

Does the surviving spouse have usufruct on the moral rights of a deceased author? Dualism or monism in the succession of copyrights – Blog posted on 19 September 2014 by Herman Croux and Jari Vrebos (MVVP)

Judgment of the Court of Appeal of Antwerp, 13 July 2011

Moral rights – usufruct on moral rights – right of divulgation

A number of much appreciated contributions to the ALAI 2014 Blog deal with the issue of the integrity of the work. An entirely different aspect is the exercise of the moral rights after the author has deceased.

The Court of Appeal of Antwerp had to decide on the possibility for a surviving spouse to publish previously unpublished materials of a deceased author.

On March 19, 2008 one of Belgium's most famous authors, Hugo Claus, died. On May 19, 2011 a new book with a collection of elements from Hugo Claus' archive, including letters, poems, and excerpts from his diary, was published on the initiative of his surviving spouse. Hugo Claus' two sons were not involved in this publication and they opposed the distribution of the book.

Article 1, §2 of the Belgian Copyright Act of 1994 states that it is the right of the author to make the work public. The right of first publication (also called 'the right of divulgation') is one of the moral rights of an author.

In this matter, the Court of Appeal of Antwerp applied the general civil law principles of usufruct to determine whether a surviving spouse entitled to usufruct could exercise the right of first publication or not. Usufruct under Belgian law grants the usufructuary the right to the enjoyment of the "proceeds" (in Dutch: "*de vruchtgebruiker heeft het recht op het genot van alle soorten van vruchten*", in French: "*l'usufruitier a le droit de jouir de toute espèce de fruits*"). The usufructuary is to be distinguished from the bare owner, who retains the property. Compare: the bare owner would own the house or an amount of money, the usufructuary enjoys the proceeds (rent or interests).

The Court considered that the spouse of Hugo Claus was the surviving spouse and that she had usufruct on the entire inheritance of her deceased husband. As a usufructuary, the surviving spouse had a 'right of use' which according to the court offers the surviving spouse "*the possibility to take positive actions concerning the moral rights, with the exclusion of the bare owner. Concretely this means that the surviving spouse can make specific arrangements as to the exercise of the moral rights without a right of decision for the bare owner(s).*" Consequently, the spouse did have the right to initiate the publication of previously unpublished materials of her deceased husband, without previously informing the sons. The Court also considered additionally that it could not be demonstrated from any piece produced in the proceedings that the publication would have been done against the will of the author.

The decision of the Court implies a monistic approach. According to the dualistic approach, the patrimonial copyrights are part of the heritage of an author, but the moral copyrights are not. If in the dualistic approach the moral rights are not part of the patrimonium of the deceased author, the usufructuary can not have usufruct on the moral rights. Charlotte Declerck in her doctoral thesis pointed out the possibilities of a

monistic approach. By the way, she also commented on this decision of the Court of Appeal of Antwerp and thereby she eloquently refers to the ALAI proceedings 20 years ago: A. Dietz, "Le droit moral de l'auteur (droit civil). Rapport general", in Alai (ed.), *Le droit moral de l'auteur. The moral rights of the Author*, Paris, Alai, 1993, 37-39, nrs. 26-29. C. Declerck further states: "*the author shall, when exercising the moral rights, not necessarily pursue moral interests, but also (and maybe only) economic interests*" (C. Declerck, "Hoog in "de wolken". De rechtszaak-Claus", in *RW* 2011-12, nr. 26, 1174).

One can wonder whether indeed the usufruct can plainly be applicable to all moral rights. The Court of Appeal confirms that positive actions (such as right of divulgation) can be taken by the usufructuary. There is more discussion on defensive actions or prohibition actions: can both the usufructuary and the bare owner oppose a violation of the right of integrity? Let's make it more complicated: who has the right to contractually waive the right of integrity (partially – as long as it does not touch on the reputation or honor of the author)? Sometimes a partial waiver of the right of integrity makes exploitation possible, sometimes it diminishes the value of the work and therefore it would conflict with the rights of the bare owner.

It is clear that the last word as to the usufruct on moral rights has not yet been said. We do not think that on the basis of this case law a usufructuary can always and in all circumstances exercise the moral rights. In any case we are looking forward to see if the 2014 ALAI proceedings will shed more light on this issue.