

Droit Moral – The International and Comparative Scene from a Scandinavian Viewpoint

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1 Introduction and Historical Survey

1. Even as recently as fifteen years ago, an informed observer of the copyright-law scene might well have considered himself justified in stating, on the basis not only of international convention activity, national legislation, judicial practice and legal writing in the field in question but also of those pronouncements in the non-specialised public debate which concerned this area of law, that the area was in a process of development, that the direction of this development was more or less unambiguous – proceeding towards an increasingly extensive recognition and protection of the rights of individual intellectual creators in their products – and, finally, that increasing attention was being given to the non economic elements in this recognition and protection. In Sweden, in the interests of Nordic uniformity, the Copyright Act of 1960 extended the period of protection to fifty years after the author's death; in the Federal Republic of Germany the period was extended in 1965 to seventy years. In France, the codification in 1957 of a case law spanning over one hundred and fifty years involved a broadening and strengthening in various respects of the author's legal position. The East European states were eager to point out how their new legislation safeguarded the essential elements of the intellectual creator's moral rights: to prevent changes in his works and to stand before the world as their spiritual father. In the corridors of international agencies the possibility was discussed that the U.S.A. would abandon its traditional scepticism towards *droit moral* and adhere to the Berne Convention, the principal international instrument of the Old World; similar hopes were expressed concerning the Soviet Union.

All this was fifteen or even as recently as twelve or ten years ago. Since then the wind has veered. Already in the late 1960s, theatre directors and actors were maintaining that a dramatic work is as much the property of the group producing

it as it is of the author, and that the play's life on the stage, or its possibility of achieving political effect, is more important than the author's interest in having his work performed in an intact and unchanged form. From other quarters it was asserted that individual copyright was nothing more than an outplayed 19th century device, and politicians even began to speak of "community of intellectual property" as something new and progressive. In the case of new forms for the use of intellectual property, forms which presented individual technical problems, one could notice a – sometimes unavoidable – tendency to have recourse to collective agreements on free use in return for fees payable to the authors' organizations.

The future growth or decline of copyright and, in particular, of *droit moral*, is something we shall not venture to make predictions about in the present context. The complexity of possible solutions (which may not only vary from one field of copyright law to another but also include such developments as a weakening of the individual economic elements concomitantly with a strengthening of the "moral" elements) makes any such attempt futile at the present moment. We shall turn, instead, our attention to the historical roots of moral rights. By way of introduction we shall start with a short survey of this legal concept as it appears in modern Scandinavian legislation. The *sedes materiae* is Sec. 3 of the Nordic copyright statutes of the 1960s (in what follows the abbreviation URL is used for the Swedish Copyright Act of 1960 – *Upphovsrättslagen*). In translation, the Swedish version of the provision in question reads as follows:

When copies of a work are produced or the work is made available to the public, the name of the author shall be stated to the extent and in the manner required by good practice.

A work may not be changed in such a way that the literary or artistic individuality of the author is slighted; nor may the work be made available to the public in such a form or in such a connection as is slighting to the author in the manner stated.

The author may with binding effect waive his right under this section only in so far as concerns a use of the work that is limited in nature and extent.

The right to be mentioned as author in accordance with the first paragraph of the section just cited is often referred to by the French term *droit à la paternité de l'œuvre* (*droit de paternité*). The prohibition of alterations contained in the second paragraph is usually called the author's *droit au respect*. Strangely enough, no Scandinavian terms for these rights have won acceptance. For *droit moral*, on the other hand, an appropriate Nordic translation can be said to have been found: in its Swedish version this is *upphovsmannens ideella rätt* (the moral right of the author).

In Continental legal writing – and nowadays also in Continental legislation – mention is often made, as a third major component of *droit moral*, of the author's right to decide on the (first) occasion of making his work available to the public (*droit de publier, droit de divulgation, Veröffentlichungsrecht*). This right is the object of special regulation in Art. 19 of the French Copyright Statute

of 1957.¹ In the German *Urheberrechtsgesetz* of 1965 it is placed together with *droit au respect* and *droit à la paternité* under the heading *Urheberpersönlichkeitsrecht* (the German translation of *droit moral*). In Sec.12 of the German statute we find the following provisions:

(1) *Der Urheber hat das Recht zu bestimmen, ob und wie sein Werk zu veröffentlichen ist.*

(2) *Dem Urheber ist es vorbehalten, den Inhalt seines Werkes mitzuteilen oder zu beschreiben, solange weder das Werk noch der wesentliche Inhalt oder eine Beschreibung des Werkes mit seiner Zustimmung veröffentlicht ist.*

The Nordic legislators have abstained from introducing rules on a special “moral” *droit de publier*. The reasoning behind this decision, which is developed at particular length in the Swedish *travaux préparatoires*,² was based mainly on the argument that the economic powers conferred on the author, the sole right to “dispose over the work,” give him adequate protection against unauthorized publication. From the point of view of legislative technique, there is considerable justification for this attitude. In German and French law, a number of technical problems have been found to result from the existence side by side of an “economic” right of disposal, which in principle can be transferred and made the object of contracts, and a “moral” right of publication, which in principle is non-assignable.

In order to round off this introductory sketch of the components of *droit moral*, it should be added that legal writing in this field contains an abundance of proposals for all sorts of supplementary rights, some of which have been adopted in the legislation of certain countries. The most important of these supplementary rights is probably the *droit de repentir*, the right of reconsideration which is now to be found in both French and German law (Sec. 32 LF; Sec. 42 URG) as well as in other legal systems and which gives the author a right to withdraw – against economic compensation to the other contracting party – from an agreement on the publication and utilization of his work. In German law there is also an express provision on *droit d'accès*, a right for the author to have access to his work even after it has passed into the hands of others (Sec. 25 URG). On the other hand, it would seem that authors have nowhere been successful in their campaign for statutory provisions against the *destruction* of protected works, despite the fact that at the Brussels conference of 1948 the states adhering to the Berne Union expressed a desire (*vœu no. 111*) that rules on this subject should be adopted in the internal legislation of member countries.³ Nor have authors had any success in their attempts to secure a *perpetual* protection for the *droit au respect*. In the majority of countries the *droit moral* is extinguished simultaneously with the economic rights; thereafter there remains a more or less effective “monument protection,” mostly of public-law character, entrusted to various cultural authorities (Sec. 51 URL). It is only

¹ In what follows, the French act is cited LF, the German act URG.

² 1956 SOU No.25 (Stockholm), 129 *et seq.*

³ Documents de la conférence réunie à Bruxelles du 5 au 26 juin 1948, at 586 (Berne, 1951).

in France, among major countries, that the author's *droit moral* is expressly declared in a statutory provision to be "perpetual," and the application of this provision has given rise to a number of problems concerning which organizations or agencies have the right to take action on infringements of the *droit au respect*.

In the Scandinavian as in most other legal systems the protection of the author's moral right may be said to be constructed according to the following basic pattern: around a "nucleus" of rights, which provide protection for the most "central" interests or against the grossest infringements and which in principle cannot be transferred and can only to a limited extent be the object of binding agreements (in Nordic law this nucleus is contained in Sec. 3 URL quoted above) there is an outer line of defences, consisting of rules which *generally* protect the same interests but can be set aside by contractual agreement. Thus the *droit au respect* in Sec. 3 URL is complemented by the general prohibition in Sec. 28 against changes in works which have been made over to another person for his use. To this outer system there may also be assigned the rules in Sec. 26 URL, which provide that *droit au respect* and *droit à la paternité* are to be left intact when a work is made the object of such use without the permission of the author (the "borrowing right" of the public, corresponding to the Anglo-American notion of "fair use") as is regulated in Ch. 2 URL.

Finally, the taking into account of the moral rights of authors – *i. e.*, one may perhaps venture to say, of the prevailing idea that literary and artistic creation constitutes in a particularly high degree an involvement and expression of the innermost personality of the author and that, come what may, the work thus always remains his "spiritual offspring" – permeates copyright law as a whole and finds expression, side by side with the *droit moral* rules in a narrow sense and the "secondary" protective rules just referred to, in special rules on copyright *contracts*. An example from Scandinavian law is Sec. 28 URL, which prohibits a person acquiring the right to use a work from assigning the work to another person without the permission of the author (except in such cases as the total transfer of a publishing business). A further example consists of the rules (which can, however, be set aside by contract) in Secs. 30 and 33 URL; the former of these limits the assignment of the right of reproduction to a certain period, while the latter makes it a duty for the acquirer of a right to publish to issue the work. In both cases the intention is to prevent the buying of works for the simple purpose of suppressing them. The three rules just mentioned are found in most other legal systems; in many cases these also contain detailed provisions on contracts for future works and on the assignment of rights of option (Sec. 40 URG; Secs. 33 and 34 LF); these rules are intended to prevent "slave contracts" and excessively long-term and indefinite commitments of literary and artistic creativity.

2. Despite the icy winds from collectivist and other quarters which have been blowing in the faces of authors and the supporters of copyright law in later years, it would seem true to say that if the protection of *droit moral* has not advanced of late, it has not so far been seriously questioned.

What today appears natural has not always been self-evident. It has not even been natural for a particularly long period. *Droit moral*, based as it is on the idea of the artistic and literary work being a specific expression of the author's personality, has not, for a private-law institution, a very long history. On the other hand, the *prehistory of droit moral* rules covers a considerably longer period.

Here it is not possible to give even the briefest outline of the history of *droit moral*.⁴ This history would seem, however, to have a general or topical interest in certain respects. We shall therefore touch on these to some extent, concentrating our remarks on five points.

2.1. In the first place, it is seldom that lawyers have the opportunity to follow at close quarters, and with the aid of fairly abundant documentation, the prehistory of a private-law institution, i.e., its way from the origins in the development of ethical and social ideas until the stage where it is embodied in legislation. It is possible to guess at the economic and juridical background of the earliest rules that can be discovered on such things as emphyteusis and pawning, but these useful institutions were developed in the world of practical people, in silence, before they won a place in the source material of legal historians. The development leading to *droit moral* as we know it today was anything but silent. It took place to an intensive verbal accompaniment, since what was involved were attitudes, interests and disputes concerning people whose business was words, a *genus irritabile* which could be relied on to make sure that nobody got hanged in silence. The prehistory and history of *droit moral* reflect, above all, the different conceptions successively prevailing in the Western world as to the true nature of literary and artistic creativity. The development of evaluations of that activity is a subject of considerable interest for the general history of ideas, reaching far beyond the normal limits of legal history.

Those legal scholars who have written about *droit moral* have (consciously or unconsciously dominated by the ancient juristic notion that law, likewise, improves with age: *prior tempore, potior jure*) thought it incumbent on them to find the earliest possible evidence: first, that authors have set store by their rights of paternity, the integrity of their works, and the possession of the sole right to determine whether or not a work shall be made available to the public; and, secondly, that these interests have been recognized as legitimate by the surrounding community. The result has been a rich collection of anecdotes about wounded literary and artistic self-respect – starting with Cicero's indignation over indiscretions with a manuscript⁵ – and about public condemnation of literary thefts and plagiaries; the first chapter in the legend of moral rights was written, it has been claimed, when Plato's disciple Hermodoros made his master's lectures known outside the circle of *initiés*.⁶

⁴ For a detailed historical survey, cf. Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinave*, Vols. I and II:1 (Stockholm, 1967); Vol. II:2 (Stockholm, 1973), Vol. 1, at 27-498.

⁵ *Op. cit.*, Vol. 1, at 48.

