20. Authors' moral rights in the Berne Convention

Gustavo Ghidini and Laura Moscati

1. COPYRIGHT'S INDUSTRIAL GENESIS AND TYPICAL ENTREPRENEURIAL DESTINATION

It is well known that the attribution to the author of her own exploitation rights on created works occurred with the birth of the publishing *industry*, following the invention (in the Western world[1]) of movable type printing by Gutenberg, and reduced format editions inaugurated by Aldo Manuzio. This attribution was not really new in legal terms, as it was preceded by the granting of *industrial* patents in Venice during the 15th century, well before the famous privilege of the printer Johann von Speyer; in fact, several reproducible technologies had preceded printing.

It is noteworthy that such attribution occurred *after* and in the wake of the one in favour of printers and booksellers (*lato sensu*: publishers), the original recipients of book privileges,[2] and not only in Venice. In England the printers, who through the *Stationers' Company* had held printing privileges since the 16th century, seized the political opportunity to support the cause of authors as an additional argument for advancing their own interests.[3] Their support of authors was also basically due to the structural need to stimulate, with the personal economic incentive, an increase in the production of new works ('content', as we say today) and their diffusion, as the potential of the new publishing industry allowed and required. This potential could not be adequately satisfied by relying on printing the traditional (and very expensive) works so

[1] Fernand Braudel, *Capitalism and Material Life, 1400–1800* (New York 1973) 260ff., reminds that movable type print was first introduced in China.

[2] Edward Wyndham Hulme, 'History of the Patent System under the Prerogative and at Common Law', (1896) 12 LQR 151-154 and (1900) 16 LQR 44–56, writes that the first patents were found in Venice, Italy, where they were issued 'close upon the heels of printers' copyright': ibid 44.

[3] Sceptical, on this hypothesis, William R. Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (Oxford University Press 2004) 42.

far produced by scribes[4] for the benefit of the *happy few*: from translations of the Bible to those of Greek and Latin literary and philosophical classics, to the works of a few other famous scholars, dramatists and poets.

This genesis also explains the indisputable fact that modern copyright was born, and has remained for over a century (two centuries, in truth, if we consider international rules), *totus oeconomicus*, i.e., entirely consisting of a series of exclusive faculties of economic exploitation (productive and distributive) of intellectual works.[5]

Precisely, authors' copyright was born as a *(solely) patrimonial private right of disposition/authorization:* as such fully negotiable, hence *functional to the alienation*, by contract (assignment in time or transfer[6]) to the publisher. The latter is the typically necessary successor in title of the author. With few exceptions, it is only the publishing firm that has the technical, professional and financial resources to create value from the work on a commercial scale. As a rule, then, only through alienation will the author be able to obtain a concrete remuneration for her work,[7] freeing herself from the need to seek the 'salty bread' (Dante) of patrons and protectors, as in pre-industrial times. And only thanks to that transfer, will the publisher be able to dispose of new contents to feed her production and distribution business.

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[4] Their frequent intervention in the drafting of texts is recalled by Professor Luciano Canfora in his *Il copista come autore* (Palermo 2019).

[5] The expression meant 'literary and artistic works' until the second half of the last century, when copyright protection was extended to the so-called information technologies, primarily computer programs. This is how the original text of the Berne Convention (art 1) succinctly stated, and then offered (art 4) an extensive illustrative (non-exhaustive) catalogue (*infra*, in the text and n 8) which includes works of a scientific nature. Works, therefore, characterized by the common denominator of purely intellectual use, since the second half of the 20th century, except with the advent of *technology copyright*: computer programs and industrial design. On the other hand, according to the classic division of intellectual property rights (into industrial and intellectual), works of utilitarian use, such as industrial inventions, can be protected exclusively through patents for invention or model (Paris Convention, art 1.2). The purely intellectual nature of the enjoyment of a product made it possible and still makes it possible to distinguish the functional technological means from the representative result (as in the field of videogames). This distinction is consistent with the traditional principle according to which copyright protects expressions and not ideas, TRIPS Agreement, art 9.2.

[6] The first type corresponds to the publishing contract; the second type corresponds to the alienation (cession), of all exclusive rights (not allowed in some legal systems, such as Germany).

