ALAI BRUSSELS 2014

Moral rights in the 21st century

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

QUESTIONNAIRE

REPORT SPAIN

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

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

1.1 *Strictly speaking*, it was the enactment of the Spanish Copyright Act of 11 November 1987 (Law 22/1987 of 11 November) which marked the birth of moral rights in copyright law in Spain. The Preamble to the Act introduced one of its most significant innovations as being the *"express regulation"* of moral rights, adding that they constitute *"the clearest manifestation of an author's sovereignty over his/her work"*.

1.2 Under the pre-1987 system, those seeking the protection of their moral rights in Spain had to rely on Article 6 *bis* of the Berne Convention, although there were isolated cases in which some of the faculties of those rights were recognised in the 1879 law and its regulatory provisions. However, the fact that domestic law had not specifically provided for moral rights made it extremely difficult for them to be invoked in court, as had occurred in the famous case of the sculptor Pablo Serrano[1]. This gap in the law was only filled when the legal system governing copyright was revised by means of Act 22/1987.

1 This case dates back to the 1970s when a sculpture entitled "*Viaje a la luna en el fondo del mar* [*Voyage to the moon at the bottom of the sea*]", was dismantled and removed from the foyer of the hotel for which it had been created. Its creator, the sculptor Pablo Serrano, sued the company which owned the hotel, claiming infringement of the moral right to demand the integrity of the work. The action did not prevail because despite being recognised in the Berne Convention of which Spain was a founder, moral rights had not been included in domestic legislation. In that regard, the Spanish Supreme Court ruled that "*since Spanish law does not provide for moral rights, a ruling cannot be delivered in favour of these rights which are not sanctioned by the legal provisions*" (Judgment of the Supreme Court, Civil Chamber, 21/06/1965, *Pablo Serrano I*). It must be borne in mind that at that time the system governing sources of Spanish law did not provide for the immediate inclusion of international Treaties in domestic law which it does now. Later, when the Constitution of 1978, which is currently in force, was approved, Pablo Serrano filed a fresh claim, this time invoking freedom of creation as a manifestation of the freedom of expression [Article 20.1,b) of the current Spanish Constitution]. This pushed the dispute onto the terrain of fundamental rights and allowed the court action to start afresh, with the argument that the sculpture had not been destroyed, merely dismantled, and so the damage had not ended (under common damages law terms, the damage was not "permanent" and exhausted; but rather it was "ongoing" and still alive. Nevertheless, the action was once again unsuccessful because the Supreme Court found that the "right to create" (a fundamental right) was one thing and the "right over a creation" (copyright) was something else. For that reason, on finding the procedure for the civil protection of fundamental rights, as claimed by Mr. Serrano, inappropriate, the action was

1.3 For some, authors' moral rights constitute one of the so-called personality rights. Others deny this, as the Spanish Supreme Court has done on occasion, with the argument that personality rights are held by everyone whereas moral rights are only held by authors[2]. In any event, regardless of whether or not the category of personality rights is accepted, and if it is accepted, whether or not it should include moral rights, at least there is a broad consensus that moral rights are rooted in the need to preserve authors' interests, which go beyond the mere financial exploitation of the work. The fundamental core of authors' moral rights (which are comprised of recognition of the authorship of the work and respect for its integrity) reveals that the work is essentially tied to the author, and that there are values which exceed the sphere of economic rights. Basically, just like in other countries, Spanish law does not consider works (or artists' services) as mere "objects" of rights, but rather as a projection of the person. The author is "present in" the work, and so by protecting the moral rights in the work, the personal interests of the creator are protected. The same applies *mutatis mutandis* to artists' performances.

1.4 Consequently, the characteristics of personality rights, and their *post mortem* protection, likewise apply to moral rights, hence their unwaivability and inalienability.

1.5 Moral rights are not recognised as a fundamental right by the Spanish Constitution (this would have made it necessary to regulate them by means of organic law instead of by ordinary law). Nevertheless, both copyright in general and moral rights in particular can easily be linked to freedom of expression and, more specifically, to the fundamental right "*to literary, artistic, scientific and technical production or creation*", recognised by Article 20.1,b) of the Spanish Constitution[3].

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dismissed (Judgment of the Supreme Court, Civil Chamber, 09/12/1985, *Pablo Serrano II*). The case went to the Constitutional Court, although the decision was not particularly significant insofar as the application for a declaration of fundamental rights attempted by Pablo Serrano was dismissed on the grounds that it had been filed too late (Judgment 35/1987 of the Constitutional Court, 18/03/1987, *Pablo Serrano II*). A more interesting decision, even though it did not refer to moral rights, was Court Judgment 51/2008, 14/04/2008 (*Jardín de Villa Valeria*), in which the court underlined that the freedom of creation is not merely a manifestation of the freedom of expression, but rather a *reinforced* freedom of expression. In that regard, the judgment indicates that "*the express constitutionalisation of the right of literary production and creation bestow it with autonomy which, without excluding it, goes beyond the freedom of expression*".

2 See Judgments of the Supreme Court, Civil Chamber, 2/3/1992 (*El año del Wolfram*, on the grant of cinematographic rights in a novel) and 6/11/2006 (*Wall murals*, on the destruction of a wall mural due to building refurbishment work).

3 Invoked, albeit unsuccessfully due to the statute-barring of the action, in the *Pablo Serrano* case (see note 1 above).

1.6 The importance that the 1987 Spanish lawmaker wanted to bestow on moral rights is clearly shown in both symbolic and substantive aspects. With respect to the former, moral rights are always mentioned and regulated first in the layout of the law[4]. With respect to the latter, there are two highly significant possibilities:

1) Moral rights are granted to all authors regardless of their nationality (Article 163.5 of Royal Legislative Decree 1/1996 of 12 April approving the current Consolidated Wording of the Spanish Copyright Act (hereinafter Copyright Act). This is certainly coherent with the concept of the work as an expression of the person.

2) Moral rights were recognised with the highest degree of retroactivity and therefore not only in works created prior to the 1987 Act but even for authors who were already deceased on that date (Transitional Provision VI of the Copyright Act). In that regard, please note that the rights of authorship (attribution) and integrity are not subject to time restrictions. In any event, the retroactivity was not projected onto acts which had been carried out and exhausted prior to the entry into force of the 1987 Act and which had not infringed any laws at that time.

2. What do 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: ...?**

2.1 It is first of all interesting to point out a terminology-related issue. In Spain, we indistinctly talk about "the moral right of the author" (singular) and "authors' moral rights" (plural). The most correct form would probably be "moral right" (singular) and the "faculties" (plural) of which it is comprised. However, as things stand, this is a lost battle, and the singular and plural are used indistinctly, without the issue being overly important.

