

France

French copyright law: a complex coexistence of moral and patrimonial prerogatives

The French system of the '*droit d'auteur*' (the right of the author) is generally perceived as being unique, and can be seen as a complex set of rules and principles that is directly opposed to the Anglo-Saxon copyright system. The particularity of the French system is mostly due to a single factor: the French concept of moral rights.

While moral rights have been part of most copyright systems for some time, considerable discrepancies exist between the different systems in regard to both the scope of the rights that are protected and the legal regime that applies to such rights.

Moral rights benefit from the strongest and broadest protection in France. This is evident not only when analysing the evolution of the French system of the *droit d'auteur*, but also in the practice of this area of IP law, as highlighted by the case law on the issue in recent years.

History of *droit d'auteur*

Many legal authors trace the origins of the *droit d'auteur* and moral rights back to the French Revolution. Indeed, the idea of moral rights as an attempt to secure the bond between a work and the author's personality fits with the philosophy of individualism which prevailed during that period.

An alternative view is that moral rights emerged in France during the 19th century. The perception of France as the home of moral rights finds support in the work of André Morillot (1849-1922), which established a more personal understanding of authors' rights. While the French courts began acknowledging elements of moral rights from the start of the 19th century, Morillot sought to define clearly the nature of the prerogatives accruing to the author by virtue of his or her creation, distinguishing between proprietary rights and extra-proprietary rights. Morillot was the first to use the term '*droit moral*', although he employed it in a much

more technical sense than it is used today. Through his work Morillot helped France to become a pioneer regarding the perception of moral rights as a positive legal concept, which was recognised in judicial practice from the early 19th century.

However, the work of Morillot, along with most of the doctrine of moral rights, was based on prior German legal theory. Indeed, Morillot relied mainly on the dualistic approach of German author Rudolf Klostermann, whereby moral rights exist alongside patrimonial rights. This dualistic theory prevailed in France in the early 20th century, while in Germany, the monist theory (whereby the personal and patrimonial rights are inseparable components of a single right) prevailed.

In 1928 moral rights were expressly included in the Berne Convention for the Protection of Literary and Artistic Works. The newly introduced Article 6bis of the convention defined these rights as follows: "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." It is clear from this definition that the convention favoured the dualistic approach of moral rights.

By the end of the first half of the 20th century, the French *droit moral* was a solid set of rules emanating from, and regularly enforced by, the courts. The final consecration of the French construction of the *droit moral* arrived in 1957 with the insertion of moral rights into the Copyright Act 1957, codifying French case law.

Features of moral rights regime

Today French moral rights are codified in Articles L121-1

to L121-9 of the IP Code, which recognises four main branches:

- the *droit de paternité* – the right of attribution of a work, which is the right of an author to be identified as such (Article L121-1);
- the *droit au respect de l'intégrité de l'œuvre* – the right of integrity, which is the right to prevent the work from being modified or destroyed (Article L121-1);
- the *droit de divulgation* – the right of disclosure, which is the right of the author to decide when and how his work will be revealed to the public (Article L121-2); and
- the *droit de repentir ou de retrait* – the right of withdrawal, which enables the author to take back works which have previously been disclosed to the public (Article L121-4).

These moral rights are extensive not only in their scope, but also in their legal regime, which plays a major part in the concept of moral rights. This specific regime is closely linked to the perception of a work as an expression of the author's personality, and demonstrates the French choice of the dualistic theory.

Indeed, very early on the French courts considered that moral rights should have the same traits as personality rights: inalienable and imprescriptible (Court of Cassation, March 31 1858, regarding the memoirs of Saint-Simon). These traits were expressly codified at Article L121-1 of the IP Code by the Copyright Act 1957.

However, French moral prerogatives include one additional trait which results in a fundamental difference from the concept of moral rights in most other countries, particularly common law countries and Germany. Article L121-1 of the IP Code not only expressly provides for the possibility to transfer moral rights on the death of the author, but also provides for the perpetuity of moral rights under French law. This perpetual character, combined with the possibility of transferring a moral right due to death, offers a useful tool to maintain strong control over the use of a work beyond the scope of patrimonial rights and to protect cultural heritage. One of the strongest examples of this perpetuity was provided by the French courts in a case regarding the works of writer Victor Hugo (Paris Court of First Instance, September 12 2001) in which the judges considered that the moral rights over his works had been transferred to his heirs up until the present day.

