ALAI BRUSSELS 2014

Moral rights in the 21st century

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

QUESTIONNAIRE

REPORT NORWAY

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By Astri M. Lund

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

Provisions on moral rights were first introduced in the Norwegian legislation when in 1893 the copyright of authors and the copyright of artists for the first time were regulated in the same act, the Act of 1893 on Authors’ Rights and Artists’ Rights. In that act there was a provision that the "source" shall be mentioned when a work of art is made public as permitted according to an exception in the act and similar rules pertaining to situations where a literary work is made available to the public on the basis of some of the exceptions in the act.

The Act of 1893 was succeeded by the Copyright Act of 1930 in which, in addition to rules pertaining to uses permitted on the basis of limitations, there were moral rights provisions addressing situations where a work is made public as permitted by contract, and regarding the period *post mortem auctoris*. The approach was that when the author himself owns the rights he is in control of the use of the work; it is when rights have been transferred – or, as already recognized in the Act of 1893, the work is used as permitted in the act itself – that moral rights are called for.

The moral rights were further developed with the enactment of the present Copyright Act in 1961.

In the Copyright Act of 1930 the new moral rights provisions were placed in the chapter dealing with the transfer of copyright. That chapter reiterated in a somewhat amended form the rules in the Act of 1893 stating that when the author has assigned the right to make the work available to the public in a specific manner or by specific means, the assignee shall not have the right to make the work public in another manner or by other means, and the rule that if the assignee is to make the work available to the public in an altered form, he needs the author’s consent thereto. This latter provision was in the Act of 1930 accompanied by a new provision that if such making available to the public substantially violates the artistic or personal interests of the author, the author has the right to demand either that he is not named as the author, or that it is stated in a satisfactory manner that the alterations do not derive from him. This right the author was not permitted to waive. In the same paragraph there was also a new provision that neither may the author waive the right to demand that his name be stated in the customary manner when a work of his is made available to the public.

Furthermore there was in this same chapter a related provision accompanying the rules pertaining to the management of copyright during the period when the work is protected after the author’s death, stating that if during this period a work is made available in a form that is substantially altered, it shall be explicitly stated that the alterations do not derive from the author. (According to the act of 1930 any rules that the author has set out in his will as to the future making available of his works to the public or that works shall not be made available to the public, and any such appointment of a person to manage the rights, that are justified by legitimate personal interests shall be binding on the

heirs of his body.) And finally, in the chapter regarding the term of protection, there was a provision prohibiting that a work in the public domain be made available to the public in an altered form *" when, taking into account the importance of the work and the nature of the alterations, there is reason to fear that general cultural interests be harmed thereby*". The Ministry was charged with ensuring that both these rules about the making available of a work in an altered form *post mortem auctoris* be obeyed. (The ministry in question was the ministry responsible for cultural affairs, which was then the Ministry of Church and Education.) There was the requirement that a council of experts be appointed to assist the Ministry in these and other duties that the act vested in the Ministry.

These moral rights provisions represented the most prominent addition that the Copyright Act of 1930 made to the Norwegian copyright legislation. The preparations towards this piece of legislation started in a committee appointed in 1921 by the Ministry of Church and Education. The committee presented its proposal for a new copyright act in 1925. The committee's report contains a rather lengthy explanation of its proposal on moral rights.

The committee discusses the nature of copyright – whether or not it is a property right – and elects to describe copyright in a "neutral" manner, however definitely as a "right" as opposed to a mere reflection of the prohibition against piracy. It makes a point of the fact that copyright as provided for in the existing legislation and in the Berne Convention is a right which is of a composite nature in that it has an economic aspect as well as an aspect where the author's personal and artistic interests predominate. The committee expressly distances itself from the views of Kohler that there are two separate rights so that the legal effects of copyright be confined to the purely economic effects and the personal and artistic interests be protected by way of a particular personality right that shall be separate from and independent of copyright. "*Quite the opposite*", says the committee: "[t]*he property law effects and the law of persons effects are two aspects of the same right, and where no special considerations are in evidence the same rules shall apply to the right in its entirety*"**.**