[7] Limited exceptions are, e.g., direct sales of individual works by the artist to art dealers or collectors, or the sale of individual works in digital format (which are usually not complex to produce and/or represent) generated by users of telematic networks (*user generated content*).

2. FULL ECONOMIC EXPLOITATION

Thanks to the illustrative, i.e., flexible nature of the catalogue(s) of works protected by authors' exclusive rights – catalogue(s) offered both by national laws prior to the Berne Convention and by the latter – transferability could embrace *all* productions in the literary, scientific and artistic fields, whatever their mode or form of expression.[8] All kinds of works, therefore, can be gradually exploited through *all* the technical means of production and dissemination that have been produced over time: photography, phonography, cinematography, television, internet and so on.

And not only, all kinds of works, but also – and separately[9] – *all* the single exclusive faculties through which economic exploitation can be achieved, both at the production[10] and distribution level.[11] And of course, such autonomy of the individual faculties in copyright, acknowledged by undisputed principles and praxis, facilitates alienation to the publisher.

It should be further recalled that, as regards the productive profile, the author's economic rights also cover *derivative works* produced by third parties: for example, the adaptation of a novel for young readers, or its transposition into a screenplay. Thus, the author (and therefore the publisher as successor in title) has an exclusive right of authorization also on the exploitation of such derivative works.

In short, *all* the economic interests of authors in the exploitation of their works were elevated to the rank of authors' patrimonial rights, and hence predestined to the publishers' hands.

3. 'MORAL' RIGHTS: A TROUBLED COMPROMISE

It was more than 40 years after its creation (and almost two centuries after continental philosophers and jurists had intertwined moral and economic moti-

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[8] See Berne Convention, art 2.1. The provision, after listing the various types of protected literary and artistic works, concludes by mentioning '*enfin, toute production quelconque du domaine littéraire, scientifique ou artistique'* ('every production in the literary, scientific and artistic domain').

[9] This is an undisputed principle at international level. The autonomy of the individual faculties making up the prism of exclusive rights facilitates their alienation to the publisher.

[10] E.g., reproduction, translation, reduction, adaptation into another form of expression, etc.

[11] E.g., direct publication or by license, sale, generalized or selective distribution, diffusion by any means of communication to the public, etc.

vations in supporting the cause of authors[12]) that the Berne Convention, at its revision conference in Rome in 1928, came to recognize authors' own moral rights, autonomous from the economic ones. Rights, in other words, pertaining only to authors, not transferrable *inter vivos* – and therefore not assignable to publishers: thus, in proper sense, 'personal' rights, as they were often called *in lieu* of 'moral'.

In essence, this attribution established a dual right to respect (*droit au respect:* French was the international diplomatic language up to WWII) for both the true authorship and the integrity of the work vis-à-vis modifications or other manipulations detrimental to the honour and[13] reputation of the author.[14] Dual right, we say, rather than 'two rights': as they are jointly based on the author's unitary interest that her cultural personality always be respected in connection with the publication and circulation of her work.

It is important to emphasize that the Berne Convention, in 1928, recognized as rights *only these two* – however primary – moral interests of authors. Not any others: thus, the Convention refused to accept proposals (mostly Italian

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[12] According to Immanuel Kant, in an article against book counterfeiting, 'Von der Unrechtmäßigkeit des Büchernachdrucks' (1785) 5 Berlinische Monatsschrift 403ff., the work is, on the one hand, a corporeal object, and on the other hand, an immaterial creation. The first profile corresponds to a real right, the second to a personal and inalienable right. And Johann Gottlieb Fichte too, again in an article of 1793 against the counterfeiting of literary works, 'Beweis der Unrechtmäßigkeit des Büchernachdrucks. Ein Räsonnement und eine Parabel', in *Gesamtausgabe der Bayerischen Akademie der Wissenschaften*, *Werke*, I, *1791–1794*, (Berlinische Monatsschrift 1964) 413, distinguishes between the corporeal element and the spiritual element, the latter being the object of an innate right. These statements gave rise to the German dualist doctrine of *Immaterialgüterrecht,* developed in the second half of the 19th century by Josef Kohler. In France, *droits moraux* began to be considered after the French Revolution, following some *arrêts* of 1814 and the reflections of jurists such as Pardessus and Renouard, who, by outlining certain moral authorial faculties, separated intellectual property from material property: see Stig Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinave avec un aperçu de l'évolution internationale. Étude de droit comparé*, I, *L'évolution historique et le mouvement international* (CUP 1967). As for the English legal system, some jurisprudential pronouncements of the 18th century are noteworthy for the identification of a right of unpublished works: see Mark Rose, *Authors in Court: Scenes from the Theater of Copyright* (Harvard University Press 2016) 11–35. Among the precursors of the recognition of authors' subjective rights are John Milton, who, in advocating freedom of the press, extolled the value of creativity, and John Locke, who affirmed the author's ownership of her work, limiting its duration for her heirs. On the historical origins of these rights see in general Laura Moscati, 'Origins, Evolution and Comparison of Moral Rights between Civil and Common Law Systems' (2021) 32 EBLR 25–51.

