



Study Guidelines

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Moral Rights

Introduction

- 1) Copyright protects original works of authorship by granting the author (i) economic rights, which give the author an exclusive right of economic exploitation and (ii) moral rights, which protect non-economic interests of the author.
- 2) Such moral rights can e.g., include the following: right of attribution, right of disclosure, right of integrity and the right of withdrawal.
- 3) This Study Question concerns moral rights and any other legal concepts that aim to protect the non-economic rights of authors.

Why AIPPI considers this an important area of study

- 4) AIPPI has adopted no Resolutions on the general regime of moral rights.
- 5) This topic needs to be addressed because moral rights are an essential element of copyright. On the one hand, moral rights protect the rights of the author, who may, at least on occasions, be the weaker party requiring protection. And on the other hand, in some circumstances, moral rights can disturb or even prevent the exploitation of a work.
- 6) The stakes are increasingly high, because the globalisation of the economy and the development of electronic networks multiply the possibilities of exploiting and modifying works.

Previous work of AIPPI

- 7) AIPPI has not conducted any Study Question on the general regime of moral rights.
- 8) Thus, while moral rights have been mentioned in some prior Study Questions, the resulting Resolutions addressed very narrow issues, and were limited to specific types of works.
- 9) In the Resolution of "Copyright in artificially generated works" (London, 2019), AIPPI resolved that:

"In case of Copyright protection for the work generated by AI (...), the protection regime should be identical to other works protected by Copyright. This is in particular true for: (...) - Moral Rights (as interpreted by national laws)".

- 10) In the Resolution on Q57 – "A Protection of Computer-Software and Integrated Circuits" (Rio, 1985), AIPPI resolved that:

"4. Moral rights ("Droit moral") Unlike the UCC [Universal Copyright Convention], Article 6bis of the Berne Convention requires the member countries (which notably exclude the United States and the USSR) to safeguard certain moral rights of the author, even if the author has assigned all his patrimonial rights. There are two kinds of moral rights:

i) the right to claim authorship of the work ("paternity"),

ii) the right to oppose any modification prejudicial to his honour or reputation.

ad i): Having regard to the peculiar nature of software, and in particular of programs, which differ from other literary and scientific works, the paternity right should be regulated along the following lines:

a) The author should retain the right to prevent false attribution of paternity. It must also be possible to invoke these authorship rights against third parties.

b) However, the paternity right should not carry with it the right to require that the name of the author or authors must appear on every sample of the software.

ad ii): AIPPI notes that there is little likelihood that modification of software and especially of programs would be capable of prejudicing the honour and reputation of its author.

Consequently, AIPPI is of the opinion that there is no need to modify Article 6bis 1) (second sentence) of the Berne Convention which can only be applicable in exceptional cases, where the provision would then be justified.

In these circumstances the application of Article 6bis 1) (second sentence) does not seem to constitute an obstacle to effective software protection”.

- 11) In the Resolution on Q57 – “Protection of computer programmes – Protection of computer-software” (Amsterdam, 1989), AIPPI resolved that:

“4.2.4 AIPPI reaffirms the resolution adopted at Rio in May 1985 that due to the special commercial nature of software, moral rights should apply to computer programs to an appropriate extent and believes that it should be possible for them to be waived by the author”.

Scope of this Study Question

- 12) For the purposes of this Study Question, the term “moral rights” is used to encompass all legal rights and concepts used to provide protection to the non-economic rights of authors, regardless of whether they are referred to as “moral rights”.
- 13) All types of copyright protected works are within the scope of this Study Question.
- 14) However, moral rights of inventors are outside of the scope of this Study Question.
- 15) This Study Question is limited to civil (private) law issues of moral rights. Criminal law issues are outside the scope of this Study Question.
- 16) This Study Question does not address international private law issues.

Discussion

Berne Convention, WIPO treaties and TRIPS

- 17) The Berne Convention is the most important treaty for moral rights. Other treaties simply refer to moral rights, without providing any substantive rules.
- 18) The Berne Convention comprises substantive rules regarding moral rights. Indeed, Article 6bis of the Berne Convention¹, provides:

¹ Article 6bis is entitled “*Moral Rights: 1. To claim authorship; to object to certain modifications and other derogatory actions; 2. After the author’s death; 3. Means of redress*”.

“(1) Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed”².

Article 11bis § 2 of the Berne Convention, entitled “*Broadcasting and Related Rights: (...) 2. Compulsory licenses (...)*”, provides:

“It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph [broadcasting, communication to the public] may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.”

19) Article 1§4 of the WIPO Copyright Treaty (WCT) dated December 20, 1996, entitled “*Relation to the Berne Convention*”, provides: “*Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention*”.

20) Article 5 of the WIPO Performances and Phonograms Treaty (WPPT) dated December 20, 1996, entitled “*Moral Rights of Performers*”, provides:

“(1) Independently of a performer’s economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim

² The moral right has been introduced in the Berne Convention in 1928.

to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed”.