That there was such a duality in copyright is taken as a foregone conclusion, albeit that these personality aspects were not addressed in the existing copyright legislation. There is no reference to case law. (To my knowledge there was none regarding authors' moral rights.) The committee emphasizes that there is a certain moral responsibility involved in making literary or artistic works available to the public, and quotes the French author Marcel Plaisant: "*La production littéraire et artistique n'est pas seulement un jeu de l'esprit ou la manifestation nécessaire d'un tempérament, elle est aussi un acte moral, dans le sens le plus élevé*." Thus, says the committee, as a matter of course the author has the right "*to watch over that the work presented under his name really is his and that his name and artistic reputation is not damaged by works that do not derive from him being made public under his name*". It makes the observation that this aspect of the author's moral rights ends up in the *negative* requirement that the author shall have the right to interfere when something like that happens. According to the committee these moral rights are the following: 1) the author's right to prohibit that works made by another person be presented under his name, 2) the author's right to prohibit that his works be presented in an altered form, and 3) the author's right to prevent that works for which he no longer wants to be responsible be made available to the public (droit de repentir). Whether the existing copyright legislation allowed that the author when he had assigned copyright and explicitly permitted that the work be altered withdraw such permission, is uncertain, says the committee. It finds that the author should not be allowed to do so, but should at the same time not be bound to tolerate that his name be forever connected to the work in an altered form which is not of his making. "*Not only does the consideration for the author's artistic honour and responsibility call for such a solution, it is in the public interest that the true authorship is brought to light and that literary works and artistic works do not sail under false colours*", the committee concludes. The committee did not suggest that the legislation shall include a droit de repentir; it considered this to be a matter for contractual regulation only.

The other aspect that the committee included in its proposal re moral rights was the author's right to demand that his name be stated whenever a work of his is made public. In the committee's opinion the author should not be bound by any agreement according to which another person may be presented as the author of his work. "*The interest of the author in enjoying the honor and the fame that the work may bring him coincides fully with the interest of the public and the general cultural interest in knowing with truth to whom the intellectual values of the epoch shall be ascribed",* says the committee, adding that the author shall not be allowed to assign this right.

The committee also discussed the issue of suppression**,** destruction or alteration that is made by the owner of an original copy which the author has transferred; whether the Copyright Act should contain a provision according to which the author may prohibit that the owner destroy or overlay the copy or make any alterations thereto. The committee noted that no other country had as yet introduced any rule to this effect, and concluded that it did not dare to make any such proposal. The majority of the members of the committee held that only in exceptional cases will it occur that the owner alters or destroys the artistic work, and that there were issues of principle involved here as such a prohibition would interfere with the owner's established property right and right of privacy.

The committee remarked that albeit that the moral rights which it proposed were not expressed in the existing Norwegian legislation and that such rights were included in only a few foreign legislations, rights pertaining to the personal and artistic aspects of copyright were in no way unknown to existing copyright law. It pointed to the fact that such rights were in many countries recognized in case law, and were in scholarly writings presented as part of existing national law. This was seen as part of a trend that had evolved over the last decades, and that had in some countries led to moral rights being included in national legislation. In this respect the committee refers to the Rumenian Author and Artist Act of 1923 as the first example, and mentions also the proposals put forward in France in 1920 and 1921 by Georges Maillard and Marcel Plaisant respectively. It would, said the committee, be lamentable if a modern Copyright statute were to bypass rules dealing with the moral aspects of copyright, leaving such matters to theory and court practice.

Also the rules in the Copyright Act of 1930 that concern the exercise of moral rights during the period when the economic rights are protected after the death of the author stem from the committee's report. In this respect the rationale was that during this period the respect for the artistic legacy of the author is still very pertinent. The committee was aware of the discussions in scholarly writings as to whether moral rights were at all suited for being inherited, but did not agree with a conclusion that they were not; it considered it to be in the author's as well as society's interest that the moral rights subsist, and that the heirs were the closest to exercise these rights. Noting that often the author does not make a will setting out rules as regards the exercise of the copyright in his works and that it might occur that the heirs do not respect the moral rights of the author, the committee discussed two ways of approaching the problem of such disloyal exercise of copyright; 1) to empower a public body to supervise how the rights are exercised and to take steps if the exercise falls prey to pecuniary motives, disregarding the moral rights, or 2) to include in the act a provision that sets definite limits to the exercise of the rights. The committee preferred the latter solution, citing the example of the Rumenian law which then included a provision thus: *« Après la mort de l'auteur, ni les héritiers ni les éditeurs ne peuvent apporter un changement quelconque à l'oeuvre, sans que ce changement soit porté d'une manière apparante à la connaisance de la public* ». However, in the bill that the Ministry presented to Parliament the two solutions were combined resulting in the provisions described above.