[13] Textually, but improperly: 'or'.

[14] Berne Convention, art 6 *bis*.

and French) about '*le droit de décider si l'œuvre doit paraître*';[15] so, the right to withdraw the work from the market where serious moral reasons exist[16] never had any chance of recognition.

Such limited recognition was the result of a battled compromise between the representatives of European countries, Italy and France in particular, which supported a broad recognition of moral interests, while English-speaking countries (except Canada) opposed *tout court* the idea of an international protection of those kinds of interests. That hostility, rooted in a dominant publisher-friendly Anglo-Saxon legal culture, in fact subsisted and subsists, notwithstanding the formal adhesion to the Berne Convention, and, in the United States, the Visual Artists Right Act, preceded by some state laws.[17] Even at the international level, the TRIPS Agreement requires compliance with Articles 1–21 of Berne but *excepts Art 6 bis*.[18]

4. A HYPOTHESIS ON THE SUBSTANTIVE REASONS FOR THE LIMITED RECOGNITION OF AUTHORS' MORAL RIGHTS IN THE BERNE CONVENTION

A preliminary caveat: economic and moral interests of authors cannot be separated with a clean sweep of the sword.[19]

The interests in publishing, translating, reducing, transforming the work into another kind of representation, and circulating it throughout the market in all possible ways, are clearly economic by nature, as they all concern activities that potentially multiply the author's earnings. But it is also evident that the exercise of these activities corresponds to a moral interest of the author herself: in short, to see her name fly and spread her cultural message within and beyond the borders of the country of first publication. The determination of the sale price of a book, for example, may well involve not only economic but also

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[15] *Proceedings of the Rome Conference 7 May–2 June 1928*, Berne, 1929, 173.

[16] As attributed by the 1925 Italian Decree on authors' and publishers' rights, RDL n. 1950/1925, art 15.

[17] See e.g., – also for further references – the vibrant article (kindly brought to our attention by Rochelle Dreyfuss) by Amy Adler 'Against Moral Rights' (2009) 97 *Cal L Rev* 263ff.

[18] TRIPS Agreement, art 9.1.

[19] Also because of this intertwining, the moral interests of authors, elevated to personal rights, are often also (or exclusively) defended by the publishers themselves who are the beneficiaries of the economic rights, and who are equally interested in avoiding the commercial failure of the works.

moral interests of the author, with respect to both a too low price, symbolic of a work of little value, and a too exorbitant one, a brake on its dissemination.[20]

It is perhaps not too far-fetched to think that the very same original direct attribution of economic rights to the author, as a means of enabling her to earn a living through the fruit of her creative work instead of seeking the patronage of Maecenas, also objectively satisfied a fundamental moral interest of the author: personal intellectual independence.

Symmetrically, the two author's moral interests, elevated to the rank of personal rights in 1928, also have obvious economic significance. The usurpation of paternity, in fact, may well translate, *hoc ipso*, into the diversion of paying readers, to the benefit of the plagiarist and her publisher. Similarly, the loss of reputation can easily (albeit not necessarily[21]) cause the loss of public favour and, therefore, the reduction or even collapse of sales.

Thus, moral and economic interests are like Siamese twins, whose separation occurs when the legislator intervenes to elevate one rather than the other to a full right. And the cut made by the 1928 Convention was the clearest and most revealing support of the author's moral interests.

