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USER GENERATED **COPYRIGHT**

Moral Rights and Prosumerism

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Moral Rights – *Why?*

- Social and intrinsic **incentives for creativity**
- Prosuming culture posing **risks for violations** of moral rights
- **Different legal traditions** (civil law vs common law)
- Key role for **consolidating legal rules with social norms**
(*Rakebrand, 2014, 89*)



Moral Rights in IP – Setting the Scene

- **Non-economic interests** in intellectual creations
 - Attribution
 - Integrity
 - Disclosure
 - Withdrawal
- **Personal relation** between authors/inventors/creators and their **intellectual creations**
- **Industrial property rights vs copyright**
- **Only minimal harmonization**



Prosumerism and Moral Rights – Typical Areas of Conflict

- **Attribution**

- Lack of attribution or insufficient attribution
- Attribution of another person

- **Integrity**

- Adaptations of the work, changes in the work
- Utilization of works in different contexts



Moral Rights in Industrial Property Rights?

- **Attribution**

- **Patent Law:**

- **Article 4ter Paris Convention**

- The inventor shall have the right to be mentioned as such in the patent.*

- Art 62 European Patent Convention

- Sec 20 §1 Austrian Patent Act

- **Design Protection Law:**

- **Art 18 Regulation on Community Designs**

- The designer shall have the right, [...] to be cited as such before the Office and in the register.*

- Sec 8 §1 Austrian Design Protection Act

➔ **Lack of attribution** on 3D-printed objects **not infringing** industrial property rights

- **No “moral right of integrity”** under industrial property rights



Moral Rights in International Copyright Law

- **Art 6bis Berne Convention**

- (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**.*

- **Art 5 WPPT**

- (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 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**.*

➡ **Right of Attribution**

➡ **Right of Integrity**



Moral Rights in EU/US Copyright Law

- **EU Copyright**

- No harmonization of moral rights

- e.g. Rec 19 InfoSoc-Directive *“Such moral rights remain outside the scope of this Directive.”*

- **US Copyright**

- No general provision of moral rights

- 17 U.S. Code § 106A “VARA”: moral rights only for authors of works of visual art



Right of Attribution – *Who?*

- **Berne Convention**

- Art 6*bis* **Author** of:
 - Literary or artistic works (Art 1 Berne)
 - Adaptations, translations etc (Art 2 (3) Berne – if protected as work)
 - Collections of literary or artistic works (Art 2 (5) Berne)
- Computer program? (but Art 3, 4 WCT)
- Database? (but Art 3, 5 WCT)
- Joint authorship?

- **Art 5 WPPT**

- Performers of live aural performances
- Performers of performances fixed in phonograms

- **Austria**

- Producer of photographs (Sec 74 §3 UrhG) = Berne+
- Performers (Sec 67 UrhG) = WPPT+
- Authors of computer programs, databases (but Sec 40b, 40f UrhG)
- Commercially produced cinematographic works (Sec 39 UrhG) = Berne+ / Berne-



Right of Attribution – *Consequences?*

- Art 6*bis* Berne → “Right to have authorship recognized in **clear and unambiguous** fashion” (*Ricketson/Ginsburg*, 10.19)
 - **Right to claim the authorship**
 - Sec 19 UrhG
 - AUT/GER: non-transferable, unwaivable
 - US: non-transferable, waivable (written document) (*Merges/Menell/Lemley*, 2006, 504)
 - **Right of author’s designation**
 - Sec 20 UrhG, Art 6*bis* Berne??
 - Waivable (OGH 4 Ob 293/01v)
- **Typical issues of attribution in UGC**
 - No reference at all
 - Reference insufficient
 - Attribution of someone else



“User Copied Content”

aboutthatfood.com



Vegetable Rose Quiche | Vegan

Posted by ABOUTTHATFOOD on 3.

FEBRUARY 2016

Source: <http://aboutthatfood.com/2016/02/03/vegetable-rose-quiche-vegan/>

9gag.com



639 points • 4 comments

Source: <http://9gag.com/gag/avP5erO/vege-rose-quiche>



UGC and Attribution – *Requirements?*

- **Requirements of attribution?**

- **Proximity** attribution ↔ work?
- **Mouse-over?** (LG Munich, 37 O 8778/14)
- **Full screen?** (LG Munich, 14 O 427/13)
- Attribution **in photo??** (OLG Düsseldorf, I-20 U 138/05)
- **Link** as reference?





“User Shared Content”

 **Ellen DeGeneres** 
@TheEllenShow ⚙ + Follow

If only Bradley's arm was longer.
Best photo ever. #oscars
pic.twitter.com/C9U5NOtGap

 Reply  Retweet  Favorite  More



RETWEETS 523,543 FAVORITES 179,245



11:06 AM - 3 Mar 2014

Flag media

Source: <https://twitter.com/TheEllenShow>

 **ABC News** @ABC · 10h

Retweeted by Ellen DeGeneres

Ellen's Oscars group selfie most retweeted tweet ever, first to cross 1- and 2M retweets: abcn.ws/1ItUK46 pic.twitter.com/kuNqPyzdMU



 Expand ⏪ Reply ⏪ Retweet ★ Favorite ⋮

Source: <https://twitter.com/ABC>



Attribution of whom?



