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-Dir “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 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 Attribution – Consequences?

• Art 6bis Berne → “Right to have authorship recognized in clear an 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 6bis Berne??
    • Waivable (OGH 4 Ob 293/01v)

• Typical issues of attribution in UGC
  – No reference at all
  – Reference insufficient
  – Attribution of someone else
Vegetable Rose Quiche | Vegan

Posted by ABOUTTHATFOOD on 3. FEBRUARY 2016

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

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"

Source: https://twitter.com/TheEllenShow

Source: https://twitter.com/ABC
Attribution of whom?

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?*

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Right of Integrity – *Consequences*?

- **Art 6bis Berne**
  - “right to object to any distortion, mutilation or other modification”
  - “any changes” (*Ricketson/Ginsburg*, 10.21)

- ≡ **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/chuck-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 6bis 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-Dir
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-Dir)
  – „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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