

**Q282-SGL-C-2022**



**2022 – Study Question**

**Moral Rights**

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## Questions

### I. Current law and practice

#### Definition of moral rights

1) a) *Does your legislation and/or case law regarding copyright recognize moral rights?*

Yes.

b) *Are moral rights recognized outside copyright law?*

Authors' moral rights are recognized under Law no. 633/41, so called Legge sul Diritto d'Autore (Italian Copyright Law - ICL). Performers enjoy moral rights under the same law.

c) *What is the purpose of moral rights (the philosophy behind moral rights), e.g., to protect the work itself, the author, the public, etc.?*

Under the ICL, moral rights protect the personality of the author (not as such but) in connection with the work. Indeed, the relevant provisions of law are grouped under Section II, Chapter III, Title I, titled: "*Protection of rights over the work in defense of the personality of the author (Moral Right of the Author)*".

2) *Are all types of works protected by moral rights or are moral rights restricted and/or excluded for certain categories of works (software, databases, architecture, etc.)?*

All types of works are protected by moral rights, without distinction. See below, under (4).

#### Categories of moral rights

3) *What are the different categories of moral rights, e.g., right of attribution, rights of integrity (distortion or modification), rights of disclosure, rights of withdrawal, right to prevent use in association with a product, service, cause or institution, etc.? Please give a short definition of each category.*

Under the ICL, moral rights comprise the following categories of rights:

**Right of attribution**, i.e. the right to claim authorship of the work. It is disputed whether the right of attribution entails also the right to be mentioned in connection with any use of the work (see Article 20 of the ICL: "*Independently of the exclusive rights of exploitation of the work [...], and even after the transfer of such rights, the author shall retain the right to claim authorship of his work*").

**Right of integrity**, i.e. the right to object to any distortion, mutilation or any other modification of, and other derogatory action in relation to, the work, which would be prejudicial to the author's honour or reputation (see Article 20 of the ICL: *"Independently of the exclusive rights of exploitation of the work [...], and even after the transfer of such rights, the author shall retain [...] the right to object to any distortion, mutilation or any other modification of, and other derogatory action in relation to, the work, which would be prejudicial to his honour or reputation"*). This right is interpreted as covering also use of the work in association with products, services, causes or institutions, to the extent that such association might harm the honor or reputation of the author.

**Right of disclosure**, i.e. the right of the author to reveal his/her identity (see Article 21 of the ICL: *"The author of an anonymous or pseudonymous work shall at all times have the right to reveal his identity and to have his position as author recognized by judicial procedure"*).

**Right of withdrawal**, i.e. the right to withdraw the work from the market (see Article 142 of the ICL: *"Whenever serious moral reasons arise, the author shall be entitled to withdraw his work from the market, subject to liability to compensate any persons who have acquired rights to reproduce, disseminate, perform or sell such work"*).

#### Exception and limitations to moral rights

4) Does your legislation and case law provide exceptions and/or limitations to moral rights, e.g., for specific categories of works, for the exercise of moral rights by author's heirs, in case of minor modifications of a work or in the absence of the name of the author for specific exploitations, in case of abuse of rights, etc.?

As a general rule, the Italian Copyright Law provides for a limitation to the author's right to object to derogatory treatment, where the author has known about and accepted the modifications to his work (Article 22.1).

Further, Italian legislation limits moral rights in respect of works of architecture. Indeed, Article 20.2 of the ICL provides that: *i)* the author of works of architecture may not prevent modifications of his work that may become necessary during the construction process; *ii)* similarly, the author may not object to the modifications that are necessary to be made to the building work after its completion. However, if the work is recognised as having an important artistic character by the competent state authority, the author will be entitled to develop the modifications to be made and supervise their application.

Other provisions of the Italian Copyright Law entitle producers of movies and phonograms, as well as directors of newspapers to make modifications to protected works used as inputs for the creation of movies, phonograms and newspapers, as long as such modifications are needed for the making of the movie, phonogram or newspaper, on the one hand, or concern articles to be published without the name of the author. It is disputed whether such modifications could go as far as to impinge on the right to integrity. .

## Duration of moral rights

### *5) What is the duration of moral rights?*

The Italian legislation does not limit the duration of moral rights. In this regard, Article 23 of the ICL provides that, after the death of the author, the right specified in Article 20 [that is the right to claim authorship of the work and to object to any modification and damage to his honor or reputation] may be asserted, without limitation of time, by his spouse and children and, in the absence thereof, by his parents and other direct ascendants and descendants, by his brothers and sisters and their descendants. If the public interest should so require, such action may also be taken by the Minister of culture.

