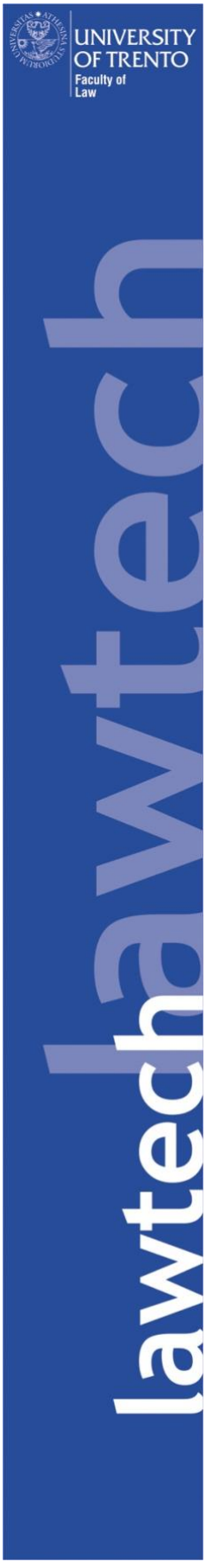

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Experimenting with EU Moral Rights Harmonisation and Works of Visual Arts: Dream or Nightmare?

Giulia Dore |November/2023

ABSTRACT

Moral rights have always faced some challenge in copyright law. Some jurisdictions protect them fiercely, others oppose the frailest safeguard to find a compromise with the international mandate. In the EU, moral rights are not harmonised, nor the European legislator has provided any explicit rules for their protection. Even so, the possibility of harmonising moral rights has never been barred and neither have lacked attempts to explore the opportunity of a future harmonisation. The conventional emphasis on the different approaches to moral rights between civil law and common law countries, which has often been brought to justify the reluctance towards harmonisation, is barely acceptable. New attention to moral rights is prompted by the implications of the digital and post-digital revolutions and elicited by copyright exceptions – as the EU case law seems to suggest, whose harmonisation has always been desirable. Nevertheless, harmonisation should not come at all cost, and this is particularly accurate about moral rights. It seems indeed fair to envision a flexible and differentiated approach, which the present study wishes to investigate, exploring a focused application of moral rights to a single area of copyright or subject matter. For this experiment, only works of visual arts will be considered, which the EU legislator has already addressed via the contentious directive 2001/84/CE (droit de suite). The prospective results of such testing are compared with the evidence suggested by the analysis of the peculiar U.S. moral rights coverage under the Visual Artists Rights Act (VARA) during the first thirty years since its enactment. A provocative proposal that however is not the sole solution, as explained throughout the work.

CONTENTS

KEYWORDS

Moral rights –Copyright – Harmonisation – EU – Visual arts

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Experimenting with EU Moral Rights Harmonisation and Works of Visual Arts: Dream or Nightmare?[1]

Giulia Dore

1. Introduction

Moral rights have always faced challenges in copyright law, despite the shared assumption that they underpin the special relationship between authors and their intellectual works. Against the mandatory but also discretionary international backdrop of the Berne Convention for the Protection of Literary and Artistic Works (Berne),[2] some jurisdictions protect them fiercely, others oppose the frailest safeguard to find a compromise with the international mandate.

The conventional emphasis on the different approaches to moral rights between civil law and common law countries, often brought to justify the reluctance towards harmonisation, is barely acceptable. Even more disputable is purporting an unfeasible divergence between the economic façade of copyright and its moral dimension, as both have pecuniary and personal implications. Furthermore, new attention to moral rights is prompted by the implications of the digital and post-digital revolutions that make works more available but exposed, facilitating their cross-border use and alterations.

In the EU, moral rights are not harmonised, and the legislature has not provided any explicit rules for their protection. Even so, the possibility of harmonising has never been barred and has not lacked attempts to explore such an opportunity. Nevertheless, harmonisation should not come at all costs, and this is particularly accurate about moral rights. It may be indeed envisioned as a flexible and differentiated approach, which this chapter aims to discuss through the exploration of a focused application of moral rights to a single subject matter: works of visual arts. This does not imply that EU harmonisation should be rigidly confined to artistic works, but it helps give it a more concrete dimension and confidently reduce the

[1] The present paper is the Author's Accepted Manuscript (AAM) of a chapter in the forthcoming publication: P. Mezei, H. Travis, A. Pogácsás (eds.), *Harmonizing Intellectual Property Law for a Trans-Atlantic Knowledge Economy*, Brill, 2023.

[2] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, Berne, effective 5 December 1887. Revised in 1908 (Berlin), 1914 (Berne), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm), 1971 (Paris), 1979.

estrangement of an abrupt harmonising action, while opening the stage for future broader reform.

The choice of confining this experiment to visual arts is suggested by the peculiar nature of the subject matter in question, especially keen to moral rights protection and highly impacted by technology. It is additionally hinted by the argument that the EU legislator has already harmonised on works of visual arts through the yet contentious directive 2001/84/CE that introduced the *droit de suite*. It is also inspired by a comparative analysis of the US moral rights coverage under the Visual Artists Rights Act of 1990 (VARA),[3] which allowed a special moral rights treatment to visual arts.

The chapter proceeds at it follows. First, it illustrates the international framework and focuses on the United Kingdom and the United States, which varyingly protect moral rights. Then, it gives a narrower depiction of the European landscape that accentuates the main similarities and divergencies across the laws of three chosen Member States (MS): France, Germany and Italy. The analysis is later devoted to the two-fold approach towards moral rights in the EU: the hesitancy towards harmonising moral rights in absence of specific evidence to support an urgent normative intervention, and the growing perception that the fragmentation of national rules on moral rights, coupled with technological advancement, adversely affects the internal market. Upholding the latter, the chapter engages with a hypothetical narrow application of moral rights harmonisation in the arts, foreseeing the opportunity for a subsequent meticulous evidence-based analysis.

