11 The moral right of integrity

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1. Introduction

Even though it is obvious that neither the right of integrity nor the other moral rights of authors\(^1\) are on the priority list of the EU intellectual property harmonization agenda at present, it can still be observed that these rights are regularly litigated in several jurisdictions within the EU\(^2\) and that they also keep attracting the attention of scholars both inside\(^3\) and outside the EU.\(^4\) As a result, even if in the Internet age the economic and financial interests of

\(^1\) On moral rights as such, see the contribution of W. Grosheide in this book.

\(^2\) See the recent dispute between architects and the German government over an architectural project within the main railway station in Berlin, which led to a decision of the Landesgericht Berlin of 28 November 2006 in favour of the architects, ref. Az.: 16 O 240/05 (not in force), ZUM 2007, 424; on this dispute, see C. Thies, ‘Eigentümerkontra Urheberinteressen. Der Fall “Berliner Hauptbahnhof”’, UFITA 2007, 741; see also J. Hillmer, ‘Berlin Hauptbahnhof – Kathedrale für den Verkehr. Urheberrechtsprozess gegen die Deutsche Bahn’, Kunst und Recht (KUR) 2006, 113.


authors and (perhaps more importantly) of other right owners (such as owners of neighbouring rights) are at the forefront given that they are threatened by the (still rampant) piracy which takes place in the on-line environment, it would be wrong to consider that the protection of the right of integrity is nothing more than an abstract topic of purely scholarly interest in the EU. It should in fact be remembered that, even if the essence of moral rights, and specifically of the right of integrity, is not of an economic nature, moral rights can still have a significant economic impact.5

For this reason, and pursuant to the goal of this book, it is interesting to assess today whether the moral right of integrity is appropriately treated within the EU, that is, whether it has been appropriate not to harmonize it so far and whether it would be useful to harmonize it in the future. For this purpose, it will first be necessary to assess the present situation (see Section 2 below). It will then be possible to turn to what could potentially be done (see Section 3 below). Finally, a few thoughts will be expressed on the future challenges of the right of integrity beyond its harmonization (see below Section 4).

2. The present situation
At the international level, the source of protection of the moral right of integrity lies in article 6bis of the Berne Convention which provides (in the relevant section) that ‘[i]ndependently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right [. . .] 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 honour or reputation’.6 This provision requires as a threshold condition that the violation of the integrity of the work shall have a negative impact on the author’s honour or reputation. The national regulations can however offer a broader protection than the minimal level which is imposed by this provision.7

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5 Metzger, 464 f.; such impact can particularly be felt with respect to violations of the right of integrity in connection with cinematographic works; see the examples and cases cited by Metzger, 465.

6 Given that art. 9 para. 1 of the TRIPS agreement expressly and notably excludes moral rights from the scope of the agreement (‘However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention [the Berne Convention] or of the rights derived therefrom’).

7 It is not the goal of this chapter to make a full presentation of the status of protection of the right of integrity in the Member States; for such presentation, see Doutrelepont, 255, and the report ‘Moral rights in the context of the exploitation of works through digital technology’ (2000) commissioned by the EU Commission’s internal market directorate-general (dated April 2000), available at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd1999b53000e28_en.pdf (hereinafter: the ‘Report’).
On this basis, some national copyright laws within the EU offer more extensive protection by providing that the protection of the right of integrity shall not depend on the showing of any harm caused to the honour or to the reputation of the author. As a matter of principle, such a protective approach could be legitimized by the fact that the moral right of integrity protects in fine the result of the creativity of the author in the exact way that this creativity was expressed, that is, the right of integrity makes sure that the work is and remains as the author has created it so that no one else shall have the right to change it in any manner irrespective of whether these changes improve or negatively impact on the author’s honour or reputation.8 However, such discretionary character may at the same time impede and undermine legitimate third party interests which would conflict with the moral right of integrity. On this basis, several national copyright systems (one of the most prominent of which is the German copyright system) reflect this idea by using a system of balance of interests between the competing interests of the right holder on the one hand and of the third party on the other hand.9

As this was established in a study commissioned by the EU Commission’s Internal Market Directorate-General (dated April 2000) on moral rights in the context of the exploitation of works through digital technology,10 the level of protection of the moral right of integrity diverges quite widely between the different Member States within the EU.11 In this report, the conclusion was nevertheless drawn that ‘in spite of the significant differences in regulation between the Member States of the European Community and in particular the difference between the UK law and the regulation in continental Europe, there seems to be no concrete evidence that this has so far resulted to adversely impact on the Internal Market’,12 whereby this report stated that the right holders were apparently quite cautious about any project of harmonization of moral rights within the EU out of fear that such harmonization might reduce and weaken the overall protection of moral rights within the EU (by making them waivable).13

