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MAXIMILIANS-  
UNIVERSITÄT  
MÜNCHEN

# Le droit moral dans les différents systèmes de droit d'auteur

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Agnès Lucas-Schloetter

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*Quid novi* since the last ALAI Congress about moral right (Antwerp 1993)?

- No “cold war” between author’s right and copyright systems anymore (?)
- New copyright legislation in civil law (Switzerland, Belgium, countries of former Eastern Europe and Latin America) and common law (New Zealand, Australia) countries having introduced moral right
- ALAI new national groups (Latin America)
- Moral rights in the digital area

Great variety of moral right systems  
at national level throughout the  
world

I – Philosophy underlying moral  
rights

II – Scope of application of moral  
rights

III – Moral rights granted



1) Moral right as mere defence against the assignee or the owner of the tangible asset embodying the work

- French case law during the 19<sup>th</sup> century
- Protection of the author's honour and reputation
- Judgement of the public + responsibility of the author
- Interest protected is objective



## 2) Moral right as absolute right with effect *erga omnes*

- French and German case-law and doctrine at the beginning of the 20<sup>th</sup> century
- Protection of all non-economic interests of the author in his work
- Moral right as a component of copyright
- Interest protected is subjective



### 3) Introduction of moral rights into common law systems

- Protection of non economic interests of the author as long as it also serves the public interest and does not conflict with the normal exploitation of the work
- Attempt to justify moral rights from an utilitarian point of view



## 4) Moral right(s) today

Moral right may serve indirectly the consumers' interest in authenticity but its primary goal is the protection of non economic interests of authors



## *Ratione personae* : ownership

### Civil law countries

- only the individual person who created the work → no legal entity (exception: *œuvre collective*)
- every author of a protected work irrespective of the conditions under which the creative process took place (even if commissioned work or employed author)
- even foreign authors (without reciprocity requirement)



*Ratione personae* : ownership

Common law countries

moral rights mostly excluded for works made for  
hire



## *Ratione materiae* : protected subject matter

- Moral rights vested in all copyright protected works as a general rule in civil law systems
- Moral rights granted only in respect of some copyright protected subject matter in common law systems (e.g. US VARA: only the original of a work of visual art)



## *Ratione materiae* : protected subject matter

- Moral right in civil law countries sometimes expressly restricted ( $\neq$  excluded) by law for certain categories of protected subject matter (software, databases, works of architecture, works of applied art, audiovisual works)
- Moral right protection in practice often reduced by case law due to the low level of



Moral right is today a concept „à géométrie variable“

- protection of non economic interests of authors is weaker for the „small change“ (*kleine Münze*) of copyright than for works of fine art.
- Such result is not in conflict with the rule according to which works of the mind are protected whatever their kind, merit or purpose.
- relativity of moral right is a valuable corrective to the debatable extension of

## Consensus on the two moral rights protected under the Berne Convention

Art. 6bis BC → right of paternity/ attribution  
→ right of integrity/ to object to  
derogatory treatment

## Right of attribution / *droit à la paternité*

- a) Right to claim authorship = to be identified as author, to have his name mentioned
- b) Right to remain anonymous or to make use of a pseudonym → right not to reveal authorship
- c) Right to object to a false attribution ?

Common law → yes

Civil law → no



## Right to object to derogatory treatment/ *droit à l'intégrité*

Art. 6bis Berne Convention:

" ... right ... to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation "



## Right of integrity

- Objective criterion of damage to the author's honour, reputation, personality or dignity (most of the countries – whether civil or common law systems – around the world)
- Subjective criterion of damage to the author's legitimate interests or test of reasonableness (Germany, Spain, the Netherlands)
- No criterion at all → right to oppose any modification against the author's will (France, Belgium, Greece, Poland, Egypt,





## Right of integrity

- distortion, mutilation or other modification: addition, cut or removal of a part; change of size, shape or colour, etc ...
- other derogatory action: use of the work in a distorting way or context
- removal of a site-specific artwork from its intended environment
- destruction ?



## Berne plus: further moral rights

### Right of withdrawal (*droit de repentir*)

- Only in some civil law countries of Europe (Germany, France, Italy, Spain, Portugal, Croatia) and Latin America (Colombia, Guatemala, Nicaragua, Paraguay, Uruguay) + Egypt
- Exception to the binding effect of contracts
- Subject to strict requirements (prior compensation)
- Rarely exercised in practice → symbolic value



## Berne plus: further moral rights

### Right of disclosure / publication (*droit de divulgation*)

- right to decide whether, when and how the work should be made accessible to the public
- right is “exhausted” after the author has exercised it once -> only first publication
- Publishing contract -> consent to disclosure through print approval/ imprimatur
- Undisclosed artwork cannot be seized by the creditors of the author and remains his own under matrimonial property



## IV – Exercise of moral rights

Specific issues related to enforcement:

– Remedies

– Applicable law

A) During the author's lifetime

B) Moral rights *post mortem auctoris*



## Transfer and waiver

- Moral rights may, as a general rule, be waived in common law but not in civil law systems
- Moral rights aim at strengthening the bargaining power of authors and should not be totally “waivable”
- Contractual agreements affecting interests protected by moral rights should be allowed subject to certain conditions
- The author may consent in advance to modifications of his work which are precisely defined
- Which legal status for ghostwriter ?



## Moral rights and copyright exemptions

- Relationship between moral rights and exceptions/limitations to copyright still not clarified
- Copyright exemptions applicable to undisclosed works:
  - Exception related to judicial proceedings
  - Exception for private copying?
  - Quotation?
- Right of paternity/ attribution in case of copyright exempted use (acknowledgment)
- Right to object to derogatory treatment v. exemption for quotation and parody



Art. 6bis para. 2 Berne Convention:

The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. (...)

- 1) Duration
- 2) Owners/ Entitled Persons
- 3) Content



## Duration

- Same duration as for economic rights of exploitation (Germany, Belgium, Switzerland, the Netherlands, UK, Canada, Australia) → no protection of moral interests in works of the public domain
- Perpetual moral right (France, Italy, Egypt, Colombia, Guatemala, Nicaragua, Paraguay, Uruguay)
- Same duration as for economic rights but some protection of paternity and integrity of works in the public domain (Nordic countries, Portugal, some countries of Latin America)
- Perpetual rights of paternity and integrity but extinction of the right of disclosure 70 years *post mortem auctoris* (Spain)





## Owners/ Entitled persons

a) Designated in the testamentary disposition

b) In the absence of a will

a) Heirs as designated by the law of succession as for economic rights of exploitation (Germany, Belgium, Switzerland, Australia, Canada, UK)

b) No transmission to the heirs but exercise through relatives (Italy, Israel, Japan)

c) Right of disclosure transmitted to the relatives but rights of paternity and integrity passed on to the heirs (France)

## Content

- 1) Real transmission *mortis causa* → same content as during the author's lifetime
- 2) No real transmission *mortis causa*
  - only entitlement to enforce moral rights
  - in accordance with what the author would have decided/wanted
  - exercised of moral rights by the heirs or relatives should be subject to a control

Singular or plural: moral right or moral rights?

Open list or *numerus clausus*?



Many thanks for your attention..