As the committee (by a majority vote) proposed that after the expiry of the term of protection (which was then the author's lifetime plus 50 years) works should enter a domaine d'état, it did not discuss moral rights beyond the term of copyright protection.

The committee report formed the basis for a bill that the Ministry presented to Parliament in 1927. However, Parliament returned this bill to the Ministry asking that some matters be reviewed, among them first and foremost the proposal that there be a domaine d'état regime, as there was "*every reason to raise strong objections against such a monopolization, which should be examined anew and in depth*".

A new bill was presented to Parliament in 1930, in which the domaine d'état proposal had been dropped.

That the Parliament had to wait three years for the new bill was explained by the Rome Conference (that had been postponed to 1928) and the intention that the new act should conform to the Act of Rome.

The bill included moral rights provisions based on the proposals of the committee, with the addition of the above mentioned rule in the chapter regarding limitations and the rule that the Ministry should supervise the exercise of moral rights after the death of the author. The domaine d'état proposal had been dropped. Instead the bill included a Section dealing with moral rights when the work has entered the public domain, as explained above. This provision was principally based on consideration for the general cultural interests, the stance being that at this stage considerations concerning the author as an individual had hardly any weight. The authority to exercise this provision was vested in the Ministry.

In the Bill there is a very detailed discussion as to whether and how these provisions comply with Article 6bis in the Berne Convention, as it was the Ministry's intention to enable that Norway ratify the Act of Rome without reservations. The issue in respect of moral rights that caused some doubt was whether Article 6bis prohibits that an author be bound by an agreement that the assignee may present the work in an altered form which is detrimental to the author's reputation or honour – an issue that was discussed during the Rome Conference. It is mentioned in the bill that there the Australian as well as the Norwegian delegation had expressed that said article should not be interpreted as to exclude such agreements, and that the Danish and the Swedish experts preparing ratification of the Act of Rome were of the same opinion. It is also mentioned that the proposal has substantially the same form as the text of the Finnish Copyright Act of 1927 Section22, and that this Act has been examined by the Berne Bureau which had found it excellent.

In the Bill the Ministry makes a point of aligning the personal and the artistic interests of the author when protecting the moral rights. The point made in this respect was that the moral rights concerning that the work be made public in the form in which it was created, flows from two sources; the interests that the author as a person has that his name is not attached to works the moral responsibility for which he does not have nor wishes to have, and the interest that the author as an artist has that his creative achievement is not bungled and that his artist name is not associated with distortions of the work. The Ministry finds support for this approach in that Article 6bis provides that the author may object to alterations that are prejudicial to his "*honor **or** reputation*".

When discussing the application of moral rights after the death of the author, the Ministry mentions that moral rights are based on the author's interests as well as society's general cultural interest that cultural assets be presented in their true and genuine form, and go through three phases. During the author's lifetime the former dominate, supported, however, by society's interest. After the author's death when the heirs handle the copyright, the interests of the author are still very important, and may need protection against the economic aspirations of the heirs, a protection which is equally in the general interest of society. After that period society's general cultural interests dominate. In its comments to the proposals regarding moral rights *post mortem auctoris*, the Ministry mentions the wish expressed at the Rome Conference "*that the countries of the Union envisage the possibility of*

introducing rules in their legislations, where it does not contain provisions in this regard, which, after the author's death, will prevent his work from being distorted, mutilated, or otherwise modified to the prejudice of his reputation and the interests of literature, science and the arts".

As concerns the provision regarding moral rights for works that are in the public domain, the Ministry makes the comment that a careful balance must be made between the basic freedom we all have to render such works, and the cultural loss that will be incurred to society if important works are distorted or degraded, while at this stage the respect for the author and his reputation recede.