2.2 As far as the content of the moral right is concerned, Spain has regulated it comprehensively. Besides the *primary* faculties of the moral right *coined* by the Berne Convention (recognition of the authorship or paternity or attribution and the right to the integrity of the work), Spanish law expands the scope of the right by conferring on the author at least four other faculties, namely:

1) Disclosure: Deciding whether or not the work is to be disclosed and in what way, and whether the disclosure should be carried out using the author's name, under a pseudonym or sign or anonymously.

4 Curiously, this does not happen in the case of artists, where the regulation of economic rights comes before the regulation of moral rights.

2) Modification: Modifying the work respecting rights acquired by third parties and the requirements governing the protection of goods of a cultural interest.
3) Repenting: Removing the work from trade due to a change in intellectual or moral convictions, after paying damages to the exploitation rightholders; and
4) Accessing the sole or a rare copy of the work: Accessing the sole or a rare copy of the work when it is in another's possession in order to exercise the right of disclosure or any other right to which the author is entitled.

2.3 The predominant opinion held among Spanish authors is that the list of faculties of which the moral right is comprised (Article 14 of the Copyright Act) is "closed" ("*numerus clausus*").

2.4 Spanish law also provides that performing artists also hold moral rights, though with less faculties. Under Article 113 of the Copyright Act, they only hold the unwaivable and inalienable right to have their name mentioned in connection with their performances, except when the omission of same is dictated by the way in which the performances are used, and to object to any distortion, modification, mutilation or any other act in relation to their performance that might adversely affect the artists' standing or reputation. Basically, their only moral rights are those of authorship or attribution and integrity.

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

3.1 Article 14 states unwaivability and inalienability as being fundamental characteristics of authors' moral rights. The same features apply to the rights of performing artists (Article 113.1 of the Copyright Act).

3.2 Unwaivability implies that the author or artist cannot relinquish authorship of those rights or the possibility of exercising them generally or beforehand. Any agreement to waive the rights could be declared null and void, as this would contravene a peremptory rule. On the contrary, an author or artist can, in isolated cases, waive the specific exercising of some of its moral rights, provided that he/she is aware of the terms and implications of the waiver and exercises it in a free and voluntary manner (i.e., without coercion or pressure such as that which the principal of a commissioned work may exercise). In that regard, legal experts hold that in order for it to be valid, a waiver of the specific exercise of the rights: i) must be made expressly and in writing, as required for the assignment of exploitation rights (Article 45 of the Copyright Act); and (ii) it will in any case be revocable by analogy with the law on the transfer of image rights (Article 2 of Organic Act 1/1982 of 5 May on the civil protection of the right to honour, to personal and family privacy and to one's own image, hereinafter OA 1/1982)[5].

5 *See* MARÍN LÓPEZ, Juan José, *El conflicto entre el derecho moral del autor plástico y el derecho de propiedad sobre la obra. ("The conflict between the moral right of the creator of visual art and the right of ownership in the work")*. *Cuadernos Aranzadi Civil*. Aranzadi 2006; and MARTÍNEZ ESPÍN, Pascual, *Article 14*, in *Comentarios a la Ley de Propiedad Intelectual. ("Remarks on the Copyright Act")*. Rodrigo Bercovitz Rodríguez-Cano (Coordinator). Third Edition. Ed. Tecnos, Madrid 2007, page 209 and subsequent pages.

3.3 As regards the inalienable character of the rights, not only does this imply that these rights cannot be transferred to third parties *inter vivos* (*mortis causa* transfers shall be analysed later in this section), but they likewise cannot be subject to liens or encumbrances. For the same reason, they cannot be seized or expropriated. On the contrary, there would be nothing to prevent the attachment of any revenue made due to infringement of moral rights.

3.4 Although they do not alter the inalienability that applies to moral rights, there are certain situations which affect the rights of disclosure and authorship or attribution and which merit mention.

3.5 With respect to the right of disclosure (Article 14.1 of the Copyright Act), there are two cases in particular which are worth mentioning.

1) In the purchase/sale and, in general, the acquisition of visual arts (Article 56.2 of the Copyright Act), it must be understood that the right of disclosure is exercised with the transfer of the object by the author, unless agreed otherwise. In that regard, the aforementioned provision (Article 56.2 of the Copyright Act) states that "*the owner of the original of a work of three-dimensional art or a photographic work shall have the right to display the work in public «even if it has not been disclosed»*". The provision shall nevertheless not apply if "*the author has expressly excluded that right in the instrument of disposal of the said original*". In any event, the work must be displayed in a manner that is not "*prejudicial to his honour or professional reputation*". The transfer of the work of art or photographic work, with the consequent entitlement of its owner to display and disclose the work, does not prevent the author of same from continuing to hold the right of disclosure which, where appropriate, can be exercised through the moral right of access (Article 14.7 of the Copyright Act)[6]. It should also be borne in mind that once the work has been disclosed, the author can also exercise, even in the case of commissioned works, his/her right to repent or to withdraw (Article 14.6 of the Copyright Act). This right shall be exercised under the terms looked at in question 2 and so without the possibility of claiming the physical carrier, which shall remain in the hands of the rightholder.

2) The right of disclosure is also affected by the limitation (exception) laid down in Article 31 *bis* I of the Copyright Act, according to which a work may be disclosed "*…for public safety purposes or for the proper processing of administrative, judicial or*

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6 Article 14.7 of the Copyright Act: "*The right of access to the sole or a rare copy of the work, when it is in another's possession, for the purpose of the exercise of the right of disclosure or any other applicable right. [//]The aforesaid right shall not allow the author to demand the moving of the work, and access to it shall be had in the place and manner that cause the least inconvenience to the possessor, who shall be indemnified where appropriate for any damages and prejudice caused him*".

parliamentary proceedings". In this case, the lawmaker puts public interest ahead of the individual interests of the author of a work with respect to non-disclosure of same.

3.6 As regards the right of authorship or attribution, alienability is perfectly compatible with the possibility that the author may opt to disclose the work anonymously or under a pseudonym (Article 14.2 of the Copyright Act). This is the author's decision, and he or she can always change his/her mind. This possibility exists even where it has been agreed that the work shall be disclosed under someone else's name, with the author being a "ghostwriter".

As regards the inalienability of the right of authorship of a work, and specifically the aspect relating to the author's power to decide how the work shall be disclosed, as provided under Article 14.2 of the Copyright Act, there is the possibility of waiving the author's right to be identified in the disclosure of the work, and for the authorship not to be revealed (i.e., preserving the anonymity of the author) or for a pseudonym to be used. It is considered that this decision by the author is, in turn, temporary or revocable.