⁶ *Op. cit.*, Vol. 1, at 47 *et seq.*

These anecdotes hardly constitute valid evidence of *legally relevant* attitudes to intellectual products and their creators. Both in antiquity and in the middle ages it was a matter, on the one hand, of the private reactions of writers and artists and, on the other, – in *élite* circles – of evaluations which lay entirely in the area of tact, good taste or, at the highest level, ethics. There is hardly a glimmer of evidence that what today are called *droit au respect* and *droit à la paternité* were regarded as claims protected by law. The objections to the drawing of such conclusions from the scattered source material are overwhelming. In the first place, until at least the end of the Middle Ages the requisite *juridico-technical* conditions for dealing with such claims did not exist and, when such conditions did emerge as a result of the gradual development of printing privileges, the situation was dominated either by the purely economic interests of publishers or by ecclesiastical and governmental interests (which sometimes could be invoked as arguments for the importance of not altering a text).⁷ Secondly, until the middle of the 18th century literary and artistic creation was essentially regarded either as a species of handicraft – and thus not inevitably associated with a given personality – or as a learned profession, strictly governed by the traditional and conventional laws of the genre. The evidence on this impersonal view of intellectual creation is much greater in volume and of much greater weight than the scattered examples of more “modern” attitudes which have been found in the source material. It is not until the 18th century that the *general* conception – and such a conception is a prerequisite for the emergence of legal rules – of literary and artistic activity gradually veers towards an emphatic accentuation of the decisive contribution made by free creative personalities. The cult of genius and originality characteristic of pre-Romanticism and the “*Sturm-und-Drang*” period resulted in the final discrediting of the hitherto prevailing conception of creation as consisting in the main of *reproduction* (mimesis). Now for the first time we find in the educated public the basic conception of intellectual creation which on the plane of collective evaluations and attitudes is necessary as a foundation for a legal recognition of the rights which today constitute *droit moral*.

Nevertheless it is not until well into the 19th century that it can clearly be seen that the prehistory of the institution has ended and its *history* has begun. For the increasingly articulate and specific claims of authors to be cast in the mould of private law it was not enough that there had been a change in the view of creativity – a change which after all belonged essentially to the domain of aesthetics. It was necessary first to carry further two other lines of development, one of them belonging to the field of legal technique, the other to that of social history. When these two lines meet and merge together, *droit moral* enters the sphere of law.

2.2. With the printing and other commercial privileges of the 15th and the two following centuries, there begins the painful intellectual process whereby European jurists gradually learned to “construct” something so thoroughly alien to their Roman law system of categories as “rights in incorporeal objects.” Even

⁷ In German legal writing, attempts have been made to procure evidence for a “consciousness of intellectual rights” in the 16th and 17th centuries. However, this evidence mostly has to be rejected or at least reduced with regard to its importance.

today the technical construction of these rights is still a topic of discussion.⁸ As we shall have occasion to mention later, the solution which may be said to dominate modern copyright law (outside the common law world) was developed in the 19th century by German authors. During the preceding century, however, there had developed a notion which (after a partial recognition in English law and certain other national legal systems earlier in the century – a recognition difficult to interpret in modern categories) was to become firmly established in European legislation as a result of the epoch-making French copyright laws adopted in the period of the Revolution. This was the doctrine of “intellectual property.”

The right of ownership – glorified by Locke and by the progressive jurists of the Enlightenment, with their liberal-bourgeois outlook – proved to be an extremely effective slogan in the authors’ campaign for legislative recognition of their *economic* rights. And *some* protection for these rights was a practical prerequisite if *droit moral* in the great majority of cases was to have any real legal interest: so long as anyone who chose could use another person’s work with impunity, such things as changes in the work and even the appropriation of the author’s name appeared secondary, at least in the sense that it was scarcely worth the trouble of going to law about them. The slogan “right of property” was, however, not without drawbacks for those who wished to see the victory of the *droit moral* idea and its transformation into an established legal principle. If the author has a proprietary right in his work, was not the right of the publisher, the theatrical producer or any other “buyer” just as good and just as unrestricted as the right of the “seller,” once the price had been paid and the “article” handed over?

Between the view of modern, pre-Romantic and Romantic aesthetics – that the work is the author’s “spiritual child” – and the conception of 18th-century jurists concerning the absolute right of ownership there was a contradiction which was not immediately resolved. At first the author who wanted to assert his inalienable right to safeguard his work often encountered the acquirer’s indignant rejoinder that he, the acquirer, was entitled to do what he wanted with his lawfully acquired property. This did not, of course, happen in all cases – the giants of Parnassus were able to hold their own with the support of enlightened opinion – but where the small change and everyday wares of copyright law were concerned, the “buyer’s” right was usually absolute.⁹ It was not until towards the end of the 19th century that a complete “theoretical” and “constructive” solution of this contradiction was achieved, and then only when in a spirit of resignation recourse was had to the *faute de mieux* construction whereby copyright law was transformed into a “*law sui generis*,” existing side by side with the accepted legal categories. If *droit moral* as a positive-law institute emerged in judicial practice at a very early date in France, the pioneer country in this field, this was undoubtedly due to the pressure that authors began to be able to exert on informed public opinion, which was here

⁸ On the modern Scandinavian debate, cf. Strömholm, *La notion de l’œuvre littéraire ou artistique dans la doctrine scandinave moderne*, in 1965 NIR 113 et seq.

⁹ The principle is laid down in a well-known decision of the French *Cour de cassation* in 1803; cf. Strömholm, *Le droit moral*, Vol. 1, at 147.

represented by the court jurists. The naked conception of proprietary rights was looked upon as something altogether too unsophisticated to be accepted without question.

2.3. With this we reach the third point where the historical development of *droit moral* rules seems to possess a more general interest. It concerns the capacity of authors as a group to *gain a hearing for their interests*. It was all well and good that towards the middle of the 18th century the technical instruments of the law had developed to a point where a general, fairly well-developed protection of copyright was possible and the leading social groups accepted intellectual creation as an activity which both engrossed and expressed the creator's innermost personality to a particularly high degree. This, however, was not enough to carry the authors' claims over into the domain of positive law.

The history of copyright law can be considered, in a broader perspective, as the history of the social and economic position of the professional categories concerned. In all periods there have been isolated writers and artists who were highly respected and had practical possibilities of looking after their own interests; furthermore, literary and artistic activities were always carried on, in European elite circles, as a more or less serious leisure occupation, by persons having an assured social position. These facts have, of course, influenced the general evaluation of the status of the activities in question, but they cannot be said to have had decisive influence on the position enjoyed by the rank and file of intellectual creators. This position has always been – and still is – far from uniform. In a purely general way it may be said that, socially, if not economically, literary authors as a group were the first to claim a level of social recognition from which they could effectively assert their interests. Broadly speaking, they reached this level in the leading countries of Western Europe during the 18th century. Two factors contributed to this result; on the one hand, the growing respect of the educated classes for creativity as such (in contradistinction to *learning*, which they had always respected and would continue to respect) affected the status of creators and among other things gave them enhanced authority in their demands for legal protection; on the other hand, the expanding market offered by the middle class had the effect of increasing the authors' independence of patrons and public bodies. In its turn the improved economic situation, taken as a whole, of authors gave – in a world which tends to admire people of substance – increased weight to non-economic demands as well. In the race for recognition, literary authors had a distinct lead over artists and composers; but the lag is greatest the nearer we approach the intellectual and social milieu of handicrafts. It was not until well into the 20th century that representatives of this field gained the recognition as “creators” that literary authors reached towards the end of the 18th century.

2.4. At the beginning of the 19th century the factors discussed above were present simultaneously, at any rate in France, and it is also in that country that *droit moral* began to develop in the case law of the courts, mainly those of Paris. If we want to fix a definite date for the earliest manifestations of the legal view which rejects the most far-reaching consequences of the doctrine of intellectual *property* and recognizes that despite any transfer of his economic rights the author retains a moral right to his work, the year 1814 would probably be the strongest candidate. In that year Pardessus's celebrated *Cours de droit*

commercial was published, and in that year the *Tribunal civil de la Seine* rendered a decision in which it stated that a work “which has been sold by an author to a bookseller or printer, and which is intended to bear the author’s name, must be printed in the state in which it has been sold and delivered.” Pardessus is more explicit: “The selling of a manuscript without reservation,” he says, “does not have the same effect as the transfer of ordinary property. It does not give the purchaser a right to dispose of the manuscript in the most unrestricted manner, e.g. by changing it, making additions or reductions to it. Nor may he destroy the work or omit to print and publish it: in fact he is only a usufructuary (*usufruitier*), who is entitled to enjoy the fruits of the object but must preserve its substance.”¹⁰

French case law from the early 19th century is very extensive; its main direction is clear – despite a number of regressions – but there is a striking lack of carefully thought-out statements of principle. In most cases the provision used either expressly or implicitly to justify the author’s right to intervene, above all against alterations, is the general rule on liability for torts in Sec.1382 of the *Code civil*.

The ensuing development is of interest from the point of view of principle owing to the strange interaction which takes place between, on the one hand, *French practical solutions* – with a weak or non-existent theoretical basis – and, on the other hand, German theorizing, which develops, for a long time, with no or hardly any support in legislation and case law.

The French solutions, which found expression, *i.a.*, in a succession of draft statutes from the 1820s, the years around 1840, and the last years of the Second Empire,¹¹ few of which reached the statute book, became increasingly clear and detailed. The legal institute which we know as *droit moral* emerged. But it was an institute without a generally accepted name and without coherent principles.

As the earliest advocate of an explicit *droit moral* in German legal theory – or at any rate as one of them – can be counted no less an authority than Immanuel Kant. In two important essays Kant discusses in detail the legal nature of authors’ rights and publishing contracts.¹² His main concern is with the position of the publisher, that of the author being treated more *en passant*. With some simplification Kant’s view can be said to be that the literary work is a *speech*, which the author makes to the public, and the publisher is not an owner but the performer of a *commission*; the commission with which he has been charged is to present this speech, and his legal position in relation to the author, to competitors, and to the public is determined by this commission. Concerning the right of the author Kant makes the following pregnant statement: “... this right is not a right in an object (in re), i.e. in the copy (for the owner can burn this up before the author’s eyes), but an innate right, inherent in his own person, which implies the possibility of opposing the attempt of another person to compel him

¹⁰ Quoted after *op. cit.*, Vol. I, at 124 *et seq.*

¹¹ *Op. cit.*, Vol. I, at 163-173.

¹² The article *Von der Unrechtmäßigkeit des Büchernachdruckes*, in *Berlinische Monatsschrift* 5 (1785), and in *Metaphysische Anfangsgründe der Rechtslehre*. On the interpretation of Kant’s ideas, cf. Strömholm, *op. cit.*, Vol. I, at 184-195.

to speak against his will”¹³ In another passage copyright is characterized as a supremely personal right (*jus personalissimum*).

It was not long before Kant’s ideas on this subject filtered into German 19th-century legal writing.¹⁴ While a number of German states, above all Prussia, through a succession of statutes (the most important of these being adopted in 1837) applied pragmatic solutions to copyright problems, philosophically minded writers went on to elaborate and define the conception of copyright as a special “personality right” or a “mixed” right, with both personal and property-law elements. The development was far from being uniform or unambiguous.

It may be said, by way of summary, that towards the end of the 1880s German legal writers had created a “theory” for *droit moral*. It is true that the various authors disagreed with one another, and would continue to do so for half a century to come, on the question whether the legal position of the author had two components – an economic one which was regulated by copyright, and a personal one falling outside the law of intellectual property (this was the standpoint taken by Josef Kohler) – whether the *whole* of copyright was of a personal character (a view represented above all by Otto von Gierke), or whether copyright was a “mixed right” with both economic and personal elements, each having its own special rules (the mediatory position launched by Ph. Allfeld which became the prevailing doctrine in the present century). But despite these differences, which were of limited importance for the practical solutions, there had been discovered *the comprehensive formula* for the *droit moral* which only gradually won for itself a place in the German copyright statutes of 1870-76 and 1901-07: this formula had to do with a “personality right” which was in principle non-transferable and which should be treated, for practical purposes, as separate from the economic proprietary right.

