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AIPPI Q282-SGL-C-2022 – Moral Rights

Report of the Swiss Group

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?

YES. However, the Swiss Copyright Act («CopA»¹) itself does not expressly define which of the rights attributed to the author should be regarded as moral rights.

b) Are moral rights recognized outside copyright law?

NO. However, Swiss law recognizes general personal rights² which do protect the interests of authors. Also, the provisions on the publishing contract (e.g., Art. 385 CO³) protect the moral rights of the author.

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.?

The original purpose of moral rights is to protect the personal interests of authors with regard to their works. They are meant to reflect the close link between the author's personality and their works.

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.)?

Moral rights apply to all types of works which are recognized by Swiss copyright law.

Members of the working group: Reinhard Oertli, Hugh Reeves, Fabian Wigger and Marc Wullschleger (Chair).

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.

– **Right of first disclosure** («Erstveröffentlichungsrecht»; Art. 9 paragraph 2 CopA): The right of first disclosure of a work includes the right to publish a work for the first time. This right enables the author to decide if, or under which circumstances, his or her work will be made available to the public.⁴

– **Right to claim authorship** («Recht auf Anerkennung der Urheberschaft»; Art. 9 paragraph 1 CoPA): This right enables the author to claim authorship of his or her work and therefore protects the relationship between author and work.⁵

– **Right of distortion** («Entstellungsschutz»; Art. 11 paragraph 2 CoPA in line with Art. 6^{bis} Berne Convention⁶): The right of distortion enables the author to «oppose any distortion of the work that is a violation of his personal rights» (Art. 11 paragraph 2 CopA).⁷ Some Swiss scholars go further and qualify as a «moral right» the right of integrity (Art. 11 CopA) as a whole (i.e., not limited to actual distortions, but covering any direct or indirect alteration of a work).⁸

1 Federal Act of 9 October 1992 on Copyright and Related Rights (Copyright Act, CopA; CC 231.1; https://www.fedlex.admin.ch/eli/cc/1993/1798_1798_1798/en).

2 See Art. 28 ss. of the Swiss Civil Code of 10 December 1907 (CC 210; https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en).

3 Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911 (CC 220; https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en).

4 C. P. RIGAMONTI, Urheberpersönlichkeitsrechte, Bern 2013, 224.

5 C. P. RIGAMONTI, Urheberpersönlichkeitsrechte, Bern 2013, 254.

6 Berne Convention for the Protection of Literary and Artistic Works, revised in Paris on July 24, 1971 (CC 0.231.15; https://www.fedlex.admin.ch/eli/cc/1993/2659_2659_2659/de).

7 C. P. RIGAMONTI, Urheberpersönlichkeitsrechte, Bern 2013, 294.

8 H. PFORTMÜLLER, in: B. K. Müller/R. Oertli (Hg.), Urheberrechtsgesetz (URG), 2. Aufl., Bern 2012, Art. 11 N 1.

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.?

It depends on how moral rights are defined (e.g., the right of integrity underlines many statutory exceptions). Several of the general limitations of copyright law also cover the personality rights of the author. For example the right (limitation) to use a work to create a parody (Art. 11 paragraph 3 CopA) overrides the right of the author to prohibit distortions. Also the right (limitation) for private use (Art. 19 paragraph 1 lit. a CopA) covers acts which in another context would be viewed as violations of the moral rights of the author. If the right of integrity as a whole is considered part of the moral rights of the author, many limitations must be considered. In addition, the general rule that the manifest abuse of a right is not protected by law (Art. 2 paragraph 2 CC) applies in the copyright context as well.

Of course, the general rule applies and provides that the manifest abuse of a right is not protected by law (Art. 2 paragraph 2 CC).

Duration of moral rights

5.

What is the duration of moral rights?

The general terms on the protection of copyrights apply also to moral rights.⁹

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.?

The author is the initial owner of moral rights.

b) Can legal entities, such as an association, a foundation, collective rights organizations, a corporate company, etc., be the initial owners of moral rights?

NO.

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.)?

NO.

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?