2. The international framework for moral rights – from putative disparity to pursued harmonisation

Notwithstanding the profuse debate over the genesis of moral rights,[4] it is undisputed that international norms provide a clear, although partial, frame. Berne (in its 1928 revision) was the first legal instrument, under art 6bis, to impose on signatory states the obligation to offer moral rights protection. It was then followed by international covenants such as the Universal Declaration of Human Rights (UDHR) and the International

[3] Visual Artists Rights Act of 1990, 17 USC s 106A (Visual Artists Rights Act).
[4] To only cite few: JC Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', (1990) 64 Tul. L. Rev. 991; R. Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain 1695 -1775* (Hart 2004); E Adeney, *The Moral Rights of Authors and Performers* (OUP 2006); L Moscati, 'Origins, Evolution and Comparison of Moral Rights between Civil and Common Law Systems', (2021) 32(1) Eur. Bus. Law Rev 25.

Covenant on Economic, Social and Cultural Rights (ICESCR),[5] both acknowledging the universal right of authors to enjoy protection of moral and material interests, the WIPO Copyright Treaty (WTC),[6] requiring compliance with the substantive rights of Berne,[7] and the WIPO Performances and Phonograms Treaty (WPPT),[8] introducing the rights of attribution and integrity for performers.

Berne imposes a minimum framework for protection, where only two moral rights are mandatory: the right of attribution, i.e. "to claim authorship of the work"; and the right of integrity, i.e. "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 [the author's] honor or reputation". It leaves states free to define their national application but also to provide for additional rights. This principled approach results in fragmented national implementations, which supersedes the classical civil vs common law divide, with some countries providing broader and stronger measures to protect moral interests (e.g. expanding the duration of the rights or complementing the two principal rights with others) and some countries limiting the duration and/or the scope of the two mandatory rights.[9]

Prospects of normative reform on a global scale have been advanced,[10] leveraging on the urgency to address the technological and digital challenges that affect moral rights,[11] on a par with and even more pressingly than economic rights. This approach descends from the argument that moral rights protect a much wider spectrum of interests that, going beyond the individual personality right of the author, benefit

[5] A reasonable international basis for moral rights protection is in fact to be found in art 27.2 of the Universal Declaration of Human Rights (UDHR), and art 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), UDHR (adopted 10 December 1948) UNGA Res 217 A(III); ICESCR (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI).

[6] WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002).

[7] WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002).

[8] WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 20 May 2002).

[9] Domestic constraints can be so blatant to hint a non-compliance with the international mandate, eg UK and US.

[10] More recently, G Ghidini and L Moscati, 'Diritti morali degli autori nella convenzione di Berna: Una prospettiva sostanziale' (2021) 2 Riv. dir. commerciale 193.

[11] E. Schéré, 'Where is the Morality? Moral Rights in International Intellectual Property and Trade Law' (2018) 41 *Fordham Int. Law J*. 773, 782, who notes how the lack of uniform international rules, paired with the vagueness on choice of law, is a problem that is likely to grow with technology.

the public interest at large,[12] e.g. suggesting that moral rights constitute an imperative instrument to preserve human creativity in the digital era,[13] reaffirms the cultural significance of copyright and safeguards cultural property and heritage.[14]

Overall, the main differences in national moral rights concern the type and scope of rights, their terms of protection and their enforceability. Examining the assortment of mainly the first two features, it is worth commencing with the UK, once an EU MS, and the US. Then, it will follow a brief overview of three main exemplary MS: France, Germany and Italy.

It is generally accepted that, at least concerning their autonomous and extensive protection, moral rights have traditionally been a privilege of civil law countries. Common law countries mostly remained tangled with the economic facets of copyright, cautiously refuting any sentimental involvement with personality in the creative process. What is rather irrefutable is the traditional absence of a moral rights doctrine, which is also mirrored in favouring domestic enactments of acceptable principled norms of conventional international law.[15] Nevertheless, it is likewise indisputable a constant interest in moral rights.[16]

Before the enactment of the Statute of Anne, some endeavours to recognise the non-economic rights of the author might have indeed found grounds in

[12] JC Ginsburg, 'Moral Rights in a Common Law System', (1990) 1 Ent. L. Rev. 121, 122, who convincingly argues that granting moral rights protection 'send a message that society cares about creation, and about authorship'.

[13] In these specific terms, see arguments by MT Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (1st end, 2011) 28; MT Sundara Rajan, 'Moral Rights in the Digital Age: New Possibilities for the Democratisation of Culture' (2002) 16(2) Int'l Rev L, Computers & Tech 187.

[14] EM Brooks, 'Tilted Justice: Site-Specific Art and Moral Rights after U.S. Adherence to the Berne Convention', (1989) 77(6) Calif. Law Rev. 1431, 1434; MT Sundara Rajan, 'Moral Rights and the Protection of Cultural Heritage: *Amar Nath Sehgal v Union of India*' (2001) 10(1) Int'l J Cult Prop 79.

[15] While in the European continent moral copyright had been firmly accepted since the first decades of the 20th century, countries such as the UK and the US, were decidedly reluctant to follow this approach, mainly due to the different copyright justifying foundation: the needs and priorities were traditionally more pragmatic and the general mistrust of international legislation. Cf *Adeney (n 3) 282.*

[16] Among many: MA Roeder, 'The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators', (1940) 53 Harv. L. Rev. 554; AS Katz, 'The Doctrine of Moral Right and American Copyright Law--A Proposal', (1951) 24 S. Cal. L. Rev. 375; CP Rigamonti, Deconstructing Moral Rights, (1985) 47 Harv. INT'L L.J. 353; EJ Damich, 'The Right of Personality: A Common Law Basis for the Protection of the Moral Rights of Authors' (1998) 23 Geo L Rev 1; L Zemer, 'Moral Rights: Limited Edition' (2011) 91(4) Bost ULR 1519.

preceding normative acts[17] or in case law,[18] although the judiciary has conversely contradicted this conclusion by explicitly fading the relevance of moral rights.[19] It is therefore largely accepted that moral rights in UK law were introduces only in late 1980s following the Berne ratification in 1982.