8 Vaver, 271 (noting that according to this approach, which is the one applicable in continental Europe, ‘the author should have recourse against those who present the work differently from the way the author originally intended’).
10 See the Report, supra note 7.
11 And specifically between the protective regime of protection of moral rights (and specifically of the right of integrity) existing in France and the less protective regimes applicable in the United Kingdom and in Ireland.
12 Report, supra note 7, 224.
13 Report, supra note 7, 225.
However, a more interventionist approach has been advocated and called for in the legal literature.\textsuperscript{14} As a result, even if the importance of moral rights in the system of protection of copyright law within the EU was acknowledged by the European Court of Justice in the \textit{Phil Collins} decision (it being noted that the ECJ only referred to the right of integrity and not to the other moral rights in its decision),\textsuperscript{15} no need for harmonization was felt so far.

This approach was confirmed in recital 19 of Directive 2001/29,\textsuperscript{16} in which it was noted that ‘[t]he 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.’\textsuperscript{17} Interestingly, this passive approach was adopted even though a few years earlier the threat to the moral rights (and to the right of integrity) was expressly identified as a critical issue in the Green Paper on Copyright and Related Rights in the information society.\textsuperscript{18}

3. \textbf{Potential issues for harmonization}

First, it is important to state that there is no apparent need to harmonize the right of integrity within the EU because the difference of scope of protection of this right within the EU as such (except for the specific issues which will be discussed in more detail below) does not affect the functioning of the internal market in a significant way.\textsuperscript{19}

\textsuperscript{14} See Doutrelepont, 576; Metzger, 471.
\textsuperscript{15} See judgment of the ECJ, C \textit{92}/92 and C 326/92, § 20: ‘The specific subject-matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation.’
\textsuperscript{18} European Commission Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society (COM(95) 382 final), para. 1.4.5.
\textsuperscript{19} For a discussion of the general conditions required for justifying a harmonization at the EU level as applied to moral rights, see Doutrelepont, 566; see also Metzger, 466–9.
This absence of a need to harmonize can be particularly evidenced by taking the example of the right of integrity of architects. Even though this is a complex and challenging issue, the legal disputes arising between architects and owners of their architectural works about the exercise of the right of integrity do not call for a harmonized solution within the EU because by their very nature such disputes are exclusively and definitively localized at the place (and in the Member State) where the disputed architectural work is located. As a result of this physically unique localization within one Member State, it is quite doubtful that a difference in the level of protection of the right of integrity of architects which may exist under the respective copyright laws applicable in the Member States will affect the ‘smooth functioning of the internal market’ (even if it may have an impact on the decision to be taken by architects to carry out their activities in certain Member States in view of the insufficient level of protection of their right of integrity in the relevant Member State where they are supposed to build an architectural work).

In spite of this view, which by and large justifies the present situation of non-harmonization of the right of integrity, it should however be considered whether the aspects of the right of integrity discussed below may require harmonization at the EU level.

3.1 Advertising breaks for the broadcasting of cinematographic works
Advertising breaks which are made in the course of the broadcasting of cinematographic works have been held as a violation of the right of integrity under the national copyright laws of various Member States. One reason why

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22 One easy way to avoid the hurdles which may result from claims of violation of the right of integrity by authors is to initially vest the copyrights in the works created by these authors in third parties (such as their employers). On this basis, the issue of the allocation of ownership of moral rights is obviously quite essential. Given that such an issue is however not specific to the right of integrity to be discussed here and that it is addressed in more detail in another chapter of this book (see the contribution of J. Phillips on authorship and ownership), it will not be further analysed here.
23 See the decision of the Swedish Supreme Court of 18 March 2008 in the case TV4 AB v. Claes Eriksson and Vilgot Sjöman (see the summary, http://www.roschier.com/monthlybriefs/TMC/8April2008/8.4.2008.HTML.htm#IPR%20Article%2021); for a recent overview of case law in selected national copyright laws (Italy, France, Germany and Sweden), see the articles of Rosén, supra note 3; see also Karl-Nikolaus Peifer, Werbeunterbrechungen nach italienischem, deutschem und internationalen Recht, Bielefeld 1997.
harmonization could be called for results from the recent adoption of the Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. According to its article 11, ‘1. Member States shall ensure, where television advertising or teleshopping is inserted during programmes, that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme, and the rights of the right holders are not prejudiced’ (emphasis added). Pursuant to article 11 paragraph 2 of the Directive 2007/65/EC, the transmission of cinematographic works may be interrupted by advertising once for each scheduled period of at least thirty minutes,\(^24\) it being noted that the previous system was more protective of authors given that the relevant period was forty-five minutes.\(^25\) From this perspective, it may be considered that the threat to the right of integrity is even bigger now that the time period is even shorter.