## Ownership of moral rights

### *6) a) Who is the initial owner of moral rights, e.g., the author, co-authors, investor, publisher, movie producer, etc.?*

The owner of moral rights is the author, intended as the natural person who created the work (Article 6 of the ICL). In the event that a work is created by the indistinguishable and inseparable contribution of several persons, the copyright belongs jointly to all co-authors (Article 10 of the ICL) but the defense of the moral rights can be exercised individually by each co-author.

For audiovisual works authorship is attributed by law only to the authors of the script, screenplay, music, and to the director. They are the only owners of moral rights on the film as such, not limited to their individual contributions.

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

As previously indicated in 6) a), according to Article 6 of the ICL owners of moral right are only natural persons.

An exception seems to be proposed by Article 11 of the ICL which provides that the copyright shall belong to: (i) the State, (ii) the Provinces, (iii) the Municipalities, (iv) the non-profit private legal entity or (v) the Academy and other public cultural bodies if the work is created and published under their name or there is not an agreement with the author.

According to some scholars, the moral rights would belong – from the origin - to the entities listed by the norm. According to a more recent opinion, the natural person is the original owner of all copyrights in the work and the entities mentioned in Article 11 would acquire only the economic rights insofar as the same have been “*created and published under their name and at their expense*”, and therefore in execution of a subordinate or autonomous work contract (with a view to publication).

Recently the Italian Supreme Court, judgement no. 2039/2018, recognized the compensation for non-pecuniary damages to the “Fondazione Vedova” for a case of plagiarism of painting belonging to the same, not as the infringement of moral rights of the painter pursuant to article 20, but as the right to the personal identity and image pertaining to the Fondazione

The Court underlines that legal persons and collective entities are entitled to compensation for non-pecuniary damages when the conduct of other damages the rights of the personality which determines a decrease in the consideration and esteem which the subject enjoys in the social and economic environment to which it belongs. [S1]

*c) Do the circumstances of the creation of the work influence who the initial owner is of moral rights (e.g., work made for hire, collective work, work created by employees, etc.)?*

No. Pursuant to the ICL only the author or the co-authors are the initial owners of the moral rights pursuant to Article 20 and Article 6 independently from the circumstances of the creation of the work.

*d) If the duration of the moral rights exceeds the duration of the author's life, who is the owner of the moral rights after the death of the author/owner?*

Pursuant to Article 23 of the ICL after the death of the author, the right referred to in Article 20 may be asserted, without limitation of time, by his spouse and children and, in the absence thereof, by his parents and other direct ascendants and descendants, and in absence of such ascendants and descendants, by his brothers and sisters and their descendants.

It has to be noted that the above-mentioned persons are not to be considered as the assignees of the author's moral rights, which remain nontransferable.

What they have is a distinct right which has a diminished content, being deprived of the right to withdraw the work from the market (Article 142 ICL), which can only be exercised by the author in person.

Unpublished works can be published by the heirs or legatees of the author unless the author has expressly forbidden publication or has entrusted it to other persons (Article 24 ICL).

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

Rights on anonymous or pseudonymous works can be exercised by the person who has represented, performed or published the work (Article 9). This provision is interpreted as covering also moral rights.

The provisions that have implemented the EU Directive 2012/28/EC “on certain uses of orphan works” and the EU Directive 2019/790 “on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC” expressly carve out the application of rules on anonymous or pseudonymous works (art. 69-*quater*.13 ICL). This means that a

work cannot be considered as orphan just because it has been published anonymously or using a pseudonym. Additionally, it seems to mean that the diligent search for the rightholder, which is a precondition to consider the work as orphan, needs to be (unsuccessfully) performed (also) for the identification and/or location of the person who published the work according to Article 9 ICL.

Privileged institutions (as named by Article 69-*bis*, publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations) must indicate the name of author(s) and of the rightholder(s), if identified, in any use of an orphan work (Article 69-*bis*.4 ICL).

In the case of orphan works Article 23, paragraph 2, of the ICL, which provides that after the death of the author, the right referred to in Article 20 may be asserted, if public purposes required it, by the Ministry of Cultural Heritage and Activities and Tourism (MiBACT), after consulting the qualified trade union, might become of practical relevance.

In both cases, the historical preservation and protection of Europe's cultural heritage should be the "required public purposes".

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

*7) Are the property rights of the owner of a tangible asset integrating a work (painting, sculpture, architecture, etc.) limited by moral rights? For example, do moral rights prevent the owner of a building from updating or destroying it?*

Property rights on tangible assets, on the one hand, and copyright, on the other, enjoy protection under the Italian Constitution. When a conflict between fundamental rights arises, it has to be solved through the application of the principle of the "balancing of interests", to be conducted under a case-by-case analysis.