It should be noted that the UK already stood out while being an EU MS for its cautious, if not skeptical,[20] approach to moral rights under the Copyright, Designs and Patents Act 1988 (CDPA)[21] by excluding some types of works (e.g. computer-generated works) from the scope of protection,[22] demanding authors to explicitly assert their rights, and relying on waivers to such rights.[23] On top of these precincts, the UK qualifies moral rights violation as a breach of statutory duty rather than technically a copyright infringement[24] and equates the term of protection to the duration of economic rights. It is also accepted that the protection of moral rights has followed other legal instruments, i.e. contracts and torts.

3. The US 'visual' approach to moral rights – a matter of convenience

The US has traditionally revealed similar, if not more pronounced, adversity to moral rights as such, excluding the sporadic initiatives of some

[17] The Engraving Act 1735, protecting the artist's reputation, and the Fine Arts Copyright Act 1862, the precursor of modern legislation on false attribution of authorship.
[18] See *Pope v Curll* [1741] 2 Atk 342, 26 ER 608 (Ch) and later *Millar v Taylor* [1769] EngR 44, [1769] 4 Burr 2303, [1769] 98 ER 201 attempting to recognize a common law right of the author originating from act of creation.
[19] *Donaldson v Becket* [1774] 2 Bro PC 129, [1774] 1 ER 837, held instead that it was only a matter of statute.
[20] I Stamatoudi, 'Moral rights of authors in England: the missing emphasis on the role of creators' (1997) 4 IPQ 478, 512, who explained the lack of enthusiasm as unavoidably due to the prominence of utilitarian concepts.
[21] The Copyright, Designs and Patents Act 1988 (CDPA) <www.legislation.gov.uk/ukpga/1988/48/contents>.
[22] *R Durie*, '*Moral rights and the English business community*' (*1991*) *Ent*. L. R. 42, 49, emphasizing how this unavoidably limit the effects of moral rights protection.
[23] It is debatable whether such a requirement is meant as the instrument to claim the right and thus seek redress in case of infringement or if it should be seen more like a formality that Berne bans. Cf JC Ginsburg (n 6) 198, who described the UK "a poor model for common law countries" given the "peculiar, not to say perverse reading of Art. 6bis Berne" (referring to the assertion requirement).
[24] There does not seem to be a formal impediment to bringing autonomous action for infringement of the moral right, although often, in practice, the claims of breach of statutory duty are brought together with claims of copyright infringement. As in *Sullivan (aka Soloman) v Bristol Film Studios Ltd* [2012] EWCA Civ 570, [2012] WLR (D) 145. Cf G Dore, 'Plagiarism as an Axiom of Legal Similarity: A Critical and Interdisciplinary Study of the Italian Author's Right and the UK Copyright Systems on the Moral Right of Attribution' (PhD thesis, University of Trento, 2015) 154 <http://eprints-phd.biblio.unitn.it/1437/>

state laws.[25] This may be arguably linked to a notion of copyright ownership that is essentially patrimonial in nature, the tendency to eschew the concept of personal creative authorship underlining the centrality of the freedom of contract, and the persistent belief that such personal rights are protected under other legal grounds.[26] However, even in the backdrop of classical rhetoric underlining the justification of copyright as an incentive, nothing excludes that moral rights share the same goal to incentivise the author's creation,[27] regardless of the lack of exact codification in statutory law.[28]

VARA is the first instrument to afford statutory protection of moral rights in US copyright. With the UK law, it shares a limitation *ratione materiae,* and an overall distinction with patrimonial rights[29] e.g. in terms of duration and means of redress. Yet, it goes even further by admitting protection only to a work of visual art and merely for the rights of attribution and of integrity.[30] Regardless of the difficulty in determining whether an object is a work of visual art, as proved by case law, *the* meticulous statutory definition offers some indication of what can be exclusively protected under moral rights.[31] While the right of attribution strictly follows the Berne formula, i.e. the right to claim authorship, the integrity right is more articulated and comprises the right to (a) "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to [the author's] honor or reputation", and to (b) "prevent any destruction of a work of recognized stature".[32]

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[25] EJ Damich, 'Moral Rights in the United States and Article 6nis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, (1986) 10 Colum.-Vla J.L. & Arts 655, convinced that moral rights were 'not protected in any meaningful sense' (at 661).
[26] G Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' (1995) 19 Colum-VLA J L & Arts 229, 251.
[27] JC Ginsburg (n 6), 122, uttering that 'moral rights are about society's commitment to the person'.
[28] RR Kwall, 'The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43 (A)' (2002) 77 Wash L Rev 989; RR Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford Law Books 2010) 142–43.
[29] See definition under the Copyright Act of 1976, 17 USC s 101 (US Copyright Act).
[30] *Leicester v Warner Bros*, 232 F 3d 1212 (9th Cir 2000).
[31] Its limited latitude expressly excludes works such as posters, maps, globes, charts, technical drawings, diagrams, models, applied art, motion pictures or other audiovisual work, merchandising items or advertising, promotional, and most relevantly, any work made for hire. US Copyright Act, s 101.
[32] US Copyright Act, s 106A.

Since VARA was enacted and even before it, when the non-compliance with Berne was examined,[33] the debate over the moral rights statutory framework continued to develop.[34] Such debate not only considers the opportunity to expand the scope of moral rights protection beyond works of art but also questions the actual sustainability of the current VARA legislation, which has been challenged by case law in many ways.[35] Reference is made to the *Wildflowers* case, in which, although considering a floral arrangement as a sculpture and painting and thus being a work of visual art, the court rejected the claim of moral rights for not meeting the copyright originality standard and, as it was a piece of site-specific art, for being categorically excluded from VARA protection.[36] Of different outcome has been the popular *5Pointz* saga, which found in favour of the artists whose graffiti was destroyed by the developer by acknowledging their recognised stature that protected them from destruction.[37] These cases, among others, questioned the stringent and controversial requirements of VARA, including the meaning of a work of visual art, the fittingness of site-specific art, the significance of the parameter of recognised stature.[38] Future cases may also question the role of the fair use doctrine as an explicit limitation against an arbitrary expansion of moral rights over other interests, e.g. freedom of expression.[39]

The reverberation that such cases had inside and outside the artistic community has possibly played an important role in the recent interest of policymakers. After a long-awaited public consultation, the US Copyright Office (USCO) published in 2019 the first systematic review of the moral rights regime following VARA. Acknowledging the limited attention that moral rights had received in policy terms and admitting the complexity and the fragmentation of the moral right overall frame – as a mixture of VARA,

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[33] Academic debate included the opportunity of extending moral rights to all subject matters. Cf JC Ginsburg (n 6), 126-127.