Based on its recitals, it can be understood that the Directive 2007/65/EC aims at safeguarding ‘the specific character of European television’ by limiting the interruptions made to cinematographic works.\(^26\) However, still according to its recitals, the Directive is also designed to ‘give flexibility to broadcasters’ with regard to the insertion of advertising ‘where this does not

\(^{24}\) ‘2. The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least thirty minutes. The transmission of children’s programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least 30 minutes, provided that the scheduled duration of the programme is greater than 30 minutes. No television advertising or teleshopping shall be inserted during religious services.’

\(^{25}\) This is still the case of the European Convention on Transfrontier Television of the Council of Europe (text amended according to the provisions of the Protocol (ETS No. 171) which entered into force on 1 March 2002), see Art. 14 para. 3: ‘The transmission of audiovisual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries), provided their scheduled duration is more than forty-five minutes, may be interrupted once for each complete period of forty-five minutes. A further interruption is allowed if their scheduled duration is at least twenty minutes longer than two or more complete periods of forty-five minutes.’

\(^{26}\) Recital 58: ‘This Directive is intended to safeguard the specific character of European television, where advertising is preferably inserted between programmes, and therefore limits possible interruptions to cinematographic works and films made for television as well as interruptions to some categories of programmes that still need specific protection.’
unduly impair the integrity of the programmes’. The reference to these conflicting goals of protecting the ‘specific character of European television’ (whatever this may mean) while giving flexibility to broadcasters does not solve in any way the issue of the protection of the integrity of cinematographic works so that this issue remains unharmonized and thus uncertain. Such uncertainty is confirmed by the provision of the Directive stating that advertising breaks made in the transmission of cinematographic works are authorized once every thirty minutes, provided however that ‘the rights of the right holders are not prejudiced’ (art. 11 para. 1). The Directive does not decide whether such advertising breaks constitute a violation of the right of integrity and thus leaves this issue unharmonized within the EU. It does not specify under what conditions the ‘rights of the right holders are not prejudiced’ which would have been helpful (and even essential) for a broadcaster in order to avoid being caught in negotiations with the right holders or in costly disputes with them in one or several jurisdictions of the Member States. This means that the transaction costs for broadcasters may be important and cumbersome.

As a result, Directive 2007/65/EC does not clarify whether the broadcasting of a cinematographic work that is interrupted by advertising breaks every thirty minutes constitutes a violation of the moral right of integrity of

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27 Recital 57: ‘Given the increased possibilities for viewers to avoid advertising through use of new technologies such as digital personal video recorders and increased choice of channels, detailed regulation with regard to the insertion of spot advertising with the aim of protecting viewers is no longer justified. While this Directive should not increase the hourly amount of admissible advertising, it should give flexibility to broadcasters with regard to its insertion where this does not unduly impair the integrity of programmes.’

28 See a similar wording in art. 14 para. 1 of the European Convention on Transfrontier Television: ‘Advertising and tele-shopping shall be inserted between programmes. Provided the conditions contained in paragraphs 2 to 5 of this article are fulfilled, advertising and tele-shopping spots may also be inserted during programmes in such a way that the integrity and value of the programme and the rights of the rights holders are not prejudiced.’

29 See the recommendations for the implementation of the Audiovisual Media Services Directive (November 2007) of the Fédération Européenne des Réalisateurs de l’Audiovisuel (Federation of European Film Directors): ‘If advertising breaks in cinematographic and audiovisual works are authorized, the implementation of this provision will give the opportunity to mention that the freedom given to broadcasters to insert advertising breaks does not mean any authorization regarding authors’ moral right. Therefore, the broadcaster is required to obtain this authorization by contracting with the authors, whether at the production or broadcasting stage’, available at: http://www.ferainfo.org/documents/RecommendationsImplementationAMSDirectiveEN28.11.2007.pdf.
the cinematographic work and what would be the remedies should this constitute such a violation (should this result in an injunctive remedy and/or in other financial or non-financial remedies?). Could for instance a disclaimer inserted before and/or after the advertising break explaining the opposition of the right holders to such breaks suffice in this respect? It would have been useful to clarify this in order to promote the broadcast and use of cinematographic works within the European Union without unduly threatening the right of integrity of authors.30 Indeed it appears awkward that the Directive authorizes advertising breaks but fails to decide at the same time whether such breaks violate the right of integrity of the authors. As a result of this, it can be wondered what is the harmonizing effect of a rule which leaves a key element of application unsolved and left to the discretionary power of the Member States.

