

The use of music in film and multimedia

Rising issues and challenges regarding the composer's moral rights

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“My field is a medium that is so proprietary that it almost works against the creative process”.

JAMES HORNER, film composer (Titanic, Troy, Avatar, ...).

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INTRODUCTION

Under the European continental *droit d'auteur*, the author of a protected work enjoys both economic and moral rights on his creation. Whereas the economic rights solely focus on the authors proprietary concerns, the moral rights are often considered as personal rights aimed at the protection of the author as creator of the work. The present paper will be dedicated to the latter.

Moral rights, as defined by the Berne Convention, have been established in practically all western countries albeit with very different approaches. Given the minimal requirements of the Berne Convention, contracting States remain free to organize moral right as they see fit. A first major distinction in the approach taken by national authorities in the handling of these “ideologically and politically supercharged”¹ rights can be found in the traditional civil law countries and the common law countries, the latter being historically more pragmatic and business-minded than the first. But differences also arise among civil countries, even in Europe, as the European Union has decided not to harmonize the matter.

This paper will firstly consist in a very brief explanation of the evolving art of music composition and production, after which it will move on to a succinct comparative study of moral rights in general. Then, the application of these rights in musical contracts emanating from the audiovisual and online world will be analyzed and discussed. The first practice to be scrutinized will be film scoring, i.e. composing music for a specific movie under a work for hire contract. The last decades have been the stage for a phenomenal expansion of that business, bringing along new phenomena like ghostwriting and the use of temp music, which inevitably raise questions regarding moral rights.

Afterwards, regard will be had to the practice of selling online sync licenses and the issues of moral rights enforcement in an international context. These situations will be illustrated by taking a well-known international licensing platform as an example, namely Jamendo. Different

¹ M. FICSOR, « *The Application of moral rights in the digital era. Introduction* », in F. BRISON, S. DUSSOLIER, M.-C. JANSSENS (eds.), *Moral rights in the 21st Century : The changing role of the moral rights in an era of information overload*, Ghent, 2015 p. 191.

scenarios of extracontractual breaches by online users will be imagined. Rules on private international law will inevitably be considered and applied to these cases.

All these investigations are meant to try and give an answer to the question: are moral rights an old-fashioned notion that should be put to bed due to its incompatibility with today's connected world? As the globalization, the digitalization and the speed of today's business world constantly increase, new principles emerge and one should wonder how this will impact the future of moral rights.

1. THE USE OF MUSIC IN AUDIOVISUAL WORKS: EVOLUTION AND MUTATION OF THE CRAFT

Music has been the lifelong partner of film. In the early ages of cinema, live music was the only way to provide silent films with an audio background. Without it, the viewer was reduced to a silent experience. Public projections of movies were accompanied by live musicians, who were tasked to enhance the movie's atmosphere and giving the viewer emotional cues.

The art of film composition has evolved alongside the film business and increasingly more musicians are able to make a living off it. This requires an enormous craft, because the music has to be coherent with both the picture and its own independent existence. Whereas, traditionally, a composer is contracted to create an original score to be added to a movie or a documentary, today's way of doing things seems to have partially inversed this process. Nowadays, the internet allows any composer to publish their spontaneously created works that can later be used as such by film makers or internet content providers, through the means of sync licenses.

Like all aspects of society, the musical and the audiovisual world have seen the grasp of law tighten on themselves during the last century. After spending centuries on developing the art of law, it slowly became obvious that the time had come to work on the law of art. The tremendous effervescence of the film industry has led it to become the thriving economical sector it is today. Since the industrial revolution, which started around the end of the 18th century, the global economic trend has been capitalism: the quest for profit through private ownership. One must produce as quickly as possible and as cheaply as possible. When the film industry emerged in the early 19th century, it made no exception to that rule. The driving force behind film companies and producers is, like for any economical agents, the search for financial gain, while artistic works are initially not created as a way to earn money² but are a means to express one's creative soul. R. R. Kwall goes as far as to state that the relation between an artist and his work is similar to a mother and her child³.

² F. HENDRICKX, "The Social Status of the Artist: A Moving Picture", in E.J.H. SCHRAGE., B. TILLEMANN, B. DEMARSIN (eds.), *Art & Law*, Bruges, Die Keure, 2008, p. 103.

³ R.R. KWALL, *The Soul of Creativity, Forging a Moral Rights Law for the United States*, Stanford, Stanford University Press, 2010, xiv. cited by G.-J. AUDORE, *Morele rechten en de digitale en online wereld: de noodzaak van een geharmoniseerde bescherming binnen de Europese Unie* Master Thesis, KU Leuven, 2014, p. 59.

This can lead to tensions between the different actors that intervene in the whole film making process, especially in the relations between the producers, who bring in the financial means, and their contracted creators.

In the field of film scoring, a large number of composers admit to feeling frustrated in performing their job⁴. That frustration results from the fact that many of them believe the deadlines that are imposed to them by contract compromise their musical voice⁵. Kevin Cassidy, who interviewed many composers in the film industry, said that when you ask a composer if he would like to get either more time or more money to do his work, he will always answer time. Indeed, when asked to compose a film score, a professional composer will usually have a period of approximatively three months for the composition, orchestration, recording and production of generally around one hour of music. Some world-renowned composers, like Danny Elfman, concede that this makes them unsure about their work. From the time a composer signs the contracts, he starts worrying about his tight deadline and about the film running late on schedule. “This is a risk most composers face since they usually can't get to work until the film has been edited and locked, or at least edited as a rough cut”⁶. Indeed, if the business works the way it does, it is because the task of the composer can only take place at the end of the post-production⁷, which is the final step in the development of a movie, after the pre-production and the production itself. It mostly consists in putting the different frames that were shot together in order to assemble the movie. Once the producers and the director have agreed on a rough edit of the movie, a copy is sent to the composer, who can only then really get to work.

The internet and the digitalization of the craft of composing have had major consequences on the world of film music. Prior to the digitalization of the industry, few musicians went on to become film composers, because the skillset required to fulfill the job was very extensive. Not only did a composer need to be able to create music as such, but he also had to notate it and sometimes orchestrate it on his own. That meant that the job was reserved for elite musicians with a strong classical training, for whom orchestral music had no secrets, and who had an innate ability to compose to picture. Examples of such composers are Bernard Herrmann, John Williams, Ennio Morricone and Maurice Jarre.

⁴ See Survey supporting this claim in Annex A.

⁵ See Annex A

⁶ P. FLACH, *Film scoring today – theory, practice and analysis*, Master thesis, University of Bergen, 2012, p. 36.

⁷ M. HALLORAN, “Film composing agreements: business and legal concerns”, 5 *Loy. L.A. Ent. L.J.*, 1985, p. 6.

That era is at an end though, as today's world allows for most anyone to create and synchronize music to image. Since the early 80s, computers have allowed musicians to put together very realistic mock-ups of their creations, thanks to Digital Audio Workstations (often referred to as "DAWs"), MIDI ("Musical Instrument Digital Interface") technology and samplers.

DAWs are software for recording, editing and producing music. They emulate all the pieces of expensive material were traditionally needed for music production. During most of the past century, recording studios were installed over multiple rooms, because every tool used consisted in large hardware that could not easily be moved. DAWs allow most anyone to design and assemble their own virtual studio without needing too much physical space, because nowadays everything is inside the machine. This has rendered the prospect of music creation very attractive to an ever-growing number of musicians.

MIDI keyboards send signals to the DAW, which in turns converts those signals into the sound of the corresponding note played by the sampled instrument. As a short and somewhat simplified example, we could imagine a studio setup where a MIDI keyboard is plugged into a computer in which a solo violin sample is loaded. When playing a melody on his keyboard, the composer will then hear a violin play the same notes through his speakers. Today, samples exist for each section of the orchestra, which allows any one person to take control of symphonic orchestra without leaving his or her room.

Given these relatively cheap – at least in comparison with the extensive hardware of yonder years – modern techniques and the internet, the issues that will be discussed in this paper affect an extremely large group of people today. Film music is no longer a business for the elite, at the contrary, it has now been popularized and vulgarized. Hans Zimmer, who is arguably considered as being one of the greatest composers of our time, "doesn't read standard notation very well" and is only "a so-so pianist"⁸. Being a film composer today is a more a matter of creativity and instinct and less of science and knowledge, because it is now perfectly possible to write an orchestral symphony only by possessing a computer and orchestral samples.

The internet has also been a game changer, because not only could composers now get to work without leaving their home, but they can also do business with people from around the world. This is a reality in today's film industry. Very often, people engage in business relations without ever having met and without intending to do so. The contracts signed by composers are often

⁸ Michael A. LEVINE, "Why Hans Zimmer got the job you wanted (and you didn't)", 2013, column available at <http://www.soundtracksandtrailer music.com/2013/07/hans-zimmer/>.

governed by a law that is not that of the State from which the composer is a national. Depending on the way moral rights are handled in that State, the contract will or won't take these rights into account, as we will see *infra*. In this new “creative web”, any internet user is given a chance to be creative and to share his creations. In other words, anybody can potentially become a potential author.

2. MORAL RIGHTS: ORIGINS AND RATIO LEGIS

2.1 HISTORICAL BACKGROUND

Moral rights are internationally established in the Berne Convention of 1886, and are classified as personal rights⁹, as opposed to the economic rights the author has on his work. The origins of these rights are however far more ancient than Berne and go back to Antiquity, Roman law, where the only rights that were recognized to authors were equivalents of moral rights¹⁰. These rights disappeared during the first part of the Middle Ages, as civilization went backwards, but came back to life with the invention of the printing press in the 15th Century¹¹. Before that time, literary works could only be copied through manual transcription by monks, which was a very costly and time consuming matter. The Middle Ages counted a few self-esteeming authors who proved to be very attached to their works¹², and the printing era brought with it an increase in bad copies and unauthorized publication¹³. This went hand in hand with the rise of what Strömholm called “*la conscience du fait créateur*”¹⁴, the slow realization that the creation of an intellectual work does not come down to the creation of an object that may be freely disposed of¹⁵. This is the very essence of moral rights. As an Indian judge very elegantly put it back in 2005:

“The author has a right to preserve, protect and nurture his creations through his moral rights [...] The creative individual is uniquely invested with the power and mystique of original genius, creating a privileged relationship between a creative author and his work”¹⁶.

The initial goal of moral rights was not to provide authors with a genuine subjective right, but only with a means to oppose denaturing use of his work by contractual partners¹⁷. The 1912

⁹ H.L. SHELF III, “Moral rights and musicians in the U.S.” *Entertainment, Publishing and the Arts Handbook*, 2003, p. 165.

¹⁰ E. ADENEY, *The Moral Rights of Authors and Performers. An international and comparative analysis.*, New York, Oxford University Press, 2006, p.10, n° 1.01.

¹¹ W. GROSHEIDE, “Moral Rights”, in E. DERCLAYE (ed.) *Research Handbook on the Future of EU Copyright*, Cheltenham, Edward Elgar, 2009, p. 242-243.

¹² M. JANKOWSKA, “On the implication of the unalienability of the right of authorship on ghostwriting contracts”, *Review of comparative law*, vol. XVIII, 2013, p. 79. The author cites a few examples, among which Eike von Reppow, who wrote *Sachsenspiegel* (1230) and Nicholas von Jeroschim, author of *Kronike von Pruzinland* (1330).

¹³ E. ADENEY, *op. cit.*, p. 11, n° 1.07.

¹⁴ S. STRÖMHOLM, *Le droit moral de l’auteur*, Stockholm, Norstedt, 1967, p. 65, quoted by M. JANKOWSKA, *op. cit.*, p. 79..

¹⁵ M. JANKOWSKA, *ibid.*

¹⁶ Delhi High Court, 21 February 2005, *Amar Nath Sehgal v. Union of India*, 117 DLT, 2005, p. 717, §24.

¹⁷ A. LUCAS-SCHLOETTER, “rapport général: le droit moral dans les différents régimes du droit d’auteur”, in F. BRISON, S. DUSSOLIER, M.-C. JANSSENS (eds.), *Moral rights in the 21st Century : The changing role of the moral rights in an era of information overload*, Ghent, 2015, *op. cit.*, p. 50.

Dutch Statute on copyright still bears marks from this conception which considers moral rights to be a mere exception to economic interests¹⁸. However, in France and Germany¹⁹, they rapidly evolved to take the form of real subjective rights of the author, intended to protect a set of extra-patrimonial, individual and spiritual concerns on his work. This evolution, nurtured by the courts²⁰, is based on the fact that the work of the mind differs from other goods because it includes a part of the author himself²¹.

2.2 PHILOSOPHICAL BACKGROUND

The question of property rights has deep philosophical groundings and has entertained generations of great thinkers. In her contribution to the 2015 ALAI²² conference regarding the changing role of moral rights in the 21st Century, Professor M. BUYDENS explains the point of view of 16th century architect and thinker Zuccari. According to him, God claims man as his work and property, because mankind is a reflection of Himself. If, like God, men can proceed to creation, it is natural that they be given similar privileges on their own creations, because creations are the reflection of its soul²³.

Immanuel Kant considered literary works to be an action of their creator. Through his book, the author speaks, so it is unconceivable to separate the work from its author. According to him, the right of the author on his work is of a personal nature, it consists in the right that nobody can publicly deliver the author's speech other than in the author's name²⁴. Possession of the physical body does not give permission to copy its content²⁵. But it goes further than that: the author's right on his work allows him to prevent anybody from bringing his work to the public without his consent. Kant's philosophical analyses have had a strong influence on the current German moral rights legislation²⁶.

Fichte further developed Kant's ideas, by alleging the author's work consists in two separate elements. The first one is the physical support of the work, the *corpus mechanicum*, which is

¹⁸ *Ibid.*, Wet van 23 september 1912 houdende nieuwe regeling van het auteursrecht.

¹⁹ J.A.L. STERLING, *World Copyright*, London, Sweet & Maxwell, 2008, p. 392.

²⁰ E. ADENEY, *op. cit.*, p. 30, n° 1.63. Back in 1814, a French judge ruled that an author had a right to prevent any modification of his work by his publisher (Tri. civ. Seine, 17 August 1814, quoted in J.A.L. STERLING, *op. cit.*, p. 392).

²¹ J.A.L. STERLING, *op. cit.*, p. 392.

²² Association Littéraire et Artistique Internationale

²³ M. BUYDENS, "Le développement de l'idée de l'intangibilité de l'œuvre à partir de la querelle des arts libéraux", in F. Brison, S. Dussolier, M.-C. Janssens (eds.), *op. cit.*, p. 16.

²⁴ R. POZZO, "Immanuel Kant on intellectual property", *Trans/Form/Ação*, 2006, p. 12

²⁵ J.A.L. STERLING, *op. cit.*, p. 1595

²⁶ J.A.L. STERLING, *op. cit.*, p. 392.

freely tradable and susceptible of property rights by anybody. The content of the work as such though, *the corpus mysticum*, must be distinguished from its form, and is by nature not appropriable²⁷.

Fichte illustrates this idea with a short fictional story²⁸ in which a brilliant scientist develops a cure against almost every kind of illness. Passionate about research, the scientist leaves the whole commercialization of the cure to a partner, who earns an enormous amount of money by overpricing it. One day, a thief sets out to steal the recipe for the cure and starts selling it for a much lesser price than the original distributor, who decides to bring the thief before the judge. In his defense, the thief argued that he acted out of collective interest, and thanks to his actions the cure is now available for even the poorest families. In other words, his theft has led him to save lives. How could one condemn his actions? “Furthermore”, says the thief, “the claimant argues that as a result of my theft, he is not able to pay the scientist anymore, who then will most certainly put a stop to his research. This is wrong however, as the scientist always loved research and fame. My theft made him even more famous. Isn’t that paying tribute to him?” The thief concludes by stating he is, in fact, a martyr for the collective interest.

This shows that there is, amongst Western philosophers like Kant and Fichte, but also Hegel²⁹, a consensus according to which the author disposes of separate economic and personal rights on his creation. The traditional inalienable character of moral rights, that is to be found in most European continental countries concurs with the unanimous Western philosophical doctrine regarding the author’s rights.

2.3 A FEW CONTROVERSIES

2.3.1 Terminology

It is quite astounding that the terminology ‘moral right’, while being overly abundant amongst law scholars and practitioners, still seems to be absent from a large number of legislative sources. First of all, Art. 6*bis* of the Berne Convention avoids the qualification ‘moral rights’ even though this terminology is used in article 11*bis* of the Convention³⁰. How surprising is it furthermore that even France, which is the *mère patrie* of these rights, waited until 1992 before

²⁷ M. BUYDENS, *op. cit.*, p. 26

²⁸ Narrated in *ibid.*, p. 27.

²⁹ *Ibid.*, p. 30

³⁰ The second paragraph of Art. 11*bis* states: “It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority”.

inserting the term ‘*droits moraux*’ into its legislation³¹? Furthermore, the French legislator only uses the plural form of *droits moraux*³² instead of the general term *droit moral*, which some argue shows a will to deliberately limit moral rights to a certain number, as opposed to the consecration of a broad principle³³. Others, like F. DE VISSCHER and B. MICHAUX, believe that “*l’incidence est plus conceptuelle que pratique*”³⁴.

Furthermore, to some authors, the appellation of “moral” rights is not representative of their purpose. As M. T. SUNDARA RAJAN puts it, “*the term “moral rights” is actually a poor translation from the French ‘droit moral’[...] The rights are not necessarily moral in the English sense of the term*”³⁵. According to her, since their aim is to protect the creativity and personality of the author, the German terminology – *Persönlichkeitsrechte* – might be preferable³⁶. Other authors go as far as saying this erroneous choice of words is the main reason behind America’s suspicious stance on moral rights³⁷.

However, the author of this paper respectfully begs to differ. First of all, moral rights protect the relation between the author and his creation, so they cannot exist before the work has effectively been created³⁸. Hence, even though they are personal rights³⁹ (*droits personnels*), one should not go as far as to qualify them as personality rights (*droits de la personnalité*), because their existence depends on the prior existence of a person *and* a work. Two elements would thus be necessary for an author to benefit from moral rights protection: a work and its creator. Furthermore and as explained above, on a philosophical level, moral rights are justified. They are moral in the sense that they ensure that the personal link between work and author is

³¹ French Statute No. 92-597 from the 1st of July, 1992 concerning the Intellectual Property Code, *Journal Officiel*, 3 July 1992; S. STOKES, *Art and Copyright*, Oxford, Hart Publishing, 2012, p.84.

³² Contrarily to the Belgian, the Spanish and the Italian legislators who have all opted for the singular form of the term.

³³ In this sense, see J. GRIFFITHS, “Moral rights from a copyright perspective”, in X, *op. cit.*, p. 83. The author intended to make the distinction between civil law and common law system by saying, about the plural form used in copyright countries: “*Where the rights are granted, they exist as individual, separate entitlements – as moral rights (plural) – rather than as particular reflection of a single overarching principle. In this respect, they differ, for example, from le droit moral, in French law*”. However, even though the continental doctrine and scholars have proceeded to use the terminology ‘*Droit moral*’, our view is that, since the legislator still speaks of “*droits moraux*”, the should not be considered as being a radical difference between common law and civil law countries.

³⁴ “The impact is rather conceptual than practical”, F. DE VISSCHER and B. MICHAUX, *Précis du droit d’auteur et des droits voisins*, Bruxelles, Bruylant, 2000, p. 145.

³⁵ M. T. SUNDARA RAJAN, “Creative Commons: America’s Moral Rights?”, *Ford. Intell. Prop. Media. E.*, 2011, vol. 21, p. 909.

³⁶ *Ibid.*

³⁷ R. B. STANDLER, “Moral Rights of Authors in the USA”, article available on M. STANDLER’S website at <http://www.rbs2.com/moral.pdf>, p. 36; On the US’ reluctance towards moral rights, cf. *infra*, 3.1.2 and 3.2.5.

³⁸ F. De VISSCHER, B. MICHAUX, *op. cit.*, p. 146 ; Cass. fr., 7 April 1987,

³⁹ Which, accordingly, can never be subject to adverse possession. In this sense, cf. *ibid.*, p. 149.

protected. In an era where everything seems tradable, moral rights are a stronghold for the author's reputation and creative interests. When all exploitation and distribution rights have been transferred to a third party, moral rights are the last string between creation and creator.

2.3.2 Protection of the public?

Until now, in this paper, moral rights have been perceived as protectors of the author's personality. But it is generally accepted that there is more to these rights. As early as the end of the Middle Ages, "concerns were expressed for the integrity of works, not only as authorial creations, but also as repositories of truth"⁴⁰. Not only are they a guarantee that the author will never be entirely alienated from his work, but moral rights also serve the purpose to ensure authenticity of the work towards the public. Concerns about cultural and consumer protection must be taken into consideration⁴¹. Indeed, a deliberate wrong attribution of a work is nothing less than a deception of the public⁴². It is here that, according to us, the term 'moral' overrides the term 'personality rights', because both the author and the public that will be reached by his work are protected by moral rights. They are a way to make sure that what the public gets is indeed what the author wrote.

The fact that nowadays the interests of the public are taken into account shows that there is clear evolution – or even shift?⁴³ – of the notion of moral rights. That approach has originally been taken by Anglo-Saxon authors, who tried to demonstrate that moral rights were not incompatible with copyright, which attaches a lot of importance to the public interests⁴⁴.