[34] See e.g. DS Ciolino, 'Rethinking the Compatibility of Moral Rights and Fair Use', (1997) 54 Wash. & Lee L. Rev. 33; JC Ginsburg, 'Have *Moral Rights Come* of (*Digital*) *Age* in the *United States*?', (2001) *19 Cardozo*. *Arts* & *Ent*. *L.J. 9*.

[35] An earlier illustration is found in Brooks (n 12), 1433, while a more recent recount in CYN *Smith, 'Creative Destruction*: Copyright's Fair Use Doctrine and the Moral Right of Integrity', (2020) 47 Pepp. L. Rev. 601, 607

[36] *Kelley v Chicago Park Dist*, No 04 C 7715, Slip Op (ND Ill Sept 29, 2007) (Coar, J), conf. in *Kelley v Chicago Park Dist*, 635 F3d 290 (7th Cir 2011); cf *Phillips v Pembroke Real Estate, Inc*, 459 F3d 128 (1st Cir 2006).

[37] *Castillo v G&M Realty LP*, 950 F3d 155 (2d Cir 2020); *Cohen v G&M Realty LP*, 320 F Supp 3d 421 (EDNY 2018).

[38] These issues are well discussed in E Bonadio, 'Graffiti Gets VARA Protection: The 5Pointz Case' (2018) 40(6) EIPR 409; E Bonadio, *The Cambridge Handbook of Copyright in Street Art and Graffiti* (CUP 2019).

[39] Smith (n 34) 607, who notes that, although no cases have been so far adjudicated, it will become essential to clarify the applicability of the four fair use (US Copyright Act s 107) factors.

state laws, trademark regulation and contracts – the report concluded there was insufficient evidence to support "a blanket moral rights statute".[40] In other words, while confirming the appropriateness of confining moral rights to works of visual arts, but it foresaw a few possible improvements in the VARA legislation and, more broadly, in the current moral rights regime.[41]

To some extent, the USCO initiative signalled a major turnover in the broader US discussion on moral rights, once mainly populated by scholars, authors and artists. It also prompted policymakers to assess the prospect of broader copyright reform. The outcome is rather interesting for this instant analysis: it encourages confronting the fragmented European moral rights system and foresees a narrower tentative action of harmonisation.

4. Moral rights in Europe – one look into the past and one into the future

The origins of the moral rights doctrine in continental Europe, far before its statutory implementation, are undisputed, and there is abundant literature dwelling on its articulated historical development.[42] Nevertheless, the discretionary nature of the discipline features the European context, where moral rights are still not harmonised and mandatory international standards are subject to lop-sided application. The diversity of regulatory approaches in the various MS depends on the territorial nature of copyright but is also linked to the coexistence of civil and common law legal traditions and different justificative theories.

It is arduous to describe all MS in this regard.[43] Accordingly, only three countries are here illustrated, chosen for their historic role in shaping the moral rights doctrine, deliberately regarding the right of integrity in the context of visual arts. They represent a sample of what an encompassing analysis of all MS would reveal, suggesting that even the seemingly slenderest differences can turn out to be considerable at the operational level, due to the distinctive of judicial interpretation, e.g. in terms of

[40] The US Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* (No 763, 23 April 2019) 36 <www.copyright.gov/policy/moralrights/full-report.pdf>

[41] Ivi 38.

[42] See supra note 15.

[43] This is to be deferred to further research, which shall consider all the legal formants, such as legislation, case law and doctrine, in all the different languages in the backdrop of diverse legal traditions. A primer of this articulated analysis can be found in MC Janssens, A Gorbatyuk and S Pajares Rivas, 'Deliverable 2.1: Mapping of the relevant European IP legal framework' (Zenodo 2021) <https://doi.org/10.5281/zenodo.5141439> 89 ss.

duration, scope of protection, conditions for exercising the protected rights.

Allegorically speaking, France is considered the mother of moral rights.[44] Since its earliest legislation, as with the laws of 1874 and 1895 providing for criminal sanctions in the case of usurpation of the author's name, France aimed to protect moral rights not merely against the person of the author but also the public interest. Legislative recognition of moral rights did not occur until 1964, although they were already subject to considerable attention by doctrine and jurisprudence.[45] Later, after the 1992 reform, the subject of intellectual property was codified and progressively updated, reserving protection for moral rights in the various fields of application.[46]

Current French law protects the moral rights of first publication or disclosure, attribution, integrity and withdrawal. For the most, they are personal rights that only are the entitlement of the human author, perpetual, non-transferable, imprescriptible,[47] and in theory not waivable.[48] However, there is no absolute understanding of the meaning and scope of such rights. In the artistic milieu, in particular, modifications prohibited by law and French courts have variably interpreted the right of integrity, e.g. confining it to material modifications that threaten the artist's honour and reputation,[49] safeguarding the right of the work's owner to destroy the work,[50] or sanctioning the destruction of the work as a violation of the right of integrity when it can be proved it is brutal, abusive (of the right of domanial property) and disproportionate.[51]

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[44] Adeney (n 3) 165 ss.

[45] Loi n° 64-689 du 8 juillet 1964 sur l'application du principe de réciprocité en matière de protection du droit d'auteur. On the historical development of French law, see R Sarraute, 'Current theory on the Moral Right of Authors and Artists Under French Law', (1968) 16(4) Am. J. Comp. L. 465.

[46] Loi n° 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle (partie législative) <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000357475?>

[47] *Code de la propriété intellectuelle* (Légifrance). Version modifiée par Loi n° 2006-961 du 1 août 2006 - art 31 JORF 3 août 2006 <www.legifrance.gouv.fr/WAspad/UnCode?code=CPROINTL.rcv>, art L121-1 CPI.

