MORAL RIGHTS UNDER EU COPYRIGHT LAW

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Abstract

Moral rights have a long history of being left aside, or even ignored altogether, in comparison to their patrimonial counterparts in copyright law. The purpose of this paper is to analyze the legal framework of moral rights, both in national copyright law and international law, with an emphasis on EU regulations (or, rather, lack thereof). We will present possible reasons why EU law has avoided this subject until now, with both advantages and disadvantages of this evasive approach. We will continue with suggestions de lege ferenda which could bridge the gap between national and international regulations, with EU law in between.

Keywords: *moral rights, copyright, patrimonial rights, European law, Berne Convention.*

1. Introduction

"Where the spirit does not work with the hand, there is no art." - these are the wise words of the well-known artist and scientist Leonardo da Vinci. Therefore, we dare to believe that da Vinci had understood the existence of moral copyright even since the 15th century, almost 400 years before it was first recognized by French jurisprudence.

Moral rights are a category of non-patrimonial personal rights, belonging to authors of literary, artistic or scientific works, performers and authors of industrial creations[1]. In this paper, we will refer strictly to moral rights in copyright and the way they are regulated or, more precisely, their lack of regulation in European legislation.

This special type of rights can be found at an international level, in art. 6 bis para. (1) of the Berne Convention, introduced by the Rome Act of 1928: „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."

Therefore, the Berne Convention introduces 2 moral rights: the right to authorship of the work and the right of the author to oppose any change which would harm his honor or reputation.

Furthermore, moral rights are found in the national legislation of the signatory parties to the Convention, including Romania, which was one of the first countries to adopt legislation recognizing moral rights[2]. In art. 10 of Romanian Law no. 8/1996 on copyright we find the five moral rights: the right to disclosure, the right to name, paternity, integrity of the work and the right to revocation of the work. These rights have some special characteristics, being closely related to the person of the author, inalienable, imperceptible, perpetual and imprescriptible.

Of course, we also find moral rights in the national law of other signatory countries, both EU and non-EU. By example, the French Intellectual Property Code of 1992[3] mentions in art. 121-2 that only the author may decide to disclose his work, as well as the manner in which he will do so, and Art. 121-4 refers to the author's right to withdraw or modify his work, with the condition that proper compensation is offered to the person to whom these rights have already been transferred. And by art. 12 et seq. of the German Copyright and Related Rights Act of 1965[4], the author is granted the right to publish the work (an equivalent of the right to disclosure under Romanian law), the right to be recognized as the author, and the right to not modify the work (an equivalent of the right to integrity under Romanian law).

Therefore, moral rights are found in two sources: international conventions and national regulations. What is missing, however, is a key element, which would provide a much deeper degree of coherence at the level of European countries: the regulation of moral rights at EU level. EU law makes certain references to moral rights, but they are sporadic at most and do not represent proper regulations in this area, as we explain below.

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[1] B. Florea, *Dictionary of Intellectual Property Law*, Universul Juridic Publishing House, Bucharest, 2012, p. 101.

[2] For a detailed discussion on the topic of moral rights in Law no. 8/1996 and the history of these regulations see C.R. Romiţan, *Moral copyright under the rule of Law no. 8/1996*, in Romanian Journal of Intellectual Property Law no. 1/2007, p. 138.

[3] https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf accessed on 07.03.2021.

[4] http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0058 accessed on 07.03.2021.

2. Treaty on the Functioning of the European Union

The first source of European intellectual property law is the Treaty on the Functioning of the European Union (TFEU)[5].

Art. 118 TFEU[6] gives the European Parliament and the Council relatively high powers in the field of intellectual property. These European institutions will take measures in order to create European intellectual property rights, as well as set up centralized Union-wide authorization, coordination and supervision arrangements. The aim is to provide uniform protection of intellectual property rights throughout the EU, a natural objective which is also found in all areas where European regulations are involved.

Introduction of this text in the TFEU implicitly recognizes the high importance of intellectual property rights for the harmonious and sustainable development of EU member states. Also, compared to most provisions of the TFEU, which have an equivalent in the old Treaty establishing the European Community (TEC), the intellectual property regulations are not found in the latter. This is a new text, introduced with the signing of the new treaty, a fact which highlights the growing importance of intellectual property in the evolving European community.