This conception has had repercussions in continental Europe, where it is now accepted that moral rights not only protect the author's individual interests, but also the collective interest⁴⁵. A. LUCAS-SCHLOETTER penned three important remarks regarding this evolution⁴⁶. First and foremost, there is nothing wrong with the objective observation that the rights of attribution and integrity indirectly serve the public interest, by ensuring authenticity. This can only make moral rights more popular amongst the people. Second, she states that the traditional conception under which a work bears a father-to-son like link with its author is outdated. An evolution of the

⁴⁰ E. ADENEY, *op. cit.*, p. 11, n° 1.06.

⁴¹ *Ibid.*, p. 169, n° 8.22 ; S. STOKES, *op. cit.*, p.84

⁴² In this sense, see G. MICHAELIDES –NOUARIOS, *Le droit moral de l'auteur. Etude de droit français, de droit comparé et de droit international*, Paris, Rousseau & Cie., 1935, p. 80.

⁴³ Cf. *infra*, 3.1.2 and 3.3.

⁴⁴ A. LUCAS-SCHLOETTER, *op. cit.*, p. 52.

⁴⁵ *Ibid.*

⁴⁶ For a more extensive analysis of these remarks, see *ibid.*

theoretical foundation of moral rights is a necessity if we want to take into consideration the realities of today's *droit d'auteur* (cf. *infra* 4.1.3). Last, but not least, this evolution of the notion of moral rights should not be understood as it being the consumer's protection who today gives legitimacy to these rights. The public interest is not a criterion for asserting moral right violations.

In other words, the protection of the public is in order as long as it is an effect of the author's protection. If a clash should occur between the two, moral rights should still let the author prevail over the public. As an example, should the public interest require an author to keep his name, enforcement of such a measure could not be based on moral rights.

3. LEGAL STATUS OF MORAL RIGHTS

3.1 BERNE CONVENTION: INTERNATIONALLY ESTABLISHED...

Moral rights are established in the oldest and arguably most important multilateral treaty concerning copyright, namely the Berne Convention of 1886⁴⁷, currently administrated by WIPO. As an overall pragmatic but imperfect response to the territoriality principle governing copyright protection, the Convention conferred the essential principle of national treatment. Before the adoption of that instrument, international protection of copyright was sought in bilateral treaties, which provided for a mutual recognition of rights⁴⁸. As time passed however, the need for a uniform protection proved increasingly necessary⁴⁹. Accordingly, The Convention was drafted and signed with the initial idea of creating a Union with the purpose of protecting authors of literary and artistic works regardless of the work's literary or artistic merit⁵⁰. Even works that are unpublished⁵¹ or that could not possibly have been imagined by the drafters, such as computers or other multimedia devices, are included in the scope of the Convention, as long as they meet its requirements for protection.

⁴⁷ It must be noted that the European Union has not yet legislated on the matter of moral rights. As can be read in Recital 19 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society explains the following: "*The moral rights of rightholders 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, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive*". However, A. VON LOON observed that given the disparities regarding copyright across the Member States, harmonization of moral rights could be justifiable in the information society (European Commission, "Follow-up on the Green Paper on Copyright and Related Right in the Information Society", IRIS 1997 1:3/1, <http://merlin.obs.coe.int/iris/1997/1/article1.en.html>). Harmonization would bring with it a risk of leveling down the scope and extent of moral rights protection. For example, the high protection conferred to authors in some countries would be jeopardized by the insertion of harmonized waivable moral rights (A. STROWEL, V. S. SALOKANNEL, E. DERCLAYE, *Study contract concerning moral rights in the context of the exploitation of works through digital technology*, Study commissioned by the EU Commission, contract n° ETD/99/B5-3000/E°28, April 2000, p. 225).

⁴⁸ S. VON LEWINSKI, *International Copyright Law and Policy*, Oxford, Oxford University Press, 2008, p. 16.

⁴⁹ G.-J. AUDORE, *op. cit.*, p. 11.

⁵⁰ Art. 1 of the Berne Convention. Art. 2 enunciates examples of such works. These are: "books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works or entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science". It must be noted that this is not an exhaustive list.

⁵¹ Art. 3(1)(a) of the Convention.

3.1.1 Article 6bis

The original version of the Convention did not contain any provision on moral rights, deemed not sufficiently universal at the time. Article 6bis, which was added during the 1928 Rome revision, states the following:

- (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.
- (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed.
- (3) However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.
- (4) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

While at the time, as we have seen, the concept of moral rights was already well established in countries such as France and Germany, the common law world was much more reserved towards this amendment⁵². As a result, the approach taken by the convention is very minimalist⁵³, as only two rights are granted: firstly the right of attribution, sometimes called right of paternity, which is considered as the “first and foremost” of the moral rights by the WIPO Guide to the Berne Convention⁵⁴ and allow creators to claim authorship of their works. The second right conferred is the right of integrity of the work, according to which mutilations or misuse of a work can be opposed by its author. In the words of S. STOKES, “to mistreat a work of art is to mistreat the artist, to invade his privacy and impair his personality”⁵⁵. As will be further developed (*infra* 2.3), this right is subject to very different approaches among the signatory countries of the Berne Convention. Indeed, Article 6bis specifies that the right of integrity can only be used when the honor or reputation of the author is at stake. Most civil law countries however decided to extend the scope of this right beyond these conditions. In any

⁵² G. DWORKIN, “Moral rights and the common law countries”, *Australian Intellectual Property Journal* 5, 1994, p. 7.

⁵³ A. DIETZ, “Le droit moral de l’auteur (droit civil). Rapport général”, in X, *Le droit moral de l’auteur. The moral right of the author*, ALAI conference, Antwerp, 1993, p. 26; M. MARKELLOU, *Le contrat d’exploitation d’auteur*, Bruxelles, Larcier, 2012, p. 39; M. JANKOWSKA, *op. cit.*, p. 84.

⁵⁴ P. GOLDSTEIN, *International Copyright*, Oxford University Press, Oxford., p. 285.

⁵⁵ S. STOKES, *op. cit.*, p.83 citing J. MERRYMAN, A. ELSSEN, *Law, Ethics and the Visual Arts*, The Hague, Kluwer Law International, 1987, p. 145.

event, the terms used in the Convention are “very elastic” and are meant to leave a great deal of latitude to the signatory parties and “to courts”⁵⁶.

A general question frequently arises in moral rights doctrine. Is the destruction of a work to be considered a breach of the right of integrity? Two views oppose themselves on this matter⁵⁷. Some argue that mutilation gets no more ultimate form than destruction, hence there should be infringement. On the other hand, others believe that since the work has disappeared, the reputation of the author could not possibly be harmed anymore. Furthermore one could say that destruction makes the sacral link between the author and his work vanish. In any event, this matter is wildly left to the discretion of the Member States.

Another noteworthy remark is the apparent absence of a right of disclosure in the Berne Convention. Indeed, the right of disclosure allows the author to decide how and when his work leaves the private sphere to be communicated to the public. Hence, while the right of paternity is considered to be the first and foremost of all moral rights, it goes without saying that it would not achieve its goal if the work has not previously fully and legitimately been disclosed⁵⁸. An unfinished work might not be reflecting the author’s personality correctly and attributing the authorship of such a work to its creator might thus be contrary to the very purpose of moral rights. But the fact that the right of disclosure is not expressly mentioned in the Berne Convention does not stop some authors⁵⁹ to claim that it is implicitly recognized, through Art. 10 of the Convention, which, in its first paragraph, states:

“(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”

The condition that a work be lawfully made available to the public prior to its use by someone other than the author is can be seen as an indirect consecration of the right of disclosure.

3.1.2 The TRIPS Agreement and its effect on the Berne Convention

One of the main flaws of the Union created by the Convention is that it does not dispose of an interpreting authority – aside from the possibility granted by Art. 33(1) to refer a dispute to the

⁵⁶ WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic works* (Paris Act, 1971), p. 42

⁵⁷ More on this topic can be found in J.A.L. STERLING, *op. cit.*, p.397.

⁵⁸ This is the reason why some scholars find the right of disclosure to be the most important among moral rights. In this sense, see A. Dietz, *op. cit.*, p. 29.

⁵⁹ Among which, A. LUCAS-SCHLOETTER in *op. cit.*, p. 58.

International Court of Justice, which has in practice never been done⁶⁰ – and the Convention cannot, as such, be invoked before national courts. There were manifest gaps concerning enforcement and international dispute resolution⁶¹. However, this situation has partly been remedied thanks to the TRIPS Agreement, whose Art. 9 reads as follows:

“Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom”.

First of all, this provision means that henceforth, rules established in the Berne Convention can be brought before the WTO Dispute Settlement Body, which gives the Member States a real incentive to implement the Berne provisions, aside from their international reputation. A controversial matter concerns the arguable direct applicability of the TRIPS provisions, i.e. the question to determine whether an individual can base a judicial claim directly on a TRIPS provision. The position of the CJEU is that matters falling within the scope of EU legislative acts must be interpreted in accordance with the TRIPS Agreements⁶². Further, Member States remain free to recognize a direct applicability to the TRIPS Agreement regarding matters that are still mainly under their attributions⁶³.

Secondly, it strikes the eye that the WTO Member States did not want moral right concerns to be brought before the Dispute Settlement Body. The reason might be that, being an organization establishing a multilateral trading system, the WTO had no interest or justification to implement Art. 6bis of the Berne Convention into its own body of rules. Another possibility is that the question was deemed too controversial, too out of question⁶⁴. It is a proof of the reluctance of the common law countries to implement statutory recognition of moral rights into their respective systems⁶⁵. The U.S. Government even admitted that it did not wish for these rights to be strengthened⁶⁶. Consequently, it seems unlikely that effective measures will be taken at

⁶⁰ D. GERVAIS, I. SCHMITZ, *L'accord sur les ADPIC*, Bruxelles, Larcier, 2010, p. 231.

⁶¹ E. ADENEY, *op. cit.*, p. 150, n° 7.60.

⁶² CJEU, 14 December 2000, joint cases C-300/98 and C-392/98, *Dior v. Tuk Consultancy and others* and *Ascco Gerüste GmbH and others v. Wilhelm Layher GmbH and others*.

⁶³ D. GERVAIS, *op. cit.*, p. 691.

⁶⁴ H. RAIZON, *La contractualisation du droit moral de l'auteur*, Thesis, Université d'Avignon et des Pays de Vaucluse, 2014, p. 15.

⁶⁵ J.A.L. STERLING, *op. cit.*, p. 393.

⁶⁶ D. GERVAIS, *The TRIPS Agreement : Drafting History and Analysis*, London, Sweet & Maxwell, 2003, n° 2.90.

the global level in a near future⁶⁷, as the copyright perspective seems to be the dominant influence at the international level.

Lastly, some authors argue that other provisions from the Berne Convention containing references to moral rights are not covered by the exclusion from Art. 9, which would mean that some sort of moral right protection is thus conferred by TRIPS⁶⁸. However, the expression ‘Article 6bis or [...] the rights conferred therefrom’ is sufficient evidence to conclude that all moral rights references were meant to be excluded from TRIPS under its Art. 9.

3.2 - ... BUT NATIONAL IN THEIR ESSENCE

Even though moral rights have been enshrined in the Berne Convention, it must be reminded that this convention merely elaborates the existence of said rights. Each country remains free to organize them however they desire, and this leads to an enormous disparity between the various regimes across the globe⁶⁹. As A. LUCAS-SCHLOETTER brilliantly explains:

“Certes, un “noyau dur” du droit moral existe désormais de façon quasi universelle quant au principe d’une protection de la paternité de l’auteur et de l’intégrité des œuvres, ce qui correspond aux exigences de l’article 6bis de la Convention de Berne. Mais l’unanimité s’arrête là et les divergences subsistent quant aux modalités concrètes d’une telle protection.”⁷⁰

The disparities regarding the attributes of moral rights are due mainly to the fact that not all countries grant the same moral rights. E.g.: most common law countries know no right of disclosure. Furthermore, even the hard shell of rights imposed by the Berne Convention is handled differently within each legal system⁷¹, with divergences either concerning the requirement that authors must meet to be granted protection or regarding possible waivers, transferability and duration of moral rights.

Firstly, a distinction is to be made between the common law countries’ copyright and the civil law countries’ *droit d’auteur*. Both concepts are often regarded as translation from each other. However, when taking the point of view of moral rights, it is clear that they are fundamentally

⁶⁷ P. SIRINELLI, “Aspect des droits moraux dans les nouveaux modes d’utilisation. Rapport général”, in F. BRISON, S. DUSSOLIER, M.-C. JANSSENS (eds.), *op. cit.*, p. 163.

⁶⁸ E. ADENEY, *op. cit.*, p. 152, n° 7.63.

⁶⁹ J.A.L. STERLING, *op. cit.*, p. 393.

⁷⁰ Translation : “True, a hard shell of moral rights exists nowadays almost universally as regards the paternity right of the author and the right of integrity for the works, which is in accordance with the Berne Convention. But the similarities end there, and there are still divergences regarding the concrete modalities of such a protection”, in A. LUCAS-SCHLOETTER, *op. cit.*, p. 50.

⁷¹ P. SIRINELLI, *op. cit.*, p. 156.

different. There where the civil law tradition is characterized by an “*ostensible deference to authors’ natural rights*”⁷², the common law approach is said to have a more utilitarian bent. This means that traditionally, moral rights in civil law countries are more rigid and more strongly protected than the copyright systems. An even more general distinction is found in the opposition of monist and dualists systems.

3.2.1. Monism vs. Dualism

Civil law countries usually adopt a dualist view of moral rights, with a few exceptions such as Germany⁷³. The *droit d’auteur* sees moral rights and economic right as mutually independent, because they have different purposes⁷⁴. They can lead a very different life and are not bound to end at the same time. As an example, French legislation states that the economic rights of an author are transferable and limited in time, while moral rights are inalienable, indefeasible and eternal⁷⁵. Being personal rights, they escape the reach of human will⁷⁶. Waivers are also not possible in these systems. This prohibition of “moral suicides”⁷⁷ is however not absolute in every legal system, and can be made permissible if it happens a posteriori and by written document.

According to the dualistic approach, allowing an unlimited transferability of moral rights for all uses and absent formalities would result in a *de facto* non-existence of these rights, because they would systematically be transferred in practice⁷⁸. Indeed, it is likely that artists or creators would sign off their moral right, because they are seldom in a strong position and are often under pressure to do so⁷⁹. The reason of being of moral rights is to counterbalance the weak position that the author finds himself in as opposed to the exploiters. It is a means for them to strengthen their negotiation power⁸⁰. Furthermore, given the fact that a right cannot be both alienable and unalienable at the same time, that it cannot be limited and eternal at the same

⁷² Expression borrowed from P. GOLDSTEIN, *op. cit.*, p. 283

⁷³ Examples of countries with a dualistic conception of the author’s rights are Belgium, France, Romania, Italy, Poland and Portugal. Examples of monist countries are Germany and Austria.

⁷⁴ M. MARKELLOU, *op. cit.*, p. 42.

⁷⁵ Art. L. 121-1, al. 3 Intellectual Property Code, *Journal Officiel*, July 3rd, 1992. However, it is important to note that most dualistic countries do not provide for perpetual moral rights. In these legal systems, the duality only exists in the inalienability of moral rights versus the alienability of economic rights.

⁷⁶ E.E.H. PERREAU, « Des droits de la personnalité », *RTD Civ.* 1909, p. 517, as quoted in M. MARKELLOU, *op. cit.*, p. 43

⁷⁷ Notion used in A. LUCAS, H.-J., LUCAS en A. LUCAS-SCHLOETTER, *Traité de la propriété littéraire et artistique*, Paris, LexisNexis, 2012, p. 440, citing H. DESBOIS, *Le droit d’auteur en France*, Paris, Dalloz, 1978, §382.

⁷⁸ Authors may not globally waive their rights for future use, because the effect would be that of a transfer of these rights. In this sense, see A. LUCAS-SCHLOETTER, *op. cit.*, p. 60 and F. De VISSCHER, B. MICHAUX, *op. cit.*, p. 147.

⁷⁹ C. CARON, *Droit d’auteur et droits voisins*, Paris, LexisNexis, 2009, p. 206.

⁸⁰ A. LUCAS-SCHLOETTER, *op. cit.*, p. 60.

time, proponents of the dualistic approach tend to say that it is logical from a legal point of view to treat economic rights and moral rights differently⁸¹. It is only when these two branches of copyright are completely distinguished that moral rights are given a real legal meaning.

On the other hand, the monist approach taken by Germany resides in the interdependence of economic and moral concerns. Indeed, the author's rights are considered to be more than a mere addition of economic and moral rights. The inalienable nature that characterizes moral rights also affects the economic rights in this system. Consequentially, the author can only grant usage rights on his works⁸². Only after his death will the author's rights be transferred to his heirs. Furthermore, the duration of moral rights is necessarily equal to that of the economic rights⁸³.

3.2.2 Civil law countries: Belgium and France

From an international point of view, both Belgium and France should be considered as star pupils among their peers. Being fairly similar in their conception of moral rights, and for the purpose of practicality⁸⁴, we decided it was more interesting to concisely analyze them side by side. They both have adopted the dualistic approach, with all its consequences explained in the prior paragraph. French law has this particularity that it considers the inalienability and unwaivability of moral rights to be *d'ordre public*. However, as we will see multiple times in our further developments, this has been tempered by practice and case law. In Belgium, definitive waivers on the future exercise of moral rights are impossible⁸⁵. *A contrario*, specific authorizations regarding moral rights are valid⁸⁶. The next lines will describe the most important moral rights that exist in these countries.

§1 Right of disclosure

French and Belgian law explicitly added the right of disclosure to the composer's arsenal, contrarily to the Berne Convention. The work is considered to be disclosed once it has been made accessible to the public for the first time with the author's consent⁸⁷. The author may

⁸¹ A. DIETZ, *op. cit.*, p. 33.

⁸² *Ibid.* p. 31.

⁸³ M. T. SUNDARA RAJAN, *Moral Rights, Principles, Practice and New Technology*, Oxford, Oxford University Press, 2011, p. 81 cited by G.-J. AUDORE, *op. cit.*, p. 5.

⁸⁴ Since the goal of this chapter is not to do an extensive comparative analysis of moral rights, but only to provide the reader with the general concepts and principles that guide moral rights in various regimes and that will be relevant in the second part of this contribution.

⁸⁵ *Ibid.*

⁸⁶ J. KEUSTERMANS, P. BLOMME, M. FLAMME, *Auteursrecht. Capita selecta*, Brussel, Larcier, 2015, p. 116.

⁸⁷ A. LUCAS-SCHLOETTER, *op. cit.*, p. 58.

choose how and when his creation will be published for the first time⁸⁸. This shows that in the dualistic theory, moral rights precede economic rights from a chronological point of view. The right of disclosure necessarily precedes the real existence of economic rights on a work⁸⁹. It is also established that an author can refuse to disclose a completed work⁹⁰, even when he is contractually obliged to do so⁹¹. French law adds the particularity that the disclosure of previously unpublished works is even regarded as a criminal offense, when the author does not consent to it⁹².

Both the Belgian and French legislations do not mention the exhaustion of the right. The general trend in France seems to head towards the principle that disclosure only exhausts the right with regard to the disclosed medium. For the purposes of protection, a new type of disclosure (i.e. a divulgation in a new context, form or medium) might very well result in a new right of disclosure⁹³. In Belgium, it is slightly controversial whether the right is only disclosed with regards to the medium of disclosure or generally disclosed⁹⁴.

§2 Right of paternity

The right of attribution⁹⁵ can not only be used in a positive way as way to ascertain one's paternity, but also in a negative way by publishing one's work anonymously or under a pseudonym. Of course, even in such cases, the author retains the right to assert his paternity whenever he sees fit, as he cannot waive it for good⁹⁶. He can always choose to come back to the foreground. In Belgium, a last way to exercise the right of paternity is by objecting to false attributions, but this more controversial in France, where some authors deem rules on

⁸⁸ Art. XI. 165, §2, al. 3 Belgian Economic Law Code; Art. L. 121-2 French Intellectual Property Code.

⁸⁹ A. DIETZ, *op cit.*, p. 33.

⁹⁰ A. STROWEL, V. S. SALOKANNEL, E. DERCLAYE, *op. cit.* p. 14

⁹¹ *Whistler* case, cf. *infra*, 4.3.

⁹² Cass. fr., 13 December 1995, *R.I.D.A.*, 1996, p. 306.

⁹³ E. ADENEY, *op. cit.*, p. 194, n° 8.105. The author cites as example the case *Sté la Cinq v. M Badarou* (Paris, 4 ch, 7 April 1994, *R.I.D.A.*, 1995, p. 354) in which a unauthorized use of an previously disclosed work in a medium that had not been envisaged by the author constituted an infringement of the right of disclosure.

⁹⁴ *Ibid.* See for example, M.-C. JANSSENS according to whom the right of disclosure is generally exhausted after its first use (M.-C. JANSSENS, H. VANHEES, *Auteursrecht @ Internet*, UGA, Kortrijk-Heule, 2011, p. 44). On the other hand, A. STROWEL, V. S. SALOKANNEL and E. DERCLAYE believe the right of disclosure is only exhausted regarding the particular medium of disclosure (*op. cit.*, p. 14).