- 21) Moral rights are expressly outside the scope of the Agreement on Trade-related aspects of Intellectual Property Rights (TRIPs), which does not provide any rules relating to moral rights. Indeed, Article 9 of the “*section 1: copyright and related rights*” of “*Part II Standards concerning the availability, scope and use of intellectual property rights*”, entitled “*Relation to the Berne Convention*”, provides:

“1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom”.

- 22) Article 27§2 of the Universal Declaration of Human Rights (UDHR) dated December 10, 1948, states:

“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”.

Regional/national legislations and case law

- 23) The recognition and the regime of moral rights are heterogeneous in jurisdictions around the world. Moral rights are generally recognized in civil law jurisdictions that incorporate the doctrine of moral rights into the IP regime. They are less ubiquitous in common law jurisdictions, although many jurisdictions provide alternative protection, sometimes under a different name.

- 24) Moral rights are not harmonized within the European Union. Nevertheless, some decisions of the European courts have mentioned moral rights. For example, the Judgment of the Court of First Instance of 10 July 1991 (*Radio Telefis Eireann v. Commission of the European Communities* - Case T-69/89) stated:

“71 However, while it is plain that the exercise of the exclusive right to reproduce a protected work is not in itself an abuse, that does not apply when, in the light of the details of each individual case, it is apparent that that right is exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86. In that event, the copyright is no longer exercised in a manner which corresponds to its essential function, within the meaning of Article 36 of the Treaty, which is to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86 (...). In that case, the primacy of Community law, particularly as regards principles as fundamental as those of the free movement of goods and freedom of competition, prevails over any use of a rule of national intellectual property law in a manner contrary to those principles”³.

- 25) The judgment of the Court of 20 October 1993 (*Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH* - Joined cases C-92/92 and C-326/92) stated:

*“20 The specific subject-matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation. Copyright and related rights are also economic in nature, in that they confer the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties (see the judgment in Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran v GEMA* [1981] ECR 147, paragraph 12)”.*

³ Emphasis added. This judgment was appealed to the Court of Justice of the European Union (“CJEU”), but the judgment of the CJEU does not mention moral rights (CJEU, 6 April 1995, case C-241/91 P and C-242/91 P).

- 26) In the United States of America (US), the author of a work of visual art enjoys rights of attribution and integrity under 17 U.S.C. §106A, that provides the following⁴:

“Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right”.

- 27) In China, Article 10 of the Copyright Law of the People's Republic of China provides the following:

“Copyright includes the following personal rights and property rights: (...)

(1) the right of publication, that is the right to decide whether to make a work available to the public;

(2) the right of authorship, that is, the right to claim authorship in respect of, and to have the author's name mentioned in connection with, a work;

(3) the right of revision, that is, the right to revise or authorize others to revise a work;

(4) the right of integrity, that is, the right to protect a work against distortion and mutilation”

⁴ For a comprehensive study of moral rights in the United States, see: <https://copyright.gov/policy/moralrights/>

And Article 20 provides that:

“No time limit shall be set on the term of protection for an author's rights of authorship and revision and his right to protect the integrity of his work”.

You are invited to submit a Report addressing the questions below.

Questions

I. Current law and practice

Please answer the below questions with regard to your Group's current law and practice.

References to "moral rights" below are used to encompass all legal rights and concepts used to provide protection to the non-economic rights of authors, regardless of whether they are referred to as "moral rights".

References to "moral rights" cover only moral rights in copyright law and not moral rights in related rights/neighbouring rights laws (e.g., rights on the performance), unless expressly stated otherwise⁵.

Definition of moral rights

- 1)
 - a) Does your legislation and/or case law regarding copyright recognize moral rights?
 - b) Are moral rights recognized outside copyright law?
 - c) What is the purpose of moral rights (the philosophy behind moral rights), e.g., to protect the work itself, the author, the public, etc.?
- 2) Are all types of works protected by moral rights or are moral rights restricted and/or excluded for certain categories of works (software, databases, architecture, etc.)?

⁵ This also applies to Parts II and III.

Categories of moral rights

- 3) What are the different categories of moral rights, e.g., right of attribution, rights of integrity (distortion or modification), rights of disclosure, rights of withdrawal, right to prevent use in association with a product, service, cause or institution, etc.? Please give a short definition of each category.

Exception and limitations to moral rights

- 4) Does your legislation and case law provide exceptions and/or limitations to moral rights, e.g., for specific categories of works, for the exercise of moral rights by author's heirs, in case of minor modifications of a work or in the absence of the name of the author for specific exploitations, in case of abuse of rights, etc.?

Duration of moral rights

- 5) What is the duration of moral rights?