We will now submit a hypothesis about the substantive reasons why, albeit reluctantly, the representatives of English-speaking countries agreed to a compromise on the recognition of just two authors' moral interests that the Berne Convention finally elevated to rights, whereas, as noted above, *all* authors' interests to economic exploitation of their work – transferable to the publisher – were in contrast elevated to full property rights.[22]

A substantive explanation stretching beyond exegetical exercises can be attempted, considering that the interests of the defence of authorship and reputation of the author are *typically non-conflicting* with the economic interests of the publisher, to whom the various rights of exploitation are typically transferred by the author. The publisher has no interest in seeing her author's work plagiarized, nor her reputation tarnished: such events tend to result in a fall or even collapse of sales. On this level, authors' and publishers' respective interests coincide.

In contrast, recognizing other moral interests of the author can well create actual occasions of conflict with the economic rights transferred by the author. Just think, for example, conflicts about choice of a translator, or the chance

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[20] An interest that Italian Copyright Law elevates to a right to prior consultation and even to opposition, art 131.

[21] The 'scandal' can create a morbid interest (*succès de scandale*), as has repeatedly occurred in literature.

[22] See *Rome Conference* (n 15) 179. The general reference to the moral interests of authors will re-emerge more than twenty years later in the UN Universal Declaration of Human Rights, adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), art 10.

of having the work translated in countries with regimes loathed by the author, or over whether to edit a version for children, or to promote the adaptation of a novel into a screenplay, and so on.

These and similar hypotheses clearly involve relevant moral interests of the author, well distinct from, and beyond, only the two recognized in 1928. Nevertheless, the Berne Convention's final compromise ruled that such interests should remain integrated (no Siamese twins' separation) in the economic rights assigned to the publisher. Hence, their possible satisfaction would remain entrusted to the sole publisher's discretionary choices.[23]

The compromise solution adopted in Berne is not only limitative of authors' personal/private moral interests (also in their intertwined economic projection). There is more: such as the possibility that a publisher might refuse to have the work translated in one or other country, or that she might choose a mediocre translator. Now, unless otherwise specifically agreed, the Berne Convention and the ensuing national laws do not grant authors the right to influence – not even in a consultative way – the publisher's decision about having the work translated, or about the choice of the translator, for the long duration of copyright.

We hold that this normative solution is also potentially prejudicial to the US constitutional aim 'to promote science and the useful arts'. Indeed, along with the author's interest in having her cultural message more diffused, and not humbled by a bad translation, the general interest in the diffusion and valorization of a work of culture – translation being of course the main instrument for the international circulation of culture – would also be wounded.

It might be of some interest to recall that the present normative situation (dating from Berne's Revision Conference of 1908) marks a clear regression in comparison with both the original 19th century Berne texts (1886 and 1896) and some previous national laws, in particular the Austro-Hungarian Sovereign Patent of 1846. A regression equally prejudicial to authors and the general interest in the circulation of culture.

In Article 5 of the original 1886 Berne text, the duration of the exclusive right of translation was detached from the general term of copyright: ten years after the first publication. In the partial revision brought about by the *Acte Additionnel* of 1896, article 1.III, the duration of the right was aligned with the general one, but the exclusivity would lapse if the authors, publishers or '*leurs ayants cause*' did not have the work translated within ten years after the first publication.

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[23] This, of course, without prejudice to the possibility of establishing a specific agreement, recognizing the author's actual contractual strength.

That special regime of translation was inspired by the regulatory approach of the quoted fundamental Sovereign Patent of 19 October 1846 of the Austro-Hungarian Empire 'to protect the literary and artistic property'. The legislator of the multinational Austrian empire (so far the most united and efficient European community) wisely considered the circulation of culture between peoples of different languages as an eminent factor of international social and political cohesion. Accordingly, said legislator *excluded* in principle – please note – that *even an unauthorized* activity of translation might constitute counterfeiting (art 5). There was a limited exception to that rule, an exclusive right of translation for the author (hence, also for the assignee publisher) only if the translation would have taken place within one year from the publication of the original work (and as long as the author had made an express reservation in that regard).

The Berlin Revision Conference of 1908 rejected such limitation, obviously contrary to the interests of the publishers.[24] Thus, the regime of translation was fully aligned, without any distinction in terms of duration, to that of all the other authors' economic rights transferrable to the publisher.