[48] Brooks (n 12), 1438 telling courts may enforce contracts allowing alterations if 'with the spirit of the work'.

[49] Cour d'appel, Versailles, chambre 1, 20 Décembre 2001 (2002) 192 RIDA 448, Pontoreau, ADACP c. AFN.

[50] Cour de Paris, 27 April 1934, D. Jur. 1934, 385, *Lacasse* et Welcome *c. Abbé Quénard*.

[51] Conseil d'état, 3 april 1936, Recucil Periodique et critique III, 37. More recently, Cour d'appel, Paris, Pôle 5, chambre 2, 2 Décembre 2016, n. 16/04867.

Of similar sensibility was Germany, whose philosophical elaborations have contributed to shaping the doctrine of moral rights and found legislative enactment since the laws of 1870 and later 1901, expressly imposing the obligation to indicate the author's name both in simple quotations and in reproductions of works.[52] The German legal system has some elements in common with the French system but also a certain degree of demarcation. The recognition of the moral right, expressly defined as a personality right (*Urheberpersönlichkeitsrecht*), protects the intellectual and personal relationship of the author with the work and the use or exploitation of the work. It protects both the moral and the patrimonial dimension of copyright,[53] which stays with the traditional German monistic theory of copyright as a unitary personality right.[54]

The in-force reference legislation is the *Urheberrechtsgesetz.*[55] The equation of the term of protection (not perpetual as in the French model) and the explicit possibility of waiver are important aspects of differentiation. Analogously interesting is the narrow interpretation of moral rights, especially the right of integrity in its artistic application. As recently confirmed by the Federal Supreme court in the matters of destroyed artistic works, although being explicitly referred to as a work impairment refuted by law, the integrity right must be balanced with other property rights and public policy, which are likely to prevail over the personal interests of the artist.[56]

The third model to consider is Italy for its unique involvement in the *travaux* leading to the enactment of art 6bis.[57] Historically, different statutes offer copyright protection long before Berne.[58] It is the law of 1925

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[52] *Gesetz, betreffend das Urheberrecht an Werken der Literatur und der Tonkunst* (LUG), 1901. Cf *Allfeld*, *Philipp*. *Das Urheberrecht an Werken der Literatur und der Tonkunst*, *2* (Auflage 1928).

[53] § 11 *Urheberrechtsgesetz*.

[54] On copyright theories, with explicit analysis of the German debate, see C Sganga, *Propertising Copyright. History, Challenges and Opportunities* (E Elgar 2018) 32, 38–42.

[55] *Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)*, vom 9. September 1965 (*BGBl. I S. 1273*) <www.gesetze-im-internet.de/urhg/BJNR012730965.html>.

[56] German Federal Supreme Court (BGH) of 21 *February 2019: I ZR 98/17,* <https://oj.is/2170418>; I ZR 99/17 <https://oj.is/2170419>; *I ZR 15/18* <https://oj.is/2170417>.

[57] L Moscati, *I diritti morali e la Conferenza di Roma del 1928 per la revisione della Convenzione di Berna, in Quaderni fiorentini per la storia del pensiero giuridico moderno* (2015) 465, who recounts how the provision was strenuously defended by the Italian representation.

[58] From the Cisalpine law of 1801, the Sardinian (Albertine) code of 1837, the Austro-Sardinian convention of 1840, which is deemed as the first systematic law on copyright; the law of 1865 after the country's unification, and the following

that expressly recognised, largely embracing the dualistic theory, the existence of moral rights as different and supplementary to economic rights.[59] A law that strengthened the position of Italy during the Berne revision in 1928 purported a sturdy approach to moral rights eventually but only partially accepted.

In its current shape, moral rights comprise the rights of disclosure, attribution, integrity and withdrawal, which mostly share the features of being perpetual, unavailable and imprescriptible. Focusing on artistic works and the judicial interpretation of work destruction, to keep alive the comparison with the previous illustrations of France and Germany, the right of integrity in Italy is broad and expressly encompasses immaterial modification that may occur in changing the position of the displayed work that affects its public perception.[60] At the same time, uncertainty prevails over the concept of a work's destruction, especially as the right touches upon material property rights (e.g. the right of the owner of the building where the work is created), and extensively depends on how the judge balances the interests at stake in the single controversy.[61]

5. Whether to harmonise moral rights in the EU – a contentious and two-fold standpoint

The short illustrations anticipated only some of the differences emerging from an all-embracing analysis of MS rules on moral rights. Given the considerable interest shown by the literature,[62] the possibility of such an outcome seems not *a priori* excluded,[63] especially in a trans-border context. Nor it seems excluded the option of an even sturdier unification of EU law

Decree of 1882. Cf LC Ubertazzi, *Alle origini piemontesi del diritto italiano d'autore, in AIDA, 1992, 301, 311;* MI Palazzolo, *La nascita del diritto d'autore in Italia. Concetti, interessi, controversie giudiziarie (1840–1941), Roma,* 2013, 10.

[59] R.d.l. 7 novembre 1925 n. 1950, disposizioni sul diritto di autore, convertito nella l. 18 marzo 1926, n. 562.

[60] Trib. Di Napoli, 9 settembre 1997; Trib. Bologna, 13 ottobre 2014.

[61] App. Bologna, 13 marzo 1997; Cass n. 2273 del 31.07.1951.

[62] J Pila, 'Intellectual Property as a Case Study in Europeanization: Methodological Themes and Context' in A Ohly and J Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013) 3, 23; PB Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright Acquis' in A Ohly and J Pila (eds), *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (OUP 2013) 58, 64.

[63] In this sense, see for instance M Van Eechoud and others (eds), *Harmonizing European Copyright Law. The Challenges of Better Lawmaking* (Alphen aan den Rijn 2009). Cfr. Stamatoudi (n 18), 512-513, who considered European harmonisation being the long-term best solution.

that would encompass also moral rights.[64] This is although none of the copyright directives has so far intervened on moral rights.[65]

Specifically, neither Directive 93/89/EEC and later Directive on the term of protection of copyrights,[66] nor Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc)[67] nor Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED),[68] nor the more recent Directive 2019/790/EU on copyright and related rights in the Digital Single Market (CDSMD),[69] intended to harmonise moral copyrights. The legislator's position is more crystal clear in recital 19 Infosoc, which articulates that moral rights are outside the scope of the Directive and should be exercised according to the MS legislation and international norms of Berne, WTC and WPPT.