3.2 Waivers to the moral right of integrity

Another issue for which harmonization could be considered relates to the critical issue of the validity and enforceability of waivers to the right of integrity.31 The issue whether and to what extent an author can with validity waive in advance by contract the protection of his right of integrity is debated in the legal literature32 and is solved in almost diametrically opposite ways in the Member States. At one end of the spectrum, unlimited contractual waivers to moral rights (including to the right of integrity) are held valid under UK copyright law.33 At the other end of the spectrum, French law34 – unsurpris-
ingly – is much more protective of the author’s moral rights and holds as null and void blanket waivers to the right of integrity as was firmly confirmed in a recent decision of the French Cour de Cassation which stated that the unwaiv-
ability of the right of integrity is a principle of public policy (ordre public) under French law, which somehow recalls the equally strong protective posi-
tion that was adopted in the famous Huston case about colorization.

On this basis, the question which arises is whether a waiver to the protec-
tion of the right of integrity which would be validly entered by an author under UK copyright law would be binding in France should a violation of the right of integrity be committed in France and should a legal action be initiated before a French court.

This issue obviously relates to the treatment of copyright and contract laws

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35 Decision of the French Cour de Cassation, Chambre civile, 1 of 28 January 2003 (case 00-20014) holding that:

Vu l’article L. 121-1 du Code de la propriété intellectuelle, ensemble l’article 1174 du Code civil;

Attendu que l’inaliénabilité du droit au respect de l’œuvre, principe d’ordre public, s’oppose à ce que l’auteur abandonne au cessionnaire, de façon préalable et générale, l’appréciation exclusive des utilisation, diffusion, adaptation, retrait, adjonction et changement auxquels il plaît à ce dernier de procéder;

Attendu que MM. X . . . et Y . . ., respectivement auteur et compositeur de la chanson ‘On va s’aimer’ ont, par contrat du 1er octobre 1983, cédé aux sociétés Televis edizioni musicali et Allione editore les droits d’exploiter directement et d’autoriser des tiers à utiliser tout ou partie de cette oeuvre, paroles et musique ensemble ou séparément, en thème dominant ou secondaire de fond sonore de films, ou de toute représentation, théâtrale, radiodiffusée, télévisée, publicitaire, ou autre encore, même non mentionnée, avec possibilité correlative d’ajouts à la partition et modifications même parodiques du texte; qu’en 1997, à l’issue d’attributions et sous-attributions de gestion des droits faites par la société Polygram Italia, successeur de la société Televis, et d’autorisations et sous-autorisations consenties par la société Allione, ils ont prétendu discerner une contravention au respect de l’œuvre dans la sonorisation d’un film publicitaire consacré aux restaurants Flunch, utilisant la mélodie de leur chanson, substituant ‘On va fluncher’ à ‘On va s’aimer’, et diffusé sur plusieurs chaînes françaises de télévision;

Attendu que pour dire licite la renonciation globale et anticipée à laquelle se ramenaient à ces égards les diverses possibilités stipulées à la cession, la cour d’appel a retenu que la clause qui les énonçait, exempte d’ambiguïté, précisait les laisser à l’initiative du cessionnaire, ‘selon son jugement, qui ne pourra pas être contesté’ et prévoyait une contrepartie financière, de sorte que les auteurs avaient défini par avance les limites de l’exploitation de leur oeuvre, et n’aliénant nullement leur droit moral, l’avaient exercé en toute connaissance de cause; qu’en statuant ainsi, elle a violé le texte susvisé.

36 RIDA 1991 (149), 197.
under private international law. It could therefore be analysed under the new EU framework regulating private international law, most specifically under regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), which contains a specific provision relating to intellectual property rights which also applies to copyright (and thus to moral rights).

