



Q282-SGL-C-2022

2022 – Study Question
Moral Rights

**QUESTIONS AND ANSWERS
by AIPPI SWISS GROUP***

I. Current law and practice

Please answer the below questions with regard to your Group's current law and practice.

References to "moral rights" below are used to encompass all legal rights and concepts used to provide protection to the non-economic rights of authors, regardless of whether they are referred to as "moral rights".

References to "moral rights" cover only moral rights in copyright law and not moral rights in related rights/neighbouring rights laws (e.g., rights on the performance), unless expressly stated otherwise⁵.

Definition of moral rights

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

YES. However, the Swiss copyright act (**CopA**)¹ itself does not expressly define which of the rights attributed to the author should be regarded as moral rights.

b) Are moral rights recognized outside copyright law?

Yes, Swiss law recognizes general personal rights², which protect the interests of authors as well as those of other persons. Also the provisions on the publishing contract contain provisions regarding moral rights (Art. 380 *et seqq.* Code of Obligations, e.g. Art. 385, 38)

¹ Federal Act of 9 October 1992 on Copyright and Related Rights (Copyright Act, CopA); CC 231.1, https://www.fedlex.admin.ch/eli/cc/1993/1798_1798_1798/en.

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

According to the “traditional” doctrine, the original purpose of moral rights is to protect the personal interests of authors with regard to their works. They are meant to reflect the close link between the author’s personality and their works.

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

Moral rights apply to all types of works which are being recognized (Art. 2 para. 1 - 3) or considered (Art. 2 para. 3^{bis}) by Swiss Copyright Law.

Categories of moral rights

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

- **Right of first disclosure** (“*Erstveröffentlichungsrecht*”; Article 9 paragraph 2 CopA)³: The right of first disclosure of a work includes the right to publish a work for the first time. This right shall enable the author to decide if or under which circumstances his or her work shall be made available to the public.⁴
- **Right to claim authorship** (“*Recht auf Anerkennung der Urheberschaft*”; Article 9 paragraph 1 CoPA): This right enables the author to claim authorship with his work and therefore protects the relationship between author and work.⁵
- **Right of protection against distortion** (“*Entstellungsschutz*”; Article 11 paragraph 2 CoPA in line with Article 6^{bis} Berne Convention): The right of protection against distortion enables the author to “oppose any distortion of the work that is a violation of his personal rights” (Article 11 paragraph 2 CopA).⁶ Some Swiss scholars go further and qualify as a moral right the right of integrity (Article 11 CopA) as a whole (i.e. not limited to actual distortions, but also covering any direct or indirect alteration

³ Federal Act of 9 October 1992 on Copyright and Related Rights (Copyright Act, CopA); CC 231.1, https://www.fedlex.admin.ch/eli/cc/1993/1798_1798_1798/en.

⁴ C. P. Rigamonti, *Urheberpersönlichkeitsrechte*, Bern 2013, 224.

⁵ C. P. Rigamonti, *Urheberpersönlichkeitsrechte*, Bern 2013, 254.

⁶ C. P. Rigamonti, *Urheberpersönlichkeitsrechte*, Bern 2013, 294.

of a work)⁷, which however is subject to a series of limitations⁸, unless they pertain to distortions that could negatively affect the honour and reputation of the author.

- **Protection against destruction** (Art. 15 CopA): Where the owner of an original work of which no further copies exist has reason to assume that the author of the work has a legitimate interest in its preservation, he may not destroy the work without first offering to return it to the author.⁹

Exception and limitations to moral rights

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

Yes. Several of the general limitations of copyright law also affect the personality rights of the author. E.g., the limitation to use a work to create a parody (Art. 11 para. 3 CopA) overrides the right of the author to prohibit distortions. Also the limitation for private use (Art. 19 para. 1 lit a) covers acts which in another context would be viewed as violations of the moral rights of the author. If the right of integrity as a whole is considered part of the moral rights of the author, its many limitations have to be considered. Of course, also the general rule that the manifest abuse of a right is not protected by law (Article 2 paragraph 2 CC) applies to moral rights.

There are also general limitations, such as duress, self-defence, prosecution of criminal offences, overriding public interests, etc.

Duration of moral rights

5) What is the duration of moral rights?