⁹⁵ Granted in Belgium by Art. XI.165, §2, al. 3 of the Economic Law Code and in France by Art. L. 121-1 of the Intellectual Property Code.

⁹⁶ M.C. JANSSENS, H. VANHEES, *op. cit.*, p. 43.

defamation or violation of honor to be more suitable⁹⁷ and where a criminal statute prohibits false attribution⁹⁸.

Still, the curious way in which the right of paternity is formulated in French law – which states that the author is entitled ‘respect’ of his name – suggests that the right also covers a right to oppose misattributions. Secondly, the Intellectual Property Code also grants protection to the author’s ‘quality’, which is quite a curiosity. Indeed, the respect of quality grants the author the right to indicate his professional status and honorific titles (like “Professor” or “Minister”), as well as his name⁹⁹. Moreover, in the case *Ophals v. Agence France Presse*, the Paris Tribunal de Grande Instance ruled that this right was infringed by indicating someone as co-author of a work, when he is, in reality, the only author¹⁰⁰.

Finally, both the Belgian and French system establish a rebuttable presumption that the person under whose name the work is published, is the author of the work¹⁰¹.

§3 Right of integrity

Whereas the Berne Convention specifies that the honor and reputation of the author must be at stake when making use one’s right to the integrity of the work, these legislations deliberately does not mention either of these words, but use the word “*respect*” in its stead¹⁰², which is a much more personal notion. It transpires from this that it is the author who singlehandedly decides whether his right of integrity has been breached or not. The right of integrity consists, both in France and Belgium, in an objective and a subjective facet¹⁰³. The objective element grants an author the right to oppose any deformation or modification of his work without his consent. The subjective aspect of the right to the integrity of the work allows the author to oppose any use of his work which would be contrary to the spirit of his creation. In such a case, no proof of prejudice is required¹⁰⁴.

⁹⁷ C. COLOMBET, *Propriété littéraire et droits voisins*, Paris, Dalloz, 1994, p. 115 as cited in A. STROWEL, V. S. SALOKANNEL, E. DERCLAYE, *op. cit.*, p. 29.

⁹⁸ A. STROWEL, V. S. SALOKANNEL, E. DERCLAYE, *ibid.*

⁹⁹ J.A.L. STERLING, *op. cit.*, p. 399.

¹⁰⁰ TGI Paris, May 5th, 1999, *Ophal v. Agence France Presse*, *R.I.D.A.*, 2002, p. 345. Case cited in J.A.L. Sterling, *op. cit.*, p. 400.

¹⁰¹ In Belgium : Art. XI.170, al. 2 of the Economic Law Code., *M.B.*, 12 June 2014; In France : Art. L. 113-1 Intellectual Property Code.

¹⁰² Art. XI.165, §2, al. 6 and 7 Belgian Economic Law Code; Art. 121-1 French Intellectual Property Code.

¹⁰³ A. BERTRAND, *Droit d’auteur*, Paris, Dalloz, 2010, p. 231.

¹⁰⁴ A. STROWEL, V. S. SALOKANNEL, et E. DERCLAYE, *op. cit.*, p. 16

The beginning of the 21st century has been the set for an important French decision regarding moral rights clauses, namely the *Barbelivien* case¹⁰⁵. In this case, the composer and songwriter of a well-known French song, called “*On va s’aimer*” contractually allowed their publisher to adapt and alter the song in certain specifically mentioned conditions. Through a series of sublicenses, this limited right to adaptation came into the hands of an Italian advertising company, who adapted the lyrics and title to “*On va Fluncher*” in the advertisement of the Flunch fast food restaurants. The composer and songwriter claimed their moral right of integrity was infringed, as they had been asked to waive their rights by contract, and the case went to Court. The Court of Appeal of Paris found that the authors had not waived their moral rights, because granting the authorization to bring certain well determined alteration to their work was only an exercise of their moral right, and that consequently, the contract must be deemed lawful. The authors went to the Court of Cassation, which disagreed with the Court Appeals, by ruling that the contract resulted in a global assignment of the author’s moral rights, which is forbidden under French law.

In Belgium, it is well established that an author may contractually adhere to certain modifications of his work insofar he has clear insight into the nature of these modifications¹⁰⁶. Still, he can always oppose material modifications or derogatory treatment of his work which would prejudice his honor or reputation¹⁰⁷.

The right of integrity, in its French conception also entails that if a work has been intended for entertainment purposes only, it may not be reduced to a mere commercial object if the author does not consent to it¹⁰⁸. The use that is made of the work must be consistent with the uses the author intended¹⁰⁹. A similar interpretation seems to be given in Belgium¹¹⁰.

Too rigid an application of the right of integrity is not desirable, according to A. DIETZ. In the end assessments of integrity breaches are “a fundamental question of fairness between author

¹⁰⁵ Cass. fr., 18 January 2003, *R.I.D.A.*, 2003, p. 414.

¹⁰⁶ B. De VUYST en L. STEUTS, “De notie morele rechten in een internationale, vergelijkende en transnationale context”, *I.R.D.I.*, 2005, p. 14.

¹⁰⁷ H. VANHEES, *De wettelijke regeling inzake auteurscontracten*, Mechelen, Kluwer, 2012, p. 90

¹⁰⁸ See, for example, Paris, 25 June 1996, *R.I.D.A.*, 1997, p. 337 (*EMI Music c. Brel*) and TGI Paris, 27 September 1996, *R.I.D.A.*, 1996, p. 250 (*Sony Music c. Farmer*).

¹⁰⁹ TGI Paris, 30 May 1996, *R.I.D.A.*, 1996, p. 324 (*Dutrone c. Musidisc*).

¹¹⁰ Civ. Brussels, 11 May 2012, *A.M.*, 2014, p. 105.

and work user”¹¹¹. This coincides more or less with the criteria applicable to the American fair use doctrine¹¹².

§4 The right of withdrawal

The right of withdrawal exists notably in France, Switzerland and Germany¹¹³. It is derived from the right of disclosure and contains the right for an author to withdraw his creation from any public exploitation – even after transfer of the economic rights on the work¹¹⁴ – at the strict condition that he compensates his co-contractor for any harm¹¹⁵. There must always be moral or intellectual reasons for taking such a decision¹¹⁶. Given the practical difficulties concerning this right, its use is all but frequent in practice and its value is primarily symbolic¹¹⁷. The Belgian legislator did not go as far as its French counterpart and decided not to introduce a right of withdrawal, since it would have the unwanted effect of unbalancing contracts too much¹¹⁸.

3.2.3 Copyright systems

While it is often said that moral rights are better protected in traditional civil law countries and that the common law tradition – who often plays the role of the anti-hero in this matter¹¹⁹ – is slowly moving towards a stronger protection modelled after its civil counterparts, this may not entirely be true, according to some authors¹²⁰. Most common lawyers believe it is best to leave moral right protection to contractual practice, as opposed to them being organized by the legislator¹²¹. This is the main reason why the copyright world sees them as alien and unfit for legislation¹²². This makes for a strong point, as it is true that contractual consistency allows a rule to stay in the collective consciousness, as opposed to the potential risk of obsolescence or disuse that comes with legislation. However, this argument may be inverted as well, by saying

¹¹¹ A. DIETZ, *op. cit.*, p. 51.

¹¹² P. GOLDSTEIN, *op. cit.*, p. 285.

¹¹³ MARKELLOU, *op. cit.*, p. 39.

¹¹⁴ A. LUCAS-SCHLOETTER, *op. cit.*, p. 57.

¹¹⁵ Art. L-121.4 Intellectual Property Code.

¹¹⁶ A. BERTRAND, *Droit d’auteur*, Paris, Dalloz, 2010, p. 236 cited by G.-J. AUDORE, *op. cit.*, p. 19.

¹¹⁷ *Ibid.*, p. 58.

¹¹⁸ F. De VISSCHER, B. MICHAUX, *op. cit.*, p. 147.

¹¹⁹ J. GRIFFITHS, *op. cit.*, p. 83.

¹²⁰ P. TORREMANS, “Introduction”, in F. BRISON, S. DUSSOLIER, M.-C. JANSSENS (eds.), *op. cit.*, p. 45.

¹²¹ See, e.g., the Creative Commons licenses, described *infra*, 4.3.

¹²² S. STROKES, *op. cit.*, p.84.

that contractual practices can also grow to be obsolete and that legislation would thus provide a more stable framework to ensure these practices¹²³.

The protection of moral rights is sometimes also sought outside copyright, in regulations on defamation, privacy, breach of confidence, passing off or trademark law for example¹²⁴. *Ergo*, the statutory recognition of moral rights that is required by the Berne Convention, is not deemed necessary and was one stumbling blocks in the way of UK and US adherence to the Convention¹²⁵.

When moral rights are granted, an essential difference from most civil law countries is that waivers are made possible in most common law countries¹²⁶, which in itself is not inconsistent with the Berne Convention, given its silence on the subject. Transfers are on the other hands not possible, except after the death of the author¹²⁷. The next lines will concisely describe the current state of moral rights in law and in practice in both the United Kingdom (3.2.4) and the United States (3.2.5). This will show how far their regimes differ, firstly from civil law countries, but also from each other.

3.2.4 In the United Kingdom

As previously mentioned, moral rights protection in the common law world was mostly granted by referring to other branches of the law. The UK was no exception to that philosophy. In 1952, the Gregory Committee considered that relying on contracts, defamation and passing off law was adequate and sufficient to implement the provisions of Art. 6bis of the Berne Convention¹²⁸. However, twenty five years later, “the Whitford Committee expressed concerns

¹²³ Cf *infra*, 4.2, where we will see that, in the case of film scoring, the protection of moral concerns through contracts is nowhere as strong as statutory moral rights.

¹²⁴ A. LUCAS-SCHLOETTER, *op. cit.*, p. 51.

¹²⁵ Let us remind the reader that in the very early *Donaldson v. Becket* case (Brown's Parl. Cases (2d ed.) 129, 1 Eng. Rep. 837, 1774), the House of Lords rejected the very concept of moral rights¹²⁵. That way of thinking lingered on for centuries, and even in 1989 (year of accession of the UK to the Berne Convention), the concept was still rather novel (D. DE FREITAS, “The Copyright, Designs and Patents Act 1988 (2)”, *133 Solicitors Journal*, 1989, p. 670.). For twenty years, common lawyers have battled to try and prove the copyright compatibility of moral rights, arguing that they served the public interest by ensuring the mention of the true origin of a particular work. In short, the moral interests of the author were sought in other domains of the law, while moral rights were originally justified as a means to protect the public's interests; J.A.L. STERLING, *op.cit.*, p. 393.

¹²⁶ For the UK, see s. 87 of the CDPA (cf. *infra*). For the US, see s. 106A (e) of the US Copyright Act (cf. *infra*).

¹²⁷ J. GRIFFITHS, *op. cit.*, p. 84.

¹²⁸ H. SHARKEY, “Moral rights and the Berne Convention: has the United Kingdom done enough?”, article available at http://gulawreview.org/entries/property/moral-rights-and-the-berne-convention-has-the-united-kingdom-done-enough-#_ftn4, 26 October 2014.

that in fact the UK was not fully implementing or fulfilling its Berne Convention obligations, and therefore supported the introduction of specific moral rights legislation”¹²⁹.

Since then, moral rights are on the rise in Great-Britain, as in other common law countries¹³⁰, as a result of international pressure to conform to the standards of the Berne Convention. Nowadays, for example, most UK publishers automatically insert a moral clause in their contracts¹³¹. An infringement on moral rights does not constitute a breach of copyright, but a breach of statutory duty¹³², which means that, aside from the damages and other civil remedies that are there for the injured author to request, the infringing party is also liable to the criminal sanctions imposed by the Statute.

Let us now in turn give a brief overview of the four moral rights established by the Copyright, Designs and Patents Act of 1988: the right of attribution (1), the right to oppose false attribution (2), the right of integrity (3) and the right to privacy of certain photographs and films (4).

§1 The right of attribution

As a result of the Berne accession, a right of attribution has been inserted into UK legislation. Section 77(1) of the Copyright, Designs and Patents Act of 1988 states as follows:

The author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work in the circumstances mentioned in this section; but the right is not infringed unless it has been asserted in accordance with section 78.

An important remark that has to be made when analyzing section 77(1) is that it adds a requirement to Berne’s conditions of protection, making it harder for an author to benefit from the protection. Indeed, whereas according to Article 5.2 of the Berne Convention, an author may claim authorship of his work regardless of any formality, the CDPA requires the author to assert this right beforehand. Furthermore, section 78 states that the right is only binding on those who are given a formal notice of said assertion. The question must be raised whether this can be considered as a compliance to the Convention. The problem with these added formalities is that the party protected by the moral right becomes the economic owner instead of the

¹²⁹ *Ibid.*

¹³⁰ J.A.L. STERLING, *op. cit.*, p 393.

¹³¹ P. TORREMANS, *op. cit.*, p. 49.

¹³² Section 103 CDPA.

author¹³³, as the weak position authors find themselves in does not grant them much negotiation power.

Moreover, section 79 of the CDPA contains a number of exceptions to the right of attribution, whereas the Berne Convention aims at the protection of any and every author. For example, developers of computer programs are not granted the right listed at section 77¹³⁴. The general exception of fair dealing for certain purposes also applies¹³⁵. Finally, the right of attribution does not apply in relation to the publication in the written media¹³⁶, or in encyclopedias, dictionaries, yearbooks, or other collective works of reference¹³⁷.

§2 The right to object to false attribution

A very interesting and rather unique feature of UK copyright legislation is the expressly stated right to object false attribution, which consists in the right to be only identified as author of a work if this attribution is true¹³⁸. This right could be seen as the negative side of the right of paternity¹³⁹, but has been treated as a separate right by the UK legislator¹⁴⁰ and expires 20 years after the passing of the person who is falsely credited as the author¹⁴¹. It is quite certain that such an occurrence would be treated as a breach of paternity right in France or Belgium¹⁴².

Still, is the right to object to false attribution a moral right? A primordial characteristic of moral rights is that it is a subjective right¹⁴³ that is acquired immediately once an author qualifies for it¹⁴⁴. Be that as it may, before even speaking of moral rights, there must be an author, a work, and an author-work relationship between the two¹⁴⁵. The holder of the right to oppose misattributions however is no author in the legal sense of the word. The right is not founded on his quality as author, but as person, insofar it is conferred to anyone to whom authorship has

¹³³ H. SHARKEY, *op. cit.*

¹³⁴ Section 79 (2) CDPA.

¹³⁵ Section 79 (4) (a) CDPA.

¹³⁶ “a newspaper, a magazine or a similar periodical”

¹³⁷ Section 79 (6) CDPA.

¹³⁸ Copyright, Designs and Patents Act of 1988, s. 84.

¹³⁹ See WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic works* (Paris Act, 1971), p. 41: (about the right of paternity) “[...]under it, an author may refuse to have his name applied that is not his, nor can anyone filch the name of another by adding it to a work the latter never created [...]”.

¹⁴⁰ P. TORREMANS, *op. cit.*, p. 45.

¹⁴¹ Copyright, Designs and Patents Act of 1988, s. 86 (2).

¹⁴² Cf. *supra*, 3.2.2, §2; J.A.L. STERLING, *op. cit.*, p. 396.

¹⁴³ A. LUCAS-SCHLOETTER, *op. cit.*, p. 50.

¹⁴⁴ P. TORREMANS, *op. cit.*, p. 47.

¹⁴⁵ Cf. *supra*, 2.3.1.

been falsely attributed¹⁴⁶. The right to object to false attribution should hence be seen as a personality right, but not as a moral right.

§3 Right of integrity

The right of integrity is also conferred to authors in the CDPA, but with a less secure foothold than in civil law countries, because only derogatory treatment is approached. Moreover, like it does with the right of paternity, the UK Act provides for exclusions which are not mentioned nor permitted by the Berne Convention. Section 80 of the CDPA states that a copyright protected work may not be subject to derogatory treatment. However, the term ‘treatment’ does not include translations¹⁴⁷, nor does it include arrangements¹⁴⁸. Still, it is perfectly conceivable that an author would not be content with a bad translation which does not do justice to his work¹⁴⁹.

Contrarily to Belgian and French law, the way to assess an infringement of the integrity right is not by taking into account the opinion of the author on the use of his work. An illustration of this fact can be found in the *Tidy* case¹⁵⁰. In this case, a drawer sued a publisher who used some of his cartoons after having reduced their size, thereby concealing most of their details. J. Rattee wrote: “the fact remains that, before accepting the plaintiff’s view that the reproduction in the book complained of is prejudicial to his honour or reputation I have to be satisfied that that view is one which is reasonably held”, which was not held to be the case. The dominant criterion is reasonableness.

§4 Right to privacy of certain photographs and films

Lastly, section 85 of the CDPA, states that a person who for private or domestic use commissions the making of a copyright protected photograph or film, has a right to oppose the divulgation to the public of said work. The attentive reader will immediately notice that it is not the author of the work who is protected in this case, but the owner. Some argue that it therefore should not be considered a moral right¹⁵¹. We rally to this opinion.

¹⁴⁶ High Court of Justice, Chancery Division, 21 January 1998, *Clark v. Associated Newspapers Ltd All ER (D)*, 1998, p.6. Case extensively described in P. TORREMANS, *op. cit.*, p. 46 and 47.

¹⁴⁷ Section 80 (2) (a) (i) CDPA.

¹⁴⁸ Section 80 (2) (a) (ii) CDPA.

¹⁴⁹ H. SHARKEY, *op cit.*

¹⁵⁰ High Court, *Tidy v. Trustees of the Natural History Museum and another*, 1994 T 4562.

¹⁵¹ G.-J. AUDORE, *op. cit.*, p. 8.

§5 Right of disclosure?

Authors in the UK do not have a right of disclosure. However, they can still rely on legislation concerning confidential information to oppose any illegitimate divulgence of their work¹⁵².

3.2.5 In the United States

The U.S. joined the Berne Convention in 1988, more than a century after it was drafted. This alone stands witness to the aversion of the American legislator towards the adoption of moral rights. There was also a strong reluctance coming from the film industry¹⁵³. The notion of moral rights was deemed to be too vague¹⁵⁴, and there was a fear that such rights would hinder the spread and distributions of copyright protected works¹⁵⁵. The core essence of copyright law is to encourage authors – by the prospect of financial gain – to further the progress of science and the useful arts¹⁵⁶. Authors of copyrighted works are given a monopoly that is justified by the general benefit derived by the public from their labour¹⁵⁷. The reasoning is exclusively economic and leaves no apparent room for moral rights protection. The American common law philosophy is undeniably business and trade oriented, with very little regard to the authors. “The United States [...] has been reluctant to acknowledge that the author may have a deep personal connection with his expression that goes beyond a pure economic interest”¹⁵⁸.

However, the accession to Berne was a necessary step for the U.S. as their goal was to have a central position in international copyright law¹⁵⁹. It had two consequences. First of all, its registration-based copyright system was to be replaced by an automatic copyright protection naturally arising out of the act of creation. Secondly, US law had to provide moral rights to authors. If the implementation of an automatically recognized copyright protection has happened quite swiftly and gracefully, the same cannot be said of moral rights¹⁶⁰. Aside from the fact that it was never the idea to modify the Copyright Act of 1976 in order to implement Art. 6bis, the Government even adopted the Berne Implementation Act of 1976 which expressly

¹⁵² G. DAVIES, K. GARNETT, *Moral Rights*, London, Sweet & Maxwell, 2010, p. 81.

¹⁵³ G.-J. AUDORE, *op. cit.*, p. 9.

¹⁵⁴ *Ibid.*, citing G. DAVIES, K. GARNETT, *op. cit.* 2010, p. 38.

¹⁵⁵ C. H. Settlemeyer III, “Between Thought and Possession, Artists’ “Moral Rights” and Public Access to Creative Works”, *Georgetown Law Journal*, 1993, Vol. 81(6), p. 2309.

¹⁵⁶ Cf. Copyright Clause (Art. 1, al. 8 of the U.S. Constitution) and SCOTUS, *Mazer v. Stein*, 8 March 1954, 347 U.S. 201.

¹⁵⁷ U.S. Supreme Court, *Fox Film Corp. v Doyal*, 286 U.S. 123, 1932.

¹⁵⁸ A. NG, “Copyright and moral norms”, *14 Loy. J. Pub. Int. L.* 57 2012-2013, p. 67.

¹⁵⁹ M. T. SUNDARA RAJAN, *op. cit.*, p. 911.

¹⁶⁰ *Ibid.*, p. 912.

stated that the Berne Convention is not self-executing under the U.S. Constitution¹⁶¹. In 1990, the Visual Artists Rights Act was adopted in order to grant moral rights authors of visual works, but *only* to them¹⁶². These authors now enjoy the rights of attribution (which expressly includes the right to oppose misattribution) and of integrity, which are both waivable by written agreement¹⁶³.