3.7 The inalienability to which we have referred up until this point is *inter vivos* inalienability. Another issue is what happens to moral rights when the author or artist dies and, where applicable, the role played by their will. It is unclear whether there is an authentic *mortis causa* transfer of the moral rights in the sense that, following the death of the author, they pass down to a new owner. What is clear is that, when the author dies, regardless of whether or not there has been a transfer in the strict sense, the law entitles certain persons to be able to act in defence of the author's moral interests following his/her death. It is likewise clear that the author may appoint the person that he/she wishes to carry out that function. Regarding this issue, please see question 4 below.

4. What is the term of protection of moral rights in your country? Is it identical to the term of protection of economic rights? Can 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?

4.1 The term of protection of moral rights is different from the term of protection for economic rights. Of the faculties which comprise moral rights under Article 14 of the Copyright Act, in principle, only three can be exercised after the author's death. These are: the right of authorship or attribution, the right of integrity and the right of disclosure (Article 15 of the Copyright Act). The rights of authorship and integrity can be exercised without time constraints (Art. 15.1 of the Copyright Act). On the contrary, the right of disclosure has the same term of protection as economic rights, i.e., seventy years following the author's death (Article 15.2 of the Copyright Act).

4.2 Spanish law also recognises the right to access a sole or rare copy of the work for the purpose of exercising exploitation rights or the right of disclosure as a moral right. Consequently, even if the law does not expressly state this, since this right of access is instrumental in other rights which continue after the author's death, it will also endure whilst they remain subject to protection.

4.3 With respect to the persons authorised to exercise the rights, this would primarily be the natural or legal person expressly named by the author in his/her last will and testament. In the absence of such provision, the exercise of the rights shall pass to the author's heirs (Article 15.1 of the Copyright Act). Where there are no heirs, or their whereabouts are unknown, the exercise of the rights shall pass to the State, the Autonomous Communities, local Corporations and public bodies of a cultural character (Article 16 of the Copyright Act).

4.4. As regards protection of moral rights in works in the public domain, Article 41 of the Copyright Act provides that "*works in the public domain may be used by any person provided that the authorship and integrity of the work are respected in the manner specified in items 3 and 4 of Article 14 [Copyright Act]*".

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?

5.1 Without entering into debate on the legal nature of moral rights, it can be affirmed that the protection of such rights has been expressly and specifically included within the scope of the Copyright Act since 1987 (see question 1).

5.2 This special Act provides that the content of intellectual property is both economic and personal (Article 2), and the personal aspect is identified by the Act itself as the moral right. This, as far as authors are concerned, is dealt with in Articles 14 to 16, which sets out their characteristics and defines the different moral rights (see questions 1 and 2). In turn, their protection is regulated in Book III of the Copyright Act, relating to the protection of the rights recognised in this Act (Articles 138 to 143). Here, it is established that the owner of the rights may, without prejudice to any other action that may be available to him/her, apply for an injunction restraining the unlawful activity of an infringer and claim compensation for material and moral damages caused. The owner of the rights may also request the total or partial publication or disclosure of the court decision or arbitration award in the press at the infringer's expense, and may also apply for urgent precautionary measures to be taken beforehand.

5.3 To conclude, moral rights are protected by intellectual property legislation, and there is no need to resort to different categories. It would, however, be necessary to do so where there are moral interests that are not protected by any moral rights. In that regard, please note that the list of moral rights or faculties provided in Article 14 of the Copyright Act is "closed" (see question 2). If the author is subject to excessive criticism or if another's work is attributed to him/her, he/she will not be able to claim infringement of his/her moral rights, and other channels will have to be explored, such as the right to honour, or the right to rectify untruthful information.

5.4. Leaving the foregoing aside, it can be said that some moral rights, such as the right of integrity, can overlap with the right to honour, understood as artistic reputation, since

Article 14.4 of the Copyright Act (following Article 6 *bis* of the Berne Convention) requires in order for that right to be deemed damaged that the distortion, modification, alteration of, or attack on, the work be liable to "*prejudice his/her legitimate interests [of the author] or threaten his/her reputation*". This means that the author will have to choose between bringing action based on the right to honour and action based on the moral right of integrity. The two actions would not appear to be cumulative, although they could be instituted at the same time, with one being ancillary to the other. In that regard, please note that in the case of moral rights, action for damages will become statute-barred 5 years following the time when it could legitimately have been filed (Article 140. 3 of the Copyright Act), whereas in the case of the right to honour, such action will become statute-barred after 4 years (Article 9.5 OA 1/1982).

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

6.1 Intellectual property legislation only expressly provides for the possibility of court intervention in order to bring about the disclosure of an unpublished work if, upon the author's death, his/her successors in title exercise their right of non-disclosure in a manner which infringes the provisions of Article 44 of the Constitution referring to the right to access culture. However, the court's intervention would not appear to derive from actual abusive exercise; rather, from the prevalence of social interest following the author's death.

6.2 The absence of specific provisions would not prevent the general rules requiring that rights be exercised in good faith and sanctioning any abuse or antisocial exercise thereof from applying to moral rights, as they would to any other rights (Article 7 of the Spanish Civil Code).

6.3 Nevertheless, in case-law there have been no lawsuits resolved on the basis of an author's abusively exercising his/her moral rights. It has, on the other hand, been determined whether or not it was legitimate for the author to prevent the modification of his/her work when deciding whether or not his/her right of integrity had been damaged.

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

7.1 According to Article 3 of the Copyright Act: *"Authors' rights shall be independent, compatible and susceptible of combination with:[…]1º. The ownership of and other rights pertaining to the physical object in which the intellectual creation is embodied"*. Nevertheless, recognition of the author's moral rights obviously touches on the faculties of the owner of the physical object in which the protected intellectual work is embodied,

and for that reason, the Spanish courts have had to rule on the possible conflict between the interests of the author and the owner of the carrier.

7.2 This is a tricky issue, and generally speaking, the Spanish courts have endeavoured to strike a balance between the interests at play depending on the circumstances of each specific case. When finding the necessary balance between the interests of the author and those of the owner of the carrier, the most typical conflicts which have arisen in practice have referred to recognition of the moral right in respect of the right of integrity of the work.

7.3 Under Spanish law, the moral right to the integrity of the work is regulated under Article 14.4 of the Copyright Act, according to which the author is invested with the unwaivable and inalienable right to: *"demand respect for the integrity of the work and to object to any distortion, modification or alteration of it or any act in relation to it that is liable to prejudice his legitimate interests or threaten his reputation"*. Therefore, under Spanish law, it will not suffice for the work to have been altered for there to be infringement of the moral right to demand respect for the integrity of the work; rather, the act must have caused objectively demonstrable damage to the author, in the form of damage to his/her honour or reputation. In general, it must be understood that modifications or alterations of the work which are liable to infringe the author's moral rights are those which affect the work by having a bearing on the author's artistic conception. Consequently, the infringement of this moral right occasionally does not require the carrier of the work to be directly altered or modified. A mere change of location can constitute infringement if that change affects how the creator had conceived his/her creation.

