

## Moral rights 'revisited'

A clash between theory and practice ?

A view from continental Europe

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## Outline

- Moral rights and collective dependent creation processes (I)
- Remedies for violations of moral rights (II)

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### I. Collective dependent creation processes



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### I. Collective dependent creation processes

- No general rules on the exercise of moral rights:
  - by co-authors
  - during the process of creation of a work (individual or collective)

N.B. Specific rules for audiovisual works / employment contracts

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I. Collective dependent creation processes

Same situation for neighboring/related rights  
(i.e. right of performers)

- WIPO Performers and Phonograms Treaty (WPPT, 1996): art. 5
- Beijing Treaty on Audiovisual Performances (2012): art. 5

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I. Collective dependent creation processes

Case study

- Decision of the Swiss Supreme Court (decision of March 19, 2013; ref. 4A\_598/2012)

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2 graphic designers (D)

1st copyright assignment

Advertising agency (A)

2nd copyright assignment

Client (C)

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## I. Collective dependent creation processes

### Decision of the Swiss Supreme Court

- No right of the designers (D) to terminate the agreement with the advertising agency (A) for just cause (« justes motifs ») in spite of the (unauthorized) changes made to the works by the client (C)
- No violation of the right of integrity of the designers

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2 graphic designers (D)

Advertising agency (A)

Client (C)



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## I. Collective dependent creation processes

### Working hypothesis

- What if one of the designers (D) had refused to deliver the final work after having received [90%] of the agreed remuneration from the advertising agency (A)
- And if the client (C) had already invested in the launch of the new product line

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## I. Collective dependent creation processes

### Classical approach

- Right of first disclosure (« droit de divulgation »): no obligation of the designer to disclose the unfinished joint work
- Right of integrity (« droit à l'intégrité »): right of the designer to object to any unauthorized changes made to the unfinished joint work

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## I. Collective dependent creation processes

### Revisiting moral rights

- How to find a balance between the respective interests of the parties (D, A and C) ?
  - Moral rights between co-authors (D) ?
  - Moral rights on *unfinished* works (D vs A / C)

(Dutch case: Loxodorme v. Fortior, District court of Maastricht, July 29, 2009; US case: Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38 (1st Cir. 2010))

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## I. Collective dependent creation processes

### General test: balance of interests & proportionality

- Art. 3.6 of the European Copyright Code ([www.copyrightcode.eu/](http://www.copyrightcode.eu/)):



« (1) The moral rights [...] will not be enforced in situations where to do so would harm the legitimate interests of third parties to an extent which is manifestly disproportionate to the interests of the author »

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## I. Collective dependent creation processes

### Need to adopt a *specific contractual test*?

- Art. 2.6 of the European Copyright Code (« Works made on commission »): « Unless otherwise agreed, the use of a work by the commissioner of that work is authorised to the extent necessary to achieve the purposes for which the commission was evidently made »

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## I. Collective dependent creation processes

### « Zweckübertragungstheorie »

- Applies to the transfer (license) of economic rights and to finished works
- What about extending its scope / its rationale to moral rights ?

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## I. Collective dependent creation processes

### Extending the « Zweckübertragungstheorie »?

- Present: the use of the *finished* work is authorized for the purpose which was contractually agreed upon (applicable to *economic* rights)
- Extension: the use of the finished *or unfinished* work is authorized for the purpose which was contractually agreed upon (applicable to both economic rights *and moral rights*)...

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## I. Collective dependent creation processes

...provided that the commissioner has met its contractual obligations (no breach of contract)

### Consequences

- Limited protection of the right of first disclosure
- Limited protection of the right of integrity
- Choice of the author regarding the right of paternity

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## I. Collective dependent creation processes

### Contractual dependence of authors: waiver of moral rights

- What is a waiver (“renonciation”; art. 1 § 2 Belgian Copyright Act)?
  - *Unilateral* commitment of the author: freely revocable (at will) ?
  - *Contractual* obligation of the author: irrevocable or revocable only for just cause ?