However, we cannot ignore the fact that art. 118 provides a very general wording. Notions such as "European intellectual property rights" or "centralized authorization systems" do not offer much clarification, but are rather vague expressions (we might even call them unassuming) about the actual measures to be taken by the European institutions in the field of intellectual property. We can compare this text with the more specific and detailed expressions of the TFEU in other chapters, such as EU monetary policy or the EU customs union.

Given this lack of particularity, there was no expectation that the legal text would mention copyright, much less moral copyright. The notion of "European protection rights", especially the manner in which it was later translated[7], leads us to think rather of industrial property, trademarks and patents, not copyright, which does not require a "title" or official recognition from an authority in order to receive legal protection.

Therefore, TFEU appears to ignore the existence of copyright altogether. And even the positioning of art. 118 does not help much in this regard. The text is introduced in Part Three of TFEU, Union policies and internal actions, namely Title VII Common Rules on Competition, Taxation and Approximation Of Laws, Chapter 3, Approximation of laws.

This chapter itself has a high degree of generality. The notion of "legislative approximation" refers to a goal that can be applied in any field, nothing specific to intellectual property or, even less so to copyright. And the fact that the text only refers to "approximating" the law, not standardizing it, only confirms that EU law does not pursue and will probably never pursue a legislative uniformity in the field of copyright at Member State level, because an "approximate legislation" is more than enough.

On the other hand, we recognize that, through these vague and general expressions, TFEU leaves the member states more "room for maneuver" in the field of intellectual property, which can be seen as an advantage. Also, the fact that EU institutions with powers in the field of intellectual property regulation are expressly indicated, *i.e.* The European Parliament and the Council, is a plus.

We also find provisions on intellectual property in art. 207 para. (1)[8] of TFEU, which shows that the EU's common commercial policy is based on uniform principles in areas such as exports, foreign investment, but also trade in intellectual property. Although the text refers in general terms to intellectual property, it does not provide actual rules for enforcement in the field of copyright.

The text can be found in Part Five, Title II of TFEU - Common commercial policy. When we think of intellectual property in the field of "commercial policies" we will mainly consider trademarks, as distinctive signs of the trader, not copyright. Trademarks have a significant importance in commerce and protecting them may become equivalent to protecting the business itself.

In addition, even if we ignored the impact of trademarks, the text would still not become applicable to moral copyright. The notion of "trade" is very broad, it can include trade in the field of art, books, videos, all of which are deeply affected by the copyright regime. But regulations would rather concern patrimonial rights

[5] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12016E/TXT&from=RO, according to the updates in 2016.

[6] Art. 118 TFEU: *"In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements. "*

[7] In the Romanian version of TFUE, EU intellectual property rights was translated as "titluri europene de proprietate intelectuală".

[8] Art. 207 TFEU (ex art. 133 TEC) para. (1): *"The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. "*

in the field of copyright, not moral rights. By patrimonial copyright we refer to rights that take a pecuniary form[9]. On the other hand, moral rights are more subjective rights, that cannot take a monetary form[10], being closely linked to the personality of the author and their inner forum, with a much lower importance in the field of trade.

On the other hand, trade is not entirely alien to moral rights, a correlation between these notions exists as well. Resale of a work can be done only after the author's right to disclosure has been exercised in a positive manner and as long as they have not exercised their right of withdrawal. Also, the sale of a work will always be done under the name chosen by the author and abiding by their right to paternity. And regarding the manner of commercialization, the right to integrity of the work must always be respected, as one cannot commercialize works with changes that would harm the honor or reputation of the author.

But the above aspects are not expressed strongly enough, in order to state that art. 207 para. 1 of TFEU affects the legal regime of moral copyright in any way. A similar regime applies to art. 207 para. (4) TFEU[11], which mentions that when negotiating and concluding agreements on commercial matters of intellectual property, the Council shall take decisions by unanimous vote, if they concern provisions which require unanimity in the adoption of internal rules. As in the case of para. (1) of the same article, the legal text does not consider moral rights in any way, but only the commercial, pecuniary aspects of intellectual property.

We also find references to intellectual property in TFEU at art. 262[12], more precisely regarding litigations on intellectual property rights. As we showed when we referred to art. 118 TFEU, we consider that the concept of intellectual property rights refers rather to industrial property, such as trademarks or designs. According to art. 1 para. (2) of Law no. 8/1996, "The work of intellectual creation is recognized and protected, regardless of bringing it to public knowledge, by the simple fact of its realization, even in unfinished form". *Per a contrario*, the protection is recognized from the moment the work is created, even in absence of registration formalities[13]. This category of formalities would also include the rights mentioned at art. 262 TFEU.