Around 1870 a French legal writer, Morillot, discovered the German doctrine and became an advocate of the “dualistic” approach, (after the German author Klostermann), which holds that side by side with the property-law “monopoly” there exists – and it is here that the *term* is launched for the first time – a *droit moral* which has the character of a right of the personality.¹⁵ What is strange is that Morillot, in his eagerness to acquaint his fellow countrymen with German ideas, failed altogether to investigate the – by that time abundant – French case law which could be cited in support of his ideas. In time that task was performed by later writers, whereas the judges were extremely hesitant in giving a name to the legal institute which they had helped to create. It is not until the early part of the present century that French courts begin to speak of a “*droit moral*,” and then it is used alongside with other terms (“*faculté inhérente a la personne*,” says the *Cour de cassation* in a judgment from 1902; “*droit de propriété morale*,” is a phrase used in 1908 by the *Tribunal civil de la Seine*, which a year later speaks of “*droit moral de contrôle et de surveillance*”).¹⁶

¹³ Berlinische Monatsschrift 1785, p 416, the footnote.

¹⁴ Strömholm, *op.cit.*, Vol. 1 at 194.

¹⁵ *Op. cit.*, Vol. 1, at 273. The term *droit moral* is used for the first time in *Revue critique* 1872-73, pp. 29 *et seq.*

¹⁶ On the development of French case law after 1880, *cf. op. cit.*, Vol. 1, at 281 *et seq.*

It is not possible here to follow the ensuing international development. The evolution of *droit moral* is a complicated one; different “theories” were launched; numerous authors invented new and bold notions, while judicial practice in the principal Continental countries steadily built up the positions of the author and (not least in the 1930’s, a particularly fruitful period for attempts to codify *droit moral*) a number of legislative proposals, not all of which reached the statute book, gave an increasingly important place to *droit moral*.

A concrete item may serve as a tailpiece to this historical sketch before we try to formulate its results. In 1928 *droit moral* made its appearance in the Berne Convention. A new Article 6 bis was introduced at the revision conference in Rome. At the Brussels conference in 1948 the following text was adopted for the Article:

1. Independently of his economic rights and even after the assignment of these the author shall retain during his whole lifetime the right to claim authorship of the work and to object to any distortion, mutilation or other alterations thereof, or any other action in relation to the said work, which would be prejudicial to his honour or reputation.
2. The rights accorded to the author under the preceding paragraph shall, in so far as the legislation of the Union countries permits, continue to apply after his death at least until the economic rights have expired and shall be exercised by such persons or institutions as the legislation shall appoint for the purpose. It is reserved for the legislation of the countries of the Union to determine the conditions for the application of the rights referred to in the present paragraph.
3. The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

2.5. The idea that the work protected by copyright law is principally an expression of the author’s personality, not a commodity, an impersonal “object,” may be said to have been the driving force behind the emergence of the *droit moral* rules and the notion which (side by side with considerations of legal technique and legal policy) caused European jurists and legislators to abandon the conception of the author’s right as a form of right of property or *ownership*.

Before leaving our discussion of the historical development of the *droit moral* idea, there is reason to point out the far-reaching – and practically important – effects of this idea on the construction of copyright as a whole. “The expression of individuality” has in fact become the central formula around which all Continental European copyright law (to this group can also be assigned Latin American copyright law as well as, insofar as it exists, African and Asian copyright law) is organized.¹⁷

The notion that the protected – and protection-worthy – work is an expression of the author’s personality plays an important role as one of the most weighty policy arguments (and one which happens to coincide with strong ethical and also aesthetical considerations) for providing legal protection to intellectual

¹⁷ For a closer analysis, cf. Strömholm, *Upphovsrättens verksbegrepp* 85-136 (Stockholm, 1970).

creators in the form of an exclusive and non-assignable right that can be invoked against all other persons. The ideology stressing the sanctity of ownership – which (in combination with certain arguments, taken mainly from John Locke, concerning individual work as the basis of proprietary rights) authors were able to invoke with success in the 18th and 19th centuries – has lost much of its force. On the *ideological level* a number of schools of thought have appeared, which more directly emphasize the claim to *remuneration for work*; on this basis, i.a., the “*bourgeois*” sole-right construction on the model of proprietary rights, has so far managed, by and large, to hold its own. The mostly vague speculations about “community of cultural rights” instead of individual monopoly, and of a state “cultural workers’ wage” instead of royalties, which have recently been ventilated by certain politicians can be regarded as a logical development, insofar as these ideas imply a socialization of “property” and a replacement of the yield thereon by wages. Whereas it may not be impossible to reconcile these recent ideas with the argument, put forward in support of copyright protection, that “the labourer is worthy of his hire,”¹⁸ they are scarcely compatible with the argument for protection which can be derived from the personal character of intellectual creativity. In the 1956 report of the Swedish Royal Commission on Copyright Law it is stated: “What we are here confronted with is a form of human activity where to a greater extent than in other connections the producer puts into his product his personality, his spiritual apprehensions and experiences, and where in consequence there often arises an emotional connection between the author and the results of his work which is seldom found to the same extent in any other sphere of activity. Authors are therefore sensitive in a different way from other producers to what happens to ‘their spiritual children’.”¹⁹

The practical importance of the “personality right” formula is not, however, confined to its use as an argument for a certain legislative or, more generally, legal policy. At the same time it fulfils an important function in the actual administration of copyright law in those jurisdictions where that formula is accepted: it is the analytical instrument which serves *to find and to draw the line between products worthy of protection and products falling outside that group*. It also serves when it is necessary *to determine which elements in a given product are covered by the protection*. In the text of Nordic statutes the first-mentioned delimitation is expressed in the choice of the term “work” (in Swedish “verk”, comparable to the French “œuvre”) to denote protected items. “Inherent in this,” according to the Royal Commission just mentioned,²⁰ “is the requirement that the product of intellectual labor which is being considered shall – as the report of 1914 expresses it (p. 57) – ‘have attained a certain degree of independence and originality, and must in some measure at least express the author’s individuality. ...’” The second delimitation is touched upon by the same Commission in – *inter alia* – a passage²¹ where, in a discussion of which elements in a work are protected, there is quoted with approval a statement from legal writing to the effect that the object of copyright should be “the author’s

¹⁸ E.g., the Swedish Royal Commission report, 1956 SOU No.25 (*cf. supra note 2*), at 85.

¹⁹ *Loc.cit.*

²⁰ *Op. cit.*, at 66.

²¹ *Loc. cit.*

‘individual’ view of the subject – whether it be of an aesthetic or a scholarly nature – as this has manifested itself in the way in which the view is expressed.”²²

In short, the formula “expression of personality” may be said to provide the key to two questions: first, *why* the author should be protected by being granted an exclusive right and, secondly, *what* this exclusive right should comprise. In a society with a strong respect for the inviolability and freedom of individuals and a particular respect for intellectual creativity – and it was in such a society that the supporters of copyright in the period, say, 1880-1960 wished to live, believed themselves to live and were in fact quite likely to be living, in spite of glaring evidence to the contrary in other fields – this is a highly effective formula.

There may be divided opinions as to whether this “spiritualized” view of copyright provides, in the world of mass production and electronic music, the best and most realistic basis for a practical analysis of the question of protection-worthiness and the problem of delimitation, and whether it pays proper regard to the technical, commercial and conventional factors which must be taken into account in an empirical investigation of the way in which copyright protection actually functions. There can, on the other hand, be little doubt as to the efficiency of the formula from the point of view of *legal policy* and as to the services it has rendered to legislators, judges, legal writers – and authors – during the development of modern copyright law, and above all the development of *droit moral*, from the latter part of the 19th century onwards. It is still justifiable to say that *droit moral* and the view of intellectual creativity which has received its clearest concrete expression in this concept still actually permeates the whole of Continental copyright law.

2 The Elements of *Droit Moral*

3. If our purpose had been merely to give an account of *droit moral* in a limited sense in Scandinavian law, as compared to what may be called the average international standard, the following exposé would have offered little difficulty and it could have been made very brief. A reasonably complete conception of the significance of the institution, on the other hand, calls for broadening the survey in two ways: first, by examining somewhat more closely the leading Continental legal systems and, secondly, by dealing with rules and solutions outside the area covered by Sec. 3 URL and other enactments. We shall not try to give reasons of principle for the delimitation which is undertaken in the last-mentioned respect; any attempt to do so would require an unreasonable amount of space if proper consideration were given to the many standpoints and arguments to be found in legal writing concerning the role and scope of the *droit moral* concept. At the beginning of this century some writers of dissertations, in their enthusiasm over this new notion, allowed *droit moral* to swell to such proportions that it devoured the whole area of copyright law. The pragmatic criterion used in what follows to delimit those questions which are considered

²² *Op. cit.*, at 69.

side by side with *droit au respect* and *droit à la paternité* is, quite simply, whether the solution given to a certain situation in the legal systems examined can be considered to express in a particularly high degree a concern for the non-economic interests of authors. We shall begin with questions relating to contracts for future works (in legal writing, use is sometimes made of a comprehensive designation, “*droit de créer*”), continue with questions concerning publication and then consider *droit au respect* and *droit à la paternité de l'œuvre*. In conclusion some general questions will be dealt with.

4. *Contracts on Future Works*. In the 1920s and 1930s, when *droit moral* could be said to be “in fashion,” certain authors put forward the idea that to the other attributes of this legal concept there should be added a *droit de créer*, a “right to create.”²³ What these authors had in view was, on the one hand, legal protection against various sorts of outside interference which hamper or vitiate the process of intellectual creativity and, on the other, such rules as apply in relations between an author and a person with whom the author has entered into a contract for a work which he has not yet produced.

No particularly penetrating analysis is needed to establish that a general *droit de créer* concept is neither clarifying nor suitable from a practical and theoretical point of view. So long as the author is carrying on his creative activity on his own, without having bound himself through contractual undertakings, there is no concrete basis for a special “right” of the type advocated. The author enjoys the general freedom of action prevailing in the community; his doings are, *legally speaking*, of no more significance than if he were making a table or digging in his garden. As and when his product takes shape, it *may* become relevant for the purpose of various legal rules (*e.g.* rules concerning freedom of expression, indecency and obscenity, etc.); when the work is presented for publication it will obviously be evaluated in the light of, *i.a.*, legal rules which apply to public utterances and public behavior as a whole. But this is not specific to *protected works*; from the point of view of freedom of the press it is a matter of indifference whether or not an utterance reaches up to the “threshold” of a work, *oeuvre*.²⁴ From the point of view of systematic clarity it is no advance to bring in this body of rules – mainly of public-law type and applicable to all sorts of heterogeneous activities – among the copyright rules on *droit moral*.

The position is somewhat different concerning the question of the author’s legal situation in such contractual relations as concern future works. Copyright, or substantial elements of it, are essentially assignable in the majority of countries. It is only the modern German legislator who has drawn the consequence of his theoretical view (which implies that copyright *in its entirety* is of a “mixed” economic and personal character, *cf.* Sec. 11 URG 1965), and who has thus expressly provided that copyright is *not* assignable (Sec. 29 URG).

²³ *Cf.* Strömholm, *Le droit moral de l'auteur*, Vol. 11:1, at 85 *et seq.*

²⁴ Where – as the case is in the Federal Republic of Germany – there are special constitutional rules on the “freedom of art,” courts may have to examine, *e.g.* in defamation or pornography cases, whether a certain work has a sufficient “artistic” character to enjoy the privileged treatment offered by the Constitution; the criteria in many cases coincide, inevitably, with those which determine whether the work is protected under copyright law. German case law illustrates the difficulty of the questions raised by the Constitution in this respect.