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## I. Collective dependent creation processes

### Revisiting moral rights

#### A clash between theory and practice?

- Need rules on moral rights in a contractual setting: commissioned works, contractual waiver of moral rights, joint authorship

N.B. private international law

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## Outline

- Moral rights and collective dependent creation processes (I)
- **Remedies for violations of moral rights (II)**

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## II. Remedies for violations of moral rights

### Standard remedies

- Injunctions
- Damages (moral prejudice / « tort moral »)

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## II. Remedies for violations of moral rights

### « **The changing role of the moral rights in an era of information overload** »

- More difficult to gain visibility (competition for eyeballs)
- Authors should benefit from the visibility offered by online platforms
- Remedies for violations of moral rights should be adapted

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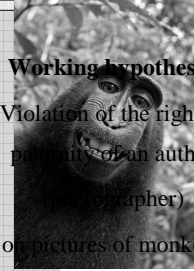
## II. Remedies for violations of moral rights

### Revisiting remedies

- Traditional (offline) remedies: reactive/punitive remedies
- Example: rectification of a book cover for a violation of the right of paternity (Court of Appeal of Paris, Anne Bragance vs Michel de Grèce, RIDA 1989 (142), 301)

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## II. Remedies for violations of moral rights



### Working hypothesis:

Violation of the right of  
paternity of an author  
(photographer)  
of pictures of monkeys  
(Indonesia images)



« Author: David Slater »

with hyperlink to his personal website:  
<http://www.djsphotography.co.uk/>

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## II. Remedies for violations of moral rights

### Revisiting remedies

- Making court decisions about violations of moral rights  
*more visible* « in an era of information overload »
- Traditional approach: publication of the court decisions in  
offline media (newspapers)

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## II. Remedies for violations of moral rights

### Mediatization of court decisions

- « To act as a supplementary deterrent to future infringers  
and to contribute to the awareness of the public at large, it is  
useful to publicise decisions in intellectual property  
infringement cases » (recital 27, EU Enforcement Directive  
2004/48)

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## II. Remedies for violations of moral rights

- « Member States shall ensure that, in legal proceedings  
instituted for infringement of an intellectual property right,  
the judicial authorities may order, at the request of the  
applicant and at the expense of the infringer, appropriate  
measures for the dissemination of the information  
concerning the decision, including displaying the decision  
and publishing it in full or in part » (art. 15 para. 1, EU  
Enforcement Directive 2004/48)

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## II. Remedies for violations of moral rights

### Revisiting remedies

- Use the visibility of online platforms to publicize court decisions about violations of moral rights: social media campaign, search engine optimization (etc.)



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## II. Remedies for violations of moral rights

- Need to adapt remedies to the online environment (N.B.: no « copy paste » of offline remedies):  
« La publication figurera en première page de la Tribune de Genève en support papier, format 10 cm x 15 cm au moins, [...]; dans le même délai et sans commentaires, la même publication, [...], figurera sur le site internet du journal (« www.tdg.ch »), dans lequel ladite publication durera six mois »  
(Swiss Supreme Court, October 3, 2013, ref. 5A\_170/2013 and 5A\_174/2013, para. 8)

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## II. Remedies for violations of moral rights

### Lesson from the protection of the right of personality: invitation to *innovate/be creative*

- Decision of the High Court of Ireland of May 16, 2013 (Eoin McKeogh v. John Doe/Facebook/etc.): « The Court must be imaginative in trying to fashion an appropriate remedy for the plaintiff » (§ 21)
- Publication of an apology on Facebook accounts for a defamation (Swiss Supreme Court, November 4, 2013, ref. 5A\_309/2013)

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## Final words

### Moral rights ‘revisited’

#### A clash between theory and practice ?

- Need to revisit moral rights => to ensure that the rules reflect today’s market conditions (contractual processes of work creation, online environment)
- No irremediable clash / no need for a revolution  
=> Trust in the adaptative capacity of copyright law...

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## Final words

and...

...trust in the wisdom of ALAI

- Resolution on Moral Rights (following the Congress of Antwerp, Sept. 19-23, 1993)  
« It [the Executive Committee of ALAI] admits, however, that a certain flexibility in the application of copyright law with regard to authors' moral rights may be accepted [...] »

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**Thank you for your attention**

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