5. A WEAK EUROPEAN COMMUNITY FRAMEWORK, AND THE UN UNIVERSAL DECLARATION OF HUMAN RIGHTS

A lack of incisive reform proposals emerges, both on the regulatory and the hermeneutical level about author's moral rights. This can be said also of those proposals presented by the eminent jurists who in 2010 gave birth to the European Copyright Code (Wittem Project[25]) as a model for future European and individual state legislation. In that project, the moral rights guaranteed by the Convention are more precisely defined, but without substantially expanding the range rights (while limiting the temporal duration of the rights themselves).

The same can be observed with respect to the current European Community framework, which is quite reluctant to include moral rights different from and additional to the (agreed) classic ones of authorship and integrity. The 1988 Green Paper on Copyright leaves the fate of moral rights to national laws.[26]

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[24] Much more than the authors'. Indeed, that limitation actually tended to hasten the translation of works assigned to publishers.

[25] The Wittem Group, 'European copyright code' (2010), https://www.ivir.nl/copyrightcode/european-copyright-code/ accessed 3 December 2022.

[26] *Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action*, COM (88) 172 final, 7 June 1988; see also 'Working

And there was silence on moral rights in the 2019 Copyright Directive,[27] and the explicit statement of the official documents accompanying the 2016 proposal declared: 'Moral rights are not harmonized at EU level'.[28]

In the attempt to put forward some more incisive reform proposals at the international level, we would start from the United Nations Universal Declaration of Human Rights, that explicitly and broadly supports authors' 'moral interests', without limitations of type.[29]

The broad principle set out in the UN Declaration should encourage national Berne Convention Members to promote *a revision of Art 6 bis* aimed at widening the area of moral rights within a balanced composition of the interests at stake: among which, eminent for their constitutional rank, are the collective ones in the dissemination of culture.

6. IN SEARCH OF REFORM: AN ADEQUATE SPACE FOR 'REPENTANCE' RIGHTS

As hinted, the protection of the author's interest in her own identity as author and in the integrity of her work is an acknowledgement of her right to safeguard her own 'cultural personality' at all times, before or after the publication, and *erga omnes*, i.e., vis-à-vis third parties and assignee-publishers alike.

It is self-evident that the two rights sanctioned in the Rome Revision of 1928, while certainly fundamental, are not an exhaustive expression of that safeguard. One example will suffice: the author's interest in not having re-edited or reprinted a novel that was written in the past and inspired by totalitarian and/or racist ideas that she later repudiates. In the present regime, unless her fame allows her to dictate conditions, the decision is only the publishers'.

The example suggests the expediency of an appropriate reform broadening to include rights of repentance, the attribution of which alone – in addition to the two rights under Article 6 *bis* – can fully guarantee adequate compliance with that safeguard. The fullest compliance would include a reasonable degree of satisfaction of the authors' interests in the *valorization* of their work by pub-

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programme of the Commission in the field of copyright and neighbouring rights. Follow-up to the Green Paper' COM (90) 584 final.

[27] 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 (Text with EEA relevance) [2019] OJ L130/92.

[28] cf, 'Commission Staff Working Document Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' COM (2016) 593, 6.

[29] UDHR (n22) art 27.2.

lishers. But given the current reluctant atmosphere about moral rights, even in Europe, we postpone that issue to a future discussion and remain on the more positive ground of respect for authors (*droits au respect*).

In short, the author should be granted, even after the alienation of rights to the publisher:

(a) the right to withdraw her consent to publish the work;
(b) the right to modify the work before the publication of the first edition and any subsequent editions or reprints;
(c) the right to have the work withdrawn from the market after the publication of the first or subsequent editions or reprints;
(d) by way of analogy, we would add the right to oppose the translation into the language of a country in which has become dominant a political regime, or a cultural *milieu*, that she considers in serious conflict with the ethical values informing her *current* cultural and political personality.

In the framework of a fair balance of the parties' legitimate interests, the exercise of such rights of repentance should only be permitted for serious moral reasons.[30] And (unless otherwise agreed by the parties) it should be accompanied by the author's duty to indemnify the publisher both for all expenses incurred, and for any loss of commercial opportunities that her decision to repent might entail.

[30] This condition is laid down by art 142 of the Italian Copyright Law.