As can be seen from the above, the philosophy behind the introduction of moral rights was that whereas the moral rights were founded on consideration for the author as an individual person, societal considerations support such rights. Professor Ragnar Knoph, who was the committee's chairman, underlines this aspect in his book "Åndsretten" (Intellectual Property Law) Oslo, 1936. He there makes the observation that this interplay between individual and social considerations characterizes the design of the moral rights, giving them quite a different form in the three phases during which they apply, namely the lifetime of the author, *post mortem auctoris* while the copyright still subsists, and after the work has entered the public domain. He mentions the discussions as to whether copyright encompasses the economic as well as the moral rights or consists only of the economic rights; the moral rights then to be regarded as part of the personality rights as was the view of Kohler. This is followed by the observation that Kohler's line of thinking is far removed from the approach of the Norwegian Copyright Act of 1930. He adds, however, the comment that at the same time *"there is in Norwegian law the realisation that there is a close connection between moral rights and the law protecting the human personality*".

The moral rights were further developed when in 1961 the Copyright Act of 1930 was replaced by the present Norwegian Copyright Act, dated May 12th 1961. There the moral rights are set out in Chapter 1 *The object and substance of the copyright*, in a separate Section 3, following Section 1 on the objects of copyright, and Section 2 on the economic rights. By this the moral rights acquired an impact on the interpretation of all the provisions in the act, that relate to copyright.

2. What do the 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: ...?

The moral rights set out in the Copyright Act of May 12th 1961 Section 3 consist of the right to claim authorship and the right to respect and integrity.

According to Section 3, first paragraph, the author is entitled to be named "*in the manner required by proper usage*", on copies of the work and when the work is made available to the public. (In Norwegian copyright law the term "making available to the public" covers distribution of copies to the public, public display of copies of the work, and all forms of communication to the public and public performance.)

The right to respect and integrity encompasses protection of the reputation as well as the individuality of the author and of the work respectively. It entails a prohibition against altering the work, or making the work available to the public, in a manner or a context which is "*prejudicial to the*

author's literary, scientific or artistic reputation or to his individuality, or prejudicial to the reputation or individuality of the work itself" (Section 3 second paragraph).

This dual approach of respect for the author and respect for the work was introduced during the parliamentary proceedings. The reasoning was as follows: What is prejudicial to the work will normally be prejudicial also to the author**,** but often it will be more natural to say that it is the work that is violated, and there will be instances when a work of great value is violated and profaned where it will not seem natural to speak of prejudice to the author's reputation or individuality. Mention is made that history provides examples of an author having forfeited his artistic or scientific reputation, and that also such authors shall enjoy protection of the reputation or individuality of a valuable work of his.

The moral rights according to Section 3 apply also when a work is used pursuant to limitations or exceptions set out in the act (Section 11). However, when in such cases the work is made available to the public, it may be rendered in the dimensions and form required for the purpose insofar as this does not result in alteration or degradation of the character of the work. The source shall always be stated in the manner required by proper usage.

There is only one exception from the moral rights; works of applied art may be altered without the author's consent when this is done for technical reasons or for utilitarian purposes (Section 29).

The moral rights according to Section 3 apply correspondingly to the performer's performance of a work.

There are two more provisions in the Copyright Act that complement the protection of the reputation of the author or the work that is accorded by way of the moral rights set out in Section 3.

Section 46 prohibits that a literary, scientific or artistic work be made available to the public under a title, pseudonym, mark or symbol that is likely to cause confusion with a work which has previously been made available to the public or with its author. If someone makes a work available using the author's real name as a pseudonym, this will fall under this provision. It is not necessary that there is confusion between two titles, pseudonyms, marks or symbols; the confusion may be caused otherwise, for instance by the use of book title that includes the name of a particular character known from the contents of a previously published series of novels.

In Section 47, first paragraph, there is a provision that the name, mark or symbol of an author shall not be placed on a copy of a work of art by any person other than himself, unless he has given his consent thereto.