Pursuant to article 8, ‘[t]he law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed’ (para. 1), whereby paragraph 3 specifies that ‘[t]he law applicable under this Article may not be derogated from by an agreement pursuant to Article 14’, which means that the governing law cannot be freely chosen by the contracting parties.

Under these circumstances, it could be argued that, irrespective of a waiver of the right of integrity which would be governed by UK law and would be valid under such law, French copyright law could apply as the law of the country for which protection is claimed and under which the right of integrity could not be validly waived (at least to the broad extent which is allowed under UK copyright law). Irrespective of this, it could also be claimed that French law shall apply as a matter of public policy (ordre public). In this respect, it can be mentioned that the regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) also contains relevant provisions in the context of this discussion relating to the application of mandatory foreign rules or public policy of the forum.  

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37 On the issue of copyright and conflicts of law, see the chapter by P. Torremans in this book.
38 Recital 26: ‘Regarding infringements of intellectual property rights, the universally acknowledged principle of the lex loci protectionis should be preserved. For the purposes of this Regulation, the term “intellectual property rights” should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights.’
39 See the French Anne Bragance case, RIDA 1989 (142), 301 (concerning an employed American ghostwriter who had validly waived her right of attribution under US law, which was the law governing the contract for which the French Cour d’appel de Paris held that such ghostwriter could exercise her right in France, because the waiver violated the French ordre public).

Article 9 refers to ‘Overriding mandatory provisions’ which are ‘provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation’; in addition, art. 21 relates to the
In any case, and without going into more detail about these intricate issues of conflicts of law of moral rights, it appears that the condition and extent of the waivability of the right of integrity may pose difficulties for the proper functioning of the internal market to the extent that diverging levels of waivability of the right of integrity between the Member States may hamper or even prevent the cross-border exploitation of copyrighted works within the EU, whereby such cross-border exploitation is and will be even more commonplace in the digital on-line environment.

In the same context, it is also important to note that some Member States have already adopted rules for the purpose of protecting the authors considered as weaker contracting parties in international copyright contracts in order to avoid foreign (less protective) regulations being chosen as the governing law in copyright contracts for the essential purpose of trying to avoid the more protective rules implemented in the national regulations in these Member States. It can also be recalled that some national regulations provide for a broad protection of the moral rights of foreign authors and thus confirm the importance of the protection of moral rights in an international context.

From this perspective, there are not inconsiderable risks that the validity and enforceability of waivers to the right of integrity which would be valid under the law of one Member State could be struck down by the application protection of the ‘Public policy of the forum’ by providing that ‘The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (‘ordre public’) of the forum’.


See also Metzger, supra n. 3 at 465 (noting that ‘die technischen Möglichkeiten des grenzenlosen Vertriebs digitalisierter Inhalte in Datennetzen lassen die Forderung nach einem einheitlichen europäischen Rechtsrahmen für die Fragen des Werkschutzes und der Namensnennung umso dringlicher erscheinen’).

Most notably the new German rules governing copyright contracts providing for a minimal financial protection (i.e. minimum remuneration) of authors and which provide that these rules cannot be circumvented by a choice of law clause should the matter have minimal connection with Germany (see § 32b of the German Copyright Act); on these new rules in an international perspective, see Reto M. Hilty and A. Peukert, ‘Das neue Urhebervertragsrecht im internationalen Kontext’, GRUR Int. 2002, 643.

See for instance § 121 para. 6 of the German Copyright Act providing for protection of moral rights over works created by foreign authors irrespective of the place of first publication of such works; see also Section 1.2 of the French Law 64-689 of 8 July 1964 which was applied in the Huston decision of the French Cour de Cassation (RIDA 1991 (149), 197) which provides that the integrity of a literary or art work cannot be affected in France, regardless of the State in whose territory the said work was made public for the first time.
of the protective rules of another Member State. This may affect the functioning of the internal market and could consequently justify an action of harmonization at the EU level.

3.3 Enforcement of the right of integrity
The enforcement of the right of integrity may also be potentially harmonized. This would be required in order to make sure that effective and appropriate enforcement mechanisms are made available in case of violation of the right of integrity. From this perspective, it can be noted that the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights covers the enforcement of moral rights (including the right of integrity) given that it covers all types of intellectual property rights which are covered either by Community provisions or by national law in the relevant Member State. However, this Directive does not adopt any specific rule about the enforcement of moral rights, even though it provides that the amount of damages which is due as a result of an infringement shall also take into account the ‘moral prejudice caused to the right holder by the infringement’, whereby moral prejudice is likely to be caused as a result of a violation of moral rights.