7.4 When trying to strike a balance between the right of the author and the right of the owner of the physical carrier, deciding which is to prevail in the conflict involves comprehensively contemplating the interests at play in each case. These ideas are clearly noticeable when studying the judgments rendered by the Spanish courts. For example, the Spanish Supreme Court (Civil Chamber), in its judgment of 17/07/2008 (*Zortziko «Maite»*), concluded by finding that the moral rights of the composer Pablo Sorozábal had not been affected, since the modifications in question did not imply the substantial distortion of the work. The Supreme Court's ruling of 18/01/2013 analyses the moral right to demand respect for the integrity of works created for a specific location (Judgment of the Supreme Court, Civil Chamber, of 18/01/2013, *Nagel*). In that judgment, the court expressly ruled that since the artist had expressly conceived and created the art for placement of the physical carrier in a specific place ("*site-specific works*"), changing the location could threaten its integrity, insofar as it would alter or interfere with the communication process that every work of art entails, by modifying communicative codes, distorting the messages that it transmits, as well as the feelings, thoughts and reflections that it arouses in whoever contemplates it.

7.5 The conflict between the interests of the author and those of the owner of the carrier had already been tackled in previous judgments, such as the judgment rendered by Vizcaya Court of Appeal on 10 March 2009 (*Zubi Zuri*) in a famous lawsuit between the

architect Santiago Calatrava and Bilbao City Council. In that case, respect for the integrity of the work was not directly related to the change of location of a bridge created by this architect; rather, a walkway was added to it in order to extend it until it connected with a new residential area, which altered the architect's conception of his work. The judgment found the architect's moral rights to have been infringed, but dismissed his claims concerning the way in which he had conceived the work and merely awarded him damages.

7.6 The Civil Chamber of the Spanish Supreme Court has also had to rule, in its judgment of 6 November 2006, on a conflict arising on account of the necessary demolition of a wall containing a pictorial work that had been created for a competition (*Pinturas murales*). In this case, the court held that, in principle, the demolition of the wall featuring the work could constitute infringement of the artist's moral rights and give rise to pecuniary damages for the damages sustained. However, given the circumstances of the case, it could not be ruled that an illegal act had taken place, since there were grounds which ruled out any hypothetical unlawfulness. In that regard, the court held that the circumstances of the wall and the building were particularly significant, and that the deteriorated state of the building called for its reconstruction, which could not be neglected without putting people's safety at risk, and so it was impossible to preserve the paintings. Moreover, the state of the paintings had deteriorated considerably due to their location, the effects of weathering in a place with a high level of rainfall and the actions of delinquents. Also, given the characteristics of the work, which could not be separated from its carrier, although it could be reproduced on the basis of sketches, its lifespan was contingent upon the lifespan of its carrier, and so it was never destined to have a perennial nature, but instead had a temporary lifespan.

7.7 In other cases, given the surrounding circumstances, the Spanish courts have ruled that the author's right to demand respect for the integrity of the work prevails over claims by the owner of the carrier regarding carrying out renovation or repairs which unavoidably affect the work. An example of these rulings is the judgment by Guadalajara Court of Appeal of 13 October 2003 (*Renovation of bank branch*).

7.8 Together with the moral right to demand respect for the integrity of the work, Spanish law confers on the author the right to modify the work, respecting rights acquired by third parties and the requirements governing protection of goods of cultural interest (Article 14.5 of the Copyright Act). This is a moral faculty which can be considered to be the positive aspect of the precedent and which, as we can see, would also call for consideration of the interests at play and respect for the owner's rights.

7.9 Lastly, Spanish law also confers on authors, as a moral faculty, the right to access the sole or a rare copy of the work when that copy is in another's possession, for the purpose of exercising the right of disclosure or any other applicable right (Article 14.7 of the Copyright Act). In this case, the Act states that this right shall not allow the author to demand the moving of the work, and access to it shall be had in the place and manner that cause the least inconvenience to the possessor, who shall be indemnified where appropriate for any damages and prejudice caused to him/her. As can be seen in this case,

the Spanish lawmaker has also laid down a rule anticipating the potential conflict between the rights of the author and those of the owner of the carrier, and trying to strike a balance between them.

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?

8.1 Intellectual property in general, and moral rights in particular, must fit in with the requirements of fundamental rights including the freedom of expression. Generally speaking, however, it is considered that this conflict has already been resolved by the law itself. In other words, it is assumed that the lawmaker has already analysed the potentially conflicting rights. Nevertheless, this does not mean that conflict does not arise in practice.

8.2 Under Spanish law, the fundamental right to honour, to personal and family privacy and to one's own image, guaranteed in Article 18 of the Constitution, provides civil protection against all kinds of unlawful interference in accordance with the provisions of Organic Act 1/1982 of 5 May on the legal protection of the right to honour, to personal and family privacy and to one's own image. Generally speaking, this provision states that actions which have been authorised or ordered by the legally competent Authority shall not be deemed to constitute unlawful interference, not even where there is a significant prevailing historic, scientific or cultural interest.

8.3 In practice, this is not an issue which has cropped up frequently. However, it must be borne in mind that under Spanish law the disclosure of facts relating to the private life of an individual or family which affect their reputation and good name, as well as the disclosure or publication of the content of letters, memoirs or other personal writings of a private nature, is classed as unlawful interference. Consequently, these rights would have to be considered to prevail over moral rights. This prevalence would also apply in cases in which damage was caused to a person's honour or reputation by means of an intellectual work.

8.4 When, on the other hand, the breach is suffered by the author by means of distortion or mutilation of his/her work which affects his/her moral rights, freedom of expression cannot be used as a means of defence to justify an act that has damaged the honour and reputation of the author and his/her moral rights in the work. This is the solution arrived at in the judgment of Madrid Court of Appeal of 14 October 2003 (*Mil mujeres cubanas*), concerning a journalistic piece referring to a mural made up of photographs of Cuban women displayed in a hotel in La Habana, which the article linked to prostitution (the article was entitled "*Mil mujeres en cada hotel. La revolución de las jineteras*" – *"One thousand women in each hotel. The prostitutes' revolution"* – and it was illustrated with a partial photograph of the mural). According to the judgment: *"This attack cannot be justified by the constitutional right to freedom of expression, since it is absolutely impossible to comprehend that freedom of expression can allow a gratuitous attack on the right held by an author to demand the integrity of his work, since whether it is legal to*

criticise the artistic values of the display or the spirit of the displayed work is not under debate; rather, what is being reproached is the distortion and denigration of its meaning by linking it to the rather delicate issue of sexual tourism".

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 licences (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 moral rights? If so, which ones?

A) How do authors exercise their moral rights in practice? Do they consider this a matter of importance?