Furthermore, the Court of Justice of the European Union, whose interpretation aims at consolidating national legislations, has de facto extensively harmonised copyright law in many areas,[70] although it has never ruled on the protection of moral rights,[71] has indirectly shown a

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[64] Firmly convinced that unification is inevitable, as the lack of a single rule is holding back the EU internal market, and only a matter of time: T-E Synodinou, 'The desirability of unification in European copyright law', in E. Rosati (ed), *Routledge Handbook of European Copyright Law* (Routledge 2021) 39, 52.

[65] It should be reminded that the same standard of originality, which is now one of the pillars of EU law, had not been harmonised until recently on the argument that there was no need or urgency to do so.

[66] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights [1993] *OJ L 290, 9–13.* Repealed by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] *OJ L 372, 12–18, which specifies that the harmonising action of the directive does not prejudice the provisions of the MS regulating moral rights.*

[67] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, 10–19.

[68] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157, 45–86.

[69] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, PE/51/2019/REV/1 [2019] OJ L 130, 92–125.

[70] The active role of the CJEU in copyright 'Europeanisation' is discussed by many, e.g. M Favale, M., Kretschmer, M. and P.L.C. Torremans, 'Who is steering the jurisprudence of the European Court of Justice? The influence of Member State submissions on copyright law', (2020) 83 Mod Law Rev 831; E. Rosati, *Copyright and the Court of Justice of the European Union* (Oxford 2019); J. Griffiths, The Role of The Court of Justice in The Development of European Union Copyright Law', IA Stamatoudi and P Torremans (eds.), EU Copyright Law (E Elgar 2014) 1098.

[71] See A Pogácsás, 'Contemporary Problems of Integrity Protection of Copyrighted Works in the Light of Article 6bis of the Berne Convention and the Recent Practice

certain thoughtfulness to the issue. *Funke* mentions a not better defined "author's interest in being able to object to the use of his work, while guaranteeing that author the right to have his name mentioned, in principle",[72] which seems easily framed in terms of moral rights. *Painer* clarifies that art 5(3)(d) Infosoc requires that the citation must indicate the name of the author of a photographic work insofar as this is not impossible, thus signifying the right of attribution.[73] But the foremost thought goes to *Deckym*, which presumably refers to moral rights when it finds that changes made to the work may associate it with a discriminatory message. In those circumstances, there is a legitimate interest in ensuring that the protected work is not associated with such a message, but as the Advocate General concludes, "the decision as to whether or not there is a violation of moral rights is entirely left to the national court".[74]

CDSMD confirms, for the time, the intention not to achieve any harmonisation of moral rights. The only timid reference to non-pecuniary rights is made in recital 23 CDSMD, with reference to the application of exceptions and limitations to copyright, where it is explained that MS "retain the option of providing that the use of works or other subject matter respects the moral rights of authors and performers". And yet, in the context of copyright exceptions and limitations, implicit reference to the substance of especially the right of attribution further supports the conviction that harmonisation of moral law at the European level is opportune.[75]

Only Directive 2001/84/EC on the harmonisation of the resale right[76] can be considered a fainthearted step towards the possible intervention of moral rights,[77] laying the first pieces of the harmonising puzzle. The

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of CJEU', in M Szabó and others (eds.), *Hungarian Yearbook of International Law and European Law* (ELP 2019) 355, 369, who discusses "the erosion of the right of integrity" as a common trend in most MS, and yet considers the consequences of detaching from a rigid interpretation in favour of a more balanced approach to such right.

[72] C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623, para 60.

[73] C-145/10 *Painer v Standard VerlagsGmbH* [2011] ECDR 13, para 215.

[74] C-201/13 *Deckmyn v Vandersteen* [2014] ECDR 21, Conclusions of the AG PC Villalón, paras 28–31.

[75] Article 6 para 2, lett. a e art 9 para 1 lett. b Dir 96/9/CE; art 5 para 3 lett. a Dir 2001/29/CE; art 5 co 1 lett. b; art 8 co. 1 lett a. Dir. (UE) 790/2019.

[76] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] *OJ L 272, 32–36.*

[77] The directive, leading MS to recognise the right of the author of a work of art to receive a percentage of the profit from further sales of the original, was and still is discussed. See J. Collins, '*Droit de suite*: An Artistic Stroke of Genius? A Critical

connection of the *droit de suite* with moral law is also explained by the fact that the discipline aims to protect the value of the work as it relates to the artist's reputation.[78] However, the two rights remain distinct, being the former the right of artists to enjoy a share on the sale price of the original artwork and thus technically an economic right with a strong market relation.[79]

6. Fragmentation as the enemy of internal market consolidation and cultural cohesion

One of the prerogatives of European law is harmonisation (i.e. the approximation of national copyright laws to ensure the consolidation of the common market). Harmonisation efforts were initially undertaken mainly on the purely economic aspects of copyright since Directive 91/250/EEC on the protection of computer programs,[80] and no action has been deemed necessary on moral rights for the time being. For a long time, this has been the main and largely uncontested assumption in policymaking and in the scholarly debate.[81] However, given that moral rights have economic consequences, non-standardised national rules lead to a distortion of the proper functioning of the internal market, affecting the use of intellectual works. This seems even more so if one fears that, in the absence of adequate protection – including moral protection – the creativity of authors is undermined, especially in the upsurge of digital technologies.[82]

Yet, there has been no shortage of occasions in which the harmonisation of moral rights has been abstractly considered by the European Commission. Think of the 1985 White Paper on the completion of the internal market, the 1988 Green Paper on the technological challenges of copyright, the 1991 follow-up, the 1993 White Paper on the challenges of the 21st

Exploration of the European Directive and its Resultant Effects' (2012) 34 EIPR 305 ss.