Why only to visual artists? Once again, because the consecration of general moral rights that would apply to all authors is deemed unnecessary as the protection of moral concerns is usually sought in other fields of law. Amongst the alternatives to moral rights in the U.S., one might mention the form of integrity right can be found in Section 106 of the Copyright Act of 1976¹⁶⁴, which grants the author an exclusive derivative right¹⁶⁵. This prerogative is granted to all authors and must be understood as an interdiction to all other persons to produce derivatives of the work. Moreover, in some sectors, the right of attribution is granted to authors by guild agreements, e.g. for screenwriters and directors¹⁶⁶. An alternative to the right of withdrawal can partially be found in the regulations on termination of transfers¹⁶⁷. To some, the right of disclosure is substantially embodied in the author's exclusive right of distribution to the public¹⁶⁸ and is implicit in the rights of reproduction and public performance¹⁶⁹. Furthermore, the strong protection given to the right of first publication¹⁷⁰ is also an argument for the obsolescence of the addition of a moral right of integrity. However, the tendency to protect moral concerns with purely economic rights does not tally with the philosophy behind moral rights and copyright holders who are concerned about their moral rights can always insert appropriate clauses in their exploitation agreements¹⁷¹.

¹⁶¹ Berne Implementation Act of 1988, Section 2.

¹⁶² 17 U.S.C. 106A

¹⁶³ 17 U.S.C. §106A (e) (1).

¹⁶⁴ Section 106 states: "[...] the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: [...] (2) to prepare derivative works based upon the copyrighted work [...]"

¹⁶⁵ P. GOLDSTEIN, *op. cit.*, p. 155.

¹⁶⁶ W. MAXWELL, *op. cit.*, p. 122.

¹⁶⁷ U.S. 1976 Copyright Act §203, 304 (c). Cf. P. Goldstein, *op. cit.*, p. 156.

¹⁶⁸ U.S. 1976 Copyright Act §106 (3). Cf. P. Goldstein, *ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ For example, *Harper Row v. Nation Enterprises*, 1985, 471 U.S. 589 in which the Court restricted

¹⁷¹ H. L. SHELF III, "Moral Rights and Musicians in the United States", *Entertainment, Publishing and the Arts Handbook*, 2003, p. 3

4. FILM SCORING

In big budget movies, music is usually composed directly for the picture, in order to fit the timecode and cues of the film perfectly. This practice is called film scoring. As previously specified, the composer's task take place during the post-production of the picture, which means he has very little time to do his work.

The purpose of this chapter will be to analyze particular questions concerning the moral rights of the film scorer, with an entire section dedicated to the right of disclosure. Art. 6bis of the Berne Convention does not confer a right of disclosure, and, even though this right has now been adopted in many civil law countries, some big players of the movie industry, under which the United States, have not done so. The question is then whether the influence of the American film industry over the whole world during the past sixty or seventy years has had an impact on the right of disclosure, as granted in European countries such as the UK or Belgium.

The concrete question that will be raised in the following sections is how the composer's right of disclosure can and should be given a rebirth in practice (3.3), after analyzing a few clauses emanating from Belgian, UK and US composer contracts (3.2). Prior to that however, it is appropriate to linger on the working conditions of the composer and some obvious questions that must be raised regarding the rights of paternity and of integrity.

4.1 THE WORKING CONDITIONS

This section will very briefly focus on two growing practices in the world of film scoring that result from the speed at which composers must perform their contractual obligations. These last decades, the digitalization of the craft has saved all actors in the industry (producers, directors, editors, etc.) a lot of time and money, and as a result composers have to face much tighter deadlines than they used to¹⁷². This led to the trivialization of temp tracks (§1) and ghostwriting (§2).

4.1.1 Use of temp music

Often, film producers will ask the film editor to add an existing piece of music to an early cut of the picture and send the result to the composer, with the request that he create a similar sounding piece. The existing piece of music, which is called a temp track, or more generally,

¹⁷² P. FLACH, *op. cit.*, p. 32.

the temp music, will serve to provide a guideline an ideas for a certain cue¹⁷³, when the director is looking for a particular emotion or style in a specific scene. This practice is as widely spread as it is frowned upon, especially by some composers and film music enthusiasts, who feel the originality of film scores has taken a turn for the worse in the last decades¹⁷⁴. When asking from a composer that he create in the style of somebody else, producers would deny the composer the possibility to develop his own original ideas. When asked about his opinion on temp tracks, Danny Elfman answered: “*Temp music is the bane of my existence [...]. I won’t listen to it but once, and if they (ed. the director and producers) are addicted to it, it is just going to make my job harder*”¹⁷⁵.

However, if, as a result of the alleged excessive use of temp tracks, so many film scores end up sounding the same, then shouldn’t the film industry currently be overflowing with copyright lawsuits concerning this? The reason why this usually does not happen is that, as will be further developed in the next section (cf. *infra* 3.2), it is standard practice to contractually provide for a transfer of ownership of the music in the film business. As a result, large film companies have become owners of tons of music, and without a second of hesitation will put some of that music at the disposal of their producers and directors to be used as temp tracks.

This has become a strange habit that leaves some composers astonished, because they seem to hear mutilated versions of their songs in movies with which they have nothing to do. A fundamental question arises, could the new track, which is supposedly composed especially for a specific picture, but in fact based upon an existing piece, be infringing the right of integrity of the temp track? A logical answer would be affirmative, in the sense that sometimes both pieces are hardly distinguishable from each other, with one seeming to be an alternate version of the other¹⁷⁶.

This is the situation as it exists in Hollywood and it poses absolutely no legal problems, given that moral rights are legally inexistent for the composer. On a moral level though, this practice

¹⁷³ *Ibid.*, p. 41.

¹⁷⁴ J. BOND, *X-Files: Fight the Temp Track*, 1998, available at http://www.filmscoremonthly.com/articles/1998/03_Jun---X_Files_Fight_the_Temp_Track.asp.

¹⁷⁵ T. GRIEVING, “Danny Elfman on scoring ‘The Girl on the Train’: The darker it gets, the happier I get”, *Los Angeles Times*, 6 October 2016, press article available at <http://www.latimes.com/entertainment/movies/la-et-mn-girl-on-the-train-danny-elfman-20160930-snap-story.html>.

¹⁷⁶ Examples of this statement can be found in TONY ZHOU’s video “The Marvel Symphonic Universe” (T. Zhou, *The Marvel Symphonic Universe*, 7 September 2016, available at <https://vimeo.com/181873015>).

could be decried, as it is a perfect illustration of the way authors are reduced to mere deliverers of a certain product, as opposed to creators of intellectual performances.

In European legal systems, the situation is different, as the right of integrity is conferred in every Member State, even if its scope and content might differ. Still, it would be perfectly possible for the composer of the temp track to sue a large film company under French or Belgian law for infringement of his right of integrity on the temp track. This indicates, in the international context, how important the applicable law can be on composer contracts (more on this *infra* 4.4.2 and 4.4.3). The very existence of moral rights depends on it and they are constantly annihilated in practice due to contractual clauses making American law or English law applicable¹⁷⁷.

4.1.2 Ghostwriting

Tight deadlines have contributed to the generalization of ghostwriting in the world of film music. It has many film aficionados concerned, because of the musical inconsistencies that can occur in the final score of a movie. From a legal point of view, it raises concerns regarding the right of paternity.

Under a ghostwriting contract, the creator of a work will not claim its paternity, but will leave it to an apparent author. It is a very common practice in the editorial world and in all areas of art¹⁷⁸. The practice has become commonplace in the film music world with the emergence of film score companies, like Remote Control Productions, based in Santa-Monica, CA and run by Hans Zimmer. Today, Remote Control Productions employs none less than 62 film composers, 68 arrangers, 21 orchestrators and conductors and 64 members of the technical staff. As a result, most movies credited to Hans Zimmer are the result of extensive teamwork. Consequently, a Hans Zimmer score is never 100% Zimmer.

There is a negative stance on ghostwriting conventions as they both deprive the rightful writer of a work to be considered as its creator and they deceive the public, thereby undoing both purposes of moral rights¹⁷⁹. The original writer inserts his personality in his creation, but he will not be the person who will be held in high regard, should his work be successful. In this sense, ghostwriting conventions are reprehensible from a moral point of view. There are

¹⁷⁷ Cf. *infra* 3.2.

¹⁷⁸ M. JANKOWSKA, *op. cit.*, p. 82.

¹⁷⁹ Cf. *supra*.

however perfectly legal in the common law world, where the paternity right – when it exists – is freely waivable and thus poses no problem whatsoever in practice there.

At the same time, it should be remembered that the right of paternity has both a positive and negative aspect. It is possible for the author to remain anonymous or to publish the work under a pseudonym. One may not waive his rights, but nothing prohibits the author from not exercising them. Some French scholars believe that the negative facet of moral rights results in a *de facto* freedom waive them¹⁸⁰, because those two scenarios could amount to one same result. It can be incredibly difficult to differentiate a rightful author who renounced to his rights from an author simply decides not to make use of them¹⁸¹.

In civil law countries, a ghostwriter who would have contractually foregone his right of paternity may always come back on his decision and assert his right¹⁸². In Belgium, waivers are possible when limited in extent¹⁸³. In France however, the position of the case law as it stands today makes for a very strange legal interpretation of ghostwriting agreements. According to the judges, the contract is licit because it is freely revocable by the ghostwriter. Temporary waivers of the paternity right are thus allowed¹⁸⁴. Whenever he likes it, he can decide to impose the mention of his name on the work. V. NISTOR, a French lawyer, emphasizes the discrepancy of this reasoning. Indeed, in her view, the ghostwriting contract is only freely revocable because it is void by law. Any other interpretation of the situation would amount to declare legal purely enabling clauses (*conditions purement potestatives*¹⁸⁵) on the part of the ghostwriter. As a consequence, the reasoning of the French courts results in a disregard of the inalienable character of the right of paternity, but it also leads to a gross violation of general contract law¹⁸⁶.

The conclusion of a ghostwriting contract governed by Belgian or French law between composers cannot legally bind any of them to waive their paternity on the created work. Each will be able to claim his authorship regarding the parts effectively composed by him.

¹⁸⁰ G. KOUMANTOS, « Faut-il avoir peur du droit moral ? », *R.I.D.A.* April 1999, p. 87, n° 180.

¹⁸¹ A. LUCAS, H.J LUCAS, A. LUCAS-SCHLOETTER, *Traité de la propriété littéraire et artistique*, 4ème éd., Paris, LexisNexis, 2012, n° 543.

¹⁸² P. GOLDSTEIN, *op. cit.*, p. 286.

¹⁸³ M. JANKOWSKA, *op. cit.*, p. 82

¹⁸⁴ Cass. fr., 5 May 1993, n° 91-13664, *R.I.D.A.*, October 1993, p. 205; Cass. fr., 13 February 2007, *R.I.D.A.*, April 2007, p. 275.

¹⁸⁵ Forbidden in France by Art. 1304-02 of the Civil Code and in Belgium by Art. 1174 of the Civil Code.

¹⁸⁶ V. NISTOR, « L'affaiblissement du caractère inaliénable du droit moral : les conventions de nègre », *Le nouvel Endroit*, 2015, n° 2, p. 125.

4.1.3 Evolution of the theoretical foundation of moral rights

The increase of temp music and ghostwriting testifies to the slow liberalization of the author's rights. However, on the question whether it would be preferable to legally allow these practices, our opinion is that in the era of relentless production and consumption that we live in, and in which the principle of transparency sneaks in practically all aspects of our daily lives, it would be incoherent to advocate for a reduction of the protection of the right of paternity. Now more than ever does the public want to know where his consumption products – under which music – come from. Australian author James MCKHEANIE considers moral rights breaches to be deception offenses or fraud¹⁸⁷. They are not purely property offenses since the injured party is not only the author, but also the public. In this sense, one should not underestimate the social importance of creation. A similar reasoning is applicable to temp tracks, because they both neglect moral concerns of the author on the integrity of his works, but, since temp tracks are usually not disclosed to the public, they are also a form of deceit of the public. Only final soundtrack, which is based on the temp track, is disclosed.

This calls for a change of paradigm, for an evolution of the theoretical basis of moral rights¹⁸⁸. If the law is indeed to be guided by our living and continuously evolving society, the rights of paternity and integrity should downright be better enforced. This way these traditional, “old-fashioned” rights would perform an undeniably timely function. The principle of transparency gives reason to believe the indirect purpose of moral rights to protect the public should be emphasized in order to be given an importance almost similar to the author's protection.

4.2 THE CONTRACT

The agreement between the producer and the composer must be analyzed differently in the common law world and in the European continental countries. The “archaic” practice by which film studios hired composers under long-term employment agreements is long dead, as today composers are hired on a film-by-film basis¹⁸⁹. Today's norm in the Anglo-Saxon film industry is to let an independant composer work for hire, whereas in continental countries, like Belgium or France, the concluded contract is called a *contrat de commande*¹⁹⁰. The notions “work for hire” and “*contrat de commande*” need to be analyzed separately, because even though they

¹⁸⁷ J. MCKHEANIE, “‘IP’ Moral Rights Breaches are Deception Offences, Not Property Offences: Correcting a Category Error”, *Res Publica*, 2016, p. 193.

¹⁸⁸ Cf. *supra* 2.3.2; A. LUCAS-SCHLOETTER, *op. cit.*, p. 52.

¹⁸⁹ M. HALLORAN, *op. cit.*, p. 6.

¹⁹⁰ Regulated by Art. XI.167, §3, al. 2 Economic Law Code.

might roughly seem similar, or even a translation of one another at first glance, the reality is that they differ as much as copyright differs from *droit d'auteur*. Both these terms should not be mixed and mashed, as they refer to different philosophies, historical backgrounds even if the subject matter is similar. Let us immediately state that all these agreements contain clause designating the law of the country from which they emanate as applicable to any the contract and any dispute concerning it.

4.2.1 In the US

The following clauses, which regard some of the author's moral concerns, emanate from a US composer contract¹⁹¹:

“[...]

4. *SCREEN CREDIT: If the Composer's Score is used, **the Composer shall receive screen credit** in the main titles of the Film, to read: Original Score by _____*

5. *SOUNDTRACK ALBUM: In the event that any of the Composer's Score is included on a Soundtrack Album from the Film, the Composer and Producer shall negotiate in good faith for any artist and/or producer royalties to be paid to Composer from said Soundtrack Album. **If fifty percent (50%) or more of the Score is on a Soundtrack Album from the Film, Composer shall receive credit on the front cover,** to read: Music by _____, Produced by _____.*

[...]

7. *OWNERSHIP OF SCORE: Composer hereby acknowledges and agrees that the Score and all other results and proceeds of Composer's services (collectively, "Work") hereunder have been specially ordered or commissioned by Producer for use as part of the Picture, that the Score shall constitute a **"work-made-for-hire"** as defined in the United States Copyright Act of 1976, **that Producer shall be the author of said work-made-for-hire and the owner of all rights in and to the Work**, in accordance with the terms and conditions herein contained, including, without limitation, the copyrights therein and thereto, throughout the universe in perpetuity.*

8. *RIGHTS OF PRODUCER: Producer to have the perpetual, irrevocable right to **use the Score** in connection with any and all exploitation of the Film in all media, including advertising and promotion of the Film.*

[...]”

Let us remind the reader that the US only grants moral rights to authors of works of visual art. Since motion pictures have expressly been excluded from the definition of works of visual art,

¹⁹¹ Thanks to Deniz Hughes for providing us with this template.

film composers do not enjoy any moral right¹⁹². Even if they had though, the Copyright code also excludes moral right protection when the work is created for hire¹⁹³, which is the case in our situation¹⁹⁴. A work is considered as having been made for hire if it fits one of the following conditions¹⁹⁵:

- It has been created under employment contract¹⁹⁶;
- In the case of an independent creator, when the work has been ordered or commissioned to be used as part of a collective work, *as a part of a motion picture or other audiovisual work*, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. This is the situation that will be described in this section.

The copyright holder for a work made for hire is the commissioner¹⁹⁷ and the term of the protection is an exception to the traditional 70 years *post auctoris mortem*: It expires either after 95 years from the date of publication or after 120 years from the date of creation, whichever comes first¹⁹⁸.

Works made for hire are characterized by a total contractual freedom of the parties regarding moral concerns. It strikes the eye that authorship is given a fair deal of importance in the agreement (see sections 4 and 5 of the contract), although with a number of limitations. The name of the composer will always be mentioned in the movie itself. Regarding the soundtrack album, the composer's name will appear only if the album consists in 50% or more of the composer's music. But that is it, and other uses of the composer's work seem to be left to chance. This contractual protection of moral concerns is nowhere as strong and unconditional as a real, statutory based, right of paternity.

¹⁹² S. 101 of the US Copyright Code withdraws any works for hire from the definition of a work of visual art: "A work of visual art does not include A)(i) any [...] motion picture or other audiovisual work [...].

¹⁹³ S. 101 of the US Copyright Code withdraws any works for hire from the definition of a work of visual art: "A work of visual art does not include [...] (B) any work made for hire".

¹⁹⁴ See Clause 7 of the contract.

¹⁹⁵ S. 101 of the US Copyright Code.

¹⁹⁶ In the US, in order to determine whether a person should be considered as an employee or an independant contractor in the context of works for hire, the criteria from *Community for Creative Non-Violence v. Reid* (US Supreme Court, June 5th, 1989, 490 US 730) should be applied. These are whether there is control by the employer over the work (a) and over the employee (b). One must also look at status and conduct of the employer.

¹⁹⁷ US Copyright Office, Circular 09, p. 2.

¹⁹⁸ *Ibid.*, p. 3.

As regards the right of integrity, one should read sections 7 and 8 of the contract together, which results in a total obliteration of the right of integrity of the score. As this right is not granted to composers by the law, and neither by contract, it must be considered non-existent. All the composer potentially could do is ask the producer to invoke his exclusive derivative right to oppose any mutilation or alteration of the work¹⁹⁹. Still, this is a case where the rationale of the traditional conception of inalienable and non-waivable moral rights jumps to mind: that even when all his economic rights are transferred, the composer will always have the moral rights card to play when indecent use is done of his work. This agreement is hence inconsistent with the alleged common law practice of ensuring moral rights through contracts. The right of paternity is only partially secured, and no right of integrity or disclosure are provided.

4.2.2 In the UK

The first owner of moral rights in UK law is the film composer²⁰⁰. That is why, even though the composer agreement is often exactly similar to the one whose clauses have been analyzed above²⁰¹, UK contracts usually treat moral rights in the terms and conditions of the agreement. Such a clause may be found in the following example

3. a) The Composer hereby asserts his/her **Moral Right of paternity** as defined under s.77 of the Copyright Designs and Patents Act 1988 (as the same may be amended varied or re-enacted) (“the Act”).

b) The Composer grants to the Commissioner **the right to edit the Work** as may be reasonably required in connection with the Production.

Clause 3. a) of the terms and conditions is really interesting, as it specifies that the composer asserts his right of paternity, a formality which is necessary under UK law in order to render the right effective²⁰². This could be seen as a way of ensuring the respect of moral rights through contracts. However, we must add that the UK provides for a legal exception to copyright (including moral rights) in its notion of incidental inclusion²⁰³. Indeed, as regards incidental

¹⁹⁹ Cf. *supra*.

²⁰⁰ S. 11 CDPA.

²⁰¹ Both countries are copyright systems.

²⁰² Indeed, s. 78 (2) states: “The right may be asserted generally, or in relation to any specified act or description of acts (a) on an assignment of copyright in the work, by including in the instrument effecting the assignment a statement that the author or director asserts in relation to that work his right to be identified, or (b) by an instrument in writing by the author or director”. More on the assertion of the right of paternity and its compatibility with the Berne Convention, cf. *supra*, 3.2.4, §1.

²⁰³ The incidental use of a copyrighted material in a film is not infringing copyright according to section 31 CDPA. Musical works however will not be regarded as incidentally included in another work when they have been deliberately included (section 31 (3) CDPA). Consequently, cases in which music can be said to have been used incidentally are very rare.

inclusion of a copyrighted work in television programmes, the credits are very often regulated by the broadcaster's guidelines. As an example, the BBC guidelines state the following:

“Music: there may be times when a production judges that it would be of interest to the audience to know the name of a piece of music used in a programme. A reference in the credits must be non-promotional and must be limited to the title of the piece and either the composer or the performer, not both.”²⁰⁴

In case of the BBC, it is the production that decides whether or not to credit the author. The consequence of this is that there will be cases where a composer is not credited for the use of his music in a film.

Clause 3. b) of the terms and conditions involves the integrity right. After reading said clause, one can derive that the composer remains holder of the right of integrity, but he must allow the producer to make some alterations to the music for adequate use in the programme. This right does not raise particular questions in this case, aside from the fact that in UK law, the right of integrity only secures the right to oppose derogatory treatment²⁰⁵. Arrangements are perfectly allowed as long as they don't stain the work's or the author's reputation.

4.2.3 In Belgium

The Belgian film industry is nowhere as big and fruitful as its British and American counterparts. However, there has been a strong evolution in this field and movements have been initiated in order to bring together Belgian composers. A perfect example of this would be the founding of the Belgian Screen Composer Guild on June 10th, 2016²⁰⁶, whose purposes notably include to stand up for the composer's rights.

