

ALAI BRUSSELS 2014

Moral rights in the 21st century

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

QUESTIONNAIRE

REPORT ITALY

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ITALY - Stefania Ercolani

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

The rules that grant moral rights are based on article 6-bis of the Berne Convention, on which articles 20-24 of the Copyright Law are based. Italian Copyright Law recognizes the dual nature of author's rights, consisting in rights and prerogatives of moral and economic nature that can be exercised separately. Moral rights are motivated by the close and permanent link between the author and his works, even after the transfer of economic rights. They are considered personality rights, closely related to the author's artistic activity, fame and reputation, and this character determines their regime and the interpretation of the relevant provisions.

2. What do the moral rights consist of in your country:

Right of disclosure (divuligation)

The right of first publication of an work (as the right to keep a work unpublished "diritto di inedito") is considered a strictly personal prerogative of the author, although it is not listed in the section devoted to moral rights, but in art. 12, in the section pertaining to exploitation rights. The moral content of this right can be assumed also on the basis of Article 24 of the Copyright Law, which - after the author's death – prescribes that the author's express will must be respected in any case. The law reserves to the author's close relatives (and not to the heir of the exploitation rights) the right to decide on the first publication when the author's will is not known.

The right not to divulge an artistic performance has been recognized also to performers, when the performance recording do not achieve a certain quality standard (Court of Appeal of Milan, July 18, 2003).

Right to claim authorship (paternity right)

The author has the right to claim the authorship of his work and to have it recognized when the works is exploited.

In case of anonymous or pseudonymous works, the author has the option to reveal his identity after the publication notwithstanding any prior agreement to the contrary. After the revelation of the author's identity, also derived right owners are obliged to indicate his name on the occasion of any exploitation of his works.

The authorship right is retained by the author even after full assignment, sale or transfer of all exploitation rights.

Right to respect and integrity

The author has the right to object to any distortion, mutilation, or any other modification or action prejudicial to his/her honor or reputation. The application of this principle largely depends on the type of work at stake. In general terms, the harm to the author's honor and reputation must not be assessed on the basis of the author's subjective, acute sensibility, but on objective, balanced criteria that safeguard the author's personal dignity, while taking into consideration also the type, destination, and value of the work whose integrity was allegedly infringed. Damages must be proven accordingly.

A sound recording that distorts the work to the point of hindering the correct perception of the work infringes the moral rights of both the author and the performer; the relevant liability is attributable to the record producer (Court of Appeal of Milan, June 3, 2003). On the contrary, pursuant to art. 63 of the Copyright Law, the modifications that are justified for technical reasons relating to the manufacture of the sound carrier can be introduced, provided they do not conflict with moral rights.

The respect of the integrity right has proven particularly controversial for cinematographic works; in case of disagreement between the producer and one or more of the authors, the dispute on the adaptations shall be decided by a panel of specialists designated by the President of the Council of Ministers (Article 47).

Right to repent or to withdraw

The author's right to withdraw his works from the market is regulated in Articles 142 to 143 of the Copyright Law. This personal and not transferable right can be exercised by the author only for "serious moral reasons" which are in principle related to the author's personality; for example, a fundamental change in his artistic views or political opinions, such as his previously published works conflict with his ideas.

The author who decides to withdraw his works from the market must follow a specific procedure that is a safeguard for the parties involved. He is also liable to compensate any person who has acquired rights to reproduce, disseminate, perform, or sell the works that are withdrawn. After the completion of the legal procedure, any dissemination of the work constitutes an infringement of copyright.

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

No, they cannot. Moral rights are inalienable and cannot be assigned. Obviously, they are exercised by the author or his successors discretionally; for example, the Court admitted the validity of the clause by which a film author agrees not to claim the destruction of the film in case of modifications that he does not approve, while keeping his right to withdraw his "signature", as a means to disclaim authorship (Procura of Rome, June 22, 1989).

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

Moral rights have unlimited duration in Italy, like any personality right. They can be exercised by the author and after his death by his closest relatives (parents, children, wife/husband and other direct ascendants or descendants; in their absence by brothers and sisters). When there is a public interest, if the relatives do not intervene or no relative exists, then the moral rights can be exercised by the Government, in case of serious infringement (article 23).

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?

Letters constituting protected works have a special treatment even after they have fallen into the public domain. For their confidential character and their link with the intimacy of private life, letters may not be published, reproduced, or in any manner divulged without the consent of the author and of the addressee too.

After the death of the author or of the addressee, the publication can be allowed only if close relatives consent (relatives are entitled according to the predefined order indicated by art. 93 of the Copyright Law). A similar regime is foreseen also for all type of correspondence, family and personal memoirs and other writings of a like nature. This rule can be derogated if the relevant knowledge is necessary for the purposes of civil or penal proceedings or in connection with the defense of the honour or reputation of the person or family concerned .

The law excludes from the scope of these provisions official documents and letters of interest to the State.

The Copyright Law includes some specific rules concerning portraits (articles 96-98). The portrait of a person may not be displayed, reproduced or commercially distributed without the consent of such person. After the death, this right is exercised by close relatives legally entitled in predefined order.

However, basing on freedom of information, the consent is not required when the publication or reproduction of the portrait is justified by the person’s notoriety or public office, or by the needs of justice, or for scientific, didactic, or cultural reasons, or when reproduction is associated with facts, events and ceremonies of public interest or which have taken place in public. In all cases, the publication must not prejudice the honour, reputation or dignity of the person portrayed. Special stricter rules are applicable to minors.

Some specific rules apply in the case of commissioned photographic portraits. In such case, the portrayed person or his successors have the right to publish the photos, subject only to the payment of an equitable remuneration to the photographer by any person making commercial use of the reproduction. The name of the photographer must be mentioned if it appears upon the original photograph.