9.1 In practice, moral rights are exercised by including, in economic rights transfer contracts, a clause demanding respect for them or prohibiting any conduct that could infringe them.

9.2 In the case of the right of authorship or attribution, including the name, signature or sign on copies of the work, or next to the title in the case of digital archives, constitutes exercising of the right.

9.3 Subsequently, once an infringement has occurred, authors go to court in order to demand recognition of their rights by means of the actions expressly laid down in Article 138 and subsequent articles of the Copyright Act and in the Spanish Criminal Code (Article 270 of the Criminal Code). Authors consider this matter important because the defence of moral rights is not, in principle, assigned to collective management organisations, and so it is they who must deal with any infringement.

9.4 This task is extremely difficult if we bear in mind how easy it is to infringe moral rights in the digital network environment (e.g.: a greater possibility of plagiarism, a greater possibility of modifying existing works). In this setting, authors commonly use watermarks to protect their right of authorship, and other technological measures to prevent modification of the file.

B) How do they want to be acknowledged (which modalities exist for the exercise of the rights of authorship and integrity)?

9.5 Through the right of authorship, authors may demand recognition of their capacity as such in their works. This right is provided under Article 14.2 and 14.3 of the Copyright Act and has two aspects: a) a positive aspect consisting of proclaiming the authorship in an express manner by indicating the name, or putting a signature or sign, on each copy of the work, or announcing it in each performance or in advertising of the work; b) a

negative aspect relating to the right not to reveal the author's identity and to conceal it through anonymity or use of a pseudonym. Plagiarism constitutes the main form of infringement of the right of authorship.

9.6 The right to demand respect for the integrity of the work allows the author to prevent any distortion, modification or alteration of the work, or any act in relation to it that is liable to prejudice his/her legitimate interests or threaten his/her reputation. This is laid down in Article 14. 4 of the Copyright Act. In actual fact, and unlike in the previous case, there are no different modalities for exercising this right. The only thing possible is that the author, when transferring the right of transformation, can grant varying degrees of freedom to the assignee when it comes to modifying or transforming his/her work. In any event, moral rights give rise to the most court proceedings. Furthermore, the infringement of these rights can occur with respect to any kind of work: literary, musical, audiovisual, photography, visual arts, etc.

C) How do they impose respect of their moral rights when they are faced with derivative works?

9.7 The freedom enjoyed by the assignee to modify the work will depend on the rights which have been transferred by the owner. If the right of transformation (Article 21 of the Copyright Act) has been transferred, the assignee will be able to create derivative works or modify the original work. For example, a contract for the transformation of an existing work, regulated in Article 89 of the Copyright, allows the assignee to adapt a literary work in order to create an audiovisual work. Assignment of the right of transformation means more freedom in that sense.

9.8 The moral right of integrity is closely linked to the economic right of transformation. Transformation can cover from adaptation to the inclusion of just some elements of the original work. The assignee of the right of transformation could infringe this right and not the right of integrity. The latter could, however, be affected where the adaptation damages the author's legitimate interests or threatens his/her reputation (Article 14.4 of the Copyright Act). This will happen when, for example, drastic changes are made to the plot or characters, or where the artistic conception is altered [judgments of the Supreme Court, Civil Chamber, of 17 July 2008 (*Zortziko «Maite»*) and 15 December 1998 (*Postage stamp reproducing an art poster*)].

9.9 Once the infringement has been committed, authors may resort to civil action for the protection of copyright: 1) a cessation action (Article 139 of the Copyright Act); 2) precautionary measures (Articles 138 and 141 of the Copyright Act); 3) damages action (Article 140 of the Copyright Act). If the infringement constitutes a criminal offence, they can rely on Article 270 of the Spanish Criminal Code.

D) Do licences (in particular via creative commons) commonly provide a prohibition to create derivative works?

9.10 There is no general trend; rather, it depends on how comprehensive the Creative Commons licence which has been used is. There are licences which prohibit transformation in order to make derivative works. Others, however, do not include such a prohibition, but they require that the derivative work be distributed or communicated to the public under a licence identical to the licence for the original work. If transformation is allowed for the original work, then it should also be allowed for the derivative work.

9.11 However, works that are not subject to this kind of licence do include an express prohibition on the creation of derivative works, which will always require the express consent of the rightholder. Article 21 of the Copyright Act confers on authors the exclusive right of transformation, and so only they (or the assignee, where applicable) may authorise such use. An exception is parody (Article 39 of the Copyright Act) which, despite entailing a transformation, does not require the author's consent.

9.12 In the field of computer programs, Article 99.b) of the Copyright Act includes, among the exclusive rights of authors, the possibility of authorising or prohibiting their translation, adaptation, arrangement or any other transformation. This is without prejudice to the limitations affecting works of this kind, where certain types of use which do not require consent are permitted: a) the transformation of a computer program, including the correction of errors, where those acts are necessary for the use of the program by the lawful user (Article 100.1 of the Copyright Act); b) the carrying out of successive versions of the computer program, or of programs derived therefrom (Article 100.4 of the Copyright Act); and c) the reproduction of the code and the translation of its form in order to achieve the interoperability of a program with others (Article 100.5 of the Copyright Act). In any event, the provisions concerning computer programs come from the European Directive on this subject and so they are the same as the provisions in the other European Union countries.

E) 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 moral rights? If so, which ones?

9.13 Yes. Collective management organisations (SGAE and DAMA, among others) and professional organisations, as well as associations of authors, place at the public's disposal model contracts for the assignment of copyright in the literary, audiovisual, musical and visual arts sectors. The contracts normally contain one of the following two kinds of clause relating to moral rights: a) A bar to the assignment thereof, since they are non-transferable; or 2) the requirement, among the assignee's obligations, to respect the authorship and integrity of the work.

9.14 When the rights are transferred by means of a publishing or dramatic or musical performance contract, the obligation to respect the right of authorship and integrity is absolute. As regards the right of authorship, Article 64.1 of the Copyright Act states that the publisher is obliged to include the name, byline or sign identifying the author on copies of the work. Article 78.2 of the Copyright Act obliges the assignee to perform the

work under technical conditions that do not damage the author's moral rights. In the field of audiovisual works, respect for moral rights is required once the work is completed. In such cases, the right of authorship will be considered damaged when the authorship of the director/producer, soundtrack composer or scriptwriter is not acknowledged in the title credits (Article 92.2 of the Copyright Act). Nevertheless, in none of these cases will the right of ownership be infringed if, for technical reasons and reasons concerning exploitation of the work, it is impossible to include the author's name, byline or sign [Supreme Court judgment of 15 December 1998 (*Postage stamp reproducing an art poster*)].