As a civil law country, it comes as no surprise that all composer contracts are fitted with a moral rights clause, which typically, says the following:

« Article 7 : Droit moral

Le droit moral du Compositeur lui est formellement réservé. Le Producteur s'engage à ce que le nom du Compositeur figure clairement au générique et sur le matériel de promotion de l'Œuvre. Il imposera cette obligation aux distributeurs et aux exploitants. Le Compositeur se réserve néanmoins le droit de se faire connaître sous un pseudonyme.

Le Producteur n'apportera aucune modification à la Musique sans l'accord du Compositeur.

²⁰⁴ Guidelines available at <http://www.bbc.co.uk/commissioning/tv/production/articles/credits-branding-trademarks#music>.

²⁰⁵ Cf. *supra*, 3.2.4, §3.

²⁰⁶ See their website <http://screencomposers.be/>.

Le Compositeur n'invoquera pas son droit au respect de l'Œuvre pour s'opposer à des pratiques courantes dans le secteur audiovisuel, telles que l'interruption pour des messages publicitaires (pour autant qu'ils soient clairement distincts de l'Œuvre). »²⁰⁷

First of all, the right of paternity is secured in its most absolute form, even more so, since it imposes upon the producer an obligation to require from his distributors and operators the respect of the composer's paternity.

The integrity of the work must however allow for usual practices in the field, such as commercial breaks. It is interesting to note that, in France, the use of commercial breaks in the middle of a movie had been considered as a breach of the director's moral rights²⁰⁸. By extension, one could have argued that such a clause would probably have a hard time being enforced in a French court, even in the case of the composer. However, when producers, who grew tired of the strict enforcement of the author's moral rights, started to insert such clauses *ex officio* in all contracts in the film industry, the case law tolerated them²⁰⁹. It has now become commonplace to ask each of the co-authors (under which, the composer), to accept in advance certain alterations of the movie²¹⁰. Both in Belgium and in France, the moral rights are very reasonably secured.

4.3 REASSERTING THE COMPOSER'S RIGHT OF DISCLOSURE

The systematic absentee from composer contracts is the right of disclosure²¹¹. This absence is not limited to the countries who do not grant such a right to composers, at the very contrary. The reluctance from producers to insert a disclosure clause in composer contracts is probably due to the fact that by its very nature, it is not fit for contractual limitations, although it is definitely put under pressure in practice. The right of disclosure is a strange creature, and it is sometimes doubted whether its existence is really justified, and if it still should be applied. To

²⁰⁷ This clause is drawn from a model contract drafted by the SABAM. English translation: "The composer's moral rights are reserved to him. The producer commits to mentioning the composer's name in the screen credits and on all advertising material of the work. He will also impose this obligation on distributors and operators. The composer nonetheless holds the right to be credited under a pseudonym.

The producer will bring no alterations to the music without consent of the composer.

The composer will not use his right of respect of the work to opposes practices which are usual in the audiovisual sector, such as interruptions during commercial breaks (as long as they are clearly separate from the work)".

²⁰⁸ TGI Paris, 24 May 1989, *Carle v. TF1*. In TGI Paris, 23 March 1994 (*R.I.D.A.*, 1995, p. 401) it was ruled that cutting a part of the film in order to make it shorter constitutes an infringement of the director's right of integrity. This would also be the case in Belgian law (A. STROWEL, V. S. SALOKANNEL, et E. DERCLAYE, « *op. cit.* », p. 16). 3000/E°28, p. 14

²⁰⁹ W. MAXWELL, *op. cit.*, p. 3.

²¹⁰ *Ibid.*

²¹¹ Given that this section solely concerns the right of disclosure, it will only concern those legal systems who provide for such a right.

some, it is not necessary because the author's possibility to sovereignly decide about the modalities of the communication to the public of his work is already granted thanks to the fact that the author enjoys exclusive exploitation rights on his work²¹². When these rights are used for the first time, they necessarily require a decision of the author to disclose his work.

A further important remark is that, both under Belgian and French law, can the composer of an audiovisual work only exercise his moral rights once the work is completed²¹³. This decision rests with the director and the producer, who must jointly agree on the completion of the work²¹⁴. By putting the co-author's moral rights on hold until effective disclosure of the audiovisual work, these systems provide for an exception to the right of disclosure for film composers. Originally, the composer, like other artists involved in the creation and development of a movie, was to be considered as a co-author, because of the importance of their contribution to the project²¹⁵. It was seen as a kind gesture, as they deserved to be presumed co-author in order to jointly enjoy all the rights on the audiovisual work. However, according to us, this provision is far from protecting the composer's interests, at the very contrary. In depriving him of his right of disclosure, it takes away a lot of the composer's balance weight during the negotiations of his contract. Moreover, he never gets to personally have any say in the management of the economic rights on the work, since composer contracts systematically contain a clause by which he grants licenses for all economic use of his contribution to the producer²¹⁶. In summary, a moral right of utmost importance is taken away from the composer without any consideration in practice.

Thus, from the perspective taken in this chapter, which is the point of view of a composer who, as usual in his job, will be asked to transfer all of his economic rights, another reasoning might be preferable. If divulgation to the public as such were only to be seen as an economic prerogative, it would not protect the author, but only the right holder. This must be opposed to the right of disclosure, which in this case really gets the opportunity to be moral and to protect the personality of the author. If an author cannot resort to his right of disclosure to oppose a premature publication of a work in the context of a contractual obligation, then what good is it

²¹² A. DIETZ, *op. cit.*, p. 29.

²¹³ In Belgium: Art. XI.179 *juncto* art. XI.181 of the Economic Law Code, *M.B.* 12 June 2014. Art. XI.179 cites the composer as one of the co-authors of the work. In France: Art. L. 121-5 of the Intellectual Property Code.

²¹⁴ Art. XI.181. The particularity of this rule is that it grants a right of disclosure to a person who is not an author, namely the producer (A. STROWEL, V. S. SALOKANNEL, et E. DERCLAYE, *op cit.* p. 20).

²¹⁵ Act Project regarding on Author's Rights and Neighbouring Rights and on the private copy of audio- and audiovisual works, Discussion on the articles, *Doc. Parl.* Ch., extraordinary session, 1993-1994, 473/33 – 91/92, p. 172.

²¹⁶ See Annex 2.

to have such a right? Why would the right of disclosure be considered inalienable if any contract could put a stop to it? Let us remind the reader that the right of disclosure is so inherently linked with the author that any contractual limitation amounts to a definitive renunciation of the right, and is thus prohibited²¹⁷. As A. DIETZ wrote :

*“[...] on peut toujours imaginer des situations spécifiques où apparaît la nécessité d’accorder séparément un droit de divulgation afin de protéger cet intérêt moral particulier de l’auteur. C’est vrai, par exemple, dans le cas où le contrat d’exploitation concerne une œuvre future qui n’existe pas encore au moment de la conclusion de ce contrat [...]”*²¹⁸.

In the quite ancient French *Whistler* case, in which a painter had been commissioned to deliver a painting on a certain date but refused to do so, explaining his work was not done yet, the judge ruled that indeed, the author held the right to retain the painting since it had not been brought to completion. However, the painter had to return the sum he had been paid²¹⁹.

This scenario is very similar with what can happen in film scoring, even though if the composer refuses to complete the score or finds himself unable to do so, he shall not be able to oppose the use of the already composed parts²²⁰. The *Whistler* case is a clear example of the hidden power concealed in the right of disclosure regarding contractual matters. In the field of film scoring, the right of disclosure resembles the rights of first publication²²¹ or communication to the public. Indeed, in the tight post-production schedule of the film making process, the moment that the composer will disclose the soundtrack has as immediate effect its addition to the movie, and subsequent communication to the public, either in movie theaters or on the internet, depending on the mode of communication. However, these rights “are clearly distinct (ed. at least) in Belgian law”²²². This gives us even more reasons to give the right of disclosure the scope it was meant to have in contractual matters. Moreover, in the context of film scoring, its one-time exercise immediately brings along the exhaustion of the right²²³. Disclosure is a decision that should hence not be taken lightly.

²¹⁷ M. MARKELLOU, *op. cit.*, p. 46.

²¹⁸ *Ibidem*, p. 30. An English translation of the quote would be: “[...] we can always imagine specific situations where it seems necessary to grant separately a right of disclosure, in order to protect this particular moral concern of the author. It is true, for example, in the case where the exploitation contract concerns a future work which does not yet exist at the time of the signing of the contract [...]”.

²¹⁹ Cass. fr., 14 March 1900, *D.P.*, 1900, p. 497, *Eden v. Whistler*.

²²⁰ Art. XI. 180 Economic Law Code

²²¹ In the U.S., this right was confirmed in the aforementioned *Harper & Row v. Nation Enterprises* case.

²²² A. STROWEL, V. S. SALOKANNEL, et E. DERCLAYE, *op cit.*, p. 17.

²²³ M.-C. JANSSENS, H. VANHEES, *Auteursrecht @ Internet*, p. 44; formation du contrat d’auteur, p. 48.

Consequentially, it is our humble opinion that in extreme cases, when the parties know from the moment the contract is signed that the timing and schedule given to the composer are going to be hard to meet, the composer should be able to rely on his right of disclosure to ask for a reasonable delay to complete his contractual obligation. The objective of this theory would be to find a middle ground between the interests of both parties, and between the (too?) rigid conception of moral rights and the utterly liberal conception of economic rights, as opposed to the rather radical solution found in *Whistler*, where in order to uphold his moral right, the artist had to return his fee. Belgian scholars also agree on the Whistler doctrine, according to which an author cannot escape his contractual liability by invoking his right of disclosure²²⁴. In our opinion, the right of disclosure could be articulated so as to give the composer a heavier weight in the balance during the negotiations of the composer contract and to give the right of disclosure a practical usefulness. It would, after all, be in the interest of the producer to be aware of this weapon the composer disposes of in case of abusively close deadlines. From a more conceptual point of view, this also helps to remind the world that composer are not mere content providers, but authors who must be capable to oppose a too early transfer of their work when, as creator, they feel uncomfortable with the completeness of their work as it is. Indeed, an unfinished work might not fully reflect the soul and mind of the artist the way he intended it, thereby impacting the work's right of integrity. Claiming paternity of such a work is also more problematic, because unfinished works do not give the composer the same pride and sense of entitlement than finished ones (*supra*, 2.2.1). As a result, a real and legitimate use of the right of disclosure is a necessary condition to render all other moral rights entirely relevant²²⁵.

Another argument for a stronger right of disclosure that music, like all other art forms, is subject to each his own appreciation. It is very hard to have an objective take on a particular music piece. *Ergo*, it is hardly possible to make sure beforehand that the director will like the music created by the composer. It takes multiple tries and of course trying takes time, but time is what the composer always lacks, as we have seen²²⁶. It follows that the right of divulgation should

²²⁴ In this sense, see F. GOTZEN, M.-C. JANSSENS, *Wegwijs in het intellectueel eigendomsrecht*, Brussels, Larcier, 2012, p. 37; J. KEUSTERMANS, P. BLOMME, M. FLAMME, *op cit.*, p. 117.

²²⁵ Furthermore, most professional composer must figure out an effective composing process in order to maximize their musical production. This brings with it the risk that, when inspiration is lacking and when running on tight schedules, the composer will start a piece of music with elements from which he knows, from experience, that they will work, in the hope that they will trigger the flame of his inspiration. It follows that the components of a piece of music that will make the work original can often be added at the end of time devoted to the composition of said piece. Consequentially, ensuring a serene use of the right of disclosure can also be a condition for originality.

²²⁶ As a result, some tools have been developed in order to help composers to work in a faster fashion, but which inevitably compromise creativity. A very recent example of such tools is Hexachords Orbs Composer, a software

take precedence over the blind application of the contract, which is far from the case in practice, and which results in a sort of ‘legally condoned injustice’.

Let us also note that, in this view, a strict dualist approach to moral rights is neither preferable, nor adequate. Moral rights protect personal interests, but it is well established that they have an economic importance as well²²⁷, since moral right infringements usually occur as a way to pursue some financial gain²²⁸. Accordingly, moral rights can be a way to protect financial interests when these interests are linked with moral ones. The outcome of *Whistler* makes sense, in the logic that if the work is not delivered, payment is not due. In a seemingly more practical reasoning however, the work would be delivered, albeit in a with a reasonable delay time. Strictly taken, this could of course lead to abuses from the composer’s side, just as today’s practices may show abuses on the producer’s part. That is why any reasoning based on this theory must rely on the criterion of reasonableness. This criterion however is already inherent to the right of disclosure, since it can have far-fetched consequences when strictly taken²²⁹. The right of disclosure must be designed – and used – as an ultimate lifeline for the composer, a

that works as a virtual assistant that helps composers create better structures, to write coherent chord progressions faster and so on. On the reasons of being of Orb Composer, its developers notably say: “We have also designed Orb Composer features for composers working at the frontline needing to hit that deadline. For composers who work for TV, films, games and radio” (<http://www.hexachords.com/orb-composer/orb-composer-features/>). However, as technology takes more and more workload upon itself, one can wonder how the fundamental notion of originality is set to change in the (near) future. Indeed, much in the same way we know collective works today, the coming years might lead to a new sort of work creation, the “hybrid work”, where computer and human share the paternity of a work.

²²⁷ E. ADENEY, *op. cit.*, p. 150, n° 7.60; See, as illustration of this statement, the *Phil Collins* case (CJEU, joint judgments *Phil Collins v. Imtrat* and *Patricia v. EMI Electrola*, 20 October 1993, C-92/92 and C-326/92, point 22) in which the Court said that all the rights (both moral and economic) conferred to an author can impact the exchange of goods and services as well as the competitive relationships within the European Community; S. STROKES, *op. cit.*, p.84; J. KEUSTERMANS, P. BLOMME, M. FLAMME, *op cit.*, p. 117.

²²⁸ As an example, we could cite the nowadays famous *Huston* case (Cass. fr. 28 May 1991, *R.I.D.A.*, 1991/149, p. 161) in which the colorization of a black and white film was found to be a breach of the author’s right of integrity. Such colorization of course was meant to precede a new commercialization of the movie. The producer of the movie “Asphalt Jungle”, to whom all of the director’s (M. John Huston) rights had been transferred, proceeded to the colorization of the movie in order to reach a new public. The director’s daughter – since the director himself had passed away a few years earlier – was deeply opposed to this alteration and took the case to the American courts, who ruled in favor of the producer since he had been transferred all the rights of the director. But M. Huston’s daughter held on tight and brought the case in France, where the Court of Cassation ruled that the colorization of a movie is an alteration of the work, hence that the author may use his moral right of integrity to oppose the process. *Huston* is a perfect example of the different approaches taken in common law and civil law countries. It led American filmmakers to demand French inspired moral rights protection, which they eventually never got. On the other hand, French producers claimed moral rights were an unjustified obstacle to progress (P. SIRINELLI, *op. cit.*, p. 154).

²²⁹ As an example, M.-C. JANSSENS and M. CARLY explain the following: “Strikt genomen mag een leraar op het einde van de les dus niet zomaar de opstelletjes ophalen en ergens ophangen of op het internet zetten. Misschien was de leerling van oordeel dat zijn werk nog niet af was” (English translation: “Strictly taken, a teacher may not collect the pupil’s papers at the end of class and just pin them somewhere or publish them on the internet. The pupil could be of an opinion that his work was not done yet”), in M.-C. JANSSENS, M. CARLY « Auteurswet en onderwijs met bijzondere aandacht voor de internetomgeving », *T.O.R.B.*, 2003-2004, liv. 3, p. 171.

way to assert his position as artist. A different reasoning would amount to a constant annihilation of the right of disclosure in practice and in a *de facto* exception to the author's moral right of disclosure in such contractual matters.

5. THE USE OF AN EXISTING PIECE OF MUSIC

Aside from being composed especially for a project, most multimedia content providers use existing pieces of music in their projects. Here, the last decade has had a groundbreaking effect with the unlimited dissemination of works through the internet. Today, music can be adapted, remixed, and covered by virtually anyone, and consequently, the moral rights – as well as the economic rights – of authors are exposed like never before.

We will try to distinguish the different problems authors can be faced with in this still recently globalized context. A first section will analyze the state of moral rights in public domain music, while a second section will aim at today's ways of licensing music through the internet.

5.1 NEW METHODS OF USE

As has been stated in the introductory premises, the printing press launched a new era in the reproduction of literary works. From that moment on, books could reach the most remote places of the known world, and authors deemed it necessary to ascertain the origins of the works, as a sign of respect to the mind from whence they flowed. One could argue that a similar revolution has taken place with the rise of the internet and the globalization it implies. Today's copyright protected works are spread throughout the whole world and can be copied virtually an unlimited amount of times for no extra costs ("copy/paste"), which present a formidable challenge²³⁰. The concept of 'ownership' might also be changing, as consumption of music happens increasingly more through digital platforms such as Spotify or iTunes as opposed to the physical CD or vinyl²³¹. Aside from the evident cases where the paternity of the authors could be breached, other examples of 'modern' infringements can be the mediocre quality of a restitution of a work due to compression. However, not only the form of the work can constitute a breach of the author's moral rights, but also alterations of the spirit of the work.

This, according to some, justifies the idea that the whole concept of moral rights ought to be re-imagined, or at the least, modernized and harmonized. A strong argument resides in the fact internet has evolved to be more about content than communication, for which it was originally designed²³² and that its average users are usually characterized by utmost anonymity.

²³⁰ J.A.L. STERLING, *op. cit.*, p. 394.

²³¹ S.I.V. SCHMITZ, *The Struggle in Online Copyright Enforcement*, Baden-Baden (Germany), Nomos, 2015, p. 28.

²³² *Ibid.*, p. 24.

Furthermore, even though these new methods of use are shared by almost every State in the world, the legal answers and legal tools framing them vary, because the applicable norms are not the same everywhere²³³.

Now, it is true that the WIPO Treaty of 1996 provides some protection to authors, by stating in its Art. 12 that Member States must provide for penal and civil remedies against those who commit acts that “induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority”²³⁴.

The second paragraph of the same Article clarifies the meaning of ‘rights management information’. This *inter alia* includes information identifying the author, the work, information on the right holder or on the terms and use of the work.

However, this treaty brings no solution to the glaring struggle between the territoriality of copyright and “the global dimension of intellectual production, exploitation and use”²³⁵. Moreover, if the remedies implemented in each Member State – as a consequence of the Treaty – are meant to have dissuasive effect on the population, we are not so sure that will be true in practice. Sure, the internet is rife with voluntary infringements of copyright, but it is even more abundant in *bona fide* uses of works in which the author might see strong alterations or mutilations, but that do not originate from a malicious intention²³⁶. Still, these breaches are happening, and this is why it is justified to identify them. It would indeed be unwise to sacrifice creators for the user’s sake²³⁷.

²³³ P. SIRINELLI, *op. cit.*, p. 151.

²³⁴ WIPO Treaty, 1996, Art. 12 (1).

²³⁵ R.C. DREYFUSS, “Enforcing Intellectual Property Claims Globally When Rights Are Defined Territorially”, in X., *The internet and the emerging importance of new forms of intellectual property*, Alphen aan den Rijn (Netherlands), Wolters Kluwer, 2016, p. 16.

²³⁶ In such cases, it is important to balance on the one hand the author’s rights and on the other hand the freedom of expression of the internet user. Concerning economic rights, there is an extensive case law by the European Court of Human Rights regarding the matter, see cases *Ashby Donald et al. v France* (10 January 2013, 36769/08), available at [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-115845\"\]}](http://hudoc.echr.coe.int/eng#{\) and *The Pirate Bay case* (Neij and Sunde Kolmisoppi v. Sweden, 19 February 2013, 40397/12, available at [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-117513\"\]}](http://hudoc.echr.coe.int/eng#{\)); P. VALCKE, J. DUMORTIER, *ICT- en Mediarecht*, Bruges, Die Keure, 2013, p. 10.

²³⁷ P. SIRINELLI, *op. cit.*, p. 163.

5.2 PUBLIC DOMAIN MUSIC

A work of art enters the public domain at the moment that the rights of the author extinguish. Once a work falls into the public domain, an authorization of the rightful owner is no longer required to make use of it. French law, much like the Belgian and the UK legislations, provides for a protection of 70 years *post auctoris mortem* of the author's right²³⁸. However, article L. 121-1 of the Intellectual Property Code states that moral rights are perpetual, contrarily to most of the other legal systems, where the length of moral right protection does not exceed that of the economic rights. That means that theoretically, the heirs of iconic composers such as Mozart or Beethoven could oppose adaptations of 'The Turkish March' or 'Ode to Joy'. The burden of proof that would rest upon the heirs' shoulders would however be unbearably high²³⁹. This is why French doctrine nonetheless admits that the strength of these rights weakens over the years²⁴⁰. It is only natural that the moral rights of a person who died over a century ago, and who left an enormous panel of artistic creations, will fade over time. However, French case law does not seem to agree with this way of seeing things, because in 1988, the Court of Appeals of Paris ruled that moral rights may also be exercised once the work has fallen into the public domain²⁴¹. In other words, the personality of the author is 'trapped' in an eternal embrace with his work. According to A. DIETZ however, as long as the work is capable of being communicated to the public and transferred, so long do the moral right of its author live²⁴². Following this reasoning, public domain music that can be shared and copied online is perpetually covered by moral rights protection.