Moral rights are inheritable according to general rules of inheritance law.

e) Who is the owner of moral rights of orphan works?

The owner of copyrights (including moral rights) in orphan works is unknown by the statutory definition of an orphan work (Art. 22b paragraph 1 CopA).

Moral rights and contracts

7.

a) Can moral rights be subject of contracts?

Yes.

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?

The general view is that the moral rights are not transferable. However – and depending on the definition of what a moral right is – some moral rights could be subject to a transfer (see above paragraph 6d). In addition, general rules of inheritance law shall apply for moral rights if an author dies.

c) Can the owner of moral rights renounce or waive them?

Yes, with the exception of the right of distortion. In particular, renunciations or waivers for moral rights are an important issue in a contractual context.

d) Can the law relating to moral rights be overridden by contractual provisions?

NO. Even if there is a clause referring to the renunciations or waivers for moral rights, the author is still entitled by law to execute their moral rights. This would not, however, in any event protect the authors of possible negative impacts due to a specific contract (like a contractual penalty).

Infringement of moral rights

8.

Is infringement of moral rights qualified as a copyright infringement?

Yes.

9.

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.?

In general, there are no special requirements. However, at least for the right of distortion («*Entstellungsschutz*»; Art. 11 paragraph 2 CoPA), it would be necessary that the distortion has a sufficient impact to violate the author's personality. Thus, not every alteration of a work is at the same time a distortion.

⁹ D. BARRELET/W. EGLOFF, in: Barrelet/Egloff (Hg.), Das neue Urheberrecht, Kommentar zum Bundesgesetz über das Urheberrecht und verwandte Schutzrechte, 4. Aufl., Bern 2020, Art. 29 N 12.

Moral rights on related rights

10.

a) Does your related rights legislation recognize moral rights, for example for performers?

Yes. Performers have the right to be recognized as such in connection with the performance of a work (see Art. 33a paragraph 1 CopA).

b) If YES, please indicate if moral rights in related rights legislation are identical to moral rights in copyright law?

NO, performers' moral rights do not have the same scope of protection as the author's moral rights.

c) If they are not identical, please indicate the main differences from moral rights in copyright law.

Performing artists, for example, do not benefit from the right of first publication.

a) the definition of moral rights

b) categories of moral rights

i) exceptions and limitations to moral rights

ii) the duration of moral rights

iii) ownership of moral rights

iv) moral rights and the owner of the tangible asset integrating the work

v) moral rights and contracts

vi) the regime of moral rights

vii) infringement of moral rights

viii) moral rights and related rights

Yes.

– the definition of moral rights > see above Q12 (*re* scope of integrity right)

– moral rights and contracts > see above Q12 (*re* non-transferability)

13.

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?

NO.

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

11.

Could your Group's current law or practice relating to moral rights be improved? If YES, please explain.

Yes.

We see a particular need for improvement regarding the question of how moral rights can be validly disposed of.

It is now widely accepted that the «traditional» reference to the non-transferability and non-waivability of moral rights neither adequately reflects the economic realities nor the actual needs of authors. Accordingly, there is a degree of consensus that this principle needs some adjustments. Nevertheless, the exact manner and extent to which moral rights can be validly disposed of is still not clear.

A sensible approach might look something like this. The first step should be to assume that the transferability as stipulated in Art. 16 paragraph 1 CopA (and thus also the licensability and waivability) also applies to moral rights. In a second step, those moral rights for which a transfer is not possible due to their specific nature would have to be defined. In the latter cases, it would have to be clarified in a third step whether or under which conditions a valid waiver is possible.

Moreover, there are certain inconsistencies regarding the scope of some moral rights. For example, it is questionable whether an integrity right that applies even to minor changes is reasonable. Maybe it would be more reasonable for this integrity right to be limited (e.g., via a provision in copyright contract law) in cases where a user is allowed to use a work.

12.

Could any of the following aspects of your Group's current law relating to moral rights be improved? If YES, please explain.

III. Proposals for harmonisation

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

14.

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.

Yes

– moral rights and contracts > see above Q12 (*re* non-transferability)

Definition of moral rights

15.

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

Yes.