The practical effects of this attitude of principle are limited, however, since according to Sec. 31 URG the author can “grant a licence to another to utilize the work in a particular manner or in any manner” (*Nutzungsrecht*). Thus “full assignments” are not considered to be possible but “assignments” practically unrestricted as to contents are allowed. The theoretical *finesse* implied by this statement can be criticized on practical as well as theoretical grounds.²⁵

The contractual freedom which as a matter of principle operates with regard to copyright and its elements undoubtedly involves certain hazards for intellectual creativity, and these hazards are not least evident in respect of works which are not complete at the time of the contract. In Scandinavian law, the author is given under Sec. 3 URL the protection, with regard to contracts concerning works already produced, that a waiving of *droit moral* is valid only to a limited extent. An author who binds himself by contract to produce a work in accordance with the instructions of the person commissioning it cannot invoke this provision in order to safeguard his intellectual freedom. In other respects, too, contracts concerning future works involve consequences which conflict with the conception, expressed in the *droit moral* rules, of creation as an expression of personality. In the annals of literature and, even more, of art there are many examples of “slave agreements” whereby economically dependent authors have been compelled to produce work on terms involving an encroachment on their artistic freedom. Special problems arise where the author has the status of an *employee*; the prevailing opinion in most sources would seem to be that the employment contract means that the employer acquires the right to works produced by the author within the framework of the employment.²⁶ At the same time it must be admitted that various types of contracts concerning future works often have the advantage of giving the author favorable working conditions and freeing him from financial worries. The history of the Paris art-trade, to give only one instance, shows that there is a place for such contracts. If contracts concerning future works were to be entirely forbidden or invalidated, the authors themselves would certainly be the worse for such a step.

It is possible to distinguish a number of different types of agreements on future works. One fairly well delimited group is that consisting of *employment contracts*. Another group consists of *commissions* for the production of one or more works; it is usually characteristic of this group that the work is intended for a certain purpose and has to fulfil certain requirements, stated at least in general terms, concerning its execution.

“Unspecified *firm orders*” form a third main group: here an author enters into an agreement with another person whereby the latter will on special conditions acquire the author’s next work, or possibly several of his future works. This type of agreement is probably very unusual where acquisition of copyright is concerned but, on the other hand, occurs not infrequently in the case of

²⁵ Cf. Strömholm, *Verwertungsrecht und Nutzungsrecht. Gedanken zur Systematik des deutschen Urheberrechtsgesetzes*, 1973 GRUR Int. 350-357.

²⁶ We do not enter here into the difficult question if and if so to what extent rules drawn from the law of competition and principles concerning the loyal performance of contracts may impose certain restrictions on an author in his future creative activity. For a full treatment, cf. Strömholm, *La concurrence entre l'auteur d'une oeuvre de l'esprit et le cessionnaire d'un droit d'exploitation* (Stockholm, 1969).

acquisition of works of art. It is true that such acquisition does not imply any *assignment of copyright* (Sec. 27(2) URL; Sec. 44(1) URG) but nevertheless the transfer has certain important consequences from the point of view of copyright law; according to Sec. 8(2) URL, the work is considered to have been “published” as soon as copies of it have been put on the market with the consent of the author, and this publication leads to certain legal effects (see also Sec. 25 URL).

The fourth and last of the main types is that consisting of options, i.e. contracts which give the author’s counterparty a right of first refusal, i.e. a preferential right to acquire the work or works covered by the contract. Insofar as the option does not secure tangible advantages for the author, it is undoubtedly particularly questionable inasmuch as the commitment for one of the parties which it implies is not offset by any commitment for the other party. Where a contractual relationship is durable and functions smoothly, the option may often be an acceptable device. Thus it may be reasonable for a publisher who is bringing out with a considerable risk the work of a new author to secure for himself an option on the writer’s future and perhaps – after he has established himself – more profitable works as a return for the risk and the work which he has put into the launching of the first book. On the other hand, it is easy to see that there may be abuses of this device.

If we now pass on to the *types of conflicts* which deserve special attention within the framework of the various contractual relations concerning future works, the following questions would seem to fall into this category from the point of view of the *droit moral* rules and in the light of the interests which form the basis of these rules.

First and foremost, there is the general question of the *validity*, from the point of view of principle, of the types of agreement concerned. In this general form, this is a matter which scarcely arises in relation to contracts other than unilaterally binding options. As already indicated, it would certainly be doing no service either to culture, to *droit moral* or to authors, if the validity of every agreement concerning one or more future works was to be questioned. Apart from options there is only one type of such contracts which calls for closer attention, and this is probably a highly unusual one: *unrestricted* “firm orders” for an author’s future production. The series of lawsuits in France over Rouault’s paintings is a striking illustration of the fact that such contracts do actually occur.

In the case of *commissioning contracts*, one type of conflict of practical importance which may arise is that where at some stage of the development of the contractual relationship the author *refuses* to fulfil his undertaking, for example on grounds of conscience or the like. Here to some extent we are confronted with an essential problem concerning the special nature of intellectual creativity: what means are at the disposal of the person giving the commission and what sanctions are incurred by the author?

Within the framework of *work contracts* and *commissioning contracts* there may arise a conflict which likewise concerns the freedom of creativity in a marked degree. The problem at issue is the extent to which the author is under obligation to follow directives on the *execution* of the work (as distinct from the actual *result*) issued by the employer or the person giving the commission. In

commissioning contracts there may also arise a question in connection with which it appears probable that copyright agreements have a status of their own within the larger group constituted by conditions of employment, namely the extent to which the author undertakes to carry out *personally* the contracted performance.

Finally, in connection with *all the cases here under consideration* – with the possible exception of option contracts which have, so to speak, their own built-in solution of the problem – there may arise questions of a type that also concern the freedom of creativity in a marked degree: these are the questions concerning the *demands as to quality* that can be made by the acquirer in respect of the copyright-protected product which is the object of the contract. To put the matter in plain commercial terms what, in such a transaction, constitutes “the goods as ordered?”

In Scandinavian law the majority of the questions into which we have in the foregoing attempted to break down the unclear concept of *droit de créer* have been left unregulated by statute, and in the main unanswered by case law as well. The instrument which the courts have at their disposal for dealing with copyright agreements that appear objectionable from the viewpoint of the basic legal-policy evaluations expressed in URL used to be Sec. 29 of that statute, an enactment of the kind called “general clause” (German: *Generalklausel*), which presented difficulties with regard to its contents and effects. In Swedish law, since 1976 a general rule on unfair contracts, covering also copyright agreements, is found in Sec. 36 of the Contracts Act. It gives the court a right to modify or, in extreme cases, annul such contracts. In the major Continental countries, contracts regarding future works are hedged about with more or less complicated protective rules. Let us consider in the first place the provisions, contained in Sec. 40 URG and Secs. 33 and 34 LF.²⁷ Under the former provisions, the author has a general right to rescind after five years such contracts as relate to the whole of his future production or to future works defined only as to their genre. This right cannot be waived and contracts of this kind are valid only if they are in writing. The rule applies solely to assignment of rights and thus not, for example, to contracts between an artist and an art dealer concerning the selling of the former’s works as a physical object; here, however, the general rules of German law regarding the rescission of long-term contracts are available. On the other hand, Sec.40 URG covers both “firm” assignments and options. The solutions available in French copyright law are more complicated and are not entirely clear in all respects. What can be stated with certainty is that any assignment of future works cast in purely general terms is invalid. With regard to options in the publishing industry, these are valid insofar as they relate to no more than five works belonging to a particular genre or the entire production of an author during a period of no more than five years. Although there are thus limited areas where a definite opinion can be ventured, the legal situation outside these areas is somewhat obscure. Probably the prohibition against general assignments in Art. 33 applies not only to assignments of rights but also to assignments of the original of a work. Logically, “firm” assignments, in order to be valid, ought to be of no greater

²⁷ Cf. Strömholm, *Le droit moral de l'auteur*, Vol. II:1, at 122-192.

extent than the option cases referred to in Art. 34, but in the light of the legislative material this is not certain.

With regard to the conflicts which arise if during the contract period the author refuses to fulfil his commitments, there are no copyright rules; recourse is had to general principles of the law of execution, and in the great majority of cases these principles do not countenance any direct compulsion for the bringing about of a performance of this individual and special kind. There would, however, appear to be exceptions; thus where markedly simple and “mechanical” products are concerned, the possibility is not excluded that the person giving the order can secure execution by causing another author to carry out the performance at the cost of the defaulting author. From Swedish law there may be noted a decision of 1957 – admittedly somewhat exceptional in character – where a court of appeal accepted an order which a lower court had made for a writer to finish a promised work within a certain time on pain of a fine.²⁸ It is, however, doubtful whether this decision can be regarded as correct. At any rate it is a completely isolated case.

The question whether the author may be bound by the orderer’s instructions for the carrying out of the work is also one which lacks a legislative solution. Nor is it easy to draw up any general rule. It is evident that the problem is closely connected with the two questions concerning the principles that apply to the evaluation of the quality of the finished product and concerning the obligation of the author to carry out the promised performance personally. Although Continental practice has abundant examples of disputes on all these cases, it is not possible to deduce clear rules from these cases, much less to assert that the solutions could serve as a basis for the construction of some “*droit de créer*” in the sense of general exceptions, inspired by the notions on which *droit moral* is based, from the private-law rules which apply to other comparable contracts. In a purely general way it may be said that the courts have paid regard to the special nature and the psychological circumstances of individual creativity; it is considered on the whole self-evident that the author *in dubio* undertakes to carry out a promised work by himself (in those parts which according to prevailing practice in different fields of activity constitute “artistic” creation as distinguished from technical and mechanical procedures, *e.g.* in connection with casting, printing, etc.). The evaluation of quality is as a rule considerably more liberal than it is in the normal private law evaluation of what can be regarded as “acceptable goods,” and in the same way the author is usually considered to enjoy great freedom in the forming of his product. It would not be possible to go further than these general statements without entering into a detailed discussion of individual cases.²⁹

To sum up, it is not possible to assert that those authors who have sought to set up the concept *droit de créer* as a special attribute of *droit moral* have succeeded in showing the existence of rules which justify the establishment of such a concept.

²⁸ Svensk juristtidning, Stockholm, 1957, rf p. 24.

²⁹ Strömholm, *Le droit moral de l'auteur*, Vol. II:1, at 264-355.

5. *The Right to Publish.*³⁰ As stated in the introduction above, both French and German law – the latter mainly under the influence of legal writing – have in their legislation a special “right of publication” of a “moral” kind, i.e. a right that is in principle non-assignable and is only to a limited extent susceptible of modification through contracts and concessions. In the case of French law, however, this special right has been accorded a particular status which is difficult to analyze: it is defined in Sec. 19 LF and does not figure in the general enactment on *droit moral* (Sec. 6); a special succession rule applies to the right of publication (as distinguished from both “economic ”and “moral” rights in general).