3. Copyright Directives

In addition to the provisions of TFEU, we also find copyright provisions in various directives, from which we will choose the most relevant legal texts for further analysis.

3.1. Directive 2009/24/EC on the legal protection of computer programs

Directive 2009/24/EC on the legal protection of computer programs states even from its preamble[14] that member states should protect computer programs as literary works, under copyright law. This solves the "problem" posed by these rather atypical computer creations. At first glance, we cannot easily fit them into a set category, they seem to fall somewhere between artwork and invention, also excluding from protection the ideas or principles underlying the program itself[15].

The Directive does not mention in any article the notion of moral or non-patrimonial copyright. However, we consider there is an implicit inclusion of these rights by reference to the Berne Convention, which is the main document that imposes moral copyright to an international level. Art. 1 para. (1) states that member states must protect computer programs by copyright, which are literary works in accordance with the Berne Convention. And in art. 7 para. (3) it is mentioned that special rights to decompile programs must not be interpreted in a way that is prejudicial to the legitimate interests of the copyright holder or the normal operation of the program in accordance with the Berne Convention. In other words, as long as the reference to the Convention is so general, including all the rights contained by it (including copyright), we can state that the Directive has also been issued with

[9] L. Cătună, *Civil Law. Intellectual property*, All Beck Publishing House, Bucharest, 2013, p. 78.
[10] *Idem*, p. 70.
[11] Art. 207 TFEU para. (4): *"(...) For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules."*
[12] Art. 262 TFEU (ex-art. 229 ECT): *"Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements."*
[13] N.R. Dominte, *Intellectual Property Law. Legal protection*, Solomon Publishing House, Bucharest, 2021, p. 244.
[14] Directive 2009/24/EC, preamble, para. (6): *"The Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorise or prohibit certain acts and for how long the protection should apply."*
[15] Directive 2009/24/EC, art. 1 para. (2): "Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive."

reference to them. But the connection is so weak, that it is almost not worth mentioning.

On the other hand, the Directive makes numerous references to patrimonial copyrights, both expressly in art. 2 para. (3)[16], as well as indirectly, by reference to the rights of reproduction, translation, adaptation and public distribution in art. 4, which are all patrimonial rights, for which we find a Romanian equivalent in art. 13 of Law no. 8/1996.

Therefore, we can conclude that the Computer Programs Directive does not contribute to the protection of moral rights, because the connection with these rights is rather speculative and indirect, strictly considering the general references to the Berne Convention.

3.2. Directive 2006/115/EC on rental and lending

Another resource on European copyright law is Directive 2006/115/EC on rental and lending rights and certain intellectual property rights in the field of intellectual property. The aim of this directive is to strengthen the fight against piracy, which is becoming more and more common and harmful, as mentioned in the Recitals at para. (2). The legal text also provides effective ways to continue the lending and rental business for video and audio works, in a safe and legal manner.

Similar to Directive 2009/24/EC, the document does not mention in any way the notion of moral or non-patrimonial rights. Moreover, there is no mention of the Berne Convention, so we do not even find an indirect reference to moral copyright. However, this is to be expected, especially given the title of the directive: the right to borrow and rent creative works are patrimonial rights, not moral ones, as is expressly mentioned in Law no. 8/1996 at art. 13 letter d) and e).

According to the doctrine[17], the right to rent means making a work or its protected copies available for use, for a limited time and for an economic or commercial advantage, either directly or indirectly. And loaning works also means making them available for use, for a limited time, but without economic or commercial advantage, through an institution that allows public access for this specific purpose[18].

Of course, the exercise of these two rights can only be achieved after the moral right to disclosure has been exercised in a positive manner, with the recognition of the real author and under the name they have chosen, without harmful changes and as long as the work is not withdrawn from the market. But these requirements are found in national legislation and in the Berne Convention, not in the text of Directive 2009/24/EC.

We can thus say that Directive 2006/115/EC does not contribute to the protection or regulation of a framework for protecting moral rights, but solely for certain patrimonial rights.