Source: ABC, <http://www.dailymail.co.uk/tvshowbiz/article-2572822/Bradley-Cooper-owns-right-famous-selfie-history-took-photo.html>



UGC and Attribution

- **Exceptions to requirement of attribution?**
 - Right of attribution is **waivable** (OGH 4 Ob 111/08i, 4 Ob 293/01v; BGH I ZR 3/92)
 - Social media:
 - Attribution as standard in CC-licenses
 - Formal declaration/reservation of the right not necessary (OGH 4Ob13/10f)
 - „Nuisance“ of not mentioning authors not as „accepted standard“ (OGH RS0116163; OLG Düsseldorf, I-20 U 138/05)
- **UGC as citation**
 - Art 10 (3) Berne, Sec 57 UrhG → Name + Source



Right of Integrity – *Who?*

- **Berne Convention**
 - Art 6bis **Author** of:
 - Literary or artistic works (Art 1 Berne)
 - Adaptations, translations etc (Art 2 (3) Berne – if protected as work)
 - Collections of literary or artistic works (Art 2 (5) Berne)
 - Computer program? (but Art 3, 4 WCT)
 - Database? (but Art 3, 5 WCT)
 - Joint authorship?
- **Art 5 WPPT**
 - Performers of live aural performances
 - Performers of performances fixed in phonograms
- **Austria**
 - Producer of photographs (Sec 74 §3 UrhG) = Berne+
 - Performers (Sec 67 UrhG) = WPPT+
 - Authors of computer programs, databases (but Sec 40b, 40f UrhG)
 - Commercially produced cinematographic works (Sec 39 UrhG) = Berne+ / Berne-



Right of Integrity – *Consequences?*

- Art 6*bis* Berne
 - “right to object to any distortion, mutilation or other modification”
 - “any changes” (*Ricketson/Ginsburg*, 10.21)
- \triangleq Art 5 WPPT
- Sec 21 UrhG
 - Any shortenings/additions/other changes of work/title/author’s designation (Berne+)
- **Prosumer?**

Collective production, Digitalization, Remix, Mashups, Samples, editing etc



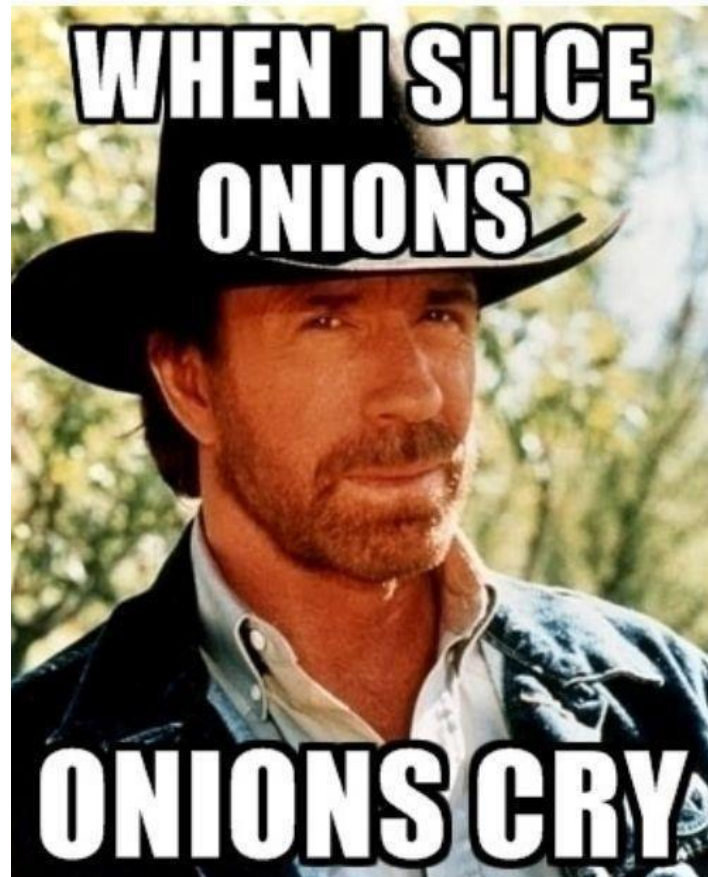
Right of Integrity – *Consequences?*

- “Moral right of integrity” beyond “adaptation right” (Art 12 Berne)
 - Art 6bis Berne “*even after the transfer of the [economic rights]*”
 - Art 9 (2) Berne, Sec 57 UrhG → Exceptions
 - Art 6bis Berne “*in relation to the work*” → **context** of use
 - Waiver of moral rights?
- **Restrictions**
 - Art 6bis Berne “*prejudicial to honor or reputation*”
 - Sec 21 UrhG
 - Only in public sphere
 - Consent of author or permitted by law
 - Changes appropriate to the “*authorised use*” or according to “*honest practices*”