In common law countries on the other hand, it is well established that all rights on a work are lost after it has entered the public domain. Moral rights are also included in this principle since they are, at the longest, limited to the copyright term²⁴³. An illustration can be found in the *Dastar v. Twentieth Century Fox* case²⁴⁴. In this case, Dastar had identified itself as producer of footage that had actually been produced by Fox years beforehand. These works had since then fallen into the public domain. Knowing it hence could not rely on copyright law anymore,

²³⁸ Art. L. 123-1 Intellectual Property Code.

²³⁹ W. MAXWELL, « Moral rights clauses after Barbelivien », *Ent. L. R.*, 2004, p. 122.

²⁴⁰ C. CARON, *Droit d'auteur et droits voisins*, *op. cit.*, p. 205.

²⁴¹ Paris, 31 October 1988, *Cahiers du Droit d'Auteur*, 22 april 1989, cited in J.A.L. Sterling, *op. cit.*, p. 418.

²⁴² A. DIETZ, *op. cit.*, p. 39.

²⁴³ Concerning the moral right of authors of visual works, this can be found in s. 106A (d) of the US Copyright Act of 1946. A similar rule is contained in UK legislation in s. 86 of the CDPA.

²⁴⁴ SCOTUS, 2 June 2003, *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 US 23.

Fox decided to invoke the Lanham Act²⁴⁵, which contains important provisions on passing off, a form of right of attribution according to common lawyers²⁴⁶. The Supreme Court replied however that authors cannot resort to the Lanham Act once their copyright has expired.

5.3 CREATIVE COMMONS LICENSES

Creative Commons is an alternative public licensing method²⁴⁷ developed and put forward by a California based non-profit organization bearing the same name. It consists in “a user-friendly license system that copyright owners can adopt to designate what rights they are willing to give up and under what conditions they are willing to surrender those rights”²⁴⁸. These licenses are meant to apply to copyright protected contents²⁴⁹, under which music of course music. The main goal of the organization is to “realize the full potential of the internet”²⁵⁰, i.e. enhancing global creativity by creating a platform on which various works can be shared for free. In other words, the objective is to simplify the movement of literary and artistic works across the internet²⁵¹. In Belgium, CC licenses have for the first time been recognized as legally binding in 2010²⁵².

5.3.1 The licenses

There are six main Creative Commons (hereafter “CC”) licenses, all of which are designed on the basis of four simple components (Attribution, Share Alike, Non-Commercial and No Derivatives). These are intended to help creators retain copyright while allowing users to freely copy, distribute and make either commercial or non-commercial use of their work²⁵³. The duration of authorizations granted by CC licenses coincides with the duration of the rights²⁵⁴. Any dispute regarding these licenses will take place through Copyright litigation²⁵⁵. The next lines will briefly review the existing licenses.

²⁴⁵ 15 U.S. Code, Chapter 22.

²⁴⁶ W. MAXWELL, *op. cit.*, p. 122.

²⁴⁷ A. LAURENT, « Les licences non volontaires et l'intérêt général en droit d'auteur [étude de droit comparé] », *I.R. D.I.*, 2010, liv. 2, p. 127.

²⁴⁸ L. M. FORSYTHE, D. J. KEMP, “Creative Commons, for the common good”, *30 U LA Verne L. Rev.*, 2008-2009, p. 348.

²⁴⁹ P. LAURENT, “Les licences de type ‘open source’ ou ‘open content’ ne se fondent pas sur un ‘droit de destination’”, *I.R. D.I.*, 2008, liv. 2, p. 150.

²⁵⁰ See <https://creativecommons.org/about/mission-and-vision/>.

²⁵¹ M. CLÉMENT-FONTAINE, « Creative commons face au droit moral », in F. BRISON, S. DUSOLLIER, M-C-JANSSENS (eds.), *op. cit.*, p. 198.

²⁵² TPI Nivelles, 26 October 2010, *J.L.M.B.* 2011, liv. 16, p. 776.

²⁵³ See <https://creativecommons.org/licenses/?lang=en>.

²⁵⁴ Section 6(a) of all CC licenses.

²⁵⁵ M. T. SUNDARA RAJAN, *op. cit.*, p. 924

1. Attribution (“CC BY”)

The Attribution license is nowadays omnipresent in the CC system²⁵⁶, but that was not always the case. In the first version of CC licenses, authors were permitted to waive their right of attribution, an option which received a very unwarm welcome at the time, as it seemingly undermined the general online principle of reputation²⁵⁷. Consequently, the Attribution license has been made common to all CC licenses²⁵⁸ and is the basis of the entire system.

It lets licensees make whatever use of the work as they see fit, as long as the author is credited. In other words, an author who licenses his creation under this license agrees that the only right licensees must respect is the positive aspect of his right to the paternity of his work²⁵⁹. His creations may be distributed and remixed freely both for commercial and non-commercial purposes.

2. Attribution-Share Like

The second license, known as the Attribution-Share Like license (“CC BY-SA”), consists in the same terms as CC BY, with the added requirement that any derivative work must be licensed under the same conditions than the original work.

3. Attribution-No Derivatives

The Attribution-No Derivatives license (“CC BY-ND”) allows for the licensee to copy and distribute the work commercially or non-commercially, but only in its original version. The author’s creation may not be modified or edited in any way. In this respect, both the right of paternity of the author as the one facet of his right of integrity are upheld. However, this license does not prohibit a licensor to use the piece of music in a context which the licensor had not foreseen and would not agree to²⁶⁰.

4. Remaining licenses

The remaining CC licenses are buildups and combinations from the Attribution, ShareLike, No Derivatives and Non-Commercial components. As an example, we have the Attribution, Non-Commercial, No Derivatives license (“CC BY-NC-ND”) according to which a licensee must

²⁵⁶ P. LAURENT, *op. cit.*, p. 150.

²⁵⁷ M. CLÉMENT-FONTAINE, *op. cit.*, p. 201.

²⁵⁸ Section 2(a) of all licenses.

²⁵⁹ Apart from Canada, no common law country knows the negative facet of the right of attribution; A. LUCAS-SCHLOETTER, *op. cit.*, p. 51.

²⁶⁰ L. M. FORSYTHE, D. J. KEMP, *op. cit.*, p. 363.

credit the author a creator, is not authorized to bring any modification to the work and may only use it in a non-commercial way.

Interesting is also the fact that Creative Commons makes it possible for authors to directly put their work in the public domain by waiving all of their rights. This however is not possible for authors who reside in countries where some of their rights are unwaivable.

5.3.2 Moral implications of Creative Commons

Despite their worldwide success, CC licenses have raised many concerns among European continental scholars regarding the conformity of these licenses with inalienable and unwaivable moral rights²⁶¹. They are a step towards a long-needed uniformity or harmonization in the management of moral concerns, albeit by means of contractual licenses. They nonetheless bring along the obvious risk of leveling down the protection of moral concerns. This explains the suspicion with which continental lawyers approached them. Upon closer look, these concerns are justified, as for example under the last version of the CC-licenses, the right of integrity must be waived or at least not asserted to the extent possible in order to render to use of the license possible²⁶². Are the licenses going too far to be in accordance with European continental law? M. FICSOR answers in the negative, because the use of the words “to the extent possible” should be interpreted as to what is possible under the Berne Convention and under each national system²⁶³. Hence a CC license should be seen as a contract that establishes obligations for the author and for the users, and which is governed by the law of the country where the license is acquired. The goal of the waiver is only to render use of the license possible. Furthermore, the very purpose of CC licenses is to ensure that authors get the recognition they deserve, through the attribution license, and retain control over their works once online, through the other CC components. Hence, they could not be compared to, say, exploitation contracts containing moral rights waivers, where the waiver only aims at ensuring the economic right holder that the author will not disrupt his exploitation of the work.

It is fascinating to see how well CC licenses are doing in our society, where no art form usually escapes being priced, labeled and put on the market. Indeed, their popularity is surprising, since

²⁶¹ For example, it seems indisputable that CC licenses have an impact on the right of withdrawal, as the internet ensures a massive and exponential diffusion of the artistic work. The hardship lies on a practical level, because there is no doubt as to the existence and effectivity of the *droit de repentir*, but it would be vain to try and apply that right in its traditional – and rather rigid – French conception. (In this sense, see M. CLÉMENT-FONTAINE, *op. cit.*, p. 201); H. RAIZON, *op. cit.*, p. 257.

²⁶² Section 2, b), 1 of the licenses.

²⁶³ M. FICSOR, *op. cit.*, p. 192.

there is absolutely no financial gain to be made by authors in this system²⁶⁴. On the contrary, CC licenses allow digital works to be shared an unlimited number of times for free.

Their success gives us reason to believe that in our age of illegal downloading, some authors, being well aware of the fact that the works they put on sale on the internet run the risk of being pirated, may choose to allow for a free distribution of said works through CC licenses instead, because at least in that case some recognition is to be had on the side of moral rights²⁶⁵. What we face here are authors who would rather choose reputation and glory over any financial benefit²⁶⁶. That explains CC's success compared to the open source system (OS), where the sole concepts of "creator", "compensation" and "intellectual property" are seen as inherently wrong²⁶⁷. Creative Commons encourages authors by ensuring them recognition and integrity for their works, contrary to OS' anti-copyright attitude²⁶⁸. Online users who can legally obtain the rights to use certain songs will be more inclined to respect the conditions to which this use is subjected, as opposed to the user who flat out illegally downloads a song. In this sense, CC licenses are an example of contractual protection of moral rights, but with the particularity that they are public. In other words, a CC license is a "contract open for world to join" which highlights and ensures certain rights, that can be opposed to anyone. While some (civil law) countries might confer higher standards of protection than the CC licenses, it should be noted that on the other hand the No Derivs licenses offer better protection to the author than the UK version of the right of integrity for example. How intriguing is it moreover that these licenses were originally created as an application of American copyright, and not *droit d'auteur*? They were created in the context of a law where moral rights are non-existent for most creators, where the means to stimulate creation is pecuniary reward. The expansion of CC licenses prove that ensuring moral concerns can work as an incentive for creation too. If CC was initially created

²⁶⁴ L. M. FORSYTHE, D. J. KEMP, *op. cit.*, p. 361.

²⁶⁵ Still, if CC licenses have undeniably become very popular tools in a certain category of creators, users and enthusiasts, they are certainly not unanimously appreciated. In June 2010, ASCAP, the American Society of Composers, Authors and Publishers, urged its members to fight CC licenses, saying they undermined copyright law. Its main arguments concerned the waiver of royalties, the non-exclusivity of CC licenses and matters linked exclusively to the artist's economic rights. However, ASCAP seemed to fail to understand the main reason of succes of Creative Commons licenses, which is the optimal visibility granted to CC licensed works, as well as the respect of the author's paternity – and his right to integrity when a CC ND license is specified. CC's terms make it clear to any attentive user that its licenses are not meant to bring in any money, but to enhance visibility and recognition for one's work. For more information about the reasons for ASCAP's critical take on Creative Commons licenses, see https://www.ascap.com/playback/2007/fall/features/creative_commons_licensing.aspx; M. FICSOR, *op. cit.*, p. 194.

²⁶⁶ Thereby confirming that works of art are usually created to express creativity and not as a way to escape unemployment or to earn money (cf. *supra*) (in this sense, see F. HENDRICKX, *op. cit.*, p. 103).

²⁶⁷ M. FICSOR, *op. cit.*, p. 193.

²⁶⁸ *Ibid.*

as a reaction to a too rigid American copyright, its current success is also wildly due to the rights it grants beyond copyright, to the fact that it recognizes the sacral link that exist between an author and his work, a component that has an all-time absentee in American law.

As Professor Morten ROSENMEIER stated “rules relative to *droit moral* reflect not only social and economic developments and factors. They also reflect psychological and conceptual developments in society: the way we think”²⁶⁹. The ongoing success of Creative Commons licenses are the embodiment of this statement. Except that the rules are no longer put into place by the legislators, but by the artists themselves. The main innovation brought by CC licenses on the field of moral rights is that it provides one same standard of protection for everyone²⁷⁰. They are political tools²⁷¹, filled with ideology and purpose, helping transnational copyright find its way towards the consecration of international moral rights.

5.4 ROYALTY FREE MUSIC

5.4.1 Practice and risks

One of today’s ways for a composer to make a living out of his music is by selling it online as royalty free tracks. The way it works is quite simple. The composer chooses an online platform – like Jamendo or Audiojungle – on which he will put sync licenses at the disposal of any internet user, against a fixed price, which will vary following the use that the licensee will make of the music.

For example, a license to use the composer’s music in a YouTube video will usually cost about 5€, while a license to make any online use of the music will be around 50€. Licenses for cinematic use or physical copies can go up to 300€ for a single piece. That sum is then usually divided in fair shares between the composer and the platform. Furthermore, these platforms often ask for exclusivity on the track, i.e. a track that is put on the platform may not be licensed outside it. But, as their name states it, these licenses offer no royalties to the composer, who must sometimes cope with the fact that there was much more money to be made by licensing his music directly to a third party who would have provided for royalties. Indeed, if a composer were to license his music through Jamendo to a film producer, who would then add the music to a blockbuster movie, the composer would only get 299€²⁷² minus Jamendo’s fee, which is 60 or

²⁶⁹ M. ROSENMEIER, « Introduction : droit moral in the past and in the future. Some short reflexions », in X., *Le droit moral au 21^{ème} siècle. Le rôle changeant du droit moral à l’ère de l’informatique surabondante*, Bruxelles, Larcier, 2015, p. 11.

²⁷⁰ Up until now, the territoriality principle of copyright has prevented any strong advances in the field of moral rights harmonization.

²⁷¹ L. M. FORSYTHE, D. J. KEMP, *op. cit.*, p. 346.

²⁷² To see the various licenses Jamendo proposes, https://licensing.jamendo.com/en/pricing?source=catalog_index.

70% of the price, depending on whether Jamendo has exclusivity on the track. On the other hand, if he had been able to negotiate royalties, outside of Jamendo's grasp, that number could potentially skyrocket. However, these are economic concerns, who hence do not fall within the scope of this paper, but they nonetheless help to show the precarious position that composers can find themselves in.

In this section, we will analyze the impact that such online selling platforms have on the moral rights of the composer by taking the aforementioned Jamendo platform as an example. Jamendo, a Luxembourg based company, is an online network where every uploaded piece of music is offered to the world under the CC license of the author's choosing (often Attribution – No Derivatives – Non-commercial License). Furthermore, if the author wishes it, these same pieces of music can be licensed for commercial use against the payment of a fee²⁷³. The rights that the composer grants to Jamendo are developed in clause 3.1.3 of its terms of use:

“The Artist grants JAMENDO, for the duration the Work is online, the worldwide, royalty free and non-exclusive rights to:

- *reproduce and have reproduced, fix and have fixed on any media, publish and have published, broadcast and have broadcast, distribute and have distributed or transfer **in any format**, the Works and the Materials provided by the Artist;*
- ***adapt** the Works and the Materials **in any format** to meet JAMENDO's or its partners' requirements;*
- *use the Works and the Materials on any media to promote the Artist and JAMENDO;*
- *monetize the JAMENDO's services by inserting advertisement that may or may not remunerate Artists.”*

In order to correctly commence our analysis, various factors should be held into account. First, the music a composer decides to upload to Jamendo are works that were freely and spontaneously created by him, and not under any contract of any form. The right of disclosure has been fully and legitimately exercised. Moreover, given that all pieces of music must be licensed under at least a CC attribution license, the right of paternity will not be a major problem in this case either. However, we must point out that clause 3.1.3 is manifestly conflicting with

²⁷³ Clause. 3.1.2 of Jamendo's terms of use states the following: *“Artists shall select a CC License when they publish their Works and Materials on JAMENDO, for each Work or for an entire Album. Depending on the type of CC License chosen by the Artist, Users may benefit from more or less extensive rights on the Works and the Materials of the Artist. Certain CC Licenses enable Users to make commercial use of the Artist's Works without compensation for the latter. Should the Artist wish to participate in the Commercial Programs offered by the JAMENDO LICENSING service [...], it is advisable for the Artist to preferably opt for a non-commercial CC License (NC) from among the six (6) CC Licenses”* (<https://www.jamendo.com/legal/terms-of-use>).

the Belgian and French conceptions the right of integrity, as it can be interpreted as a global *a priori* renunciation of said right²⁷⁴.

Let us now adopt the point of view of a Belgian composer. If after having sold a license through Jamendo, he realizes that the use that is made of his music is breaching his right of integrity, what options are open to him? The fundamental question is to assess whether the globalization of our society has an overall negative impact on the enforcement of moral rights. In order to try and give answers to these questions, we will take into account legislation on private international law. In case of moral right infringement by one of Jamendo's users, multiple claims can be imagined, one against Jamendo's users (§2), and secondly against Jamendo itself (§3)

5.4.2 Integrity breach by an online user of Jamendo's services.

The legal relationship between the composer and the user of his music is quite unclear. After selling a license, only the name and location of the licensee is disclosed to the composer. Aside from the type of license that was chosen, the composer cannot know what use is made of his music. This is already a bit controversial, because shouldn't the composer at least know where to find the works to which his music has been incorporated in order to check on possible infringements? But even so, what is more troubling is that nowhere on Jamendo's website could we find any clauses about possible disputes between licensee and composer. Al. 2 of clause 3.3.1 of the terms of use does stipulate that users shall "*commit to use the Work in conformity to these General Terms of Use and the License under which the Work has been published, and more generally, not to infringe any intellectual property rights held by Artists*", Furthermore, clause 2.2.1.1. of the terms of sale²⁷⁵ specifies the permitted uses by purchasers of Jamendo licenses:

"Modify or adapt the Work, for the purpose of the uses hereby permitted, provided that **You may not modify the Work to the prejudice of the unwaivable moral rights of the Artists**"

The licensee is not a contractual partner of the composer, but of Jamendo, since the aforementioned clause 3.1.3 should be interpreted as a license of rights to Jamendo, who then in turn sublicenses to users. This means that the composer should hence have a contractual claim against Jamendo every time a user infringes his rights²⁷⁶.

²⁷⁴ Renunciations are only possible in these systems so long as they are clearly delineated and limited.

²⁷⁵ Terms of sale available at <https://licensing.jamendo.com/en/static/termsofsales>.

²⁷⁶ Cf. *infra*, next paragraph.

On the other hand, what if the composer wants to act directly against the alleged infringer? The situation at hand is an extracontractual infringement of moral rights. The problem is that the interests protected by copyright are intangible and ubiquitous²⁷⁷, but copyright is at the same time governed by the principle of territoriality²⁷⁸, and the infringing act can potentially take place in any State on earth. Given the disparities in national systems, authors would be well advised to choose one country's law over another's. Where can the composer bring his action in such a case and what law will be applicable?

§1 In case of a European sub-licensee

The Berne Convention confers the principle of *lex loci protectionis*, meaning the law applicable is the law of the State where protection is sought²⁷⁹. This is usually the law of the place where the proximate cause of the harmful event occurred²⁸⁰, and, since as we will see, the competent courts are usually those of that country, the *lex loci delicti* often coincides with the *lex fori*²⁸¹. Both the Rome-II Regulation²⁸² and the Belgian CODIP²⁸³ took over this principle.

Accordingly, it is of foremost importance to determine the competent jurisdictions. In the EU, the Brussels-Ibis Regulation allocates jurisdiction based on the residence or domicile of the defendant or the place where the harmful event occurred²⁸⁴. In its interpretation of that rule in the *Shevill* case²⁸⁵, the Court of Justice of the EU (hereafter CJEU), stated that for damages suffered globally, only the jurisdiction from the country where the harmful event occurred can grant global damages, while other jurisdictions may only allow damages for the harm suffered in their territory. Later, regarding online breaches of personality rights, the CJEU interpreted the place of harmful event as the country where the claimant has his center of interests²⁸⁶. A

²⁷⁷ R. XALABARDER, *op. cit.*, p. 172.

²⁷⁸ The implementation of the principle of territoriality can be found at the international level in the Berne Convention "either by means of national treatment and/or the *lex loci protectionis* rule" (Art. 5.1 and 5.2 Berne Convention). There are very few copyright treaties that discuss applicable jurisdiction and applicable law. That means that international cases, such as the hypothetical ones that are discussed in this section, can lead to very different results, given the numerous differences national systems can have amongst themselves. (R. Xalabarder, *Ibid.*, p. 179).

²⁷⁹ Art. 5.2 Berne Convention. See also Art. 6bis, §4.

²⁸⁰ See TGI Paris, 20 May 2008, *SAIF v. Google*, n° 05/12117; Cass. fr., 30 January 2007, *Lamore v. Universal City Studios Inc.*, n° 03/12.354; U.S. District Court for the Northern District of California, 7 November 2001, 433 F.3d 1199, *Yahoo v. La Ligue contre le racisme et l'antisémitisme*.

²⁸¹ M. TRIMBLE, "The Multiplicity of Copyright Laws on the Internet", *Fordham Intell. Prop. Media & Ent. L.J.*, 2015, Vol. XXV, p. 342.

²⁸² Art. 8.1 *juncto* 13 Regulation 864/2007/CE of 11 July 2007 on the law applicable to non-contractual obligations.

