

RECREATING EUROPE

Rethinking digital copyright law for a culturally diverse,
accessible, creative Europe

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***Experimenting European Moral Rights Harmonisation
to Works of Visual Arts: Dream or Nightmare?***

(re)WIPS 5, 19 April 2021 (online)



Outline

1. **Some premises on copyright law and moral rights**
2. **Moral rights harmonization in Europe: where do we stand?**
3. **Moral rights in the European Union**
4. **Applying moral rights harmonisation to the visual arts**
5. **More options: other laws, contracts, social norms, technology**
6. **The study: stages and prospects**

6. The study: stages and prospects

A. Literature review

B. Mapping of the legal framework (International law, EU law, national laws)

i. [Current stage] Verifying data – national correspondence welcome!

C. Comparative analysis (USA)

D. Empirical analysis

i. EU (at the level of MS)

ii. USA (both at the federal and state level)

E. Legal proposals (*pars construens*)

1. Some premises on copyright law and moral rights

- **Moral rights have always faced some challenge in copyright law**
 - Conflict of economic/non-economic rights has an historical and theoretical foundation (monist/dualist theories)
 - The civil law and common law divide has traditionally featured the reluctance towards a strict recognition of moral rights
- **Moral rights find incidental recognition in copyright and other legal frameworks**
 - E.g., trademarks, passing-off ...
- **Moral rights are regulated under other (often ancillary) normative schemes**
 - E.g., contracts, social norms, technology
 - MR regulation is solicited by digital and post-digital tools allow the amplest dissemination
 - Technological means either boost protection or facilitate infringement

2. MR harmonization in Europe: where do we stand?

- **Officially, we are at ground zero**
 - There is no harmonisation at the EU level
 - The European legislator has not yet provided explicit rules
- **However, there is room for harmonisation**
 - No express barring, but interest towards MR has increased over the decades (since 1990)
 - Critical the impact of disparities in MR protection on the proper functioning of the Internal market
 - Elicitation by copyright exceptions is convincing (e.g., quotation)
 - Significance of MR can be inferred by close reading of ECJ caselaw (see Painer, Deckmyn)
- **Digitisation implies reconsideration of most copyright rules, including those on MR**
 - Implications of new exceptions implementation are to be seen
 - Effects of future technology-driven regulation (e.g., AI) suggest to look from a broader angle, incl. MR



3. Moral rights in the European Union

- **Addressing (theoretical) obstacles towards harmonisation:**
 - Conventional emphasis on the civil law and common law divide is no longer satisfactory
 - Maintained collision between the economic/moral dimensions of copyright is inaccurate
- **Addressing (practical) hindrances:**
 - The legal MR landscape is highly fragmented at the national level
 - Attribution and Integrity do not exhaust the bundle of MR (and) some are more problematic
 - Risks related to legal translation are high
 - Economic and societal effects must be evaluated
 - Cf. resale right

4. Applying moral rights harmonisation to the visual arts

- **Harmonisation not at all costs, but a flexible and differentiated approach seems proper**
 - **Testing a step-by-step EU harmonisation on visual arts**
 - *Droit de suite* in the EU (its worth and contradictions)
 - **Getting insights on the US approach to MR for works of visual arts**
 - Significances of VARA application after 30 years
 - **Tackling EU MR fragmentation in the post-digital world**
 - Singularity of visual arts in respect to copyright exceptions
 - Visual arts as forerunner in copyright law (e.g. AI applications)



■ US Moral rights

- **Under US law moral rights are protected through:**
 - Judicial interpretation of federal copyright, trademark, privacy, defamation law
 - Visual Artists Rights Act of 1990 (17 U.S.C. s. 106A “Rights of certain authors to attribution and integrity”)
 - State laws and related case law (i.e., California and New York)
- **VARA narrow and limited (in scope and duration) protection limits to:**
 - Works of visual art
 - No transfer but waiver is allowed
 - Judicial interpretation of VARA is contested (e.g., application of the functionality test)
 - Its impact on moral rights protection should be reassessed
- **Empirical analysis is welcome to test its broader and accurate impact**



5. Alternative options: other laws, contracts, social norms, technology

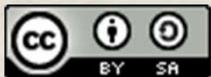
- **Different contexts and means should be considered when addressing MR:**
 - The law beyond copyright
 - E.g., trademark law, tort of passing off
 - Contracts (e.g., attribution clause in CC licenses)
 - Informal or social norms (incl. informal sanctions such as banishment/ostracism of infringers)
 - Technological codes (e.g., TPMs)
- **But «doubts never dies»**
 - From an international perspective, why the issue of MR is still debated?
 - From an EU perspective, are reservations over the impact of disharmonised MR in the digital environment settled?
 - From a comparative perspective, If those were enough, why was the US VARA enacted?



Thank you!

Your comments/critiques/suggestions are very welcome

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