply to moral rights[51].

The first two decisions related to violations of personality rights on the internet. In Belgium, as explained above under question 1, moral rights are not considered personality rights. Therefore neither the eDate Advertising and Olivier Martinez case law of the CJEU can apply to moral rights.

The Pinckney case law relates specifically to violations of economic rights of copyright on the internet, and not to moral rights as such. The outcome of the Pinckney case[52] cannot be applied by analogy on moral rights, as one reasoning of the CJEU was that the economic rights of copyrights are harmonized in the European Union by the Copyright in the Information Society Directive, justifying that specific rules concerning European jurisdiction in internet cases must apply. Since moral rights are not concerned by this Directive and are not harmonized, the reasoning in the Pinckney decision cannot be applied by analogy to moral rights.

As a consequence, we are of the opinion that the general rule of Article 5.3. EEX Regulation applies for violations to moral rights, i.e. the courts where the harmful event occurred will be competent[53].

Finally in **contractual matters** related to moral rights, the competent judge can be agreed upon by the parties in the contract and this according to Article 23.1. EEX Regulation. If no such agreement exists, in principle the general rule is that the court of the residence of the consumer is competent or still, according to Article 2 EEX Regulation, the court of the residence of the defendant.

2. Regarding **the applicable law in contractual matter in a European context**, we did not find a case in Belgium dealing with moral rights in this context. However as the international private law criteria link to rather general criteria such as the place of protection, the place where the damage is caused or where the violation is executed etc. without differing between economic or moral aspects of the protection or damage, we are of the opinion that the international rules determining the applicable law are identical for economic and moral copyrights.

The Rome I Regulation nr. 593/2008 of 17 June 2008 states in its Article 3.1. that parties can agree on the applicable law for their contractual disputes. This general rule will also apply to moral rights that are concerned in a contract[54]. If no choice of law is done, the law of the country with which the contract has the closest link, i.e. where the most characteristic performance must be executed, will be applicable according to Article 4.1 Rome I Regulation[55]. We have not found an opinion or case law on what would be the most characteristic performance of contracts regarding moral rights. We are of the opinion that the most characteristic performance related to a contract concerning moral rights is the

[50] CJEU, 25 October 2011, C-161/10, eDate Advertising GmbH / X, C-509/09, and Olivier Martinez and Robert Martinez / MGN Limited

[51] F. DEBUSSCHERE, “Cassatie omarmt Shevill 2.0: loutere toegankelijkheid van website in België is voldoende voor internationale bevoegdheid voor schending van persoonlijkheidsrechten”, *RABG* 2013, p. 1305.

[52] CJEU, 3 oktober 2013, C-170/12, Peter Pinckney tegen KDG Mediatech AG

[53] H. BORN and M. FALLON, «Chronique de jurisprudence – Droit judiciaire international (1986-1990)», *J.T.* 1992, p. 427-434 nr. 90-122; J. LAENENS, «Overzicht van rechtspraak (1979- 1992) – De bevoegdheid», *T.P.R.* 1993, p. 603-1606, nrs 185-201; E. GULDIX, «Het internationaal privaatrecht in cyberspace», in K. BYTTEBIER e.a., *Internet en recht*, Antwerpen, Maklu 2001, p. 225-226

[54] P.L.C. TORREMANS, “Intellectuele eigendomsovereenkomsten en de Rome I-Verordening”, *TBH* 2009, p. 540

[55] P.L.C. TORREMANS, “Intellectuele eigendomsovereenkomsten en de Rome I-Verordening”, *TBH* 2009, p. 550

exercise of his or her moral right and therefore the law of the country where the work is protected should apply in our opinion.

The applicable law in case of a harmful event outside a contractual context, will be determined according to Article 8.1. of the Rome II Regulation nr. 864/2007 of 11 July 2007 stating the *lex loci protectionis* principle. Article 8 of the Regulation states indeed that "*The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed*." This general rule will also apply to infringements of moral rights.

In an international context involving Belgian press representatives against the American company Google Inc. concerning the reproduction in *Google News* of news articles of Belgian newspapers and – websites, the Brussels Court of Appeal referred to Article 4.1 of the Rome II Regulation determining as general rule that the law of the country where the damage is caused due to a harmful event, will be applicable[56]. This is somewhat strange, as this Regulation does not seem to apply to disputes involving a non-European party. The Court however also referred to Article 5 of the Berne Convention, but decided that this article does not contain sufficient clear references for resolving the problem of the applicable law to an international copyright dispute when the harmful event and the damage occur in different countries[57].