9.15 With respect to the right of integrity, the assignee cannot delete, add to or modify the work subject to assignment (Article 64.1 of the Copyright Act concerning the right of publication and Article 78.2 of the Copyright Act concerning dramatic or musical performance contracts). The possibility of making changes is limited by the right of integrity itself and by use in trade and good faith. Nevertheless, if, in order for the work to be exploited appropriately, it has to undergo technical modifications, then they can be carried out even if they have not been agreed to by the author, and the right of integrity shall not be deemed to have been infringed (e.g. spelling or syntax corrections in the publication of a literary work, unless the incorrect forms have been deliberately included by the author). This was held by the Supreme Court in its judgments of 28 January 2000 (*Itálica de Esculturas*) and 17 July 2008 (*Zortziko «Maite»*). Any other kind of modification must have the prior consent of the author, and a right of ratification must always be provided in order to ensure that the modifications carried out by the assignee satisfy the author and do not damage his/her right of integrity. It is nevertheless necessary to bear in mind the specific sector in which the work is to be exploited in order to know what kind of modifications may be made without consent (for example, an author who consents to the television broadcasting of his/her work is implicitly permitting advertising interruption). In the case of audiovisual works, any modification of the final version of the audiovisual work will require the prior consent of those who have agreed upon that final version, namely the director and producer (Article 92.1 of the Copyright Act).

9.16 Examples of clauses included in contracts:

- Production contract: "*The assignment to the PRODUCER shall not include the author's moral rights, which are expressly reserved by the latter*". "*The AUTHOR's moral rights are reserved under the terms provided in the Copyright Act*".

- Publishing contract: "*The AUTHOR hereby reserves his/her moral rights, which shall be respected by the PUBLISHER, who shall, in turn, demand that all third parties with whom it enters into a contract safeguard said rights*".

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

10.1 In principle, moral rights are not managed by these organisations. Nevertheless, this does not mean that collective management organisations do not play a significant role in the protection of such rights in certain situations.

10.2 For example, it could be that following the death of the author, a management organisation is entrusted with the exercise of the right of authorship and integrity, this being a possibility which has to be deemed included in Article 15.1 of the Copyright Act. It is also possible, although highly unlikely, that where no person has been expressly designated to exercise any subsisting moral rights (authorship, integrity and disclosure), the management organisation could intervene as an heir, assuming that the author has established it as such.

10.3 Of greater practical importance is the fact that some management organisations, in their bylaws, allow authors to entrust them with the defence of their moral rights (e.g., Articles 5.d and 9 of SGAE's bylaws; Article 9 of DAMA's bylaws; and Article 4.4.f of VEGAP[7]'s bylaws).

10.4. Notwithstanding the above, management organisations, just like any other person with a legitimate interest, can take the pertinent court measures when, upon the author's natural or declared death, his/her successors exercise their right of non-disclosure in a manner that is contrary to the right to access culture laid down in Article 44 of the Spanish Constitution (Article 40 of the Copyright Act).

10.5 In most cases, the role that can be played by management organisations in this field must be entrusted by the rightholder beforehand.

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

- **Artistic quotation**
- **User generated content**
- **Folkclore**
- **Orphan works**
- **Cloud computing**
- **Alternative (free) licensing schemes (in particular open source licences or creative commons)**
- **International aspects (determination of jurisdiction and applicable law)**

(A) Artistic quotation

11.1 Artistic quotation is regulated in Article 32.1 of the Copyright Act. It is limited to the use of fragments of the works of others which have already been disclosed and which

7 The bylaws of Spanish management organisations can be consulted on their websites. In the case of the three which have been cited, the addresses are as follows: SGAE (http://www.sgae.es/acerca-de/estatutos-sgae/); DAMA (http://www.damautor.es/estatutos.html); and VEGAP (http://www.vegap.es/que-es-vegap/estatutos).

must be included in the author's own work. This inclusion into the author's own work is not quantified or measured. In any event, this condition does not infer that the included elements must be accessory or secondary. The quotation can be made for the purpose of analysis, comment or critical assessment, but also for mere illustration purposes[8]. Article 32.1 of the Copyright Act only includes it for teaching or research purposes, but this requirement has been discredited in case law and legal opinion, and its origin lies in the lawmaker's desire to regulate (1987 Act) limitations regarding quotations and education together[9]. In any event, Article 32 of the Copyright Act requires inclusion of the source and author's name[10].

B) User generated content

11.2 User generated content (UGC), if original, can be classed as a work and generate copyright for its creator (Article 1 of the Copyright Act). However, during the creative process for this kind of content, works belonging to third parties are frequently used. Taking into account that the Spanish system is "closed" in respect of the exceptions permitted by the law, and that these exceptions are interpreted in a restrictive manner, we are looking at a situation in which a large number of Internet users are considered to be infringing copyright legislation without there actually being any social reprobation against their conduct or reaction from the rightholders themselves. Consequently, there are calls for a specific limitation to deal with the issue on a legislative level[11].

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8 Judgment of Barcelona Court of Appeal, Section 15, 31/10/2002 (*Barcanova*, on the reproduction of visual art in school books): "*Quotation, because of its grammatical and logical meaning, is an act of reproduction which has a broader and more neutral immediate purpose than the purpose of the other three which are permitted [analysis, comment and critical assessment], and whose relationship with the work containing it is less specific. In actual fact, quotation is warranted by its purpose, which is also referred to in Article 32. It is its function or final cause which makes it lawful: teaching or research. Consequently, there is no reason not to include in the quotation the reproduction carried out in order to illustrate, with another's visual art, the author's own work, obviously on condition that the other requirements necessary for warranting it are satisfied, including teaching or research purposes and proportionality.*"

9 This situation changed somewhat when the Spanish lawmaker decided to devote an express provision to the limitation in order to favour educational and research activities. In spite of this, the requirement of teaching or research purposes was absurdly maintained for quotation. The Draft Reform Bill for the Copyright Act which is currently being passed through Parliament, despite dealing broadly with the educational and research exception, has once again neglected to remove the requirement whereby the quotation must be for teaching or research purposes (*Draft Bill amending the Spanish Copyright Act, approved by Royal Legislative Decree 1/1996 of 12 April and the Spanish Civil Procedure Act (Law 1/2000 of 7 January)*. Official Parliamentary Gazette, 21 February 2014. No. 81-1.)

10 Judgment of Madrid Court of Appeal, Section 13, 26/02/2007, on the use of visual art to illustrate school books.

11 See the study "*El futuro del derecho de autor y los contenidos generados por los usuarios en la web 2.0*" *("The future of copyright and user-generated content on web 2.0")* directed and

C) Folkclore

11.3 It is necessary to distinguish between folkclore in the strict sense and works belonging to a folkclore genre. In the first case, we are talking about the result of creative activity carried out by groups of humans over generations, and so no relationship can be established between the result and specific people. The "work" (music, dance, storytelling...) has been created "gregariously" or "tribally" if you like. This is the case of the cultural heritage of some towns, districts and regions[12]. It is difficult to apply copyright to creations of this kind, and so moral rights are not attributed to anyone, and adaptations or new versions can be made of these manifestations which, on the contrary, will enjoy copyright protection[13]. In the second case, however, we are talking about

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coordinated by Franz RUZ, particularly pages 35, 44-49, 52-80. http://rooter.es/documents/futuro_derechos_autor_contenidos_generados_usuarios_web_2.0.pdf.