3.3. Council Directive 93/83/EEC on satellite programs and cable retransmission

Compared to the above-mentioned directives, Council Directive 93/83/EEC on the coordination of certain rules relating to copyright and related rights applicable to satellite and cable television broadcasts makes a brief reference to moral rights. This does not mean, however, that the legal text brings something new in this field. The reference is included in the Recitals of the Directive, at para. (28), which states only that this Directive is without prejudice to the exercise of moral rights.

The document refers to copyright in satellite and cable programs, as its name implies. Specifically, the problematic situation in which TV broadcasts take place not only within a single country, but also across borders, in other EU member states, which of course have other copyright laws. And in order to protect the authors of these audiovisual works, it was necessary to issue regulations in this field. Therefore, the text does not center around non-patrimonial rights, but rather patrimonial rights that we also find in art. 13 letters g and h of Law no. 8/1996: broadcasting and cable retransmission of the work.

In this directive, the preamble is very extensive and detailed, almost equal in size to the enacting terms themselves. Which means that the recitals are of high importance and the brief reference to moral rights, even if made in the preamble, should not be overlooked.

However, we must conclude that we are, again, in the presence of a document that does not provide regulations in the field of moral rights.

3.4. Other copyright directives

In addition to the three texts mentioned above, we can identify other directives in the field of copyright, which we will refer to briefly. Directive 2006/116/EC on the term of protection of copyright and certain related rights seems to include a wider range of copyright, according to the title, but in fact it only applies to patrimonial rights, as specified expressly in para. (20) of its preamble: "It should be made clear that this Directive does not apply to moral rights".

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[16] Directive 2009/24 / EC, art. 2 para. (3): "Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract."

[17] V. Roş, *Intellectual Property Law*, vol. 1, C.H. Beck Publishing House, Bucharest, 2016, p. 334.

[18] *Idem*, p. 335.

On the other hand, Directive 96/9/EC on the legal protection of databases makes a relatively extensive reference to copyright in para. (28) of its preamble: „Whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive". But, as it can be seen, this legal text does not add to the regulation of moral rights.

In a similar way, Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society excludes moral rights from its regulations, as shown in para. 19 of the recitals: "The moral rights of right holders should be exercised in accordance with the laws of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty and the WIPO Performances and Phonograms. Such moral rights do not fall within the scope of this Directive."

Another European document on copyright, Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, does not refer to moral rights, either. However, this was to be expected, starting from the very title of the document: the resale right is a patrimonial right, also found in art. 24 of Law no. 8/1996.

Although its title is much more general, not limited to property rights such as the legal text mentioned above, Directive 2004/48/EC on the enforcement of intellectual property rights does not even refer to moral rights. These are not even taken into account, in order to expressly exclude them, to emphasize that the legal text does not apply to them, as is the case with other directives analyzed above.

The same approach was chosen in Directive 2012/28/EU on certain permitted uses of orphan works, by completely ignoring the existence of copyright, without even a single reference to them. And Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, also does not mention moral rights or the Berne Convention. Although according to Romanian law, the contribution of collective management bodies is quite important in the field of moral rights - based on art. 11 para. (2) of Law no. 8/1996, they are responsible for the exercise of the rights in question, if the author dies and has no heirs.

4. The need for EU regulations on moral rights

We do consider that the lack of EU regulations in the field of moral rights has a number of advantages. Member states have much more freedom to impose their own rules on moral rights, such as the number of rights they recognize, the duration of protection, the legal regime, and so on. And the fact that an international treaty on moral rights already exists, *i.e.* the Berne Convention, might make potential EU legislation seem redundant.

On the other hand, we believe that the mere existence of an international treaty to which, incidentally, all EU Member States are parties, would not be an impediment to the existence of European regulations. This even more so, since EU law imposes more drastic measures when not complied with, like the infringement procedure.

By contrast, international conventions do not always impose clear sanctions for non-compliance, a relevant example being the Berne Convention itself. The United Kingdom signed the Convention in 1887 but did not make the necessary implementations until 100 years later, with the adoption of the Copyright, Designs and Patents Act in 1988[19]. And an even more problematic case is the United States of America which, although party to the Convention since 1988, has not yet fully implemented its provisions[20]. As the doctrine shows, „those schooled in the United States may find moral rights to be quite a foreign concept"[21].

In the US, moral rights are recognized only in the field of visual arts, such as paintings, sculptures, drawings, limited edition photographs by the VARA - Visual Artists Rights Act, passed in 1990. And before adhering to Berne, the United States had relied for international copyright protection on its bilateral treaties and on the Universal Copyright Convention (UCC), neither of them requiring any moral rights protection[22].