The issue of fashioning appropriate legal remedies to intellectual property infringements does not only apply to moral rights (and thus the right of integrity) but is rather a topic which affects all types of intellectual property rights. In any case, the nature and extent of the remedies which may result

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45 See also Doutrelepont, at 579.
46 It should be recalled in this respect that art. 6bis para. 3 of the Berne Convention provides that ‘[t]he means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed’, which is not appropriate in view of the diverging ways in which such enforcement can be implemented at the national level.
47 Recital 13: ‘It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned.’
48 Art. 13 para. 1 provides that ‘When the judicial authorities set the damages: (a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement […]’.
49 This issue has been hotly debated with respect to the conditions of injunctive relief since the widely publicized decision of the US Supreme Court in the case eBay Inc. v. MercExchange L.L.C., 126 S. Ct. 1837 (2006), which discussed the equitable conditions for obtaining injunctive relief under US patent law and which conflicts with the more protective approach which results from some EU regulations as shown by the Nokia v. Wärde  

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from a violation of the right of integrity must be carefully analysed in view of the potentially legitimate interests which may be threatened should an injunctive relief be automatically granted in case of a finding of a violation of the right of integrity. In this context, it would appear appropriate to pay attention to the nature of the work at issue in order to avoid significant investments being lost as a result of a violation of the right of integrity. It is worth remembering in this respect that the French and German copyright laws, which probably provide for the most protective regimes for moral rights and specifically for the right of integrity, limit the scope of the right of integrity with respect to audiovisual works.\(^50\)

One potentially appropriate remedy for a violation of the right of integrity could thus be to remove the name of the author from the (audiovisual) work the integrity of which would have been violated instead of enjoining the exploitation of the work at issue. This remedy could make sure that the author’s name shall not be connected to a work with which the author rejects any creative connection while allowing the continued use of such work (thus preserving the financial and personal investments and efforts made in the creation of such work).\(^51\) This system was implemented in the UK CDPA 1988.\(^52\)

\(^50\) See § 93 para. 1 of the German Copyright Act which specifically limits the protection of the right of integrity to gross mistreatments and requests that the right holders shall take due account of the position of the producer (‘(1) Die Urheber des Filmwerkes und der zu seiner Herstellung benutzten Werke sowie die Inhaber verwandter Schutzrechte, die bei der Herstellung des Filmwerkes mitwirken oder deren Leistungen zur Herstellung des Filmwerkes benutzt werden, können nach den §§ 14 und 75 hinsichtlich der Herstellung und Verwertung des Filmwerkes nur gröbliche Entstellungen oder andere gröbliche Beeinträchtigungen ihrer Werke oder Leistungen verbieten. Sie haben hierbei aufeinander und auf den Filmhersteller angemessene Rücksicht zu nehmen’); see also arts 121-6 and 121-7 of the French Code de la Propriété Intellectuelle which also limit the scope of the right of integrity for authors of audiovisual works.

\(^51\) ‘Whether the work is copyrighted or not, the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications (e.g., where a novel or stage play is sold for adaptation as a movie), it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original.’ Granz v. Harris, 198 F.2d 585, at 589 (2d Cir. 1952) (footnote omitted).

\(^52\) S. 83 para. (2) of the UK CDPA 1988: ‘In proceedings for infringement of the right conferred by section 80 (right to object to derogatory treatment of work) the court may, if it thinks it is an adequate remedy in the circumstances, grant an injunction on terms prohibiting the doing of any act unless a disclaimer is made, in such terms and

3.4 Term of protection

It could also be considered whether the term of protection of the right of integrity would also require harmonization within the EU. It can be recalled in this respect that this was contemplated in the course of the preparatory work for the Directive harmonizing the term of protection of copyright and certain related rights, before it was abandoned. Even though it is uncertain whether the lack of harmonization of the term of protection of the right of integrity (and of moral rights in general) truly affects the functioning of the internal market, voices have been advocating such harmonization.

It is true that certain specificities of national copyright regimes of protection for moral rights, and most notably the perpetuity of protection of moral rights which is anchored under French copyright law, may raise concerns (or at least eyebrows) among foreign observers. This can be well illustrated by the case recently decided by the French Cour de Cassation which dealt with a book constituting a sequel to the world-famous book by Victor Hugo, *Les Misérables*. The sequel allegedly violated the right of integrity of the work of Victor Hugo according to Pierre Hugo (one of the heirs of Victor Hugo) who filed a claim before the French courts. In its decision of 30 January 2007, the Cour de Cassation, deciding that the freedom to create a sequel to a copyrighted work should not unduly be blocked after the expiration of the term of protection of economic rights, struck down the decision of a lower court which had erroneously found a violation of the right of integrity and remanded the case for a new decision on the merits.