The Italian jurisprudence dealt with the conflict between the rights of property and the authors' moral rights with reference to works realized in a unique piece (sculptures, paintings etc.) assessing that the right of integrity, recognized by Article 20 of the ICL, can limit the property right for example: i) by imposing the maintenance of the work to prevent its degradation; ii) by imposing to maintain the work in the place where it was located by the author; iii) by impeding modifications and alterations of the work which can harm the author's artistic honor and reputation (see Italian Supreme Court, n. 25510/2010 – "Gardaland case").<sup>1</sup>

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<sup>1</sup> (i) by charging a duty of maintenance in order to keep it in its original state and prevent its deterioration or consumption, AIDA 2005/1057 (on the duty of maintenance and restoration), ii) by preventing its displacement from the place identified for its location (Trib. di Napoli, 9.09.1997 – Trib. Naples 9.10.2002 in Dir. autore 2003, 258; Trib. Bologna 13.10.2014), preventing the detachment of the work from the wall in the case of street art; iii) avoiding modifications or interventions on the work

According to the prevailing opinion, the moral rights should not impede the destruction of the work decided by its owner, principle affirmed in a consistent manner over time (see Italian Supreme Court 2273/1951).

The above-mentioned considerations can apply to the street-art works as well.

### Moral rights and contracts

#### *8) a) Can moral rights be subject of contracts?*

Under the ICL, moral rights are inalienable.

Article 22 of the ICL expressly declares inalienable the right of paternity and the right to the integrity of the work. Moreover, article 142, paragraph 2, states that the right to withdraw the work from the market is personal and not transmissible.

However, in doctrine, a distinction has been made between i) acts of exercise of the right, considered legit, and ii) acts of disposal of the rights, considered prohibited. According to this theory, this last category would include only those contracts whose effect is the loss by the author of the authorship and integrity rights.

#### *b) Can the initial owner of moral rights transfer (e.g., through a contract for valuable consideration or free of charge) these to third parties?*

Moral rights are considered as personality rights and, as such, they cannot be transferred to third parties. See above paragraph a)

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

The ICL does not state on the validity of waivers. It only prevents the author who has knowledge of modifications or alterations to his work which could harm his honor or reputation and accepts them from the exercise of the right to integrity (Article 22.2 of the ICL).

According to a traditional opinion, waivers should be considered as not allowed. However, more recently, some authors have taken position in favour of the validity, in certain cases and under specific conditions, of agreements limiting the exercise of moral rights (such as ghost-writing agreements or *ex-ante* authorizations to use the work in a form which might harm the honor or reputation of the author). Courts, on their parts, have admitted the validity of agreements with which authors waive their right to be named in conjunction with the exploitation of their works, even if the author would still retain the right to publicly reveal his authorship, which would prevail over the waiver (see Italian Supreme Court n. 21831/ 2021).

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{AIDA 2015 1697— case of the reduction of the work of sculpture— Civil Cassation sec. I, 16/12/2010, (ud. 10/06/2010, dep. 16/12/2010), no.25510 / Gardaland case}

Furthermore, it has been submitted that, in the case of open licenses, a more liberal approach to moral rights might be considered, as, in particular, the right to integrity could hamper the freedom of licensees to remix or, at the very least, generate uncertainties and, in turn freezing effects on downstream creators.

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

No.

### Infringement of moral rights

*9) Is infringement of moral rights qualified as is copyright infringement?*

The infringement of moral rights is qualified as a tort, in the same way as the infringement of economic rights. In both cases the infringement does not require intent or fault. Remedies are the same.

*10) What are the conditions for an infringement of moral rights to be recognized, e.g., proof that the infringement violates the honour, reputation, dignity, legitimate interests of the author, etc.?*

Yes, and the right to object to any distortion, mutilation or any other modification of, and other derogatory action in relation to, the work, should be prejudicial to his honour or reputation.

Moreover, under Article 142 of the ICL, the right to withdraw the work from the market is subject to serious moral reasons (e.g. in the event the author's reputation or personality is affected by the persistent presence of the market of the copyrighted work) and the obligation to indemnify those who have acquired the rights to reproduce, disseminate, perform, represent or sell the work itself.

### Moral rights on related rights

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

Yes, Italian Copyright Law acknowledges moral rights also to performers (i.e. actors, singers, musicians, dancers and other persons who represent, sing, recite, recite or perform in any way art-works and also conductor and, in specific occasions, orchestra and choir).

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



Moral rights concerning related rights have a narrower scope compared to moral rights in copyright law.

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

The main differences are as follows:

- i) The right to withdraw the work from the market is not provided;
- ii) Only performers that have primary role in the work or dramatic, literary, or musical composition have the right to be mentioned in connection with the exploitation of the work. Additionally, it is disputed (as in the case of the corresponding right of authors) whether such right is economic or moral in nature;
- iii) The law does not expressly provide for a protection of moral rights after the death of the performer (however, Article 85 of the ICL regulates the duration of performers' rights without distinctions between economic and moral rights; and Article 5(2) WPPT implies they have the same duration);
- iv) The law does not declare performers' moral rights inalienable.