In case law, the right to some special identifying features (like clothing styles or accessories) has been recognized in Court as having personal as well as economic content.

Several judgments concern the right to control the use and publication of the personal image, both for the purpose of its economic exploitation and as a safeguard of the person’s private life.

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

No. There is no specific legal rule for the abuse of moral rights.

7. How would a conflict between the exercise of a moral right and of any other proprietary right, such as the right to “material” property on the “carrier” of the work, be solved in your

country? (e.g. mention of the name of the author on a building, modification of a utilitarian work, demolition of an artistic work, graffiti on a building,...)

Some specific provisions concern the right in architectural works. As a derogation to the right of integrity in art. 20 it is stated that the author of works of architecture may not oppose modifications deemed necessary during construction or other modifications that become necessary in the completed work. However, if the work is recognized by the State authority as having an important artistic character, the author has the right to be entrusted with the study and execution of such modifications. In the case of important projects that have an artistic relevance, the contract between the architect and the owner includes clauses on this rights, that are contractually regulated in advance.

According to the Supreme Court (Cassazione, October 18, 1991, n. 11043), in order to obtain damages the architect whose work has been modified during the construction, must prove that there has been an actual damage to his reputation in the professional circles (experts, critics or other potential customers).

No rule applies specifically to sculpture, paintings, or other works of visual arts and no case of destruction of an artistic work has been submitted to the Courts. However, there are interesting decisions in this field; for example, in a decision of October 9, 2002, the Tribunal of Naples deemed that it infringes the author's moral rights the removal of a sculpture from the location for which it had been conceived and where it was placed by the author in the event that the new location is detrimental to the author's honour and reputation. Equally the reproduction in a different size was deemed a violation of moral rights

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?

The Italian Copyright Law contains the well-known exceptions motivated by freedom of information and freedom of speech. They are enshrined in the law as follows:

article 65: free reproduction of articles, for the purposes of reporting the current events, as far as it is justified by the informative purpose. The reconciliation with moral rights is realized through the provision that the exception is applicable "as long as the source, including the author's name, if quoted, is indicated, unless it turns out to be impossible".

Article 66: publication of speeches, lectures and conferences delivered in public, in newspapers and other media within the limits of the information purpose. In this case the exception is applicable provided that the source, the author's name, the date and the place where the speech was delivered, are indicated.

Article 70: communication and reproduction of quotations, abridgment, fragments or parts of a work, within the limits justified for the purposes of criticism or discussion. The right of authorship is expressly safeguarded, prescribing that there must always be the mentions of the title of the work, and of the names of the author, the publisher and, in the case of a translation, of the translator, whenever such mentions appear on the work that has been reproduced. It appears clear that the safeguard is two-sided, since the mentions are also necessary to for the public to understand the criticisms and/or to participate in the discussion. This is even more true for the limitation provided for in the same article in favour of the reproduction in anthologies for school use (against an equitable remuneration established in the Regulations implementing the Copyright Law).

The most frequent and remarkable cases of conflict between moral right and freedom of expression concern parody, caricature and similar derived works. Since there is no exception for parody in Italian Copyright Law, the reference is made to art. 21 of the Constitution. When the derived work is not a mere adaptation or elaboration of the original but, on the contrary, it turns the original concept and meaning into something substantially different, the freedom of expression prevails. There are several decisions that confirm such orientation, including cases when the parody follows very closely the plot, characters and even the expression of the original work, provided that there is a reversal of the meaning, for example turning a romantic novel into a satire of sentimentalism.

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 the moral rights? If so, which ones?

This is not an easy question and there is no uniform answer. The consideration of moral rights is subjective by nature and the reactions of the authors depend not only on their personal attitudes but also on the type of works or the field in which they are active.

In some cases quotations or transformations are considered positively by the author, as a recognition of the artistic value of the original work. In other cases, there can be contractual arrangements for the case the author does not approve the version of his work that is offered to the public. Such arrangements can be negotiated on a case by case basis and mainly depend on the respective bargaining power of the parties. CMOs are not involved in such negotiations.

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

11.

No, collective management organizations are not involved in the exercise of moral rights. Licenses granted to users by SIAE (Italian Society of Authors and Publishers) make express reservation as to moral rights, drawing the attention of the licensee to the necessity to respect them. In all cases, enforcement remains in the personal competence of the author.

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

- “artistic quotation”
- user generated content
- folklore
- orphan works
- cloud computing
- alternative (free) licensing schemes (in particular open source licences or creative commons)
- international aspects (determination of jurisdiction and applicable law)

No, There are no specific distinct rules on moral rights relating to said forms of exploitation. The exceptions listed under question 8 apply.

13. 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?

We are not aware of case law that gives particular evidence of this shift in the digital age. For divulgation right, as explained above, since 1941 the Copyright Law itself clarifies for letters and portraits that the intimacy of private life must be respected in addition to copyright. See also answer under question 5 above.

As far as authorship is concerned, several cases were brought in front of the Courts about the authenticity of paintings. Rather than to authorship or integrity rights, such cases were decided on the basis of the rules governing contractual agreements (Cassazione, August 29 1987, n. 7126; Cassazione, May 4, 1982, n. 2765). An interesting decision of the Court of Appeal in Rome on July 26, 1978, concerns the disavowal of authorship of a painting showing on its back the signature the famous artist De Chirico, certified by a notary. The Court deemed that only the person that had received from the author the "certified" painting (being the contractual party in the transfer) was entitled to claim damages deriving from the subsequent authorship disclaim by the same author.

Rather than referring it to author's moral right, the right to disclaim authorship has been deemed a personality right to one's name and identity, when made by the author or, after his death, when made on the basis of a technical expertise, on request of his entitled relatives (Court of Appeal of Milan, December 11, 2002).