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53 Art. 6bis para. 2 of the Berne Convention leaves some flexibility in this respect by providing that: "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. 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."


55 For an account of this, see Doutrelepont, 574.

56 Doutrelepont, 579.

57 Art. 121-1 of the French Code de la Propriété Intellectuelle.

58 ‘Vu les articles L. 121-1 et L. 123-1 du code de la propriété intellectuelle, ensemble l’article 10 de la Convention de sauvegarde des droits de l’homme et des libertés fondamentales;

‘Attendu que la “suite” d’une oeuvre littéraire se rattache au droit d’adaptation; que sous réserve du respect du droit au nom et à l’intégrité de l’oeuvre adaptée, la liberté
Beyond the peculiarities of the French system and the perpetuity of protection of moral rights, it is uncertain whether the issue of the term of protection of the right of integrity justifies a harmonization within the EU. One potential reason for harmonization would be to limit the abusive behaviours of right holders after the death of the original right holder of the right of integrity (i.e. the author). It happens indeed that heirs of authors rely on the protection of moral rights (and specifically on the right of integrity) in order to (try to) prohibit the use of their deceased parent’s works by third parties without having justifiable grounds for refusing such use.\(^{59}\) One difficulty of such harmonization would however result from the fact that it might affect legal fields beyond copyright law (such as inheritance law).

### 4 Future challenges to the right of integrity beyond its harmonization

Moving beyond the issue of harmonization within the EU, perhaps the most fundamental challenge that the right of integrity faces in the EU (and even at a more global level) lies in the fact that such a right may appear as the expression of an abusive power by the authors over their works and thus may lack any justification. Such a risk may arise as a result of an overly protective political attitude deriving from an attempt to sacralize moral rights, which would be wrong and counterproductive\(^{60}\) and which has already been vigorously criticized.\(^{61}\)

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\(^{59}\) On the relationship between copyright law and inheritance law under German law, see Christoph Clément, *Urheberrecht und Erbrecht*, Baden-Baden 1993.

\(^{60}\) This approach was viewed as quite detrimental to France in the international arena, given that France apparently adopted an overly dogmatic and inflexible approach with respect to the protection of moral rights which reduced the influence of France at the international level; see the Report, *supra* note 7, 78 (‘Même en matière de droit d’auteur, cependant, la France se comporte assez souvent de façon peu crédible car relativement dogmatique, par exemple en ayant tendance à sacraliser le droit moral de l’auteur’).


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Against this background, the challenge is to make sure that the right of integrity shall be exercised reasonably by authors in order to avoid such right being rejected by courts and by legislative bodies because it would be too extreme to deserve protection in view of the legitimate conflicting interests of other stakeholders. The terminology of ‘moral rights’ itself may not be innocent in this potential misconception of these rights by the public. The reference to ‘moral rights’ might indeed be understood as meaning that moral rights would deserve more protection than what could be called by contrast ‘non-moral rights’ (such as economic rights of the right holders or of third parties) given that moral rights would be morally and ethically prevalent. On this basis, it would be preferable and less misleading to refer to the rights of personality of the authors by following the German terminology (Urheberpersönlichkeitsrecht) which might avoid misleading values being conveyed by the wording itself.

Beyond this terminological element, it appears that the future fate of the right of integrity will depend on whether authors and courts are in a position to apply this right in a reasonable way. This is unfortunately quite a challenging task to the extent that it requires defining objective grounds for deciding cases of alleged violation of the right of integrity even though the violation of the integrity of the work may artistically be highly subjective (and may thus depend on the subjective sensitivity of the artist).