> *12. The objective of certain moral rights appears to be changing in the digital context. The right of disclosure, which enables authors to decide when their works can be made public, is invoked at times to protect the confidentiality of certain kinds of content or data or their private dimension. The right to claim authorship (paternity) is changing into a right of attribution which places more emphasis on the identification of one contributor among others (for example, on Wikipedia or in free licences) than on recognition of authorship. Lastly, the right of integrity may become a right through which to protect a work's authenticity. Indeed, while modifications to works are more and more widely authorised, authenticity is assuming greater importance, notably through the use of technological measures to guarantee it. In your country, are there any indications in legislation, case law and/or scholarly literature that the moral rights "shift" in a digital environment:*

- From a divulgation right to a right to the protection of privacy (private life)?

The Brussels Court of Appeal decided that the exercise of moral rights, more precisely of the right of divulgation, in the framework of contractual negotiations, namely the refusal to divulge certain relevant information with the purpose to obtain better contractual conditions at the end, constitutes an abuse of moral rights[58]. Belgian scholar literature confirms that Belgian case law is in general indeed rather conservative and respects the original philosophy of moral rights[59].

[56] Court of Appeal Brussels, 5 May 2011, *Revue du Droit des Technologies de l'Information* 2011, p. 43
[57] Court of Appeal Brussels, 5 May 2011, Revue du Droit des Technologies de l'Information 2011, p. 42
[58] Court of Appeal Brussels, 29 May 2008, A&M 2009, p. 106
[59] M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 125

- From a right to claim authorship (paternity) to a right to attribution?

In general in Belgian case law, it is rather difficult to determine whether an author claims authorship in order to be recognized as the (sole) author, or as a kind of right of attribution which places more emphasis on his or her identification among others. It is not because an author claims co-authorship of a work, that this is to be seen as a right to attribution. However an interesting decision by the Court of Appeal of Mons stated that besides the scenarist and the designer of a cartoon, also the person (and plaintiff in that case) who collaborated substantially with the scenarist to create the first album of the cartoon and one cartoon character, was to be mentioned on the cover of the cartoons[60].

- From an integrity right to a right to respect the authenticity of the work?

In scholarship literature in Belgium, a public purpose is retained for the right of respect and integrity, namely the assurance that the work is the authentic and original work[61].

But the private purpose of moral rights also plays a part where the authenticity of the work is more and more protected, whereas the original philosophy of moral rights was in fact the link between the author and his/her work. In Belgian case law one can see a shift in the direction to open up the protection of the right of respect and integrity towards a more general protection also covering the authenticity of the work even through the environment in which the work is used. The Belgian Supreme Court recognized this principle of wide protection, not only of the integrity of the material work as such, but also of the spirit of the work, i.e. the immaterial aspects of the work[62]. The Court so joined case law and literature that already defended a similar position[63]. In that perspective the changing of the support of an audiovisual work, causing a difference in format and broadcasting technique, was considered a violation of the moral right of respect and integrity[64]. On the other hand the publication of a remastering of an audiovisual work was not found to be a violation of moral rights[65].

- Up to acknowledging similar interests and rights akin to moral rights for authors and

performing artists, for the benefit of publishers, producers and broadcasters?

In Flanders the so-called media decree of 27 March 2009 foresees a protection for the *integrity of television signals of the broadcasters*. This decree states in its Article 180 that the signal of broadcasters has a certain integrity and that a third party, in practice mainly cable companies and satellite or internet platforms, may only linearly transfer it without adapting or modifying the signal. If a modification is made, f.i. in case of adding publicity or the function to fast forward or rewind programs and advertising or to record or save a program, third parties must obtain the authorization of the broadcasters. The name of the decree illustrates that indeed the broadcasters signal, is somewhat granted a moral protection, as the *integrity* of the signal must be respected.

[60] Court of Appeal Mons, 2 October 1997, *JT* 1998, p. 18
[61] M.C. JANSSENS, « Le droit moral en Belgique », *Les Cahiers de propriété intellectuelle*, 2013, p. 102
[62] Cass., 8 May 2008, A&M 2009, p. 102
[63] F. DE VISSCHER and B. MICHAUX, Précis du droit d'auteur, Brussels, Bruylant, nr. 200; Court of First Instance Verviers, 26 March 1996, *Ing-Conseil*, 1996, p. 188
[64] Court of First Instance, 4 May 2004, *Ing.-Conseil*, 2004, p. 402
[65] Court of Appeal Brussels, 19 June 2006, A&M 2006, p. 438

According to Article 39 §2 and 44 §2 of the Belgian Copyrights Act, the person of whom the name or indication is mentioned on the broadcasting, the reproduction or on the public communication of a work, is presumed being the producer of the phonogram, the producer of the first fixation of movies or to be the broadcaster. This presumption provides somewhat a kind of moral right to claim authorship. The presumption counts unless the proof of the contrary is provided.

We have not found similar protective rights for publishers in Belgium.