Another right in the moral rights category is the droit d'accès set out in the Copyright Act Section 49:

"*If circumstances necessitate the destruction of the original copy, the author, if he is alive, shall be notified in reasonable time, if this can be done without particular disadvantage.*

If the possessor of the original copy of a work without reasonable grounds prevents the author from exercising his exclusive right pursuant to Section 2, he may by court judgment be ordered to give the author such access to the said copy as the court finds reasonable. The court will make its decision after taking into consideration all the existing circumstances, and may make the author's access to the copy conditional on his providing security, or impose other conditions.

Such proceedings as are referred to in the second paragraph may only be brought by the author personally with the consent of the Ministry concerned."

This Section was proposed by the Parliament's standing committee handling the bill for the new copyright act in 1961. The committee stated i.a.:

"*The provision will in the committee's opinion not represent a sharp breach with existing law, rather, it can be said that it imposes on current perceptions as to what constitutes good practice*. *The owner of an original copy has the duty to exercise his possession of the copy in a manner that does not unduly prejudice the interests of the author. Just as the public's right to use a work stands by and equivalent to the author's right, should the ownership that the transferee has to the original copy naturally be accompanied by an obligation to show consideration for the author.*"

General cultural interests are then mentioned primarily as an important aspect in regard to protection against the destruction of an original copy, but are also seen as relevant to the droit d'accès, the example mentioned being that of an owner refusing to permit that the original copy of a work of art be displayed at an exhibition. In support of its proposal the standing committee also referred to Wish III adopted at the Brussels Conference (1948) that countries introduce a prohibition against the destruction of literary and artistic works, and noted that in the Austrian Copyright Act of 1936 and in the French Copyright Act of 1957 the author was granted some kind of right of access, and that such a right was proposed in the draft for a new German Copyright Act that was presented in 1959.

There is no right of disclosure (divulgation) in law Norwegian Copyright except that which is inherent in the exclusive right of making the work available to the public, this right covering use of the work in the original or an altered form, in translation or adaptation, in another literary or artistic form, or in another technical manner.

In this context it may be relevant to mention – as the other side of the coin – that there are provisions in the Copyright Act according to which an author may rescind an assignment of exclusive rights if the assignee does not within reasonable time make the work available to the public as provided for in the contract. Such a provision apply to assignments to perform a work other than a cinematographic work, to publishing agreements pertaining to publication in printed form (except agreements concerning contributions to newspapers or periodicals, and agreements concerning contributions which are to be used as illustrations in works that are to be published) and to assignments of the right to use a work for a film. The two latter provisions are mandatory.

There is no right to repent or withdraw. Once the work has been made available to the public with the consent of the author, the work may be quoted, and limitations of the exclusive right apply on the basis of which the work or excerpts of the work may be used for specific purposes set out in the act, the application of such limitations depending i.a. on the manner in which the work has been made available to the public.

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

The moral rights vest in the author personally and cannot be transferred (the Copyright Act Section 39, first paragraph). They may be waived, but only for use which is limited in nature and extent (Section 3, third paragraph). The criterion “limited” is interpreted strictly, i.e. in the literal meaning. However, if the work is made available to public in a prejudicial form or manner the author shall, even if he has given valid consent to this use of the work, have the right “*to demand either that he is not to be named as the author, or that it is stated in a satisfactory manner that the alterations made do not derive from him*” (Section 3, fourth paragraph). This right may not be waived by the author.

These rules apply correspondingly to the moral rights of performers.

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?

In Norway the paternity right and the right to respect and integrity (droit de respect) last in principle in eternity. This follows from Section 48 of the Copyright Act, in which the moral rights protection is widened to include also general cultural interests, and the Ministry concerned (presently the Ministry of Culture) is vested with the authority to exercise such rights. Section 48 reads:

"Even if the term of protection of copyright has expired, a literary, scientific or artistic work may not be made available to the public in a manner or in a context which is prejudicial to the author's literary, scientific or artistic reputation or individuality, or to the reputation or individuality of the work itself, or which may otherwise be considered harmful to general cultural interests.

Irrespective of whether the term of protection has expired or not, the Ministry concerned may, if the author is dead, prohibit a literary, scientific or artistic work from being made available to the public in such a way or in such a context as is referred to in the first paragraph. A similar prohibition may also be imposed by the Ministry at the request of a living author if the work in question is not protected in the realm.