But artists and authors themselves also have a strong interest in ensuring that the right of integrity shall be exercised reasonably if they want to be taken seriously by courts and legislative bodies. As a result, authors who are found to use what could be viewed as a ‘sword of Damocles’ of an alleged violation of the right of integrity in order to try to obtain extra remuneration from the users of their works should not prevail because such use of moral rights should not be protected given that it would constitute an abuse of right (i.e. using a right for a purpose which is not the one for which such a right was conceived). In addition, authors should also be aware that an over-broad protection of the right of integrity may be detrimental to their own creative interests to the extent that creative processes are quite frequently based on the artistic re-use of pre-existing copyrighted materials. As a result, authors should not claim on the one hand a very broad protection of the right of integrity of their own works, while pleading at the same time for a broad right to freely use works created by third parties (i.e. without risking the infringement of the moral rights existing on these pre-existing works) with-
out adopting a grossly contradictory attitude. In short, the authors themselves have a strong interest in establishing a system in which moral rights and the right of integrity shall be exercised in good faith and on legitimate grounds.

The reasonableness of the exercise of the right of integrity means that the scope of protection should largely depend on the specific circumstances of the case at hand. From this perspective, it has been pleaded that the protection of the right of integrity should keep some flexibility in its application and that the protection should depend on various factors which should be analysed by courts in each individual case.

The courts will first have to take into account the nature of the work at issue because an alleged violation of the right of integrity will not be assessed in the same way when dealing with a poem or a work of fine arts or with a functional work (for instance a computer program, for which specific – less protective – regulation might have been adopted in the relevant jurisdiction). Similarly, the conditions of creation of the work could also be taken into account. If a work is created in performance of a contract (commissioned work or work for hire) and if such work is part of a collective creative project, such circumstances will also have an impact on the scope of protection of the right of integrity of the work and may limit such protection in view of the legitimate interests of third parties involved in the project (such as the employer and the other right holders). Another factor impacting on the scope of protection of the right of integrity depends on the type of use of the work for which a violation of the right of integrity may arise. If the publisher of a book is not allowed to change in any manner the book that it is supposed to publish, the adaptation of a book into a movie will necessarily imply that some changes should be made to the book in order to convert it into a movie. Similarly, a certain freedom may also exist, to a lesser extent, with respect to the staging of a theatrical play for which the director may also enjoy a certain creative freedom in the process of staging the play. Similarly, a parodic use of a work will intrinsically imply violations of the right of integrity of the parodied work. From this perspective, the scope of the protection of the right of integrity will necessarily depend on the modus of use of the work.

On this basis, it has been suggested that a list of factors defining the scope of protection of the right of integrity based on the model of the fair use provision

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63 Dietz, 182; see more generally J. de Werra, *Le droit à l’intégrité de l’œuvre* (thesis of the University of Lausanne), Berne 1997.

64 See for instance art. 121-8 of the French Code of Intellectual Property.
set forth under US copyright law could be part of an EU harmonization of the right of integrity.

It may therefore be considered whether it would make sense to draw up a list of potential criteria on which courts could rely when deciding cases of alleged violation of the right of integrity which could be harmonized at the EU level. It may however be wondered whether such an approach could succeed to the extent that it may be quite difficult to find common ground between the diverging views existing in the Member States on the content of such a list of factors, whereby the goal would be to set up a list of criteria which would serve as a basis for decisions by the courts. However, it is likely that Member States will insist on including in such a list of criteria each and every one of their national special cases and exceptions resulting perhaps in a long list of quite diverse factors which would not constitute a successful harmonization. By analogy, such lack of harmonization was also complained about with respect to the (very long) list of optional exceptions to the exclusive right of reproduction which is contained in article 5 of the Directive 2001/29 and which reflects the variety of specific exceptions contained in national copyright regulations. On this basis, it does not appear realistic to suggest (even less to hope for) such an approach so that the power to decide cases of violation of the right of integrity will remain with the national legislative or more probably the judicial authorities within the Member States.

Finally, even though specific aspects of the right of integrity may be

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65 Art. 107 of the US Copyright Act provides (in the relevant section) that:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

66 See Dietz, 187 (noting that ‘one can also imagine that a harmonized regulation of moral rights within the European Community, which does not yet exist, not even as a proposal, could make use of such a method [i.e. list of factors modelled on s. 107 of the US Copyright Act] [. . .]’).

67 For instance, the exceptions to the protection of the right of integrity under the UK copyright regulation, see S. 81 UK CDPA 1988.

harmonized at the EU level, this right will essentially remain a matter to be decided by the judicial authorities of the Member States. It can thus be hoped, and this may be the most important challenge of the right of integrity in the future, that these judicial authorities will keep in mind that the right of integrity should not be neglected because it is perhaps the most essential right of an author given that it ultimately aims at making sure that the work that the author has created is disclosed to the public in the way in which the author wanted it to be disclosed.

69 Such as the ones discussed in Chapter 3 supra.