Another key feature of the moral rights regime is that the French courts consider it to be a matter of public policy, meaning that nobody, not even the author, should have the power to decide on the existence and

ownership of these rights. Therefore, not only can the prerogatives of moral rights not be transferred or assigned, but they also cannot be waived, unlike the position under the UK Copyright Act. Therefore, a refusal by the author to benefit from the moral rights attached to his or her works is said to be purely precarious under French law.

Furthermore, in a well-known case regarding the film *Asphalt Jungle* by John Huston, the Court of Cassation decided not only that moral rights are a matter of public policy, but also that the provisions of the IP Code governing moral rights are of mandatory application as regards international private law (First Chamber, May 28 1991, Huston). This means that French judges must apply the provisions of the IP Code regarding moral rights, regardless of the traditional conflict of law rules.

Although the French system rejected the German monist system, which includes moral prerogatives within a single right, moral rights have continued to be an essential part of the French copyright system. The importance of moral rights and the independent existence of such prerogatives in France become clear in relation to penalties for the infringement of authors' rights. Indeed, the infringement of one of the branches of moral rights discussed above opens up the possibility of using the remedies applicable to an infringement of patrimonial rights.

Particularities of moral rights regime

However, not all of the various prerogatives included in French moral rights benefit from the same treatment and the same regime. The *droit de divulgation* has some major particularities which distinguish it from the other three prerogatives. According to the *droit de divulgation*, which was first recognised by the Court of Cassation in the *Whistler* case (Civil Division, March 14 1900), the author should be the sole decision maker in regard to making the work available. This prerogative has been the subject of several important decisions by the court in recent years, thereby demonstrating the continuing complexity and relevance of this right.

The *droit de divulgation*, which consists of the discretionary and absolute right of the author to determine the disclosure of the work to the public, is considered to be the foundation of the *droit moral*. The importance of the *droit de divulgation* is reflected in the devolution of the moral rights prerogatives. Since 1989 the Court of Cassation, applying a dissociative approach to Articles L121-1 and L121-2 of the IP Code, has considered that the specific order of devolution of Article L121-2 applies only to the *droit de divulgation* and

not to the other prerogatives, which are governed by the common inheritance law (First Civil Division, January 11 1989, Utrillo). As a consequence, the *droit de divulgation*, unless specifically attributed by the author to one person, follows its own path and may therefore end up in different hands from the other moral prerogatives.

Although the French system is based on the dualistic approach to moral rights and patrimonial rights, the exercise of the moral rights prerogatives regularly interferes with the exercise of the exclusive economic right. This interference is particularly strong as regards the exercise of the *droit de divulgation*, since this right determines the moment when patrimonial rights are created. Indeed, before disclosure, the work exists only as part of the author's personality; upon disclosure, the work becomes a patrimonial asset, based on which such rights may be exercised.

As a direct consequence of this, the *droit de divulgation* also interferes with the statutory exceptions to patrimonial rights. Indeed, all the exceptions provided for in Article L122-5 of the IP Code are applicable only "once the work has been disclosed".

Furthermore, the Court of Cassation recently reaffirmed that the author's *droit de divulgation* is the right not only to make the work available, but also to decide the means and conditions of disclosure, including the choice of publisher and the economic conditions of publication (First Civil Division, March 25 2010 regarding the rights over the works of philosopher Emmanuel Levinas). In that case the son of the deceased author, who had been designated by his father to exercise the *droit de divulgation* over his works, was the only person who could determine the financial

conditions of publication with the editor, even though the patrimonial rights over the works were shared between him and his sister.

Conversely, and more surprisingly, the exercise of patrimonial rights also interferes with the exercise of the moral rights prerogatives. For example, in practice, the moral *droit de paternité* is rarely respected in regard to ghost writers. Although, under French law, in theory the author can demand at any time that his or her authorship be recognised, it is rare for the author to do so for economic reasons.

Regarding the *droit au respect de l'intégrité de l'œuvre*, the Court of Cassation recently held that the owner of this right could not renounce it in advance and in general (First Civil Division, April 2 2009, Barbelivien). This suggests that in the case of limited scope renunciation of this right, the assignment of the right and the specific renunciation would prevail on the principle of inalienability of moral rights.

Comment

Although the French system is based on a dualistic approach that separates moral and patrimonial prerogatives, the crossovers between moral rights and economic rights seem to be unavoidable. However, these points of crossover are healthy in order to maintain a balance between the various interests at stake and to limit the differences between the French system and monist copyright and common law systems.

The main uncertainty for the future is how the increasing intervention of the Court of Justice of the European Union in copyright issues will address the issue of moral rights and the specificities of the various systems and regimes.



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