The provision in Section 3, first paragraph, shall apply correspondingly, even if the term of protection of the copyright has expired or if the work is not protected in the realm."

Please note that a "scientific" work is a literary or artistic work in the scientific field.

While the author is alive, it is he alone who may exercise the moral rights as set out in Section 3 (except that the Ministry on the request of the author may exercise moral rights to a work that is not protected in Norway due to it failing to meet the protection criteria as regards origin or nationality). General cultural interests are then not protected as such, only the reputation and individuality of the author and the work.

After the death of the author, Section 39k of the Copyright Act applies. According to this Section the law relating to inheritance, the community property of spouses and the right of the surviving spouse to remain in possession of the undistributed estate shall also apply to the author's copyright. However, in his will the author may, with binding effect also as regards the surviving spouse and the heirs of his body, make provisions as to the exercise of his copyright or empower another person to make such provisions. Any infringement of such provisions and any infringement of the moral rights according to Sections 3 and 11 (cf. answer to question 2) may be prosecuted both by the author's surviving spouse and by any other of his relatives in direct line of ascent or descent, brothers and sisters, or by the person appointed pursuant to the will.

Furthermore, after the death of the author the Ministry may exercise the moral rights as set out in Section 48, second paragraph.

The Ministry shall, before deciding whether to apply Section 48 to prohibit the use of the work, consult a council of experts consisting of representatives of authors and of industries or trades connected with the exploitation of literary, scientific or artistic works. The Ministry shall appoint the members of the council and shall issue regulations relating to the organisation and activity of the council, and the remuneration of its members (cf. Section 53 of the Copyright Act).

The relative weight of the different interests that are protected by moral rights shifts as very pertinently described by the committee preparing the Copyright Act of 1930 and by Professor Knoph (cf. answer to question 1) and as time goes by the importance of the interests that are protected by moral rights wane. This perspective was maintained when the Copyright Act of 1961 was prepared. In the bill to Parliament there is the remark that in the period between the author's death and the expiration of the term of protection the intervention of the Ministry will normally not be called for, as the author's successors will supervise the use, but that there is a need that the Ministry have the authority to intervene when there is prejudice to "*a work of great cultural importance*" and the successors fail to act against such offence. As for works in the public domain, the perspective was that there is a definite need that public authorities have the possibility of intervening against "*distortions and public renditions that from a general cultural point seem grossly offensive*". The tendency seems to be that the Ministry is increasingly reticent in this respect, and thus will intervene only where a work of great importance to the nation is thus impinged.

Section 48, third paragraph, extends the paternity right accorded in Section 3, first paragraph, to apply *"correspondingly, even if the term of protection of the copyright has expired or if the work is not protected in the realm"*. There the requirement is that the name of the author be "*stated in the manner required by proper usage*". This allows for the flexibility that the passage of time may call for.

The moral rights of performers last until the term of protection of the performer's economic rights have expired.

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?

In Norwegian case law there are several examples of the court referring to "legal protection of personality", and the existence of such non-statutory law is since long ago recognised in scholarly literature. There are also statutory provisions that accord such protection or may be used for that purpose.

The notion "legal protection of personality" is in Norway often used to cover not only protection of the personality as such, i.e. an individual with its traits and characteristics; it is often used to include also protection against interventions in the private sphere, defamations and similar statements as regards a person, and disclosures of personal matters.

In the Copyright Act there is a provision protecting the person depicted in a photograph – Section 45c:

"*Photographs of a person shall not be reproduced or publicly exhibited without the consent of the subject of the picture, except when*

a) the picture is of current and general interest,

b) the picture of the person is less important than the main contents of the picture,

c) the subject of the picture is a group assembled for a meeting, an outdoor procession or situations or events of general interest,

d) a copy of the picture is exhibited in the usual manner as an advertisement of the photographer's work and the subject of the picture does not prohibit this, or

e) the picture is used as specified in Section 23 third paragraph or Section 27 second paragraph.

The term of protection shall apply during the lifetime of the subject of the picture and for 15 years after the expiry of the year in which the subject died.

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Section 23 third paragraph permits that an issued portrait in the form of a photographic work may be reproduced in a publication containing biographical material. Section27 second sentence permits use of a work in connection with a search, an investigation or as evidence.