12 Judgment of Málaga Mercantile Court No. 2, 14/05/2012, Legal Finding III (*Pandas de Verdiales –Traditional Singing Groups from Málaga)*: *"These Singing Groups, whose origin has been lost in time, and which are made up of local people who have learnt this art form from their elders, exclusively perform popular and traditional works by unknown artists, which have been modified over time as they have been passed down the generations. These works have no fixed arrangement laid down on sheet music. They are, by definition, subject to change. Accordingly, the lyrics and music are not the creation of a specific artist with a name and surnames; rather they are the result of the contributions of many unknown performers over the course of the centuries. As such, they are works which belong to all citizens of the province of Málaga and to the rest of humanity. They form part of their cultural heritage, and no institution should in any way appropriate them or try and obtain monetary return from them. Likewise, the SGAE cannot and should not allow them to be registered in the name of any alleged current artist or artist of a version, adaptation or arrangement, in order to prevent anyone from appropriating the people's common cultural heritage. Unlike other forms of folkclore, this one, Los Verdiales, has yet to be polluted by other external musical influences, and preserves its absolutely traditional essence."*

13 Judgment of Toledo Court of Appeal, Section 1, 09/09/2009, Legal Finding 3 (*Manantial Folk*, on adaptations of folk music): *"In this case, the Judge is clear on the fact that for him it is well known from other cases that the music group Manantial Folk performs its own adaptations of folk music, and so he dismisses SGAE's claim on the grounds that since the case deals with folk music by an unknown author or long ago, over seventy years have elapsed since his/her natural or declared death (Article 26 of the Copyright Act). In short, both for being folk music and for referring to adaptations of same, carried out by the performers themselves, the complaint is dismissed. The appeal against it is based on there being no evidence that the adaptations that were performed are their own, and relies on the reversal of the burden of proof laid down in Article 150 of the Copyright Act, confusing the general presumption that the management organisation is authorised, as per Article 150, with the alleged presumption that whoever performs an adaptation of folk music is not the author of same and must prove that said adaptation is his/her own, which is certainly not stated in the aforementioned provision. In this case, what there is is valid and sufficient evidence that the adaptations are the group's own, which is none other than the Judge's own knowledge, deriving precisely from previous lawsuits that he has handled, in which it has been demonstrated that the group Manantial Folk performs their own adaptation of folk music. In view of this affirmation, it is for the plaintiff and current*

works that can be attributed to individual authors (either one or several) even though they may be unknown (anonymous works). In that regard, some judgments describe folkcloric works as being *"works created by an unknown author or long ago, (…) with over seventy years having gone by since their natural or declared death"*)[14]. Unlike in the first situation, in these other cases in which there is no "gregarious creation", but rather individual creation (by one or several), there can be held to be moral rights, and given that in Spain the rights of integrity and authorship or attribution are not subject to time restrictions (they are eternal), they can ultimately be asserted and enforced by the public bodies referred to in Article 16 of the Copyright Act. In practice, however, it seems unlikely, but not impossible, that this situation will arise.

D) Orphan works

11.4 A Draft Reform Bill for the Spanish Copyright Act is currently being passed through Parliament. Among other things, it incorporates the content of Directive 2012/28/EU on orphan works into Spanish law. According to the wording of the Draft Bill: "*The fact that it is impossible to locate the rightholders of a work should not prevent the public from being able to access and enjoy said work, and so it is necessary to allow cultural institutions to digitise it and make it available to the public, provided that even if those acts are carried out by means of agreements with private institutions or revenue is generated in their regard, such revenue merely covers the costs deriving from said use. This must be understood as being without prejudice to the right of the legitimate rightholder to put an end to the orphan work status and to receive fair compensation, taking into account not only any damage which has been caused, but also public interest and the promotion of access to culture which justify the use of the work, as well as the non-commercial nature of the use*"[15].

E) Cloud computing

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appellant to prove that this is not the case, i.e., that there are proceedings which have been heard by the same Judge in which it has been proven that Manantial Folk is not the author of the adaptations that it performs of traditional or folk music over seventy years old."

[14] Judgment of Toledo Court of Appeal, Section 1, 09/09/2009, Legal Finding 3 (*Manantial Folk*, on adaptations of folk music).

15 *Draft Bill amending the Spanish Copyright Act, approved by Royal Legislative Decree 1/1996, of 12 April, and Spanish Civil Procedure Act 1/2000, of 7 January*. Official Parliamentary Gazette 21/02/2014. No. 81-1 Section II of the Preamble. http://www.congreso.es/portal/page/portal/Congreso/PopUpCGI?CMD=VERLST&BASE=pu10&FMT=PUWTXDTS.fmt&DOCS=1-1&DOCORDER=LIFO&QUERY=%28BOCG-10-A-81-1.CODI.%29#(Página1). On this issue please also see: EVANGELIO LLORCA, Raquel, *Un nuevo reto para la digitalización y puesta a disposición de obras intelectuales: el uso de obras huérfanas y descatalogadas ("A new challenge for digitisation and making intellectual works available to the public: the use of orphan and unlisted works*") Diario la Ley, 2012, no. 7784. For further information on the process of locating authors in Spain, please see: http://www.fesabid.org/bpi/dominio-publico-y-obras-huerfanas.

11.5 In Spanish law there are no specific provisions on cloud computing. The aspects which are most commonly tackled in case-law are data protection and system security, with copyright being marginally dealt with[16].

F) Alternative (free) licensing schemes (in particular open source licences or creative commons)

11.6 Spanish law fully recognises creative commons and open source licenses. Subjection to creative commons licences therefore means that to a broader or narrower extent, depending on what the author decides, the work is protected by copyright, and anyone who uses it will be aware of the scope of its protection, and the authorship of the original work (paternity) will always be respected.

11.7 The use of these alternative licences has led to the development of an *Open Access* policy in Spain, particularly in the teaching and research fields, which has significantly altered the attribution of authors' moral rights. As a paradigm, we can find Article 37.2 of Act 14/2011, of 1 June, on Science, Technology and Innovation, which states that: "*Research personnel whose research activities are primarily financed with funds from the General State Budget will publish a digital version of the final version of the content that has been approved for publication in serialised or periodic research journals, as soon as possible, but no later than twelve months following the official publication date*"[17].