The general terms on the protection of copyrights apply also to moral rights.¹⁰

⁷ W. EGLOFF, in: Barrelet/Egloff (Hg.), Das neue Urheberrecht, Kommentar zum Bundesgesetz über das Urheberrecht und verwandte Schutzrechte, 4. Aufl., Bern 2020, Art. 29 N 12.

⁸ E.g., the repair of a damaged artwork, or the conversion of a work into a form that allows its use by handicapped persons (Art. 24c CopA).

⁹ Where it is not possible to return the work, the owner must make it possible for the author to reproduce the original in an appropriate manner. The protection against destruction with regard to works of architecture is limited to taking photos and obtaining the plans.

Ownership of moral rights

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

The author is the initial owner of moral rights.

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

NO.

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

NO. In case of a work made pursuant to a mandate or employment contract, the mandatee or employee who creates the work is still the holder of the moral rights. Where a work is created under a master plan, the copyright, including moral rights, of the creator of the master plan may override those who do the actual work. *E.g.* where one or more “authors” accept the commission to work on a project presented by a publisher, the publisher owns the copyright to the work as a whole, and the “authors” of the parts are entitled only to the agreed remuneration (Art. 393 Swiss Code of Obligations).

D) If the duration of the moral rights exceeds the duration of the author’s life, who is the owner of the moral rights after the death of the author/owner?

Moral rights are inheritable according to general rules of inheritance law.

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

The owner of copyright (including moral rights) in orphan works is unknown by the statutory definition of an orphan work (Article 22b paragraph 1 CopA), so that no one can exercise moral rights in an orphan work.

Moral rights and contracts

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

YES.

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

The general view is that the moral rights are not transferable by contract, but they are transferable by last will (testament, succession pact) and in the course of a partitioning of an estate. In the course of a succession, they can also pass to a legal entity.

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

YES, with the exception of the right of protection against distortion and other acts which could negatively affect the honour and reputation of the author and thus would violate the core personality right of the author (Art. 28 Civil Code). In a contractual context, renunciations or waivers of moral rights are an important issue.

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

NO. Even if there is a clause referring to the renunciations or waivers for moral rights, the author is still entitled by law to exercise his or her moral rights insofar as based on his or her core personality right of the author (Art. 28 Civil Code). This would, however, not in any event protect the authors of possible negative impacts due to the terms of a specific contract (like termination of contract, compensation for damages, a contractual penalty), unless these contractual terms would themselves violate his or her core personality rights.

Infringement of moral rights

- 9) Is infringement of moral rights qualified as copyright infringement?

YES.

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

In general, there are no special requirements. However, at least for the right of protection against distortion ("*Entstellungsschutz*"; Article 11 paragraph 2 CoPA), it would be necessary that the distortion has a sufficient impact to violate the author's personality. Thus, not every alteration of a work is also a distortion and a violation of the author's moral rights.

Moral rights on related rights

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

YES. Performers have the right to be recognised as such in connection with the performance of a work (see Article 33a para. 1 CopA).

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

NO, performers' moral rights do not have the same scope of protection as the author's moral rights. Producers of phonograms and audio-visual works (Art. 36 CopA) and broadcasting organisations (Art. 37 CopA) do not have any moral rights.

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

Performing artists, for example, do not benefit from a moral right of first publication, but may prohibit a recording of their performance on the basis of their personality right in their own likeness (picture) and voice (Art. 28 Civil Code).

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

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

YES.

(a) We see a particular need for improvement regarding the question of how moral rights can be validly disposed of.

Nowadays, it is widely accepted that the «traditional» reference to the non-transferability and non-waivability of moral rights neither adequately reflects the economic realities nor the actual needs of authors. Accordingly, there is a certain consensus that this principle needs some adjustments. Nevertheless, the exact manner and extent to which moral rights can be validly disposed of (transferred) or waived is still not clear.

We propose the following improvement: The first step should be to assume that the transferability (Article 16 para. 1 CopA) and consequently also the licensability and waivability,

also applies to moral rights. In a second step, those moral rights would have to be defined for which an irrevocable transfer or waiver is not possible due to their specific nature. In the latter cases, it would have to be clarified in a third step whether or under which conditions an irrevocable waiver is possible.

(b) We also propose that the right to integrity (Art. 11 para. 1 CopA) be made subject to a general limitation that allows minor changes that do not affect the honour and reputation and thus the core personality rights of the author (e.g., limitation for repairs, conversion into a different format for digital works, etc.).