UGC and Integrity → Balancing interests

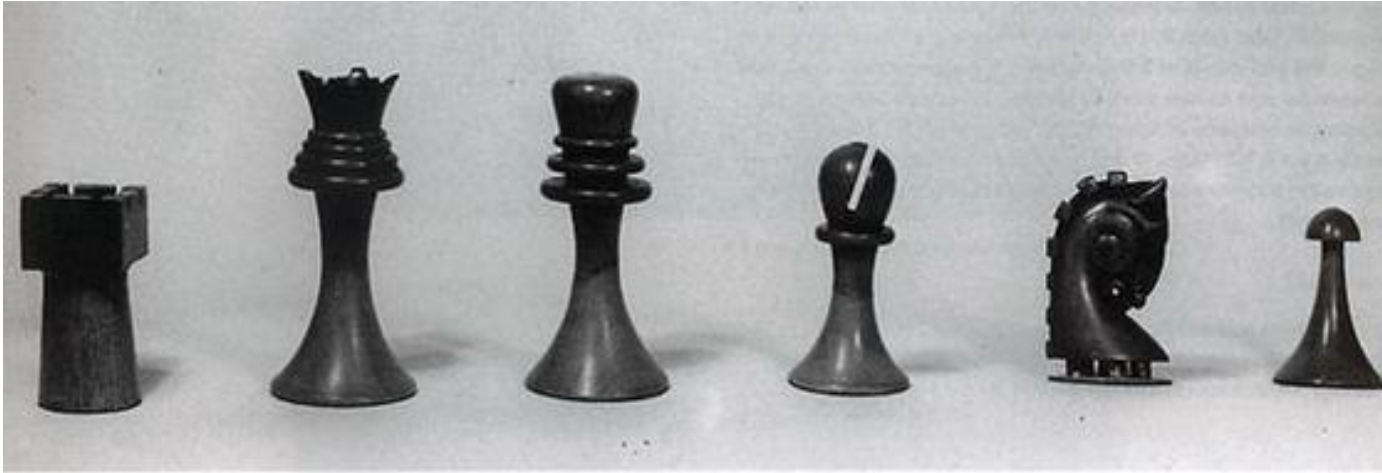
- **Changes inherent to ‘digital’ environment**
 - Format-Shifting, digitization, compression etc
- **Parody**
 - Freedom of speech
 - CJEU C-201/13 – *Deckmyn*
- **“Social norms”?**
 - “Semiotic democracy”
(Yu, Moral Rights 2.0, 2010)
- **Remix Culture??**



Source:
<https://www.pinterest.com/tishtish859/duck-norris-baby/>



“User Printed Content”



Marcel Duchamp's chess set

Source:
<http://www.fastcodesign.com/3032795/3-d-printing-brings-marcel-duchamps-long-lost-chess-set-to-life>



3D-printed version

Source:
<https://imgur.com/H0vuTyu>



Conclusion

- High significance of **intrinsic incentives**
- **“Attribution” in Social Web**
 - Sharing economy vs demand for recognition
 - Social norms in “social” web (Open Source Communities vs UGC)
 - Attribution as standard in licensing (see CC-licences)
- **“Integrity” in Social Web**
 - Preservation in an environment designed for appropriation and collaboration?



Conclusion (de lege lata)

- **Right of attribution**

- No clear procedures for compliance with requirements in digital environment (yet)
- Technical possibilities of digital attribution vs information overload?
- Attribution as „push“ not as „pull“

- **Right of integrity**

- A certain degree of flexibility for transformative uses
- Integrity and the “amateur” user?
- Consideration of “social norms”?

- **International compliance with moral rights?**



Outlook (de lege ferenda)

- **Exceptions for moral rights necessary?**
 - Attribution?
 - Attribution = no exclusivity
 - Convenience of digital uses
 - Integrity?
 - Existing leeway: “*unreasonable*”, “*honor*”, “*reputation*”
- **Exceptions for moral rights admissible?**
 - Art 6*bis* Berne, Art 5 WPPT
 - Art 9 (2) Berne, Art 16 (2) WPPT “*not unreasonably prejudice the legitimate interests of the author.*”
 - Art 5 (5) Infosoc-Directive



Canadian „UGC-Exception“

Non-commercial User-generated Content

Non-commercial user-generated content

29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if

(a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;

(b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;

(c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and

(d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, **financial or otherwise**, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.



Discussion: Future role of moral rights in IP?

- **Crossroads**
 - **„Desecrating“ moral rights?**
 - Assertion of rights as requirement? (e.g. Sec 78 UK-CDPA)
 - Formalizing procedures? (e.g. registration; metadata protected under Art 12 WCT, Art 7 InfoSoc-Directive)
 - **„Socializing“ the „unsocial web“?**
 - Enforcing moral rights?
- **“One size fits all”-approach?**
 - Distinguish within works and uses? (e.g. Sec 78 UK-CDPA)
 - Moral rights in utilitarian works or works of little creativity?
- **Copyright theory**
 - Droit d’auteur / Incentives / Public welfare



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