MORAL RIGHTS:
COULD THERE BE A EUROPEAN HARMONISATION?
A comparative study of the common law and civil law approach

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INTRODUCTION

Copyright and related rights aim to encourage creativity and investment in creativity by protecting authors, performers, broadcasters and record and film producers from unauthorised reproduction and dissemination of their works, performances, broadcasts, recordings and films.

Within this framework the discussion on moral rights has become a very important issue. It is now quite clear that these rights are significant for the satisfaction of the author's basic moral demands relative to his work. One of the purposes of the legal protection of intellectual property is the encouragement of artistic creation. This can be achieved by remunerating the author financially; but the moral remuneration is equally important. It would be a deterrent from creation for an author to lose every bond with his work after the transmission of the economic rights. This bond, precisely, is the object of protection of the moral rights legal framework.

Because of their immaterial nature these rights are easily infringed. Their opposition to economic interests of other individuals has led to compromises, on the part of the courts or even of the authors themselves. In this essay the general features of UK moral rights' law, in relation to

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the respective French and Greek legal framework will be considered. Even though all three countries are signatories to the Bern Convention[1], several differences exist between them. By focusing on only one type of moral rights – the right of integrity – it will be easier to mark the outlines of the legal framework and courts' attitude towards the authors.

I. HISTORICAL BACKGROUND

Moral rights are fundamental as can be seen from the United Nations Universal Declaration of Human Rights (art. 27), which provides that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production, of which he is the author".

Another international treaty, the Bern Convention, sets the minimum content of moral rights for member states in article *6bis*, which requires the signatories to provide, in principle, independent rights to claim authorship (paternity right) and to object to modifications or other derogatory action in relation to a work which would be prejudicial to the author's honour or reputation (integrity right). The Convention has been ratified by many countries, including the UK, the USA, France as well as Greece. The Convention came as a partial recognition of the developments taking place in the continental countries with regard to moral rights, towards the protection of the personality of the author as expressed in his creations alongside his economic interests in exploitation. In the legislative schemes of French and German law and their many derivatives, moral rights are equal to economic rights. France is, actually, considered as the 'home' of moral rights: they were first recognised by the *Cour de Cassation*, in the case of *Cinquin v. Leconq*[2]. French law has, traditionally, protected the work as the product of the author's sensibility, his soul and, therefore, his personality. The French conception, which has prevailed since the 18th century, considers the author's right to be a natural right.

During that period, there was no direct concern for moral rights in the common law countries. The notion of these personal rights was totally alienated with the functional view of author's rights adopted in these countries. The primary concern was the economic exploitation of the

[1] The Bern Convention for the Protection of Literary and Artistic Works, signed in 1886, and repeatedly revised (Paris 1896, Berlin 1908, Bern 1914, Rome 1928, Brussels 1948, Stockholm 1967, Paris 1971).

[2] D.P. 1903. 1.5.

works and neighbouring rights. In 1977, the Whitford Committee stated the basic philosophy of Copyright: "the fruits of a man's creative labour should be protected, so far as profitable exploitation is concerned"[3].

II. RECENT DEVELOPMENTS IN THE UK

A. Legal protection of moral rights

Unlike what one would tend to think, moral rights did not lack protection under English Copyright Law. Indeed, the Fine Arts Copyright Act 1862[4] gave some limited protection in respect of unauthorised changes of artistic works. But it was not until 1952 that attention became more focused on moral rights. In that year, in its report on Copyright Law[5], the Gregory Committee had to consider the nature of the UK's obligations under article *6bis* of the Bern Convention.

The Committee found that the common law provisions which dealt with these matters were adequate; therefore, there was no UK obligation to legislate. Remedies for moral injuries existed under the general law. First of all, under the law of contract, the author of a work could avail himself of a remedy. In the contracts regarding the economic exploitation of his work he could, theoretically, include a term that his moral rights be recognised by the other party. The right to object to alterations could be expressly reserved by contract[6]; in publishing contracts a term limiting the right to make alterations may sometimes be implied[7]. Yet, in practice, the author is usually in a weaker bargaining position and cannot impose his claims on the contracting party[8]. Besides, the terms of each contract, even if they include moral rights provisions, only operate *inter partes;* they do not have an effect against third parties.

Secondly, under the law of defamation the author could get protection, to the extent that he was regarded with "hatred, ridicule, or contempt by

[3] Report of the Committee to consider the Law on Copyright and Designs (1977), Cmnd. 6732.

[4] Fine Arts Copyright Act 1862, section 7.

[5] Report of the Copyright Committee (1952), Cmnd. 8662, par. 219-226.

[6] *Frisby v. British Broadcasting Corporation*, [1967] 2 All ER 106.

[7] *Joseph v. National Magazine Co Ltd.*, [1959] 3 All ER 106.

[8] *Schroeder Music Publishing Company Ltd. v. Macaulay*, [1974] 3 All ER 616 where it was held that a contract giving the author the sole right to decide on publication issues restricts free trade.

the ordinary-minded folk"[9]. This could happen in the case of false attribution of authorship or the alteration of a work[10]. In *Moore v. News of the World Ltd*[11], a false attribution of authorship was found defamatory and the plaintiff was on that ground awarded damages. Also, in *Moseley v. Stanley Paul and Co*[12]. the publication of a serious work under an unsuitable cover was held capable of cheapening the author's reputation. However, infringement of the moral right does not always cause a defamation of the author in the public's eye. The author himself may be the only one to believe that his personal or professional reputation is affected by the infringing act.

Thirdly, the law of passing-off could provide a remedy for moral right infringement, in case of false attribution. However it could only be based on the proof of the plaintiff's 'good will' in his reputation and the damage of it by the moral right infringement.

B. New Remedies Under the 1988 Copyright, Design and Patents Act

All the above remedies are still available to British authors, but the legal 'weapons' of the latter have increased, because of the specialised provisions of the 1988 Copyright, Design and Patents Act (hereinafter: CDPA).

What is interesting to see is that regardless of common or civil law jurisdictions, the moral rights debate has started quite early, even since the 19th century. Artistic works always had a multi-dimentional status that made them something more than mere economic objects of exploitation. In one way or another, justice protected the right of the author to have his name and his work equally respected.

So, eventually, the 1956 Copyright Act, stated under section 43 that it was a breach of statutory right to insert or affix a person's name to a work of which he was not the author, or to sell an altered artistic work as being the unaltered work of the author. Many lawyers doubted whether this Act actually fulfilled UK obligations under the Bern Convention[13].

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[9] J. Philips and A. Firth. *Introduction to Intellectual Property* (3rd edition. Butterworths 1995) 247.

[10] *Cf.* text to note 9. *supra*; also W.R. Cornish. *Intellectual Property* (3rd edition. Sweet and Maxwell. 1996).

[11] [1972] 1 QB 441.

[12] Macg Cop Cas [1917-23] 341.

[13] For further information see. among others: G. Dworkin, The Moral Right and English Copyright Law, 12 *ICC* 1981, 476.