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

Yes.

16.

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

See below.

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

If fundamental regulatory issues such as work integrity are governed by moral rights they must apply to all categories of works. However, due to the origin of moral rights in the personality rights, one may ask how reasonable it is to also grant them to authors who produce works in a team for money in an assembly line manner (e.g., software programmers).

Categories of moral rights

17.

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

- x **right of authorship** (this right enables the author to claim authorship with his work and therefore protects the relationship between author and work)
- x **right of distortion** (the right of distortion enables the author to «oppose any distortion of the work that is a violation of his personal rights»)
- x **right of disclosure** (the right of first disclosure of work includes the right to publish a work for the first time)
- x **right of withdrawal** (this right shall apply to works that have been already published and the work no longer is corresponding with the author's beliefs and the use of the work is no longer acceptable)

Exception and limitations to moral rights

18.

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

Yes

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

- for specific categories of works, namely _____
- x in case of minor modifications of the work
- x 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

19.

What should be the duration of moral rights?

The general terms on the protection of copyrights should apply.

Ownership of moral rights

20.

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

The author (a natural person) should be the initial owner of moral rights.

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

NO.

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

NO.

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?

The general rules of inheritance law should apply in such cases.

e) Who is the owner of moral rights of orphan works?

As the owner of (moral rights of) orphan works is unknown by the statutory definition of an orphan work (Art. 22b paragraph 1 CopA), there should be no (known) owner.

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

21.

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.

Yes. In general there should be a balance of interests in such cases.

Moral rights and contracts

22.

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

Yes. Fundamentally, we would want to prioritize contractual freedom and thereby broadly permit contracting on and with moral rights.

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

Yes, but not all elements of the moral rights. Indeed, we do want recognition of the author's personality rights, albeit in a limited subset of situations, such as those mentioned at Art. 11 paragraph 2 CopA (see also answer to Q12 above).

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

Yes – mostly. Firstly, those moral rights which can be alienated must *a fortiori* remain «waivable». However, for those moral rights which are not alienable, accepting

contractual waivers risks introducing contradictions between current legislation and the parties' contractual prerogatives. We are therefore in favour of permitting contractual renunciations at least with respect to specific situations (but see below).

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

Yes – mostly. We are in favour of broad contractual freedom. However, we are also in favour of preserving and protecting limited but essential elements of the author's personality rights. For the latter cases, waiver should remain possible and override the law, but not in absolutely all cases.

Infringement of moral rights

23.

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

Yes.

24.

What should be the conditions for an infringement of moral rights to be recognized?

The general rules for a copyright infringement should apply.

Summary

Until now the AIPPI has not assessed in-depth the general regime of moral rights within its scientific work. With Q282, the AIPPI has now conducted the first study to discuss moral rights on an international level and to assess possible harmonisation. The report of the AIPPI Swiss Group should support these efforts, especially with respect to a resolution during the annual meeting in San Francisco.

Moral rights on related rights

25.

- a) Should related rights law recognize moral rights, for example for performers? Please answer YES or NO.
Yes.
- b) If YES, should moral rights in related rights laws be identical to moral rights in copyright law?
NO, a limited set of rights should be attributed.

Other

26.

Please comment on any additional issues concerning any aspect of moral rights you consider relevant to this Study Question.

N/A

27.

Please indicate which industry/cultural sector views provided by in-house counsel are included in your Group's answers to Part III.

N/A

Zusammenfassung

Bislang hat sich die AIPPI im Rahmen ihrer wissenschaftlichen Tätigkeit noch nicht eingehend mit den Urheberpersönlichkeitsrechten auseinandergesetzt. Mit der Q282 hat die AIPPI nun die erste Studie durchgeführt, um Urheberpersönlichkeitsrechte in einem internationalen Kontext zu diskutieren und allenfalls Harmonisierungsbedarf zu identifizieren. Diese Bemühungen unterstützt die Schweizer AIPPI Gruppe mit dem vorliegenden Beitrag, insbesondere auch mit Blick auf eine allfällige Beschlussfassung anlässlich des Jahrestreffens in San Francisco.