²⁸³ Art. 93 Private International Law Code, *M.B.*, 24 July 2014.

²⁸⁴ See Art. 4.1 and 7.2 of Regulation 1215/2012 of 12 December 2012.

²⁸⁵ CJEU, 7 March 1995, C-68/93.

²⁸⁶ CJEU, 25 October 2011, joined cases *eDate Advertising v. X* (C-509/09) and *Martinez v. MGN Ltd.* (C-161/10). The center of interest is deliberately used as opposed to 'place of habitual residence' in order to take other criteria,

few years ago, in *Pinckney*²⁸⁷, the CJEU clarified that in cases of copyright infringements, the mere accessibility of a work in a certain forum is sufficient to grant jurisdiction to the courts of that State, but only for the infringement caused on that territory²⁸⁸. Consequently, given the ubiquity of works shared online, a multiplicity of fora could be available to the claimant²⁸⁹. Whether for such online infringements, the applicable law should be found following the personality rights doctrine or the copyright doctrine was debatable for a time, as according to some, neither approach would be inherently wrong and since the CJEU had not ruled on the matter²⁹⁰. Still, that time is now over as the CJEU issued its *Pez Hejduk* decision²⁹¹, in which it stated that the place of the causal event in case of publication of unauthorized content online is the country from where the unauthorized content was published online by the defendant²⁹². It follows that global damages can only be issued by the courts of that place. However, accessibility to said content from another State can also lead to the competence of that State, but only regarding damage suffered on its soil²⁹³.

Let's imagine a situation where an English user, living in and acting from the UK, has acquired a license on Jamendo for a piece of music from a Belgian composer. Afterwards, he modifies the structure of the song to fit one of his videos and puts the result online. Now, since *Hejduk*, one can presume that only the English courts will have the competence to issue global damages. Hence, following Art. 8.1 of the Rome-II Regulation, English law will be applicable. However, since the scope and extent of the right of integrity in England wildly differ from the Belgian version of the right, one could wonder if the English court will not simply dismiss the case, arguing that by uploading his piece to Jamendo, the composer waived his moral right of integrity according to clause 3.1.3 of the terms of use, which is perfectly possible under UK

like professional activity, into account. This would have been interesting for our composer, because it means he would have been able to bring his claim before a court that is very close to him.

²⁸⁷ CJEU, 13 October 2013, C-170/12, *Pinckney v. KDG Mediatech AG*.

²⁸⁸ R. XALABARDER, *op. cit.*, p. 175; In other cases of online infringements, the CJEU had ruled that the activity concerned must be directed at the Member State in which the court is seized. E.g. *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH* (16 February 2012, C-523/10) and *L'Oreal et al. v. Ebay et al.* (12 July 2011, C-523/10).

²⁸⁹ For a more extensive analysis of the consequences of *Pinckney*, see R. XALABARDER, *op. cit.*, p. 175.

²⁹⁰ However, this is not our opinion, since we argued *supra* that moral are personal rights, but not personality rights.

²⁹¹ CJEU, 15 January 2015, C-441/13, *Pez Hejduk v. EnergieAgenturNRW GmbH*.

²⁹² The CJEU did not expressly mention moral rights in its argumentation, but the case concerned, *inter alia*, a failure to credit the author of a series of photographs.

²⁹³ R. XALABARDER, *op. cit.*, p. 179; the Court justifies its reasoning by referring to the territoriality principle: §36: "[...] given that the protection of copyright and rights related to copyright granted by the Member State of the court seized is limited to the territory of that Member State, a court seized on the basis of the place where the alleged damage occurred has jurisdiction only to rule on the damage caused within that Member State".

law. Furthermore, regardless of these terms and conditions, would the modifications of the piece of music suffice to qualify them as a breach of moral rights? An element to take into account under Belgian law is the subjective opinion of the author that the use that is made of his work is contrary to the spirit of said work. Such an argument would not hold in front of English courts, where only derogatory treatment is prohibited. Besides, an English judge might very well think that such use constitutes an arrangement, allowed under English law²⁹⁴. Belgian courts on the other hand would only be able to allocate damages for the harm suffered on Belgian territory. The good news is that it would be able to rely on Belgian law in doing so, thus ensuring enforcement of the composer's moral rights.

§2 In case of a non-European sub-licensee

A Belgian composer who would like to sue a non-European, say an American online user, living in and acting from the US, for moral rights infringement can bring his before a Belgian court thanks to Art. 86 CODIP, but only for the damages suffered in Belgium. In such a case the applicable law will be Belgian law²⁹⁵.

Concerning the question whether global damages may be allocated by Belgian courts, regard must be had to Art. 96, 2° CODIP, according to which in case of an obligation resulting from a harmful event, the Belgian Court will only be competent if the harm has occurred or is likely to occur in Belgium. However, since the *Hejduk* case, the court will, once again, only be able to declare itself competent, but only for the damage caused in Belgium²⁹⁶. Furthermore, in such a case, Art. 99 CODIP states that obligations arising from a harmful act are governed by the law of the State on whose territory the event giving rise to the damage and the damage itself have occurred or are likely to occur, *in entirety*²⁹⁷. However, in our example, the countries of harmful event (US) and of the damage (Belgium) are not the same. In that case, the applicable law will be found in the subsidiary criterion from Art. 99, §1, 3°, namely the law which bears the closest link with the case²⁹⁸. In the case of Jamendo's sub-licensee, Belgian courts might find Luxembourgish law more suited to the case, because it bears a closer link with the context of

²⁹⁴ Section 80 (2) (a) (ii) CDPA.

²⁹⁵ Art. 93 CODIP.

²⁹⁶ Consequentially, as regards global damages in case of extracontractual breach of the moral rights of a Belgian composer, the very existence, scope and extent of these rights will always depend on the law of the country from which the person liable is a national.

²⁹⁷ A. DICKINSON, *The Rome II Regulation: the law applicable to non-contractual obligations*, Oxford, Oxford University Press, 2008, p.12, n° 1.15.

²⁹⁸ See also Brussels, 5 May 2011, *AM 2012*, liv. 2-3, p. 202; A similar rule does not exist in the Rome-II Regulation, where the *lex loci protectionis* principle suffers no exception. Hence, it could not be applied in the previous section.

the breach. Indeed, the piece of music was transferred from the composer to the user through the Jamendo platform and both parties signed the terms of use that, as a consequence, made Luxembourgish law applicable to disputes between any of them and Jamendo. Of course, since Luxembourgish law allows for moral rights waivers (see *infra* 5.4.3), the consequence will be that the moral rights of the composer will not be upheld²⁹⁹.

Hence, in this example, should a composer want to bring his case before a Belgian court, two remarks must be noted: first, global damages will not be an option³⁰⁰, and second, it would be in his best interest to base his claim on Art. 86 CODIP, which would have as a result the application of Belgian law.

5.4.3 Claim against Jamendo

On a contractual basis, the composer could bring a claim against Jamendo in case of abuse by one of its sub-licensees. In such a scenario, regard would be had to clause 10 of the terms of use, which consistent with Art. 3(1) of the Rome-I Regulation, state the following:

“CLAUSE 10. APPLICABLE LAW

*These General Terms of Use are governed by the **laws of Luxembourg**. Any dispute relating to their interpretation and/or their execution shall be referred to the Luxembourgish jurisdictions excluding any other competent jurisdiction.”*

Since the terms of use do not regulate the relation between composer and user, this clause should be understood as only being applicable to disputes between the composer and Jamendo itself and not between the composer and Jamendo’s sub-licensees. In such a case, the composer would be obligated to bring his claim before Luxembourgish courts and under Luxembourgish law, according to Art. 25 of the Brussels-Ibis Regulation. Jamendo would then easily refute that the composer consented to any alterations of his work by agreeing to clause 3.1.3 of the terms and conditions, which is perfectly legal under Luxembourgish law, according to which the author

²⁹⁹ With the possible exception that the Court might find Art. 21 CODIP to be applicable. This provision specifies that a foreign law which would be contrary to the Belgian *ordre public* may not be applied by Belgian courts. Whether moral rights are to be considered as part of the public order is not clear in Belgium, unlike in France. Still, given the rigid choice of words of the Economic Law Code and the strict inalienability of moral rights, Art. 21 would be a way for Belgian courts to side with the composer, but once again, only for the damages suffered in Belgium.

³⁰⁰ Belgian private international law would find US courts to be competent for global damages. In such a case, no moral right enforcement would be possible at all for the composer. But it must be noted that an exequatur of that decision will not be possible in Belgium if the Belgian court considers the case to be infringing the Belgian *ordre public* (Art. 25 CODIP).

may assign and transfer all or part of his moral rights, provided that no harm is brought on his honor or reputation³⁰¹.

5.5 NECESSITY OF INNOVATION IN THE FIELD OF INTERNATIONAL MORAL RIGHTS

The problem is clear: every State could potentially lead to a different solution. The application of the *lex loci protectionis* prevents the author from ever benefitting from higher protection in other countries³⁰². The existence, the scope and the term of protection will always depend of the applicable law. In the words of R. Xalabarder, “*strict territoriality is especially sensitive to the lack of harmonization in the field of moral rights as well as in the field of limitations*”³⁰³. The immediate consequence of this situation is the extraordinary legal uncertainty regarding international enforcement of moral rights. When the composer uploads a work on the internet, he must accept that against some users, he will never be able to obtain global damages, since those users might be nationals from a country that does not grant such rights to music composers.

A possible proposed solution for this issue would be to render the *lex loci auctoris* applicable to moral rights disputes, thereby ensuring that the scope and extent of the author’s rights are known to him. But some might say that this simply reverts the problem, because this time, it would mean a certain legal uncertainty for the user. However, there is no doubt concerning the fact that it is less troublesome for a user to inquire about the moral rights protection of the author rather than for an author to potentially undergo every existing moral right regime. In today’s world of globalization and pervasive file sharing and file copying, the content creator, who is inevitably utterly passive as to the use made of his creation once it has been uploaded, must be seen as a weak party, therefore justifying the extra protection that we propose. To the people who would insist on the practical difficulties of such an inversion of reasoning, we would point out that on the many online royalty free selling platforms who offer musical content to users, each piece of music is always at least accompanied by the mention of a certain Creative Commons license with a link to the broader explanation of that license. Such an approach would be possible with moral rights too, by giving a short enunciation of the moral rights that still link

³⁰¹ See Art. 11 of the Luxembourgish Law of 18 April 2001 on Copyright, Neighbouring Rights and Databases: « L’auteur peut céder et transmettre tout ou partie de ses droits moraux, pour autant qu’il ne soit pas porté atteinte à son honneur ou à sa réputation » (*Official Journal of the Grand Duchy of Luxembourg*, 30 April 2001). This coincides perfectly with the minimalistic approach of the Berne Convention under which the author can only oppose acts “which would be prejudicial to his honor or reputation”.

³⁰² R. XALABARDER, *op. cit.*, p. 182.

³⁰³ *Ibid.*, p. 180.

the author to his work with a link to a further and more detailed description of what these rights mean.

Note firstly that the solution proposed in this paper only concern international disputes on the *moral* rights of the author, because the management of the economic rights is sufficiently similar in all countries not to need such a drastic reinvention. Secondly, the ideal solution is of course only to be found in an international harmonization of moral rights, since the *lex loci protectionis* and the *lex loci auctoris* lead to an inevitable asymmetry of information between author and user, given the ubiquity of online infringement. The *lex loci auctoris* is simply a more practical alternative to protect the author's rights, but it not our intention to advocate it as the best solution. But the solutions brought by the *lex loci protectionis* in a globalized world still strictly under the yoke of the territoriality principle reflects a cry for innovation of the intellectual property regimes³⁰⁴.

³⁰⁴ R.C. DREYFUSS, *op. cit.*, p. 16. The author outlines 4 possible solutions to this issue: 1) Extra-territorial application of local law (p.19) which coincides with the *lex loci auctoris* principle, 2) Harmonization (p. 21), 3) Criminalization of intellectual property infringements (p. 21). and 4) the facilitation of private ordering (p. 25).

CONCLUSION

The analysis conducted in this paper has pointed out a few important flaws regarding the status of moral rights in our society. Almost a century after their international consecration in the Berne Convention, they are still characterized by enormous disparities amongst the countries around the globe. At first sight, attempts at harmonization (even within the EU) seem impossible, since the civil law and common law philosophies on the matter differ too much. Moreover, harmonization necessarily entails the need to find a common ground, which means that some countries who are very protective of moral rights would have to lower their standards of protection, and it is very unlikely that they would be willing to do so.

Aside from their international irrelevance, moral rights are increasingly more bypassed in practice. This paper took the point of view of film and multimedia composers, but there is no doubt that some of the practices described in the previous chapters (e.g. ghostwriting) are growing in other domains of creation too. One of the causes that have been discussed is the globalization of our societies. As the world gets smaller, composing contracts are more often than not concluded between nationals of different countries, and sometimes to the detriment of the composer's moral concerns. Indeed, applicable law clauses will usually refer to legal systems where moral right protection is *de lege* or *de facto* non-existent. Indeed, we insisted on the fact that waivability of moral rights equals no moral rights protection. Their purpose can only be fulfilled if they are inalienable and unwaivable.

The digital revolution has given works visibility and accessibility like never before. This is reminiscent of the invention of the printing press in the 15th Century, that led to a rebirth of moral rights. This justifies the fact that the concept of moral rights and their legitimacy should be rethought in the light of new, modern principles. Whereas moral rights are traditionally conceived as protecting the author's interests, we proposed that the protection of the public, which is currently a commonly accepted side effect of moral rights, should be emphasized, in order to be in line with the rising general principle of transparency. Music has become a consumption good and moral rights can become a way to ensure authenticity to the public, concerning both the origin and integrity of that good. This shift of the theoretical basis of moral rights would be a way to give this otherwise old-fashioned notion a very current and actual purpose.

A similar reasoning was proposed concerning the right of disclosure in composer contracts, which could be so much more than it presently is. In a purely *de lege ferenda* approach, we tried to make a case for a stronger right of divulgation for the composer, that would have no exceptions, contrarily to what French and Belgian law currently provide in the case of audiovisual works. Such a change would bring about a better balance in the negotiation of composer contracts, but it would also guarantee a legitimate exercise of all other moral rights. As we stated, a unfinished work that is disclosed will rarely bring pride to its author, who will hence not actively assert his paternity. Moreover, since it will reach the public in a way that incompletely represents the author's personality, the integrity right will also be harmed.

Indeed, moral rights provide an incentive to create, which means they are not at odds with the concerns of the film maker, at the very contrary. Furthermore, as the internet has become the playground for many a copyright infringement, moral are also an impetus to compose and publish in this risky – and in a certain way, adverse – environment. This is what partially explains the success of the Creative Commons licensing system, where internet users must respect a few set of rights that are outlined by the composer, some of whom coincide with the subject matter of moral rights (Attribution and No Derivatives licenses). They are in exchange allowed to use those pieces of music for free, in accordance with the license. The increasing popularity of CC among composers testifies to their need for stronger protection of their moral concerns. The open contracts proposed in the form of CC licenses are innovative on an international point of view in the sense that they set a same standard of protection for every creator, which, until now, was unknown territory in the field of moral rights. Even if these licenses are examples of contractual protection of moral concerns, which means that they may not infringe – nor be interpreted in such a way that would be contrary to – official laws and statutes, their importance is nonetheless primarily symbolic.

On the other hand, it would not be unwise to state that the current state of things shows a dichotomy between moral rights and economic rights. The international standard of protection offered by CC licenses comes with a catch: there is no financial gain to be made from them. Conversely, as we have seen, in trying to earn his bread by selling music in the international context, the composer runs the risk to see his moral rights annihilated. Given the existing rules of international jurisdiction – and their interpretation by the CJEU – added to principle of *lex loci protectionis* in an unharmonized field where philosophical backgrounds diverge and where each State, under the principle of territoriality, reigns in its own independent and sovereign way, it comes as no surprise that composers are faced with an enormous legal uncertainty, as to

the very existence of their moral rights. This is especially so in case of extracontractual infringements of moral rights online. The ubiquity of internet allows any person on earth to make use of a piece of music once it has been uploaded, which, from the point of view of the composer, leads to a multiplicity of applicable laws in case of breach. The aforementioned dichotomy between economic and moral rights hence consists in the fact that when you ensure one set of rights (moral), you might lose the other (economic) and vice versa. The only way to bring an end to this issue would be by agreeing to an international harmonization of inalienable and unwaivable moral rights. As this is alas very unlikely, moral rights appear to be doomed to stay – at least in the near future – a fading notion, but yet so full of purpose.

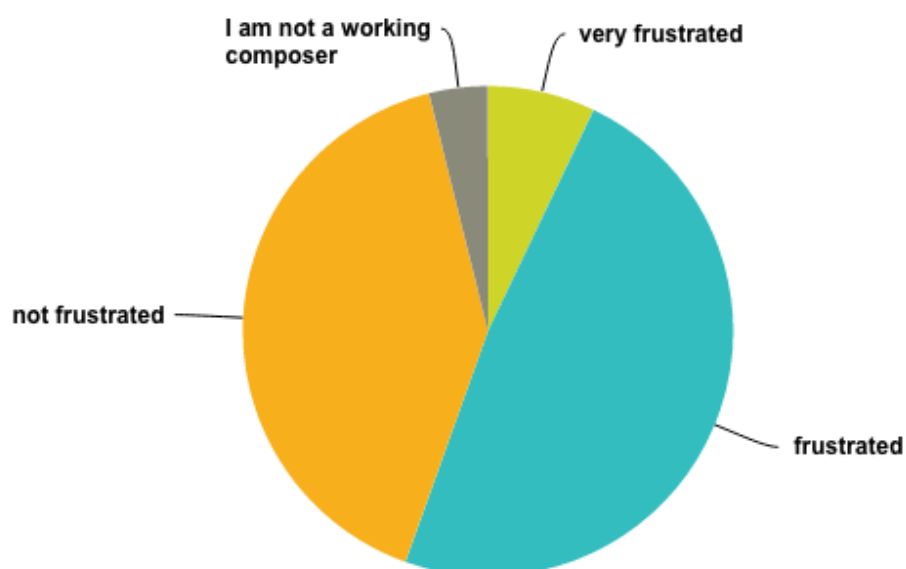
ANNEX

1. SURVEYS

Source: <http://www.denizhughes.com/composersurvey.html>

**In general as a working composer, how
FRUSTRATED are you?**

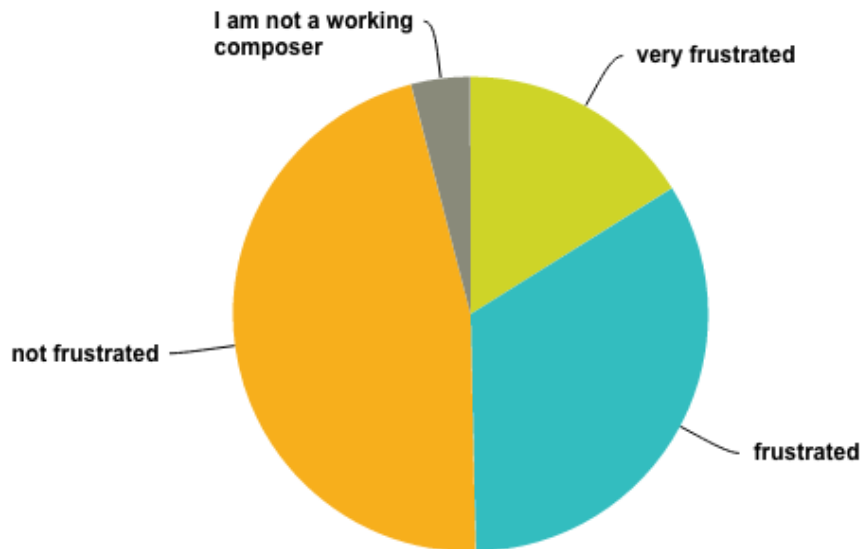
Answered: 155 Skipped: 16



Answer Choices	Responses
very frustrated	7.10% 11
frustrated	48.39% 75
not frustrated	40.65% 63
I am not a working composer	3.87% 6
Total	155

As a working composer in general how FRUSTRATED are you in terms of dealing with a LACK OF TIME to do your work?

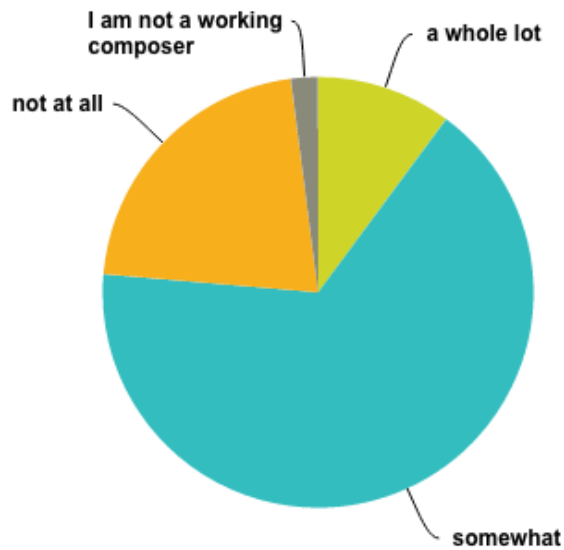
Answered: 149 Skipped: 22



Answer Choices	Responses	
very frustrated	16.11%	24
frustrated	33.56%	50
not frustrated	46.31%	69
I am not a working composer	4.03%	6
Total	149	

Overall how much would you say your musical voice is COMPROMISED by having to deal with that LACK OF TIME?