Section 45b is not confined to portraits – any photograph which depicts a person so that people who know that person can recognize him or her, is subject to this rule. (Hence calling it a "portrait right" would be somewhat misleading.) It applies only to pictures of persons who are or have been resident in Norway. Violations of the right according to Section 45c are subject to the same sanctions as violation of copyright.

According to the Copyright Act Section 39j third paragraph the rules in Section 45b apply to commissioned portraits regardless of the form, i.e. even if it is not in the form of a photograph.

Section 45c – the history of which can be traced back to a provision enacted in 1909 as part of the Photography Act – is regarded as a manifestation of the above mentioned legal protection of personality that is generally accepted as part of Norwegian law. This was the legal basis that the Supreme Court relied on in 2009 in a case concerning the use of a photograph of a well-known American athlete snowboarding in Norway in a competition – which he won – on the front page of a prospectus. The court held that in such non-statutory law there undoubtedly exists a right to one's own image, analogue to the right according to Section 45c. There was the precautionary reservation made as regards the scope of this position, that the person had been photographed in Norway and the photograph was used in Norway and furthermore that the person in the photograph had an evident interest in exploiting the image commercially.

In deciding said case the Supreme Court carefully weighed the interests of the person in the picture and the interests of the user against each other. This approach is the norm when applying these non-statutory rules.

Also public interests may play a role. In this respect the exception that is provided in Section 45b for uses when the picture is of "current and general interest" as indicative. In court practice regarding the application of Section 45b is often tested against Articles 8 and 10 in The European Convention of Human Rights.

A similar approach as that applied in the American athlete case may be viable as concerns images made in other techniques than photography.

This non-statutory personality protection may also be applied in regard to the use of look-alikes and sound-alikes. In a case where the voice of film critic who was well-known from his film reviews on the radio was imitated in a radio advertisement for photographic film, causing listeners to believe it was the critic himself who spoke, the Court of Appeals found that his personality had been violated, and he was awarded remuneration.

Typically it is where a person's character is used in a commercial context, that the non-statutory protection of the personality will be applied.

In scholarly literature mention is made that the performers' rights accorded in the Copyright Act may be seen in the perspective of personality rights, their inclusion in the act simplifying the exercise of

the rights and allowing for sanctions that are available only on a statutory basis. This implies that persons making performances other than those protected by copyright – for instance in a circus or at an athletic event – may enjoy protection provided by non-statutory law.

In some such cases also provisions in the Marketing Control Act prohibiting acts that "*conflict with good business practice among traders*" may serve to protect against use of the identity of a person for commercial purposes. An interesting example is a case where the Oslo District Court held that use of the song title "I love Norwegian country" as an eye-catcher in an ad campaign for Norvegia cheese amounted to use of the identity of the artist who had made this song his signature, so that everybody associate the song with him.

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?

There are no particular sanctions available for abusive exercise of the moral rights. To my knowledge there is no case law where this has been an issue. This may be explained by the fact that there is a protection against abusive exercise of the rights inherent in the fact that the norms set out in Section3 are objective in the sense that it is for the courts to decide what is to be considered as naming the author "*in the manner required by proper usage"* – a norm which does include that it is not always required that the author be named – and what is to be considered as "*prejudicial to the author's literary, scientific or artistic reputation or to his individuality, or prejudicial to the reputation or individuality of the work itself*". Thus it is not the opinion or sentiment of the author or the persons exercising the moral rights *post mortem auctoris* that reigns.

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,…)

As regards the mentioning of names, cf. answer to question no. 6.

As regards modification of a utilitarian work, cf. answer to question no. 2.

As regards demolition of an artistic work, cf. the droit d'accès mentioned in the answer to question no. 2. The owner of the building, ship or other carrier of the work may destroy it, however, subject to informing the author beforehand, so that he may ask for access in order for instance to document or reproduce the work – or just to study and enjoy it – before it is demolished. In order to enforce the right of access against an owner who does not comply with such request, the author needs the consent of the Ministry to bring the case to court to obtain a judgment ordering that access be granted, cf. above re Section 49. The question as to instituting legal proceedings pursuant to Section 49 shall always be submitted to the Council of experts mentioned above in the answer to question 4, before the Ministry makes its decision.