G) International aspects (determination of jurisdiction and applicable law)

11.8 As far as jurisdiction is concerned, for disputes of this kind Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter, Brussels I Regulation) is applicable in Spain. According to Article 3 of the Regulation, when the defendant is domiciled in a Member State, the courts must determine their jurisdiction in accordance with the rules of national jurisdiction. In Spain's case, Article 21 of Organic Act 5/86 of the Judiciary does not establish the exclusive jurisdiction of the Spanish courts. The criteria that is generally employed is the place where the defendant is domiciled, despite the problems that arise from defining this location in the case of online infringement, and the place where the infringement occurred *(forum loci delicti commissi*).

16 See MORALES, José Ramón. "*Cloud Computing: riesgos corporativos e implicaciones jurídicas*". *("Cloud Computing: corporate risks and legal implications").* Actualidad Jurídica Aranzadi no. 863/2013, Pamplona. 2013 and MARTÍNEZ MARTÍNEZA, Ricard (coord.) "*Derecho y «cloud computing»*" *("Law and cloud computing"*), Civitas, 2012.

17 On this issue see: DE ROMÁN PÉREZ, Raquel. "*Acceso abierto a los resultados de investigación del profesorado universitario en la Ley de la Ciencia*". *("Open access to the results of research by university professors in the Science Act").* Diario La Ley, No. 7986, 18/12/2012.

11.9 The criteria for determining applicable law in cases of international copyright infringement would appear to be laid down in Article 5.2 of the Berne Convention. This article recognises the applicable law as being that of the country where protection is claimed (*regla lex loci protectionis*), with that rule being applied, for reasons of legislative hierarchy, preferentially over the pertinent provisions provided in Spanish national legislation (Art. 10.4 of the Spanish Civil Code)[18].

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)?**
- **From a right to claim authorship (paternity) to a right to attribution?**
- **From an integrity right to a right to respect the authenticity of the work?**
- **Up to acknowledging similar interests and rights akin to moral rights for authors and performing artists, for the benefit of publishers, producers and broadcasters?**

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

12.1 This shift in the scope of the right of disclosure has not had a large impact on Spanish law so far because traditionally, the moral right of the author has been considered by the majority of legal experts and Supreme Court case-law as being a personal right, not a personality right. In this regard, the Spanish Supreme Court has, on a number of occasions, held that the moral right of the author should be recognised as *«[...] a subjective and absolute right, with legal monopoly, limited in time and not having an exclusively economic nature, since together with that aspect, it has a non-economic content, which is none other than said moral right [...], with personal faculties, even if it is not a personality right since it lacks the indispensable note of essentiality, since it is not inseparable from or essential to the person, given that not everyone is an author; but once the work of art has been created, one cannot ignore its vocation or call for externalisation, a material aspect of the immaterial right held by the author, so that in*

18 On this issue see: LÓPEZ-TARRUELLA MARTÍNEZ, Aurelio. "*Infracciones internacionales al derecho de autor*". *("International copyright infringement").* Commemorative edition. XV Anniversary AAAML. 2009. http://www.uaipit.com/files/publicaciones/1283764121_1273224021_AurelioLopezTarruellaInfraccionesDDAA.pdf.

any contract concerning the dissemination of the creation, this dual aspect – economic and spiritual or moral – has to be considered, with the latter aspect including the paternity of the work, its integrity, the reputation and good name of its creator, etc., insofar as, legally speaking, intellectual works derive and emanate from the personality [...]»[19]. Nevertheless, the idea that the moral right of disclosure is related to the right to privacy, in that bringing to light something that its creator wanted to keep reserved is not a mere copyright issue, is rather widespread among Spanish legal experts. If there were no such thing as a moral right of disclosure, those affected would probably react to the unauthorised disclosure of their works by turning to the fundamental right to privacy.

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

12.2 It is first of all necessary to make a terminological clarification: It could be mistaken to contrapose "paternity right" and "right to attribution", since both may be considered to be strictly synonymous. In this sense, talking about the moral right of attribution is merely a way in which to refer to the right to be recognised as the author without using the term "paternity", which some feel is "politically incorrect".

12.4 On having made this clarification, we will assume that the question is trying to find out whether, in the digital environment, authors are less interested in being recognised as such ("this is my work") than people who have contributed to the creation of works which are not strictly individual (e.g., Wikipedia). It is likely that some forms of creation within the context of the information society, just some of course, are of a community nature, or *gregarious* if you will; and it is also likely that in view of this situation, the only possible aspiration that creators can have is to *leave a trace*, something to show that they *were there*. *Gregarious* creation is not, however, something new. It has been around since the beginning of time. What is folkclore if not this? However, it seems that nobody wants to go back to *pure gregarious creation*, in which no trace whatsoever was left of the creators' personality. Thus, it seems (and we believe that this is the meaning of the question) that authors want to *feature in the credits*. Nevertheless, is that somewhat different from the moral right of paternity or attribution? Would it be a kind of *decaffeinated* moral right of paternity or attribution?

12.5. Whatever it is, there is nothing in Spanish legislation, case-law or legal opinion that points to this distinction between a *strong* moral right of attribution or paternity and a *downgraded* version of same.

12.6 Still, perhaps we could bring up the regulation of the so-called "collective works" provided under Article 8 of the Copyright Act. This is probably the closest thing to *gregarious creation* that can currently be found in Spanish law. It is a form of co-authorship in which authors remain in the back room and are frequently anonymous. Proof of this can be found in Article 28.2 of the Copyright Act, concerning the term of

19 Judgments of the Supreme Court, Civil Chamber, of 2/3/1992 (*El año del Wolfram*, on the transfer of cinematographic rights in a novel) and of 6/11/2006 (*Wall murals*, on the destruction of a wall mural due to building refurbishment work).

protection of collective works, which appears to consider identification of the creators of such works as a mere possibility ("*if the natural persons who created the work are identified as authors* […])[20]

C) <u>From an integrity right to a right to respect the authenticity of the work?</u>

12.7 As in other cases in question 12, it is possible that we might not have understood the question correctly, or in any event, that it might have been posed in terms which are too imprecise. What is meant by "authenticity"? Is it really something different from integrity? Is it not simply ensuring that what reaches the public is exactly what has come out of the author's mind, without any alteration? Perhaps it might have been useful to provide an example.

D) <u>Up to acknowledging similar interests and rights akin to moral rights for authors and performing artists, for the benefit of publishers, producers and broadcasters?</u>

12.8 Under Spanish law, there is currently no debate concerning the acknowledgement of moral rights or similar for publishers, producers and broadcasters, notwithstanding any protection that they might obtain by means of alternative action, such as trademark or unfair competition action.

20 This provision corresponds with Article 1.4 of Directive 2006/116/EC on the term of protection of copyright and certain related rights.