Answered: 148 Skipped: 23



Answer Choices	Responses	
▼ a whole lot	10.14%	15
▼ somewhat	66.22%	98
▼ not at all	21.62%	32
▼ I am not a working composer	2.03%	3
Total		148

2. CONTRACT CLAUSE

Clause emanating from a Belgian composer agreement (SABAM Template).

article 4: description des droits d'exploitation donnés en licence

Sous réserve d'une observation correcte de toutes les dispositions du présent contrat, le Compositeur accorde en licence exclusive au Producteur les droits d'exploitation audiovisuelle mentionnés ci-après:

4.1 Reproduction

- a. Le droit de produire l'Oeuvre en utilisant tout moyen audiovisuel, des sons et/ou des voix originaux ou doublés, des titres et sous-titres dans toute langue et une postsynchronisation.
- b. Le droit de réaliser en tel nombre qu'il plaira au Producteur des originaux et copies de l'Oeuvre sur n'importe quel support audiovisuel, en utilisant n'importe quel procédé audiovisuel, dans tous les formats et dimensions.
- c. Le droit de (faire) mettre en circulation les supports mentionnés ci-dessus en vue des exploitations déterminées dans les articles 4.2 et 4.3.

4.2 Projection publique, diffusion et transmission

- a. Le droit de projeter publiquement l'Oeuvre intégrale ou des extraits de n'importe quelle façon, dans toute salle.
- b. Le droit de diffuser et de transmettre l'Oeuvre intégrale ou des extraits, payants ou non payants, sur demande individuelle ou non et de n'importe quelle façon (ondes hertziennes, satellite, fibre de verre, câble, Internet, pay per view, (presque) vidéo à la demande, ...).

4.3 Usages secondaires

- a. Le droit de publication ou de reproduction d'éléments de l'Oeuvre (photos, extraits sonores, textes, ...), tout ceci cependant exclusivement en vue de la promotion de l'Oeuvre.
- b. Le droit d'exploiter l'Oeuvre sur vidéogrammes destinés au prêt public ou non, à la location ou à la vente au public.
- d. Le droit de participer avec l'Oeuvre à des bourses, marchés, festivals et concours.

BIBLIOGRAPHY

LEGISLATION

International Treaties

Berne Convention of 9 September 1886, last revised in Stockholm on 14 July 1967.

WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic works* (Paris Act, 1971)

WIPO Copyright Treaty, 1996, adopted in Geneva on 20 December 1996.

EU Law

Regulation 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations.

Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Belgian law

Art. 1174 of the Civil Code.

Act on Author's Rights and Neighbouring Rights of 30 June 1994, *M.B.*, 27 July 1994.

Code of Private International Law, Book XI, *M.B.*, 27 July 2004.

Economic Law Code, Book XI, *M.B.*, 12 June 2014.

Act Project ("Projet de loi") regarding on Author's Rights and Neighbouring Rights and on the private copy of audio- and audiovisual works, Discussion on the articles, *Doc. Parl. Ch.*, extraordinary session, 1993-1994, 473/33 – 91/92, p. 172.

French law

Art. 1304-02 of the Civil Code.

Intellectual Property Code, *Journal Officiel*, 3 July 1992.

German law

Act on Copyright and Related Rights of 9 September 1965, *Federal Law Gazette*, Part I, p. 1273.

Luxembourgish law

Act on Copyright, Neighbouring Rights and Databases of 18 April 2001, *Official Journal of the Grand Duchy of Luxembourg*, 30 April 2001.

Dutch law

Act of 23 September 1912 containing new regulation for copyright, entry into force on 1 November 1912.

UK law

Copyright, Designs and Patents Act of 1988, c. 48.

U.S. Law

Art. 1, al. 8 of the Constitution.

Copyright Act of 1976, Title 17.

Copyright Office, Circular 09.

Lanham Act, 15 U.S. Code, Chapter 22.

Berne Implementation Act of 1988, Section 2, entry into force on 1 March 1989.

DOCTRINE

ADENEY (E.), *The Moral Rights of Authors and Performers. An international and comparative analysis.*, New York, Oxford University Press, 2006.

AUDORE (G.-J.), *Morele rechten en de digitale en online wereld: de noodzaak van een geharmoniseerde bescherming binnen de Europese Unie* Master Thesis, KU Leuven, 2014.

BERNAULT (C.), “La propriété littéraire et artistique appliquée à l’audiovisuel”, *L.G.D.J.*, 2003, p. 157.

CARON (C.), *Droit d’auteur et droits voisins*, Paris, LexisNexis, 2009.

CLÉMENT-FONTAINE (M.), « Creative commons face au droit moral », in BRISON (F.), DUSSOLIER (S.), JANSSENS (M.-C.) (eds.), *Moral rights in the 21st Century : The changing role of the moral rights in an era of information overload*, Ghent, 2015, p. 198 – 207.

COLOMBET (C.), *Propriété littéraire et droits voisins*, Paris, Dalloz, 1994.

DAVIES (G.), GARNETT (K.), *Moral Rights*, London, Sweet & Maxwell, 2010.

DE FREITAS (D.), “The Copyright, Designs and Patents Act 1988 (2)”, *133 Solicitors Journal*, 1989, p. 670.

DE VISSCHER (F.) and MICHAUX (B.), *Précis du droit d’auteur et des droits voisins*, Bruxelles, Bruylant, 2000, p. 145.

De VUYST (B.) en STEUTS (L.), “De notie morele rechten in een internationale, vergelijkende en transnationale context”, *I.R.D.I.*, 2005, p. 8 – 16.

DICKINSON (A.), *The Rome II Regulation : the law applicable to non-contractual obligations*, Oxford, Oxford University Press, 2008.

DIETZ (A.), “Le droit moral de l’auteur (droit civil). Rapport général”, in X, *Le droit moral de l’auteur. The moral right of the author*, ALAI conference, Antwerp, 1993, p. 26.

DREYFUSS (R.C.), “Enforcing Intellectual Property Claims Globally When Rights Are Defined Territorially”, in X., *The internet and the emerging importance of new forms of intellectual property*, Alphen aan den Rijn (Netherlands), Wolters Kluwer, 2016.

DWORKIN (G.), “Moral rights and the common law countries”, *Australian Intellectual Property Journal* 5, 1994, p. 7.

FICSOR (M.), « *The Application of moral rights in the digital era. Introduction* », in BRISON (F.), DUSSOLIER (S.), JANSSENS (M.-C.) (eds.), *Moral rights in the 21st Century : The changing role of the moral rights in an era of information overload*, Ghent, 2015 p. 191.

FORSYTHE (L.M.), KEMP (D.J.), “Creative Commons, for the common good”, *30 U LA Verne L. Rev.*, 2008-2009, p. 348.

GERVAIS (D.), *The TRIPS Agreement : Drafting History and Analysis*, London, Sweet & Maxwell, 2003.

GERVAIS (D.), SCHMITZ (I.), *L'accord sur les ADPIC*, Bruxelles, Larcier, 2010.

GOLDSTEIN (P.), *International Copyright*, Oxford University Press, Oxford, 2001.

GOTZEN (F.), JANSSENS (M.-C.), *Wegwijs in het intellectueel eigendomsrecht*, Brussels, Larcier, 2012.

GRIFFITHS (J.), "Moral rights from a copyright perspective", in BRISON (F.), DUSSOLIER (S.), JANSSENS (M.-C.) (eds.), *Moral rights in the 21st Century : The changing role of the moral rights in an era of information overload*, Ghent, 2015, p. 83.

GROSHEIDE (W.), "Moral Rights", in DERCLAYE (E.) (ed.) *Research Handbook on the Future of EU Copyright*, Cheltenham, Edward Elgar, 2009, p. 242.

HALLORAN (M.), "Film composing agreements: business and legal concerns", 5 *Loy. L.A. Ent. L.J.*, 1985, p. 6.

HENDRICKX (F.), "The Social Status of the Artist: A Moving Picture", in SCHRAGE (E. J. H.), TILLEMANS (B.), DEMARSIN (B.) (eds.), *Art & Law*, Bruges, Die Keure, 2008, p. 103.

JANKOWSKA (M.), "On the implication of the unalienability of the right of authorship on ghostwriting contracts", *Review of comparative law*, vol. XVIII, 2013, p. 79.

JANSSENS (M.-C.), CARLY (M.), « Auteurswet en onderwijs met bijzondere aandacht voor de internetomgeving », *T.O.R.B.*, 2003-2004, liv. 3, p. 171.

JANSSENS (M.-C.), VANHEES (H.), *Auteursrecht @ Internet*, UGA, Kortrijk-Heule, 2011.

KEUSTERMANS (J.), BLOMME (P.), FLAMME (M.), *Auteursrecht. Capita selecta*, Brussels, Larcier, 2015.

KOUMANTOS (G.), « Faut-il avoir peur du droit moral ? », *R.I.D.A.* April 1999, p. 87.

KWALL (R.R.), *The Soul of Creativity, Forging a Moral Rights Law for the United States*, Stanford, Stanford University Press, 2010.

LAURENT (A.), « Les licences non volontaires et l'intérêt général en droit d'auteur [étude de droit comparé] », *I.R. D.I.*, 2010, liv. 2, p. 127.

LAURENT (P.), “Les licences de type ‘open source’ ou ‘open content’ ne se fondent pas sur un ‘droit de destination’”, *I.R. D.I.*, 2008, liv. 2, p. 150.

LUCAS (A.), LUCAS (H. J.), LUCAS-SCHLOETTER (A.), *Traité de la propriété littéraire et artistique*, 4ème éd., Paris, LexisNexis, 2012.

LUCAS-SCHLOETTER (A.), rapport général, in BRISON (F.), DUSSOLIER (S.), JANSSENS (M.-C.) (eds.), *Moral rights in the 21st Century: The changing role of the moral rights in an era of information overload*, Ghent, 2015, p. 50 – 68.

MARKELLOU (M.), *Le contrat d’exploitation d’auteur*, Bruxelles, Larcier, 2012.

MAXWELL (W.), « Moral rights clauses after Barbelivien », *Ent. L. R.*, 2004, p. 122.

MCKHEANIE (J.), “‘IP’ Moral Rights Breaches are Deception Offences, Not Property Offences: Correcting a Category Error”, *Res Publica*, 2016, p. 193 – 207.

MERRYMAN (J.), ELSEN (A.), *Law, Ethics and the Visual Arts*, The Hague, Kluwer Law International, 1987.

MICHAELIDES –NOUARIOS (G.), *Le droit moral de l’auteur. Etude de droit français, de droit comparé et de droit international*, Paris, Rousseau & Cie., 1935.

NISTOR (V.), « L’affaiblissement du caractère inaliénable du droit moral : les conventions de nègre », *Le nouvel Endroit*, 2015, n° 2, p. 121 – 127.

NG (A.), “Copyright and moral norms”, *14 Loy. J. Pub. Int. L.* 57 2012-2013

PERREAU (E.E.H.), « Des droits de la personnalité », *RTD Civ.* 1909, p. 517

RAIZON (H.), *La contractualisation du droit moral de l’auteur*, Thesis, Université d’Avignon et des Pays de Vaucluse, 2014.

ROSENMEIER (M.), « Introduction : droit moral in the past and in the future. Some short reflexions », in BRISON (F.), DUSSOLIER (S.), JANSSENS (M.-C.) (eds.), *Le droit moral au 21^{ème} siècle. Le rôle changeant du droit moral à l’ère de l’informatique surabondante*, Bruxelles, Larcier, 2015, p. 11.

SCHMITZ (S.I.V.), *The Struggle in Online Copyright Enforcement*, Baden-Baden (Germany), Nomos, 2015.

SETTLEMYER (C.H. III), “Between Thought and Possession, Artists’ “Moral Rights” and Public Access to Creative Works”, *Georgetown Law Journal*, 1993, Vol. 81(6), p. 2309.

SHELF (H.L. III), “Moral rights and musicians in the U.S.” *Entertainment, Publishing and the Arts Handbook*, 2003, p. 165.

SIRINELLI (P.), “Aspect des droits moraux dans les nouveaux modes d’utilisation. Rapport général”, in BRISON (F.), DUSSOLIER (S.), JANSSENS (M.-C.) (eds.), *Moral rights in the 21st Century: The changing role of the moral rights in an era of information overload*, Ghent, 2015, p. 151 – 162.

STERLING (J.A.L.), *World Copyright*, London, Sweet & Maxwell, 2008.

STROKES (S.), *Art and Copyright*, Oxford, Hart Publishing, 2012.

STRÖMHOLM (S.), *Le droit moral de l’auteur*, Stockholm, Norstedt, 1967.

STROWEL (A.), *Droit d’auteur et copyright, Divergence et Convergence*, Brussels, Bruylant, 1993.

STROWEL (A.), SALOKANNEL (V. S.), DERCLAYE (E.), *Study contract concerning moral rights in the context of the exploitation of works through digital technology*, Study commissioned by the EU Commission, contract n° ETD/99/B5-3000/E°28, April 2000.

SUNDARA RAJAN (M. T.), “Creative Commons: America’s Moral Rights?”, *Ford. Intell. Prop. Media. E.*, 2011, vol. 21, p. 911.

SUNDARA RAJAN (M. T.), *Moral Rights, Principles, Practice and New Technology*, Oxford, Oxford University Press, 2011.

TORREMAN (P.), “Introduction”, in BRISON (F.), DUSSOLIER (S.), JANSSENS (M.-C.) (eds.), *Moral rights in the 21st Century : The changing role of the moral rights in an era of information overload*, Ghent, 2015, p. 45.

TRIMBLE (M.), “The Multiplicity of Copyright Laws on the Internet”, *Fordham Intell. Prop. Media & Ent. L.J.*, 2015, Vol. XXV, p. 339 – 405.

VALCKE (P.), DUMORTIER (J.), *ICT- en Mediarecht*, Bruges, Die Keure, 2013.

VANHEES (H.), *De wettelijke regeling inzake auteurscontracten*, Mechelen, Kluwer, 2012.

VON LEWINSKI (S.), *International Copyright Law and Policy*, Oxford, Oxford University Press, 2008.

XALABARDER (R.), “Jurisdiction and applicable law issues for the protection of moral rights on-line”, in BRISON (F.), DUSSOLIER (S.), JANSSENS (M.-C.) (eds.), *Moral rights in the 21st Century : The changing role of the moral rights in an era of information overload*, Ghent, 2015, p. 172 – 188.

CASE LAW

Eur. Court of Human Rights

Eur. Court of H.R., *Ashby Donald and others v. France*, January 2013, n° [36769/08](#), available at [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-115845\"\]}](http://hudoc.echr.coe.int/eng#{\).

Eur. Court of H.R., *Neij and Sunde Kolmisoppi v. Sweden*, 19 February 2013, 40397/12, available at [http://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-117513\"\]}](http://hudoc.echr.coe.int/eng#{\).

Court of Justice of the European Union

CJEU, 20 October 1993, joint judgments, C-92/92 and C-326/92, *Phil Collins v. Imtrat and Patricia v. EMI Electrola*.

CJEU, 7 March 1995, C-68/93, *Shevill v. Press Alliance*.

CJEU, 14 December 2000, joint cases C-300/98 and C-392/98, *Dior v. Tuk Consultancy and others and Ascco Gerüste GmbH and others v. Wilhelm Layher GmbH and others*.

CJEU, 12 July 2011, C-523/10, *L’Oreal et al. v. Ebay et al.*

CJEU, 25 October 2011, joined cases C-509/09 and C-161/10, *eDate Advertising v. X and Martinez v. MGN Ltd.*

CJEU, 16 February 2012, C-523/10, *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH*.

CJEU, 13 October 2013, C-170/12, *Pinckney v. KDG Mediatech AG*.

CJEU, 15 January 2015, C-441/13, *Pez Hejduk v. EnergieAgenturNRW GmbH*.

Belgian case law

Brussels, 5 May 2011, *AM* 2012, liv. 2-3, p. 202.

TPI Nivelles, 26 October 2010, *J.L.M.B.* 2011, liv. 16, p. 776.

Civ. Brussels, 11 May 2012, *A.M.*, 2014, p. 105.

French Case law

Cass. fr., 14 March 1900, *D.P.*, 1900, p. 497, *Eden v. Whistler*.

Cass. fr. 28 May 1991, *R.I.D.A.*, n° 1991/149, p. 161, *Huston Case*.

Cass. fr., 5 May 1993, n° 91/13664, *R.I.D.A.*, October 1993, p. 205.

Cass. fr., 13 December 1995, *R.I.D.A.*, 1996, p. 306.

Cass. fr., 28 January 2003, *R.I.D.A.*, 2003, p. 414.

Cass. fr., 30 January 2007, n° 03/12.354, *Lamore v. Universal City Studios Inc.*

Cass. fr., 13 February 2007, *R.I.D.A.*, April 2007, p. 275.

Paris, 31 October 1988, *Cahiers du Droit d'Auteur*, 22 april 1989.

Paris, 4 ch, 7 April 1994, *R.I.D.A.*, 1995, p. 354.

Paris, 25 June 1996, *R.I.D.A.*, 1997, p. 337.

TGI Paris, 24 May 1989, *Carle v. TF1*.

TGI Paris, 23 March 1994, *R.I.D.A.*, 1995, p. 401.

TGI Paris, 27 September 1996, *R.I.D.A.*, 1996, p. 250.

TGI Paris, 5 May 1999, *R.I.D.A.*, 2002, p. 345, *Ophal v. Agence France Presse*.

TGI Paris, 20 May 2008, n° 05/12117, *SAIF v. Google*.

Tri. civ. Seine, 17 August 1814.

UK case law

Donaldson v Becket, 1774, *Brown's Parl. Cases* 129, 1 Eng. Rep. p. 837.

High Court, *Clark v. Associated Newspapers Ltd*, *All ER* (D), 1998, p. 6.

High Court, *Tidy v. Trustees of the Natural History Museum and another*, 39 IPR, 1996, p. 501.

U.S. case law

SCOTUS, 16 May 1932, *Fox Film Corp. v Doyal*, 286 U.S. 123.

SCOTUS, 8 March 1954, *Mazer v. Stein*, 347 U.S. 201.

SCOTUS, 20 May 1985, *Harper Row v. Nation Enterprises*, 471 U.S. 589.

SCOTUS, 2 June 2003, *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 US 23.

U.S. District Court for the Northern District of California, 7 November 2001, 433 F.3d 1199, *Yahoo v. La Ligue contre le racisme et l'antisémitisme*.

Indian Case law

Delhi High Court, 21 February 2005, *Amar Nath Sehgal v. Union of India*, 117 DLT, 2005, p. 717, §24.

INTERNET SOURCES

H. SHARKEY, "Moral rights and the Berne Convention: has the United Kingdom done enough?", article available at http://gulawreview.org/entries/property/moral-rights-and-the-berne-convention-has-the-united-kingdom-done-enough-#_ftn4, 26 October 2014.

STANDLER (R.B.), "Moral Rights of Authors in the USA", article available on M. STANDLER'S website at <http://www.rbs2.com/moral.pdf>, p. 36

A. VON LOON, European Commission, "Follow-up on the Green Paper on Copyright and Related Right in the Information Society", IRIS 1997 1:3/1, available at <http://merlin.obs.coe.int/iris/1997/1/article1.en.html>.

NON LEGAL SOURCES

BOND (J.), *X-Files: Fight the Temp Track*, 1998, available at http://www.filmscoremonthly.com/articles/1998/03_Jun---X_Files_Fight_the_Temp_Track.asp

POZZO (R.), "Immanuel Kant on intellectual property", *Trans/Form/Ação*, 2006, p. 11-18.

FLACH (P.), *Film scoring today – theory, practice and analysis*, Master thesis, University of Bergen, 2012, p. 36.

LEVINE (M.A.), “Why Hans Zimmer got the job you wanted (and you didn’t)”, 2013, column available at <http://www.soundtracksandtrailermusic.com/2013/07/hans-zimmer/>.

BUYDENS (M.), “Le développement de l’idée de l’intangibilité de l’œuvre à partir de la querelle des arts libéraux in BRISON (F.), DUSSOLIER (S.), JANSSENS (M.-C.) (eds.), *Moral rights in the 21st Century : The changing role of the moral rights in an era of information overload*, Ghent, 2015, p. 16.

GRIEVING (T.), “Danny Elfman on scoring ‘The Girl on the Train’: The darker it gets, the happier I get”, *Los Angeles Times*, 6 October 2016, press article available at <http://www.latimes.com/entertainment/movies/la-et-mn-girl-on-the-train-danny-elfman-20160930-snap-story.html>.

ZHOU (T.), “The Marvel Symphonic Universe”, 7 September 2016, available at <https://vimeo.com/181873015>.

BBC Commission Guidelines regarding credits and branding available at <http://www.bbc.co.uk/commissioning/tv/production/articles/credits-branding-trademarks#music>.

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