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

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

Generally, our law and practice seem adequate. Minor improvements will be explained in the following.

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

- a) the definition of moral rights*
- b) categories of moral rights*
- c) exceptions and limitations to moral rights*

Limitations of moral rights could be considered in relation to new categories of "useful" works to which copyright protection has been extended over the years (e.g., software, databases, designs). An extension of provisions currently applicable to architectural works (see above) could be a handy solution.

- d) the duration of moral rights*
- e) ownership of moral rights*
- f) moral rights and the owner of the tangible asset integrating the work*
- g) moral rights and contracts*

Provisions on moral rights could be amended to make it possible for the author to opt for open licenses which presuppose a waiver of the right to integrity and attribution (i.e., along the “dedication to the public domain” model designed by Creative Commons Zero licenses).

- h) the regime of moral rights*
- i) infringement of moral rights*
- j) moral rights and related rights*

*14) Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?*

No.

### **III. Proposals for harmonization**

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

*15) Do you believe that there should be harmonisation in relation to moral rights? Please answer YES or NO.*

The Berne Convention already provides for a minimal harmonization in the field of moral rights. It seems to our group that a broader implementation of this provision would lead to a sufficient level of uniformity worldwide. Considering the strong connection between moral rights and national/regional conceptions regarding the foundations of copyright, further harmonization does not seem to be required or advisable. Particularly so considering that differences in national laws have not proved so far particularly problematic in view of the cross-border circulation of copyrighted works.

*If YES, please respond to the following questions without regard to your Group's current law or practice.*

*Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.*

#### Definition of moral rights

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

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

Yes, in copyright law.

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

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

Yes, although limitations on moral rights should apply to certain categories of works (i.e. architectural works, useful works).

### Categories of moral rights

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

- right of attribution (i.e., right to oppose to any misattribution of the work)
- right of integrity (i.e., right to oppose use of the work in a manner which would be prejudicial to the author's honor or reputation)
- right of disclosure
- right of withdrawal (ci pensiamo)
- right to prevent use in association with a product, service, cause or institution (so long national law consider these cases under the right to integrity, which in our view provides an equilibrate solution – i.e., no protection without prejudice to the author's honor or reputation – and general laws protecting the author's or artist's personality offer adequate protection)
- other, namely .....

### Exception and limitations to moral rights

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

Yes.

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

- for specific categories of works, namely cinematographic and audiovisual works, architectural works, useful works (e.g., software, databases, industrial designs)
- in case of minor modifications of the work
- in case of abuse of rights
- depending on the owner of moral rights (author, investor, employer, author's

heirs, etc.)

other, namely .....

### Duration of moral rights

20) *What should be the duration of moral rights?*

We believe the solution currently adopted by our national law (see above, answer no. 5) offers an equilibrate solution.

### Ownership of moral rights

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

The author.

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

No.

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

No.

d) *If the duration of the moral rights exceeds the duration of the author's life, who should be the owner of the moral rights after the death of the author/owner?*

See above (answer no. 20).

e) *Who should be the owner of moral rights of orphan works?*

The author, but the person responsible of the publication of the work should be entitled to exercise the rights on behalf of the author.

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

22) *Should the property rights of the owner of a tangible asset integrating a work (painting, sculpture, architecture, etc.) be limited by moral rights? Please answer YES or NO. If YES, please explain how.*

Generally, the owner of the tangible asset integrating the work should not be entitled to destroy the work. If the work has been created in violation of the right to property of the owner of the tangible asset (i.e., in the case of graffiti), the latter should be entitled to remove the work at the expenses of the author, if possible, or to destroy it, if not possible. In any case, information about the work to be removed or destroyed need to be produced and entrusted to an institution responsible for the conservation of cultural heritage.

### Moral rights and contracts

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

Yes.

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

No.

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

Yes, in specific cases (i.e., ghost-writing agreements; modifications to the work which have been agreed upon by the author).

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

No, meaning that waivers or renounces should be allowed only within the boundaries established by the law, which, in this sense, should not be considered as overridable by will of the parties.

### Infringement of moral rights

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

Yes.

*25) What should be the conditions for an infringement of moral rights to be recognised?*

It depends on the moral right exercised by the author (i.e., in the case of the right to integrity, the author should demonstrate that the modifications to his work can damage his honor or reputation).

#### Moral rights on related rights

*26) a) Should related rights law recognize moral rights, for example for performers? Please answer YES or NO.*

Yes.

*b) If YES, should moral rights in related rights laws be identical to moral rights in copyright law?*

Yes.

#### Other

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

None.

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

None.