What was it hoped to secure and what concrete conflicts was it hoped to resolve by introducing this special *droit de divulgation* alongside the author’s “economic” right to exploit his work through various forms of publication? When seeking to answer this question it is important to remember, first, that the Continental legal systems which have adopted the principle have at the same time introduced a “*droit de repentir*”, a matter to which we shall revert later, and secondly, that on all essential points it has been endeavoured to safeguard, through rules (which admittedly can be set aside by contract) for the various major contract types, the author’s interest in securing that his work is not suppressed but is actually published in the manner contracted. In other words, the function which the “moral” right of publication is intended to perform is that of making it possible for the author, *before* the situation – i.e. a contract which relates to a *finished* work or the like – when *droit de repentir* can be exercised, to determine alone, *despite* any agreements made earlier, whether the work shall be brought to the knowledge of the public or not. *Before* the work has been completed, the author, as just mentioned, cannot as a rule be compelled to complete the work. Thus it is a very special conflict – relating to a very short phase in the history of the work – that it has been sought to regulate in this way, and it may be asked whether it justifies a comprehensive right on a par with *droit au respect* and *droit à la paternité*. Moreover, the provisions of Secs. 19 LF and 12 URG, formulated as they are in general terms, do not tell the whole truth: it has for good reasons never been questioned that an author who exercises his “right of publication” in conflict with a contract to which he is a party is under an obligation to see that the other party does not suffer damage. It would seem that the circumstance that the author can avoid specific performance by payment of damages should not properly be expressed in a statutory text by saying that the author has a “right” of a certain character.

There are undoubtedly occasional situations of conflict, above all within the framework of contracts on the *first* publication of a work, concerning which it is possible to speculate whether general rules of contract law (and execution law) pay sufficient regard to the special personal interests of the author. *One* such situation has been indicated above and it would be possible by analysis to find others. These situations, however, cannot provide sufficient reason to legislate for a general “*droit de publier*” appertaining to *droit moral*, and it may well be asked how this sweeping statutory solution came to be adopted.

³⁰ Fully discussed in *op.cit.*, Vol. 11:2, at 1-572; same author, *Das Veröffentlichungsrecht des Urhebers, passim* (Stockholm, 1964).

As far as German law is concerned, it is difficult to avoid the impression that those responsible for the legislation of 1965 responded uncritically to certain categorical calls for action on the part of legal writers and were moved by their general – in itself highly praiseworthy – desire to create a protection for the author’s “moral” interests that would be as efficient, complete and up to date as possible. They did not in fact envisage completely the consequences of their attitude and there is reason to suppose that the characterization of *Veröffentlichungsrecht*, formulated by the Supreme Court of the Federal Republic in a well-known decision concerning the diaries of Cosima Wagner, has retained its validity: this right is at once a “moral” right and a right under property law, it can be the object of contracts and normally enters into an assignment, since assigned rights obviously cannot be exercised without a publication of the work.³¹

In the case of French law the historical background of the *droit de divulgation* is clear. Before 1957 the legislation in this area was terse, unsystematic and incomplete. For that matter there is even now no special right of *dissemination of copies*, which means that the author’s legal control over copies of his work (including – as a category of particular importance – original works of art) is not based upon explicit statutory provisions as it is in German and Scandinavian law. Around the turn of the century – when the concept of *droit moral* was an object of particular interest, partly as the result of a number of academic dissertations – the French courts were confronted with a number of cases which had special features that all attracted considerable attention. These cases brought to a head the question of the author’s control over his works both in the relationship between an artist and the person commissioning his work and in disputes between an author and the author’s spouse (or heirs of the spouse); in the latter connection the question arose whether the works belong to the joint estate and thus should be divided between the spouses. It was in order to resolve these situations in a way acceptable from the *droit moral* point of view that the courts resorted to the construction “*droit de publier*,” which was later elevated by legal writers and the legislators to a central element in the concept of *droit moral*.

An independent right of publication which, so to speak, stands *between*, on the one hand, the undisputed right of the author to conclude alone those contracts he wishes to conclude on his product and, on the other hand, the now legislatively recognized “*droit de repentir*” would thus seem to be a product of dubious value both from a juridico-technical and a practical point of view. The situation after the author’s death may be different. The French statute (Sec. 19(2)) separates the right of publication from the normal succession and provides for it to be exercised in the first place by executors of the will, if any, and in the second place – in the absence of any special direction by the testator – by the latter’s children, spouse and other heirs and legatees, in that order. It is obvious that the author may have an interest in ensuring that the important decision on the fate of an unpublished work shall be made by somebody in whom he has full confidence. This, however, can also be achieved without a special *droit de divulgation*. Under Sec. 41(2) URL, the author may issue

³¹ *Bundesgerichtshof*, Nov. 26, 1954 (15 BGHZ 249; 1955 GRUR 201; 1955 NJW 260).

testamentary directions, binding also on a surviving spouse and on heirs, concerning the exercising of the copyright, or may authorize another person to issue such directions. A similar rule is contained in Sec. 30 URG.

6. *Droit de repentir*.³² In Continental legal writing on copyright it has been maintained since the beginning of the 20th century that the author has a non-waivable right in certain circumstances to withdraw from a contract which has been concluded on the use of the work, but these views for a long time found no support in legislation or practice. A very limited *droit de repentir* was introduced in the German statute of 1901 on publishing contracts, which is still in force (Sec. 37). Otherwise, until the adoption of the French statute of 1957 and the German statute of 1965, the *droit de repentir* must be regarded merely as an idea advocated by legal writers or as an aim of legal policy.

The *droit de repentir* under Sec. 32 LF is hedged about by very considerable restrictions. In the first paragraph of the section it is laid down that the author, after having concluded a contract for the use of the work and even after the latter's publication has a right to take back his product, but only provided he compensates the other party in advance for all damage caused by the action. In order to counteract speculations it is further provided (Sec. 32(2)) that the author, if he later decides to publish the work, is under a duty to offer it to the original contract partner and to accept the conditions agreed upon in the cancelled contract. It is not without interest to note that so far as is known no lawsuit concerning the exercise of *droit de repentir* in this form has ever occurred. It should further be pointed out that *droit de repentir* applies only in the case of contracts on copyright, not in the case of assignments of original works or other copies.

In German law the corresponding right is regulated in Sec. 42 URG, which deals with "*Rückrufsrecht wegen gewandelter Überzeugung*." The right cannot be waived or excluded through agreement (Sec. 42(2) URG). But a prerequisite of its exercise is that the work no longer corresponds to the author's convictions and that it therefore cannot be required of him that the work shall be published. In contrast to the French legislator those responsible for the URG have thus ventured to formulate preconditions which relate to the inner convictions of the author and these are supplemented by the "objective" evaluation that the court must make of the question whether the changed attitude is such that publication cannot be required of the author ("*ihm ... die Verwertung des Werkes nicht mehr zugemutet werden kann*"). The author must compensate the other party in advance for his loss, and he is furthermore under a duty to give the original contract partner a "*right of first refusal*" if he changes his mind once more and decides to publish the work; however, he is not bound by the original contract conditions but can demand suitable conditions ("*angemessene Bedingungen*"). Like its French counterpart, Sec. 42 URG has not, so far as is known, been applied in published decisions.

Whether *droit de repentir* is to be regarded as a fortunate solution from the point of view of legal policy is not easy to determine. The absence of known cases would indicate that in reality the compensation conditions involved mean

³² Cf. Strömholm, *Le droit moral de l'auteur*, Vol. 11:2, at 204 *et seq.*, 301 *et seq.*

that this right is not a practical possibility for the author. On the other hand, it cannot be excluded that the rules give authors a certain “backbone” in negotiations concerning, *e.g.* minor changes which they wish to introduce in their works after the conclusion of a contract, and undoubtedly it is possible to conceive situations where an author is prepared to pay in order to avoid being associated with a work of which he no longer approves. A scholar who has submitted an article to a learned journal may in exceptional cases have a strong interest in withdrawing it if, for example, new discoveries in his field of work mean that his article is no longer up to date or is erroneous. In the *travaux préparatoires* of URL reference is made to general legal principles which are considered sufficient to resolve any cases that may come up.³³ It is probable that this view can be supported in the case of most of the probably rather few situations which may arise but, on the other hand, it is not self-evident that contract law provides adequate remedies in all conceivable cases. *Against* the conception that a *droit de repentir* is in practice superfluous it may also be submitted that it is rather innocuous and thus does not involve any serious encroachment on the sanctity of contracts.

In connection with the treatment of the *droit de repentir*, mention should be made of the discussion of a special right of alteration for the author (*droit de modifier*).³⁴ Such a right can clearly be regarded in two different ways; both are represented in legal writing. On the one hand, it can be maintained that *majus includit minus*; if the author may even take back his work, he must also be permitted to take the less expensive measure of changing it. On the other hand, it has been pointed out that even though it is reasonable that an intellectual worker should be allowed, at his own expense, to withdraw from a contract, it does not follow from this that he would be able to compel his contract partner to observe a contract the presumptions of which are perhaps radically modified by changes in the product to which the contract relates. The latter way of looking at the matter would appear to have the firmer basis, and indeed it is this view which dominates both in practice and in legal writing as well as in legislation. With limited exceptions (right to make changes in new editions, Sec. 36 URL; Sec. 12 German Publishing Act (*Verlagsgesetz*) 1901) there are nowhere to be found special rules on the subject, and in the main the experts are unanimous that neither analogously nor with the application of a *majus includit minus* reasoning can *droit de repentir* be used as support for a right of alteration.

7. *Droit d'accès*.³⁵ In contrast to the Nordic legislators of 1960, the authors of the French and German copyright statutes have issued rules, albeit not very far-reaching ones, on the right of the author of a work to have access to it even after it has been assigned to another person. In legal writing it has been discussed whether this is to be regarded at all as a “natural” part or extension of copyright. Any person who has assigned an object having an emotional value could, of course, assert that he has a strong interest in not being entirely cut off from the

³³ Cf. the Swedish Royal Commission report, 1956 SOU No.25, at 130 (*cf. supra* note 2).

³⁴ Cf. Strömholm, *Le droit moral de l'auteur*, Vol. 11:2, at 476-505.

³⁵ *Op. cit.*, at 532-552. On *droit d'accès* from the point of view of legislative policy, *cf.* Winsnes in 1960 NIR 255 *et seq.*

object in question; it is obvious, however, that the legal system cannot be expected to introduce rules on such situations. Nevertheless it is undoubtedly possible to point to certain special circumstances which make the author's claim for access to his work particularly worthy of consideration. First and foremost, such access may be a necessary material prerequisite for the author's being able to exercise his economic right (above all the right of reproduction) which of course *in dubio* is not affected by an assignment of copies. Further, the intellectual creator may need access to the work in cases where he has to defend his right or to procure evidence in a dispute. It is true that it is often not impossible that an assignment of a valuable original work, for example a sculpture (which from a purely technical point of view can be reproduced in a small number of copies having a value comparable to that of the original) must be considered to contain an implicit undertaking by the author not to exercise his right of reproduction,³⁶ but this question may in such a case be resolved through interpretation of a contract and scarcely constitutes an argument against a *droit d'accès*.

In French law there is no explicit rule on a right of access. Instead there has been introduced a solution of general-clause nature which is aimed mainly at safeguarding the author's interest in being able to exercise his remaining copyright powers. Thus, it is laid down in Sec. 29(3) LF, that in the event of an assignment of the physical object all copyright prerogatives remain with the author and the person possessing his right but that these "cannot demand of the owner of the physical object that that object shall be placed at their disposal for the exercising of the said powers." However, it is further stated in the enactment in question that "in the event of such an obvious legal misuse on the part of the owner as prevents the exercise of the right of publication the civil court may take all appropriate measures in accordance with Sec. 20" (which deals with similar legal misuse of the owner of the rights of a deceased author, concerning the right of publication). The "strong" prerequisite, "evident legal misuse," would appear to mean that as soon as the owner of a copy can invoke some interest of a reasonably respectable character, the owner is cut off from *droit d'accès*.