[78] See P Valnetin, *Droit de suite*, *EIPR* 28 (2006) 268 ss.; G. Gibbons, '*Droit de suite*: Praise for Irish Minimalism?' (2007) 29 EIPR 163 ss.

[79] Sundara Rajan (n 10), 484-485, who concedes it a hybrid right.

[80] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] *OJ L 122, 42–46.* Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] *OJ L 111, 16–22*.

[81] Van Eechoud (n 63), 68; C Doutrelepont, *Le droit moral de l'auteur et le droit communautaire* (Bruylant 1997) 27, 207.

[82] I Sirvinskaite, 'Toward Copyright "Europeanification": European Union Moral Rights' (2010) 3 J Int'l Media & Ent 263; L De Sousa, C Waelde, 'Moral rights and the Internet: Squaring the Circle' (2002) 3 I.P.Q. 265, 274, noting that availability in different territories exacerbates disparities in national treatments and incentivises practices of forum shopping.

century, the 1995 Green Paper on copyright and the information society and the 1996 follow-up.[83]

It cannot be disregarded that the same EC acknowledges in the traditional analogue context disparities in the national treatment of moral rights but at the same time anticipates the risk of their exasperation in the digital world. However, any concrete attempts to lead to a harmonising action have faded so far without the European legislator ever grasping the need or opportunity to intervene, leading to a state of ghostly presence or the phantom of moral rights.[84]

A divergent approach to these functions by MS under the national rules on moral rights protection may theoretically harm the proper functioning of the internal market where content is passing through networks and exploited across borders.[85] The limited literature seems to contest that this will negatively impact the smooth functioning of the internal market, considering international regulation sufficient for this purpose[86] and concluding there is no urgency to harmonise moral rights.[87] This does not rule out that the Commission will change its mind given the imminent post-digital challenges that may convey not that small issues of practical significance,[88] which now appears even more topical in the context of machine learning and artificial intelligence.[89]

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[83] Commission of the European Communities, 'Completing the Internal Market: White Paper from the Commission to the European Council' COM (1985) 310; EC Commission, 'Green Paper on Copyright and the Challenge of Technology' COM (1988) 172 final; EC Commission, 'Working Programme of the Commission in the Field of Copyright and Neighbouring Rights. Follow-up to the Green Paper' COM (1990) 584; EC Commission, 'White Paper on Growth, Competitiveness, Employment: the Challenges and Ways forward into 21st Century' COM (1993) 700; EC Commission, 'Green Paper on Copyright and Related Rights in the Information Society' COM (1995) 382; EC Commission, 'Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society' COM (1996) 586.

[84] About the ghost of moral rights speaks Moscati (n 70) 460.

[85] EC Commission, 'Commission Staff Working Paper on the Review of the EC legal Framework in the Field of Copyright and Related Rights' SEC (2004) 995, 15,

[86] A Strowel, M Salokannel and E Derclaye, *Moral Rights in the Context of the Exploitation of Works through Digital Technology*, Study for the European Commission, DG Internal Market, Study contract ETD/99/B5-3000/E/28, 2000, 225; S Reynolds (ed), *Review of the EU copyright framework: the implementation, application and effects of the 'InfoSoc' Directive (2001/29/EC) and of its related instruments: European implementation assessment*, in *EPRS* Study requested by JURI, October 2015, which came up with very similar conclusions.

[87] Doutrelpont (n 69) 76-77.

[88] As signalled by many, eg C Waelde, 'Moral Rights and the Internet: Squaring the Circle' (2002) 3 IPQ 265,

[89] N Miernicki and I Ng (Huang Ying), 'Artificial Intelligence and Moral Rights'(2021) 36 AI & Soc'y: Knowledge, Cult & Comm 319; P. Mezei, 'From

However, the internal-market driven justification is no longer and should not be the unique criterion for EU harmonisation of copyright law. If, as it has been interestingly contended, the cultural dimension of copyright enshrined by Art. 27 UHRD and Art. 15 ICESCR is not an impediment, but exactly a justification for unification,[90] it seems even more practicable to justify EU copyright harmonisation in these terms and to ultimately safeguard cultural cohesion.

First elements of disruption may come from the different scope and application of current legislative provisions and the variable positions of the judiciary, as it was shortly illustrated in the previous paragraphs. To this extent, one should not either overlook the frictions between civil and common law traditions, which Brexit has not exhausted. Ireland and Cyprus,[91] as the two remaining common law countries in the EU, are clear examples of the likelihood that such conflicts will persist and in so corroborate the need for harmonisation.

7. The experiment: confining moral rights harmonisation to visual arts as a cautious first step towards a wider reform

If harmonisation is foreseeable and desirable, it becomes fundamental to determine its scope and understand how to implement it at the EU level. Considering the traditional reluctance towards a too stringent implementation of moral rights and the cautious moves of the EC, it seems wise to narrow it down, even only for the purpose of this chapter's experiment.

As a general premise, it can be argued that artistic works are particularly touched by moral rights. Art is rich in imitative practices that do not necessarily require attribution (or they indeed expressly refute it) or imply that attribution of authorship is properly acknowledged. The same is for the compresence of artistic views that either encourage or disprove practices of works modification, thus influencing the right of integrity to different degrees.

Leonardo to the Next Rembrandt – The Need for AI-Pessimism in the Age of Algorithms', (2020) 2 UFITA 390.

[90] Synodinou (n 64).

[91] Both MS protect moral rights with important limitations, e.g. duration and exclusion of certain types of works. In Cyprus, the law exclude works requiring investment (eg computer programs) and the protection terminates upon the death of the author. T-E Synodinou, 'Cyprus', R Hilti, S. Nérisson (eds.), Balancing Copyright – A Survey of National Approaches (Springer-Verlag 2012), 349.