Ownership of moral rights

- 6) a) Who is the initial owner of moral rights, e.g., the author, co-authors, investor, publisher, movie producer, etc.?
- b) Can legal entities, such as an association, a foundation, collective rights organizations, a corporate company, etc., be the initial owners of moral rights?
- c) Do the circumstances of the creation of the work influence who the initial owner is of moral rights (e.g., work made for hire, collective work, work created by employees, etc.)?
- d) If the duration of the moral rights exceeds the duration of the author's life, who is the owner of the moral rights after the death of the author/owner?
- e) Who is the owner of moral rights of orphan works?

Moral rights and the owner of the tangible asset integrating the work

- 7) Are the property rights of the owner of a tangible asset integrating a work (painting, sculpture, architecture, etc.) limited by moral rights? For example, do moral rights prevent the owner of a building from updating or destroying it?

Moral rights and contracts

- 8) a) Can moral rights be subject of contracts?
- b) Can the initial owner of moral rights transfer (e.g., through a contract for valuable consideration or free of charge) these to third parties?
- c) Can the owner of moral rights renounce or waive them?
- d) Can the law relating to moral rights be overridden by contractual provisions?

Infringement of moral rights

- 9) Is infringement of moral rights qualified as is copyright infringement?
- 10) What are the conditions for an infringement of moral rights to be recognized, e.g., proof that the infringement violates the honour, reputation, dignity, legitimate interests of the author, etc.?

Moral rights on related rights

- 11) a) Does your related rights legislation recognize moral rights, for example for performers?
- b) If YES, please indicate if moral rights in related rights legislation are identical to moral rights in copyright law?
- c) If they are not identical, please indicate the main differences from moral rights in copyright law.

II. Policy considerations and proposals for improvements of your Group's current law

- 12) Could your Group's current law or practice relating to moral rights be improved? If YES, please explain.
- 13) Could any of the following aspects of your Group's current law relating to moral rights be improved? If YES, please explain.
- a) the definition of moral rights
- b) categories of moral rights

- c) exceptions and limitations to moral rights
- d) the duration of moral rights
- e) ownership of moral rights
- f) moral rights and the owner of the tangible asset integrating the work
- g) moral rights and contracts
- h) the regime of moral rights
- i) infringement of moral rights
- j) moral rights and related rights

14) Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

III. Proposals for harmonisation

Please consult with relevant in-house / industry members of your Group in responding to Part III.

15) Do you believe that there should be harmonisation in relation to moral rights?
Please answer YES or NO.

If YES, please respond to the following questions without regard to your Group's current law or practice.

Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

Definition of moral rights

16) a) Should moral rights be recognized? Please answer YES or NO.

b) If YES, should this be in copyright law?

17) a) If YES to question 16), should all types of works be protected by moral rights?
Please answer YES or NO.

b) If NO, for which categories of works should moral rights be restricted and/or excluded?

Categories of moral rights

18) What should be the different categories of moral rights? Please tick the boxes as appropriate and give a short definition of them:

- right of attribution
- right of integrity
- right of disclosure
- right of withdrawal
- right to prevent use in association with a product, service, cause or institution
- other, namely

Exception and limitations to moral rights

19) a) Should moral rights be subject to exceptions and/or limitations? Please answer YES or NO.

b) If YES, which? Please tick the boxes as appropriate

- for specific categories of works, namely
- in case of minor modifications of the work
- in case of abuse of rights
- depending on the owner of moral rights (author, investor, employer, author's heirs, etc.)
- other, namely

Duration of moral rights

20) What should be the duration of moral rights?

Ownership of moral rights

21) a) Who should be the initial owner of moral rights?

b) Should legal entities (i.e. others than natural persons) be able to be the initial owner of moral rights?

c) Should the circumstances of the creation of the work influence who the initial owner is of moral rights?

d) If the duration of the moral rights exceeds the duration of the author's life, who should be the owner of the moral rights after the death of the author/owner?

e) Who should be the owner of moral rights of orphan works?

Moral rights and the owner of the tangible asset integrating the work

22) Should the property rights of the owner of a tangible asset integrating a work (painting, sculpture, architecture, etc.) be limited by moral rights? Please answer YES or NO. If YES, please explain how.

Moral rights and contracts

23) a) Should it be possible to contract on moral rights? Please answer YES or NO and explain.

b) Should the initial owner of moral rights be able to transfer these to third parties? Please answer YES or NO and explain.

c) Should the owner of moral rights be able to renounce or waive them? Please answer YES or NO and explain.

d) Should it be possible to override the law relating to moral rights by contractual provisions? Please answer YES or NO and explain.

Infringement of moral rights

24) Should infringement of moral rights be qualified as copyright infringement? Please answer YES or NO.

25) What should be the conditions for an infringement of moral rights to be recognised?

Moral rights on related rights

26) a) Should related rights law recognize moral rights, for example for performers? Please answer YES or NO.

b) If YES, should moral rights in related rights laws be identical to moral rights in copyright law?

Other

- 27) Please comment on any additional issues concerning any aspect of moral rights you consider relevant to this Study Question.
- 28) Please indicate which industry/cultural sector views provided by in-house counsel are included in your Group's answers to Part III.