Also, US case law is highly contradictory: while some judgments even refer to moral rights, others expressly state that such rights are incompatible with existing law. However, the US has not been subject to any sanctions for non-compliance with the Berne Convention, and the situation remains unresolved to the present date.

[19] https://en.wikipedia.org/wiki/Berne_Convention.

[20] For detailed considerations on the US position on the Berne Convention, see A. Speriusi Vlad, *On interim measures in the field of intellectual property from general to private (I)*, in Romanian Journal of Intellectual Property Law no. 3/2021, p. 179.

[21] S.P. Liemer, *Understanding artists' moral rights: A primer*, in Boston University Public Interest Law Journal, vol. 7, 1998, p. 42.

[22] The Register of Copyright of the United States of America, *Waiver of moral rights in visual artworks*, Library of Congress Department 17, Washington DC, p. 8.

Of course, the US is not an EU member state. But the example above tends to show that it may be easier to disregard obligations under an international treaty than those under European law. So, the mere existence of the Berne Convention should not discourage an initiative for European legislation on copyright.

In addition, a directive on this matter could have a much more organized content, adapted to European realities. EU member states benefit from a certain coherence, a congruity, which we could hardly see with countries outside the EU. The Berne Convention needed to have a text that would perfectly apply not only to European countries, but also to countries in the continents of Africa, Asia, North America, Central and South, even Australia. Such a convention will certainly have a high degree of generality, which will substantially dilute the respective provisions. As proof, the implementation of this Convention has been rather a challenge, as it lacks an effective mechanism for prosecuting states that have not complied with its provisions.

5. Possible approaches to EU regulations

A first step towards a unitary EU law would be to stop ignoring moral copyright, namely the lack of its mentioning in legal documents.

From the ten EU Directives analyzed above, only two expressly stated that moral rights are subject to national law and/or the Berne Convention (Directive 96/9/EC and Directive 2001/29/EC). Two other texts, although they did not refer to the Berne Convention itself, expressly stated that the document did not apply to moral rights (Council Directive 93/83/EEC and Directive 2006/116/EC). And of the remaining directives, only one mentioned the Berne Convention without any particular reference to moral rights (Directive 2009/24/EC) and the rest of the legislation had no mentions of the Convention or moral rights.

Given this inconsistent approach, a step forward would be for each of the legal documents in the field of intellectual property to mention that it does not apply to moral rights, in order to eliminate any possible confusion. As we find in Directive 2006/116/EC, a short text may be inserted in the body of the Directive or at least in the preamble: "It should be made clear that this Directive does not apply to moral rights". Although this would be the most conservative approach, it is still one step forward in the right direction.

A more direct approach would be expressly referring to the Berne Convention, as mentioned by Directive 2001/29/EC: „The moral rights of right holders should be exercised in accordance with the laws of the Member States and the provisions of the Berne Convention". We consider that such a short text would clarify for any reader not only that moral rights are not subject to the directive, but also that in order to find out the legal regime of these rights, one has to consider national law and, of course, the Berne Convention.

And, going further, a bolder and very welcomed step would be the adoption of European copyright regulations, which would bring more coherence and clarity on the matter. Such a document could not take any other form than a Directive, as done in the other intellectual property matters mentioned above. Of course, we cannot consider moral rights to be more important in EU law than property rights themselves. The EU will always focus on trade, the single market, the pecuniary part of intellectual property. But ignoring these rights is certainly not the right approach, either.

6. Conclusions

We are convinced that the importance of intellectual property will increase even more in the years to come, especially considering the various technological developments and the fact that we are becoming increasingly connected to each other. A connection that also brings numerous disadvantages, including the difficulty to respect the rights of the work's true author, especially their moral rights.

It is true that documents generally emphasize the "pecuniary" part of these difficulties, more precisely patrimonial rights, not necessarily moral rights. However, slowly but surely, it seems that the focus is starting to move towards non-patrimonial rights of individuals, on obvious example being the very impact that GDPR has brought in recent years. When we think of GDPR, we refer to very strong European legislation in an area that is closely related to the rights of individuals, and which is subject to complex and strict regulations.

So why not pay the same attention to the creative activity of humans as we have recently started to pay to the human being himself? Attention that can be found in European regulations, the missing link between the already existing legislation through the Berne Convention and internal regulations of the Member States.

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