In the *German* statute of 1965 *Zugang zu Werkstücken* has been included among "other rights" of the author, i.e. a category of special rights which has been assigned neither to *droit moral* nor to economic rights. It is laid down in Sec. 25 URG that the author can require from the possessor of the original of a copy of the work that this shall be accessible to him, "provided this is necessary for the production of copies or processing of the work and the justifiable interests of the possessor do not constitute an obstacle to the measure." In the second paragraph of the section it is stated that the author cannot require the original or the copy to be handed over to him. The condition that access can be demanded only if it is requested for the production of copies or processing would seem to mean that in the event of a dispute the author must show that he cannot in any other way exercise his right of reproduction or carry out a "processing" of the work; the reference to the justified interest of the owner seems to provide a possibility of taking into account, for example, a buyer's interest in ensuring that the work will not be depreciated through reproduction,

³⁶ Strömholm, *op.cit.*, at 455 *et seq.*

just as the possessor obviously need not accept, e.g., risks that his property will be physically damaged as a result of the reproduction process.

In Scandinavian law procedural rules enable the author to have access to the work when it is required as evidence in litigation, but otherwise no provisions exist, and to create a *droit d'accès* through analogical or free statutory interpretation does not seem to be feasible. Certainly such a power of the kind existing in French and German law is of comparatively small practical importance; the cases which have occurred, above all in Germany, relate to rather special circumstances which as a rule it has been possible to deal with by applying, *inter alia*, rules on the production of evidence. Although a *droit d'accès* thus scarcely appears to be a practically convenient reinforcement of the author's legal position, the arguments which can be invoked *against* the introduction of such a right are by no means strong, and a provision of the kind to be found in the German URG has the advantage of giving at least a certain basis for solutions.

8. *Droit au respect*. With "*droit au respect*" we reach the bastion of moral right which has the best historical foundation and is most securely rooted in legislation and practice. This means, on the one hand, that a number of the juridical-political, juridical-technical and purely theoretical problems raised by the more peripheral or disputed elements in *droit moral* are absent and, on the other hand, that we are in the presence of an immense body of case law from the major countries considered here – a case law which does not lend itself to summarization of the kind we are at tempting to give here. From the Scandinavian region, on the other hand, the case law and the theoretical treatment which can be used are comparatively limited in extent. We shall here make an attempt at an account, orientated towards principles, on the basis of Scandinavian and, in the mean, Swedish material.³⁷

Whether it is a matter of a modification which occurs in a whole edition or in a number of copies (though not buildings or utility objects, Sec. 13 URL) or which is undertaken in the production of a work, and whether what is altered is presented as an original or is openly stated to be an adaptation³⁸ – the alteration is an offence against *droit moral* under Scandinavian copyright law only if it infringes "the author's literary or artistic reputation or individuality." The same applies if a work is made available to the public in such a form or in such a connection that the author can invoke Sec. 3(2) URL.

The formulation of Sec. 3 URL was the object of critical discussion when the draft legislation was being considered by the Swedish Parliament;³⁹ the legislature noted at least one point. It is not required for the application of the section in question that a modification shall be derogatory or defamatory to the author.⁴⁰ Such changes come within the scope of the rules on defamation of the Criminal Code. However, it is not only the professional honor of the author that

³⁷ Cf. for a fuller treatment, Strömholm, *Teaterrätt* (Stockholm, 1971).

³⁸ The Swedish Royal Commission report (cf. *supra* note 2), 1956 SOU No.25, at 121 *et seq.*

³⁹ Opinion No. 41 of the (Swedish) First Standing Parliamentary Committee on Legislation, pp. 39 *et seq.*

⁴⁰ 1956 SOU No.25 (cf. *supra* note 2), at 122.

is protected but also his “individuality.” An infringement of *droit au respect* can actually be constituted by changes which most persons would regard as enhancing the literary or artistic quality of the work, provided that the author’s intentions or authentic experience are thereby changed.⁴¹ The traditional freedom to travesty and parody a work is admitted as a special exception in this respect.

The Royal Commission which prepared the Swedish Copyright Act, 1960, has pointed to some objective circumstances which it considers can provide guidance in the assessment of alleged infringements. Although openly admitted changes may constitute infringements, there is reason to apply a stricter standard in the case of reproductions which *appear with the claim that they reproduce the original work*. An adaptation – and in particular a transposition to another art form – must in the nature of the case always include *some changes*. In part these are due to purely technical circumstances or to the laws and conventions of the new art form. Depending on the aim of the permitted use and the “distance” from the original product with regard to technique and means of expression, the evaluation with regard to modifications may often circle round such questions as faithfulness to the *style, artistic level, substantive contents and tendency* of the original. In the case of a translation, for example, even purely technical shortcomings may have a depreciative effect.⁴² If the work is presented as original or as being close to the original (*e.g.* as a slightly condensed edition or the like), still stricter demands must be made. The Copyright Law Commission is also concerned to lay stress on *the value of the work from an artistic point of view*.⁴³ In view of the difficulties of determining this value objectively, I would suggest that it might be more advisable to look to the *genre* and the *putative area of use*. A lyrical poem or an artistic essay is, generally speaking, to be regarded as something more “delicate” than a hastily written newspaper article or an advertising brochure.

The *use permitted by the author* would seem to be something that cannot be left entirely out of consideration. If the author has agreed that the work shall serve some practical purpose, it is probably more difficult for him to complain of such changes as are due to this (*e.g.* deletions or additions in an article which should be kept to a certain length or contain certain information). To take an example from the theatre it would probably be an impermissible change if a large theatre were to cut out certain minor parts of a play or to simplify some part of the action, whereas the author can scarcely complain if minor changes of this type, which are clearly due to practical considerations, are made by a small group to whom he has given permission to perform the play and whose resources as regards premises and personnel are known to him. In any case, however, such characteristics of the work as its content of ideas, its tendency or substantive stylistic features must be respected.⁴⁴

⁴¹ *Loc. cit.*

⁴² *Op. cit.*, at 123 *et seq.*

⁴³ *Loc. cit.*

⁴⁴ *Cf.* the responsible Minister in (Swedish) Royal Proposition to Parliament No.17, 1960, pp. 71 *et seq.*

The Copyright Law Commission lays stress, finally, on the *object* of the changes and mentions as an example that a *restoration*, even if it is not very good in itself, can never be regarded as impermissible.⁴⁵ It should be added that by restoration are here meant measures with the aim of restoring a work, not changing it.

The views stated here held their ground throughout the various stages of the legislative process and would no doubt – given the importance of the *travaux préparatoires* in Swedish law – be taken into account by a court. Another principle which is fairly secure is that total *destruction* of a work is not regarded as a deleterious change.⁴⁶ On the other hand, it is often deleterious if a work of art, for example, is presented in a dilapidated condition.

The most difficult question arising in the application of Sec. 3 URL is the following: What standard is to be used in order to determine whether a change is in fact deleterious to the reputation and individuality of the author?

It is quite likely that the answer to this question will differ according to whether it is given by the author, by experts, by interested circles, or by a much wider public. The *travaux préparatoires* do not give any clear guidance on this point. Many circumstances – the normal public for the work, the author's intentions and his attitude to his own work – may influence the final adjustment of so difficult an evaluation. However, it is perhaps possible to trace a certain shift in the course of the preparatory work on the statute.

In the introductory part of the Copyright Law Commission report it is pointed out that the interests of the author, which it was desired to safeguard were, first, his reputation in the eyes of others and, secondly, “the integrity of the work and the feelings that he as an artist may cherish for the work he has created.”⁴⁷ Here, undoubtedly, we glimpse the traditional view that the work is an extension of the author's personality, his “spiritual child,” which he has a right to defend quite independently of how an attack on the work affects other people's opinion of him and of the work.

To find a useful “objective” evaluation of what injures the author's reputation is probably not an entirely impossible task. Even if, in the modern community, it is not possible to point to any substantial group of people (cf. however “the educated public in general,” Commission Report SOU1956: 25, p. 409) as being so influential in matters of taste that its views win general acceptance, it would nevertheless be unrealistic to deny that there exists a certain evaluative hierarchy whose views are quite widely accepted and that particular weight is given to the judgments of certain persons, e.g. influential critics and established authors. Distinctions are made between “low comedy” and serious drama, between good poetry and doggerel, between able and slovenly or inconsistent characterization, and it is possible to point to concrete bases for these evaluations. With the aid of expertise and, in clearer cases, by relying on its own judgment a court can establish the place on such a scale of an original work and of a modification of it. If a novel has been turned into a shoddy play or a film with facile and superficial effects, this is something which can be established with reasonable

⁴⁵ 1956 SOU No.25 (cf. *supra* note 2), at 125.

⁴⁶ Royal Proposition No. 17, 1960 (cf. *supra* note 44), p. 72.

⁴⁷ 1956 SOU No.25 (cf. *supra* note 2), at 122.

objectivity. There will, of course, be some troublesome borderline cases, but as we have said the task is not altogether impossible.

On the other hand, it is obviously a good deal more difficult to establish whether a change infringes the author's "individuality," injures his personality, as it has been expressed in the original work. The only really secure source of information available is the author himself, and he is a party in the case. Even if critics and perhaps also art and literary historians are unanimous that one or another set of features constitutes the individuality of a certain author, the person concerned may see his intentions and artistic endeavours in an entirely different light and attach particular value to elements in his output or in a certain work which are regarded by the judges referred to as being only peripheral or even of negative value. The history of literature offers abundant examples of authors who have "mistaken their vocation" or whose subjective view of their own works cannot be shared by other persons.

The Copyright Law Commission, for its part, states: "In judging whether changes which have been undertaken can be considered deleterious to the author, the matter should be seen from the latter's point of view, but in other connections an *objective standard* must be applied. Thus insignificant printing and translation errors cannot be assigned to the category mentioned."⁴⁸ If we try to examine the implications of this standpoint more clearly, we see that it means that a court would accept the author's description of his own reaction, the author's evaluation of the question whether he has been offended, but would thereafter go on to determine whether the infringement had been sufficiently substantial or whether it ought to be dismissed as too trivial. Some of the bodies consulted in the preparatory work on the draft statute (bodies representing the radio and film industries) were, however, concerned by the risk of subjectivity that might be entailed if the proposals were adopted,⁴⁹ and the responsible Minister found reason to emphasize that the evaluation of the question whether a certain modification infringes "the author's individuality as expressed in the work" should be made in accordance with "a standard as objective as possible."⁵⁰ This appears to involve at least a certain change in relation to the Commission's report, a tendency to approach more closely the evaluation of an author's "individuality" that could be made by experts. In Parliament it was proposed, in a private member's bill, that the expression "reputation or individuality" should be deleted as being too wide and be replaced by the locution used in the Swedish text of the Berne Convention, "*ära eller anseende*" ("honour or reputation" in the English text). This proposal was, however, rejected by the parliamentary standing committee concerned, which made the following comment: "In the opinion of this committee, however, the two expressions are, at least from a practical point of view, almost equivalent to each other. Such far-reaching assaults on the author's individuality as are here in question – the enactment is only applicable if the assaults are deleterious to him in an objective sense – would also seem in general to be harmful to his literary

⁴⁸ *Op. cit.*, at 123.

⁴⁹ Royal Proposition No.17, 1960 (*cf. supra* note 44), at 68.

⁵⁰ *Op. cit.*, at 70.

or artistic reputation.”⁵¹ In relation to the attitude of the Copyright Law Commission and probably also of the Minister the standpoint of the parliamentary committee implies a considerably more restrictive attitude towards the protection of personal interests. There would seem to have occurred both a marked raising of the “threshold of triviality” which the Commission had already worked upon, and a complete acceptance of the requirement that an “objective infringement” must be involved. The difference between the two objects for protection, the author’s reputation and his subjective feeling for his own work, has been almost entirely eliminated.