If a tentative application of moral rights harmonisation must be imagined, this could be limited to visual art, still reminding the connection with the already harmonised resale right. It appears evenly cautious to limit the range of rights to be harmonised, including the rights of attribution and integrity to satisfy the minimum requirements of Berne. Of the two, especially in art, the right of integrity appears more critical. If understood in its core terms, it should be exercised if the alteration would be prejudicial to the author's honour or reputation, which are not always specified by MS. In addition, it remains controversial whether the destruction of the work – which can take as many forms as 'conceptual', 'material', 'permanent',[92] fits in the scope of the integrity right despite not being expressly mentioned by the law, contrarily to the US VARA provision.

In approaching the harmonising action, it may be seemly to learn from USCO's assessment of VARA which, although confirming the opportunity to limit moral rights protection to works of visual art, explored the opportunity not to exclude works for hire, clarify in the statute concepts that otherwise risk being at the mercy of courts (e.g. recognised statute of the work, definition of works of visual art), and clarify the liaison between moral rights and fair use supporting a balanced assessment of the many and often different interests at stake.[93] However, the US requirement of 'recognised stature' appears particularly problematic, if it were to be rearranged as it is in EU law. It would in fact adds more complexity to the already articulated and difficult management of copyright standards that imply aesthetic or quality values.[94]

In terms of operational tools, while a regulation would be more appropriate to pursue copyright unification, a directive might be the proper option in case of harmonisation. It would give the margin of manoeuvring in terms of contemplating more rights without foregoing the mandate to acknowledge the rights of attribution and integrity.

As a general point, a compromise might be reached on the term of protection, which may be better accepted if not exceeding the general term for economic rights, or even terminate upon the author's death. This may

[92] Smith (n 34) 606 ss.
[93] Brooks (n 12) 1482, warning that "legislation must be tempered by an attention to the interests of the public and the commissioning bodies as well."
[94] In Italy, the 'artistic value' as additional requirement to creativity for copyright protection of works of industrial design and the 'important artistic interest' derogating the right of integrity for architectural plans and works. See R Caso, G Dore, 'Valore artistico e principi generali di diritto d'autore in conflitto: il caso delle opere di design', in B. Pasa (ed.), *Il Design, l'Innovazione Tecnologica e Digitale. Un Dialogo Interdisciplinare*, (ESI 2020), 293.

be welcomed by countries that traditionally grant perpetual moral rights, enabling more legal certainty. Statutory EU moral rights may follow the structure of the European Copyright Code.[95] There, the most problematic aspect is to allow the possibility of consenting not to exercise such a right by means of a waiver that, although necessarily limited in scope, unequivocal and informed, may result in a tangible overriding of moral rights protection and conflict with the idea of protecting the artist as the often weakier party with limited or no bargaining power.

The EU prospected legal provisions may be expected to clarify the meaning of alterations infringing the right of integrity, and to provide more guidance in case of conflictual tension between copyright and property rights. To such an extent, it is foreseeable that the Court of Justice will continue to exercise a considerable influence on the interpretation of copyright law, through its guiding role toward the achievement of a fair balance of interests.[96]

8. Conclusions

The phantom of moral rights continues to populate the nights of the legal interpreter. Such erratic fear of even mentioning moral rights is often shared by researchers and policymakers. Regardless of their denomination, moral rights are essentially personal, or simply not purely pecuniary, rights. They may even represent the last resort to safeguard the link between the exploited work and the creator who gave it copyright existence.

The greater ease to access, use and modify copyright works, especially in the digital environment, has important implications. Transnational cultural exchange and technology-driven implications are becoming the norm. Differences exist even among MS that are apparently coupled with the traditional moral rights doctrine. Uncertainty, in many cases, features the judicial assessment of the scope and application of moral rights. In this peculiar context, harmonisation may indeed be even more valuable.

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[95] European Copyright Code <www.jipitec.eu/issues/jipitec-1-2-2010/2622/wittem-group-european-copyright-code.pdf>.

[96] On this, it is worth citing eg C Geiger, '"Constitutionalizing" Intellectual Property Law?, The Influence of Fundamental Rights on Intellectual Property in Europe', IIC 2006, 371; C Geiger, '"Fair Use" through Fundamental Rights in Europe: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations', in S Balganesh et al. (eds), *The Cambridge Handbook of Copyright Limitations and Exceptions* (CUP 2020) 174.

The landscape of visual arts reveals its uniqueness in relation to moral rights. The reference to and comparison with the US VARA model should not be seen as a sort of 'cross-over transplant'. Itself reveals both opportunities and criticalities of such an approach. The experiment claimed in this chapter therefore had its intrinsic limits. It did not mean to suggest that the scope of a hypothetical directive should be only about visual arts. The purpose of this limited exercise was to argue that, if applied to visual arts, it could follow a similar cautiously narrow approach. All the way, this could possibly be just the first step towards greater harmonisation encompassing all copyright works.

It appears reasonable to expect an amplified presence of technological tools to create, distribute and modify the works and to predict that the international or cross-border nature of copyright activities will increase. Discrepancies in the national regulation of moral rights, in terms of scope, duration, waivability, transferability and inalienability, might become more problematic and not confined to the civil and common law divide. It may be years before the idea of EU harmonisation of moral rights is deliberated, and an extensive evidence-based analysis may be needed to support any possible reform in this regard. If this is the way forward, any future research trajectories in this field should investigate the specificities of each MS and envisage the impact of such harmonisation in the internal market, also addressing the fear towards authors engaging with forum shopping for moral rights.

However, moral rights harmonisation should not be merely justified and endorsed depending on market-driven criteria. The reasoning behind an EU harmonising action in this domain also lie in the revised need to look back to copyright in its intrinsic and (I dare) natural dimension of culture. In this perspective, it becomes essential to ensure adequate consideration of fundamental and human rights, keeping the (although complex) vital exercise of balancing opposing interests that is largely demanded to the court.

This piece has hopefully fuelled the debate that is often promptly extinguished by counterarguments that moral rights are not needed, nor is their fragmented articulation causing any urgent problem. Following the lead of the artificial intelligence trend, which is already posing challenges to the analogical dimension of moral rights, it may not be long before it gets to the legislator negotiation desk. Only time will tell when and who, US or EU, will come first.

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eccezioni e limitazioni al diritto d'autore, Trento Law and Technology Trento Research Group Research Papers; January 2023

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