(c) We also propose that due consideration is given to the nature of the work and the circumstances of the creation. The scope of moral rights should be different for, e.g., poetry and novels on the one hand and computer programs on the other hand, and they should be different for works created at the cost of the author and then offered for publication and marketing, and works created at the cost of an employer or principal. The works created collectively should be exercisable only by one person defined by law (compare for the neighboring rights of performing artists Art. 34 para. 3, rights of the soloists, conductors, film producers and representative of a group of musicians).

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

- a) the definition of moral rights
- b) categories of moral rights
 - a) exceptions and limitations to moral rights
 - b) the duration of moral rights
 - c) ownership of moral rights
 - d) moral rights and the owner of the tangible asset integrating the work
 - e) moral rights and contracts
 - f) the regime of moral rights
 - g) infringement of moral rights
 - h) moral rights and related rights

YES.

- the definition of moral rights > see above Q12 (a) (re scope of integrity right)

- moral rights and contracts > see above Q12 (b) (re non-transferability)

- moral rights and nature of the work / circumstances of creation > see above Q12 (c) (re nature of work and circumstances of creation)

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

NO.

III. Proposals for harmonisation

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

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

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

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

YES

- moral rights and contracts > see above Q12 (re non-transferability)

Definition of moral rights

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

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

YES (in copyright law and general personality law).

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

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

As long as fundamental regulatory issues such as work integrity are governed by moral rights, they must apply to all categories of works.

However, due to the basis of moral rights in the personality of the author, one may ask how reasonable it is to grant them also to authors who produce works in a team for money in an assembly line manner (e.g. software programmers).

Categories of moral rights

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

- right of authorship (this right enables the author to claim authorship with his work and therefore protects the relationship between author and work)
- right of distortion (the right of distortion enables the author to “oppose any distortion of the work that is a violation of his personal rights”)
- right of disclosure (the right of first disclosure of work includes the right to publish a work for the first time)
- right of withdrawal, also the right of withdrawal has little practical relevance
- right to prevent use in association with a product, service, cause or institution where such association could affect the personality of the author, e.g., in a political context which he or she disapproves.
- other, namely protection against destruction where only one copy of a work exists.

Exception and limitations to moral rights

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

YES

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

- for specific categories of works, namely.....
- in case of minor modifications of the work
- in case of abuse of rights
- depending on the owner of moral rights (author, investor, employer, author’s heirs, etc.)
- other, namely in situations where the interests of the owner of the work copy to modify the work override those of the author in its integrity.

Duration of moral rights

20) What should be the duration of moral rights?

The general terms on the protection of copyrights shall apply.

Ownership of moral rights

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

The author (a natural person) should be the initial owner of moral rights. In case of collective creation, the exercise should only be possible by an eminent contributor or representative of the group of authors (see Answer to Q12, (c)).

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

NO.

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

NO.

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

The general rules of inheritance law shall apply in such cases.

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

As the owner of (moral rights of) orphan works is unknown by the statutory definition of an orphan work (Article 22b paragraph 1 CopA), there should be no (known) owner.

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

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

YES. In general, see the protection against destruction (Ar.t 15 CopA). Generally, there should be a balance of interests in such cases.

Moral rights and contracts

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

YES. Fundamentally, we would want to prioritize contractual freedom and thereby broadly permit contracting on and with moral rights.

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

YES, but only insofar as the core personality of the author is not affected, chiefly in a case of distortion Article 11 paragraph 2 CopA. See also answer to Q12 above.

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

YES, mostly. Firstly, those moral rights which can be alienated must a fortiori remain "waivable". However, for those moral rights which are not alienable, accepting contractual waiver risks introducing contradictions between current legislation and the parties' contractual prerogatives. Therefore, we are in favour of permitting contractual waivers at least with respect to specific, predictable situations, but see below.

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

YES, mostly. We are in favour of broad contractual freedom. However, we are also in favour of preserving and protecting limited but essential elements of the author's personality rights. For the latter cases, a waiver should remain possible and subject to an enforceable contractual penalty, except in cases that violate the core personality rights of the author.

Infringement of moral rights

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

YES.

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

The general rules for a copyright infringement shall apply.

Moral rights on related rights

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

YES.

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

NO, a limited set of rights should be attributed.

Other

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

N/A

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

N/A