In a judgment rendered on October 31, 1969, by the Stockholm City Court, the director general of the Swedish Broadcasting Company was found responsible for infringing Sec. 3 URL by deleting certain parts of a television film. The court confined itself to stating that the deletion of the parts “had altered the artistic contents of the work,” and that the intervention had been “so considerable that the artistic reputation and the individuality of ...(the plaintiff, a television producer) has been infringed.” The Court of Appeal, however, amended the judgment and released the director general of the Swedish Radio from responsibility. In its decision the Court states that “the connection between the deleted parts and the programme in general appears...to be very loose,” and it further asserts that the sequences in question could also not be regarded as illuminating the theme stated in the description of the programme. It was true that as a result of these deleted sections a certain effect of contrast was achieved in relation to other scenes in the television film. “Having regard, however, to the construction of the film in general this effect does not seem to be considerable. The loss of the sequences has not diminished the value of the film from the point of view of social criticism or its artistic value.” For these reasons it was considered that there had been no infringement of the author’s *droit au respect*. The reasoning adopted by the appellate court would seem to reflect the more restrictive attitude towards the author which is to be found above all in the statements made by the parliamentary standing committee in the *travaux préparatoires*. The case was taken up to the Supreme Court,⁵² which, however, merely confirmed the decision of the Court of Appeal.

A considerably more liberal attitude towards the author is expressed in a decision rendered by the Stockholm City Court on November 16, 1970, in a case between the film company which had produced the film *Jag är nyfiken - gul* and the author of a religious song (which owing to the film producer’s contract with STIM (the Swedish Performing Rights Society) could lawfully be reproduced in the film.⁵³ During a period of in all 24 seconds this song was audible while the film camera was at times trained on an intimate scene between two young people in a tree and at times swept over the participants in a prayer meeting in the vicinity, at which the song was being sung. The Stockholm City Court expressly dissociated itself from the idea that the artistic reputation of the writer of the song had been infringed and held that the only question was whether his artistic individuality, “*i.e.* creative ability in the area of the religious song, had been

⁵¹ Opinion No.41 (*cf. supra* note 39), at 46.

⁵² Nytt Juridiskt Arkiv (Stockholm, 1971), p. 216; also in 1971 NIR 463.

⁵³ 1971 NIR 219.

brought into disrepute.” The film producer’s plea that the total effect of the film should be considered was not entertained; like the objection that the song had occurred only in a short section of the film, it was declared that in the case at bar this plea could be taken into account “solely with regard to the degree of defamation which may have occurred.” The City Court continues: “Finally, as regards the question whether defamation has occurred in an objective sense, the Court finds that it must be expected that the author of a religious song of the kind here in question will regard the coupling of the song with the scene depicting sexual intercourse, which the film contains, as deleterious to his artistic individuality. There is no reason not to give credence to [the composer’s] own statement that he had been deeply offended. In the light of what has been stated the Court finds that an infringement of [the composer’s] artistic individuality has taken place in the manner stated by the prosecutor and that the infringement cannot be considered to have been so trivial that in an objective evaluation it can be wholly disregarded.”

As will be seen from the opinion cited above, the City Court’s decision, which was not challenged, follows closely the interpretation of the Copyright Law Commission’s standpoint, which has been suggested above. That interpretation can scarcely be reconciled with the line taken by the Court of Appeal in the case reported earlier in this paper.

One or two other cases deserve to be mentioned. In a case decided in 1968 by the Stockholm City Court an actress had without her consent been replaced by a naked “stand-in” in certain scenes of a film.⁵⁴ The Court found that the added “scenes with the other woman, by reason of their extent and contents, essentially change ... [the actress’s] ... appearance in the film role” and that the actress’s artistic individuality as a film actress must be considered to have been infringed by this.

Finally, we may refer to a case from 1974 which illustrates the application of some of the guidelines given by the Copyright Law Commission in its report.⁵⁵ A woman designer had produced a number of paintings and had made a contract with a company for the production of a large edition of colour reproductions for sale to the public. In the contract the works were described as “posters.” The artist’s name was shown on the reproduction. The pictures showed stylized naked female bodies and plant motifs. A film company bought a number of the posters and used them to decorate a wall outside a cinema which specialized in pornographic films. The posters were displayed without the artist’s name, and pornographic photographs were pasted on to them. The woman designer claimed damages and compensation for use (in all 12,000 kronor). The film company submitted, *i.a.* an opinion by a prominent expert, Professor Gunnar Karnell, who in principle found that an infringement of *droit moral* had taken place. The District Court awarded 3,000 kronor and the decision was affirmed by the Court of Appeal. The Supreme Court disallowed the plea as far as compensation for use of the posters was concerned; such compensation could not be awarded for use which was impermissible only by reason of the *droit moral* rules. The Court declared expressly that it could not say anything of a general character regarding

⁵⁴ 1970 NIR 209.

⁵⁵ Nytt Juridiskt Arkiv (Stockholm, 1974), p. 94; 1974 NIR 187.

the application of Sec. 3 URL to reproductions, as these “occur in so many different forms.” The provision in question was, however, considered applicable to the pictures in the case. As regards the cutting up of pictures, the Court stated that some such action must “in the nature of the case” be permitted, owing to the proposed use of the pictures. In the case in question the cutting up had been drastic: two pictures had been divided up and the parts placed separately, the artist’s name having been removed. This procedure was considered to be contrary to Sec. 3 of the Copyright Act. The placing of the montage outside a cinema with a grossly pornographic repertoire was considered, furthermore, to amount to publication in a context deleterious to the author. As compensation 5,000 kronor was considered to be a reasonable amount. One member of the Supreme Court found that the actions of the company could not be considered to fall under the right of free display and in this respect also were in conflict with the Copyright Act.

Danish, Finnish and Norwegian case law can contribute a number of scattered decisions which, however, do not, any more than do the Swedish cases here reported, make it possible to arrive at precise conclusions. There is no alternative to making an evaluation from case to case.⁵⁶ A number of questions that are important from the point of view of principle must be regarded as unresolved, e.g. the question to what extent the author can intervene against deleterious changes which are undertaken already in a production of copies that may be entirely private, and the question how the removal of the author’s name affects the evaluation of an infringement of *droit au respect*. The last-mentioned question (which, of course, is illustrated by the poster case) is of interest above all because it necessarily leads to a consideration of the relation between two different types of injury: on the one hand, what we may call a purely “inner,” psychological injury which the author suffers by seeing his work mistreated and his authorship denied and on the other hand, the outward, “social” injury which alterations in signed or recognizable copies give rise to. In the last-mentioned case, of course, the observer is led to believe that the author has produced the work in the state in which it appears or has at least given his consent to the changes. In the poster case the Supreme Court has obviously paid regard to the former type of injury and has considered it fully worthy of compensation, although without discussing the question whether the respondent’s actions – which of course meant that the author was not named as such – also implied any injury to the author’s reputation.

9. *Droit à la paternité*. The rule in Sec. 3(1) URL under which the author’s name must be made known to the extent and in the manner required by good practice when copies of a work are produced or the work is made available to the public relates directly to the different traditions that have been formed in different areas. With the exception of the poster case touched on above, there is no published Swedish instance of implementation of the enactment which can throw light on how it is to be applied in individual cases. For this reason it is necessary to pay regard in the first place to such trade practices as may be

⁵⁶ Attempts to formulate principles are made in Strömholm, *Teaterrätt* 105 *et seq.* (Stockholm, 1971).

considered to be fairly generally accepted by the parties concerned and do not involve the setting aside of legitimate interests. Certain examples will, however, be given here, from the *travaux préparatoires*.

It is, of course, the author himself who decides whether he is to be named and in what form. If a play has been published in book form under a pseudonym and if later a theatre acquired the performing rights, it is – unless otherwise agreed – the pseudonym and not the author's real name which must be given. If the author appears anonymously, anyone who has acquired the right is under a duty to respect the author's anonymity. Failure to do so is as a rule a breach of contract in contractual relationships. The author's name or pseudonym must be given in the form (spelling, etc.) he himself uses.⁵⁷

In Sec. 7 URL it is laid down that the person whose name is given in the usual way in connection with the reproduction of a work is to be regarded as the author, but this presumption of authorship may be contested on the basis of evidence.

The rule in Sec. 3 (1) URL may “be considered also to imply a prohibition against the removal of indications of authorship from copies.”⁵⁸ In the Criminal Code there are special rules concerning the removal or addition of signatures, etc. on works of art.

If an adaptation of a work is undertaken the results also constitute “copies of the work,” and when these are published as well as when the work is presented in a processed state, there is a duty to state both the name of the person undertaking the adaptation and also that of the author of the original work.⁵⁹

The question may be asked how *droit à la paternité* is to be dealt with in the case of copies made for private use. In certain cases the solution is self-evident. There can be no doubt that a person who has copied a work of art for study purposes should not and must not add to it the signature of the original artist (on the other hand, the copier's own signature followed by the information “after N.N.” or the like may be an appropriate safety measure in case the copy should come on the market). In other cases, e.g. if a manuscript is reproduced in a number of copies in order to circulate within a limited group, the answer to the question may be more doubtful. Certain pronouncements of the Copyright Law Commission⁶⁰ with regard to adaptations – which, of course, like exact copies made for private use, are in themselves lawful until they leave the private sphere – may perhaps be interpreted as meaning that it is only in connection with publication that the authorship of the work must be stated. Against this may be cited the actual text of Sec. 3 URL: the author's name must be set out as soon as “copies of a work are produced.” The exceptions in Sec. 11 URL (private use)⁶¹ as well as in chap. 2 in general appear – cf. the reference in Sec. 2(1), and the absence of a corresponding reference in Sec. 3(1), as well as the text of Sec. 26(1) – must be considered as an exception from the economic, not from the moral rights. On the other hand, the Copyright Law Commission seems to have

⁵⁷ 1956 SOU No.25 (cf *supra* note 2), at 117 *et seq.*

⁵⁸ *Op. cit.*, at 118.

⁵⁹ *Loc. cit.*

⁶⁰ *Loc. cit.*

⁶¹ *Op. cit.*, at 135.

considered that *droit au respect*, which of course, objectively can be infringed through an unsatisfactory adaptation, does not come into effect until the adapted version becomes the object of an assignment or an exercise of the economic rights of any kind (before, it can be regarded as a copy “for private use”). Although it is perhaps not very practical as regards *droit à la paternité*, the question of moral right has from the point of view of principle a certain importance also in internal, non-public circumstances. It should probably be assumed that even copies made for private use should be furnished in an appropriate way with an indication of the authorship, unless an agreement to the contrary has been reached. The matter may be of practical importance in such exceptional cases as where a copy has gone astray and is used by another person without authorization.

What “accepted practice” implies in different areas with regard to authorship indications is probably clear to most people where the production of copies is concerned. With regard to performances, *e.g.* at a theatre, it is probably usual for the author or authors of all the protected items which occur during a performance to be stated by name on programmes, posters, etc.⁶² The fullest details of these items are likely to be found in the programme, whereas posters and similar advertising matter often do not include all the names. The procedure varies where it is a matter of, *e.g.*, the displaying of a photograph of the members of the cast or decor pictures in the foyer, etc. In this field one can scarcely speak of any particular “accepted practice.” If a performance takes place in such a simple or improvised form that not even a stencilled programme or a handwritten poster is produced to provide information, it is probable that at least oral information is a requisite.

While, as pointed out above, an indication of authorship is probably required even on copies for private use, the obligation to give the names of authors and participating artists at *performances* applies only when these are making the work accessible to the public. “Accepted practice” – which here is thus not attended by legal sanctions – would no doubt require even in such cases that the author and participating artists should be stated by name.