The failure to inform the author of the impending demolition may be a cause for the author obtaining damages or redress.

The fact that the author makes the graffiti without the consent of the owner of the building would probably be considered as an implied consent that the graffiti may be destroyed without the owner of the building giving any such warning.

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?

There is to my knowledge no case law addressing this particular question.

Probably such a conflict would be handled by way of interpretation of the norms set out in Section 3, cf. the answer to question no. 6. Also the approach taken that by tradition parodies and travesties be tolerated may be relevant in this respect. As there is no case law setting out the scope of this "tradition" it is difficult to say whether it amounts to much more than that parodies and travesties may be considered as new and independent works even when they come closer to the original than what would otherwise be accepted for them to be considered as new and independent works.

Relevant in this respect is that Norway is party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political rights. Under Norwegian law the provisions of those conventions take precedence over any other legislative provisions that conflict with them (cf. the Human Rights Act Section 3).

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?

Moral rights are considered a matter of importance.

Moral rights are typically exercised through negotiations and by contractual means, in which the provisions in the Copyright Act that the rights may be waived only for a limited use of the work, play an important role. In case of infringement of such rights, the author has recourse to the courts.

The Council of experts that advises the Ministry (cf. answer to question no. 4 above) or a committee thereof, has a duty to provide, when so requested, expert opinions for use by the courts in questions connected with the Copyright Act, and shall also act as an arbitral tribunal in such cases if the parties agree to this.

In the sectors mentioned there are contracts that result from negotiations between organisations of authors or performers and organisations representing users, such as for instance the Norwegian Publishers' Association and The Norwegian Film and TV Producers' Association, or major users such as the Norwegian Broadcasting Corporation (the public broadcaster) that include provisions on how the right to be named shall be practiced. Some of these contracts are binding on members of the organisations and some are model contracts. Organisations also make model contract on their own, as a service to their members.

In most contracts the clause as regards the right of paternity copies the provisions in the Copyright Act, usually almost verbatim.

The contracts often contain provisions regarding alterations; for instance that the author's consent is required, but that minor alterations may be made without consent.

Some such contracts, as for instance tariff agreements for journalists, contain rules as regards the contexts in which the work may be used, including clauses requiring that use in certain contexts be subject to the author's consent.

Most organisations provide legal advice to members and assist when there is an issue regarding moral rights.

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

Licence agreements issued by the collective management organisations include provisions on moral rights when pertinent. For instance the licence agreements pertaining to reprographic reproduction and digital uses of works that Kopinor (the Norwegian RRO) make with users and user organisations include provisions that the author shall be named, and that prohibit alterations of the work and that the work be used in a prejudicial manner, referring to the relevant sections in the Copyright Act. There are similar provisions in the licences that Norwaco – the collective management organisation for Rightholders in Audiovisual Works – has issued to educational institutions and to certain institutions as regards use of audiovisual works in their archives, among them the Norwegian Broadcasting Corporation, and the public library in Oslo (Deichmanske Bibliotek). As the agreement with the Norwegian Broadcasting Corporation permits use of extracts from archive material in new productions, Norwaco has chosen to establish a particular forum that handles inquiries from right-holders regarding such use. The members of Kopinor and Norwaco are the right-holders organisations which do play a role as described above.

The collecting society BONO – Norwegian Visual Artists Copyright Society – acts on behalf of its individual members licensing copyright collectively and individually, and provides counselling to members, all of which includes acting in matters pertaining to moral rights.

11. 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)

There is no particular legislation, and, to my knowledge, no case law in respect of any of these matters.

The applicable law as regards use of works and performances is *lex protectionis*. For issues relating to the transfer of copyright (other than copyright in cinematographic works, cf. the Berne Convention Article 14(2)) the law to be applied is the law of the country to which the obligations in the contract are most closely connected (the so-called *Irma Mignon formula*). In scholarly literature it has been argued that the rules in Section 3 concerning the waiver of moral rights apply regardless of the origin of the author or the work, the moral rights thus having the status of *ordre public.*

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?

I have not observed any such indications.