In foreign law the *paternité* rules are usually formulated in a more general way than in URL, where *droit à la paternité* is restricted to a definite situation, *viz.* the use of the work. Thus in Sec. 6 LF it is stated in a general way that the author “enjoys a right to respect for his name, his capacity as an author and his work.” The German URG also lays down (Sec. 13) that the author “*hat das Recht auf Anerkennung seiner Urheberschaft am Werk.*” It might at first be supposed from the phrasing of these two enactments that the *droit moral* rules could be invoked, for example in case anyone – without any connection with the use of a work – contests that a certain person is the author of the work in question. This, however, would seem not to be the case.⁶³ So far as is shown by case law there is no substantial difference between Scandinavian and Continental law.

⁶² *Op. cit.*, at 117.

⁶³ In a late French decision – *cf.* Dalloz-Sirey 1973, *Sommaires de jurisprudence*. p. 215 normal defamation rules would seem to have been resorted to in a case of this kind.

10. “*Protection of Classics*” in Accordance with Sec. 51 URL. In *German* law there is no attempt to safeguard, within the framework of copyright, the integrity of works, when the protection period has expired. In *French* law *droit moral* is expressly stated to be *perpetual* (Sec. 6(1) LF), and the *droit au respect* has in a number of cases been invoked by professional organizations and other interest groups in the fields of literature and art. The solution of Scandinavian law is to be found, as far as Sweden is concerned, in Sec. 51 URL, which reads as follows:

If a literary or artistic work is reproduced publicly in a manner which infringes the interests of culture, a court may, on the plea of such authority as the King in Council may decide, prohibit the reproduction on pain of a fine. These provisions are not applied to a reproduction which takes place during the lifetime of the author.

Droit moral ceases at the same time as the protection period for the economic right (50 years after the author’s death). All that then remains is protection according to Sec. 51. So far as is known this provision has never been applied by a Swedish court. In the Royal Decree of June 2, 1961, containing provisions for the application of URL, it is laid down in Sec. 16 that “a right...to put forward a plea” in the cases referred to in Sec. 51 URL shall be held by the Swedish Academy, the Academy of Music, and the Academy for the Fine Arts, each for its particular sphere. Certain questions which arose from this provision were the subject of a lively discussion in the daily press during the spring of 1970. In the first place, it is at any rate doubtful whether the Academies mentioned constitute “authorities” in the sense of Sec. 51 URL.

The question is not only one of terminology. The Decree of 1961 does not impose a duty on the three bodies concerned to take legal action against infringements under Sec. 51 URL, but only give them the power to do so. As this power is exclusive, however, it could probably be maintained with regard to *authorities* that these also would be under a duty to exercise the power conferred on them. Whether such a principle applies also to literary or artistic bodies which are not in a position, either by their organization or with regard to resources, to exercise any surveillance seems very doubtful. In the press debate mentioned above, the permanent secretary of the Swedish Academy stated categorically that the Academy did not consider itself under an obligation to take legal action in accordance with Sec. 51 URL. Statements in the press would seem to show that there have been occasions when private individuals have drawn the Academy’s attention to the re-issue in inappropriate terms – careless or drastically condensed versions – of older works, but, as already pointed out, no legal measures have been taken. In one case the Academy of Music, at the request of the Norwegian Grieg Fund, expressed the opinion that Duke Ellington’s jazz version of Grieg’s Peer Gynt suite constituted an infringement as referred to in Sec. 51 URL. As, however, the gramophone records of this version were voluntarily withdrawn by the agent concerned, no measures were taken.

The protection provided by Sec. 51 URL would seem to lack practical importance. The absence of examples also makes it very difficult to express any

secure opinion as to what can be considered to constitute “infringements of the interests of culture.”⁶⁴ However, certain statements from the *travaux préparatoires* can be quoted to illustrate the principles to which the legislators sought to give effect.

The Copyright Law Commission stated that it hoped by using the strong expression “infringe” to make it clear

that the enactment is only applicable to such cases as must be considered gross from the general cultural point of view. It is not sufficient that a person who has particular knowledge of the area considers the re-issue to have shortcomings; it must be a question of a re-issue which appears grossly objectionable to the educated public in general, account being taken of all the existing circumstances. Fears were expressed by book publishers that the provision in the form proposed would hinder the issuing of abridged or otherwise modified editions of classical works, such versions might sometimes, viewed with the eyes of a literary historian, constitute an intrusion on the interests of spiritual culture. In accordance with what has been pointed out above, the enactment should only be applicable when the re-issue appears grossly objectionable even to persons who do not possess a special knowledge of literary history; in this connection regard should be paid above all to the quality of the adaptation but in addition such circumstances as the appearance of the edition, the choice of illustrations, the way in which the author is referred to and the work is presented, and so on, are also of importance. As an example of what is here referred to mention may be made of a case from Danish case law, in which Balzac’s *Esther* had been published in an abridged version. The work, which in Oscar Madsen’s translation ran to 352 pages, had been compressed into three small booklets of 32 pages each, which had been given the titles “Skögenes Glans” (“The Splendour of Harlots”), “Glaespigens Kaerlighed” (“The Prostitute’s Love”) and “Falden Kvinde” (“Fallen Woman”). In the booklets, in a somewhat questionable manner, advertisements for contraceptives had been inserted. That the public authorities should be able to intervene against actions of this kind is obvious.⁶⁵

The pure commercial aspect in a case such as that mentioned by the Commission should probably be accorded a certain significance.⁶⁶ A one sided stressing of such a purpose, *e.g.* sexual elements, which experience shows make a product more “saleable” often indicates a lack of regard for the artistic qualities and intentions of the work, just as does a ruthless elimination of such elements as are regarded as difficult to understand or are unpopular. Gross distortions of the tendency of the work, *e.g.* the insertion of political propaganda in a play whose

⁶⁴ For the preparatory works, *cf.* the Copyright Law Commission in 1956 SOU No.25 (*cf. supra* note 2), at 409 *et seq.*; the responsible Minister in Royal Proposition No.17, 1960 (*cf. supra* note 44) and the Parliamentary Committee Opinion No.41, 1960 (*cf. supra* note 39), at 82. From Danish law, where a similar rule has been in force for a longer time, *cf.* T. Lund, *Om Forringelse af Litteratur-, Musik-, og Kunstvaerker* (Copenhagen, 1944). *Cf.* also Scandinavian decisions in 1965 NIR (*cf. supra* note 8), at 355 and 356; 1966 NIR 134, and 1967 NIR 329.

⁶⁵ 1956 SOU No.25 (*cf. supra* note 2), at 409 *et seq.*

⁶⁶ Parliamentary Committee Opinion No.41, 1960 (*cf. supra* note 39), at 82.

orientation and contents are quite different, would often seem to imply, despite the aim, a violation of the cultural interest of the public in being given the opportunity to become acquainted with the works of important authors, and the problems dealt with therein, in their original form. The responsible Minister, who in other respects associated himself with the views of the Copyright Law Commission, emphasized that parodies and travesties do not fall under the provision,⁶⁷ and the parliamentary standing committee concerned, which expressed a certain hesitation about the proposed rule, stressed that it was important that this rule should be applied with caution. “There should in no circumstances be any question,” said the committee, of “intervening against new versions of older works which have an artistic aim or are otherwise ambitious, even if the results are contested and perhaps in some quarters strongly criticized.”⁶⁸

3 Conclusion

11. It will have been seen from the foregoing survey that the rights which together are usually regarded as constituting *droit moral* are in principle hereditary. In Scandinavian law they follow, like the economic rights, the customary succession rules, although there exists a certain possibility for the author to regulate by will, with effect also in relation to a surviving spouse and heirs entitled to a portion of the estate, the exercise of the copyright (as a whole). The same standpoint is in the main taken by German law, whereas the French legislators have provided for special succession for *droit de divulgation* and have, moreover, widened the circle of those who can enjoy the – in principle – perpetual *droit moral* so as to include, among other things, organizations which are concerned. In Sweden a counterpart to the last-mentioned arrangement is constituted by the protection of classics under Sec. 51 URL; but, as we have seen, this protection is almost illusory.

A question which in French case law has played a very prominent role in the determination of the “juridical nature” of *droit moral* and of copyright as a whole is that of how these rights are to be regarded in the dissolution of the “community of property” situation normally obtaining under earlier French matrimonial law. It was partly in order to avoid the result that after a divorce an author’s spouse would be able to take decisions about or require the publication of an unpublished work that the courts in a number of determinative cases began to work on the idea of a “personality right,” which could not be assigned and so could not be regarded as an economic asset in the division of a joint estate. This view, however, applied only to unpublished works, and on this point French law does not seem to have been changed through the legislation of 1957 (on the other hand, the matrimonial law reforms of 1965 have greatly reduced the importance of the question). In German law the question is nowadays answered by reference to the principle that copyright either as a whole or in part is not

⁶⁷ Royal Proposition No.17, 1960 (*cf. supra* note 44), at 278.

⁶⁸ Parliamentary Committee Opinion No.41, 1960 (*cf. supra* note 39), *loc. cit.* at note 66.

assignable. As early as 1918 a Swedish Royal Commission⁶⁹ in a comment on chap. 6, Sec. I (2) of the reformed Marriage Code of 1920 stated that so long as an author lives, the right to any works not published in print cannot be the object of an assignment and thus should not enter into a division of property, which takes place during the author's lifetime. It would seem that this principle is still valid.

Finally, it should be noted that copyright is subject to special rules with regard to distraint for debt.⁷⁰ In French law this does not appear directly from LF, although on the basis of case law it can be stated that unpublished material, like *droit de divulgation* (and of course the individual elements in *droit moral*), is excluded from distraint for debt. A special enactment, however, further restricts the possibilities of distraining for unpaid royalties. In Scandinavian law the rules are simple and clear. Under Sec. 43 URL, copyright may not be the subject of distraint from the author himself or any person to whom the right has been transferred owing to a gift, inheritance or will. The same rule applies to manuscripts and copies of such works of art as have not been exhibited, offered for sale or otherwise accepted for publication. In Germany the present system of regulation is based on similar principles, but is fairly complicated (Secs. 112-119 URG) and cannot be discussed in detail here.

The sanctions for infringement of *droit moral* are in the main the same as in the majority of European countries; *viz.* penalties, orders to cease, and damages. They do not call for detailed description.

12. How does the existence of *droit moral* affect the "theoretical construction" of copyright? In Continental law the discussion ranging over a century is impossible to survey here; the main features of the debate were dealt with at the beginning of this paper. In the Scandinavian region, where the category "personality right" – at least in the sharply delimited form this category has been given in German and French law – is in the main unknown, it is above all the influential Norwegian writer Knoph (d. 1936) who has contributed analyses of the "personality-law" elements in the law of intellectual property. In another context,⁷¹ the present author has attempted to deal with the question whether it is appropriate from the point of view of systematics to coordinate the rules which safeguard the author's mainly non-economic interests under a common heading and to designate the whole of this complex of rules (including the mainly uncodified contract-law and execution-law principles, on which something has been said above) as a separate "personality right." If this question is answered in the affirmative, it is natural to seek for objective similarities between this complex of rules and such other groups of rules – e.g. those protecting personal integrity, in particular privacy – as are also considered in a particularly high degree to protect non-economic, "moral" interests. The conclusion of my earlier studies of this question was in both these respects negative, so far as

⁶⁹ Lagberedningens förslag till revision av giftermålsbalken och vissa delar av ärvdabalken, Part IV, at 223 *et seq.* (Stockholm, 1918).

⁷⁰ Cf. Strömholm, *Le droit moral de l'auteur*, Vol. 11:2, at 315 *et seq.*

⁷¹ *Op. cit.*, Vol. I, at 1-15, and 1969 NIR 207-230.

Scandinavian law is concerned – but at the same time it must be conceded that in at least one advanced legal system, the German one, the cohesive idea of *Persönlichkeitsrechte* has been very serviceable.