

## Moral right in France: towards a pragmatic approach?

*André Lucas*

It is a great honour for me to be invited to explain the French approach to moral rights at Blaca. An honour and an opportunity. The opportunity to correct widely spread perceptions of an institution that is not always well understood in the country of copyright, as well as sometimes in other droit d'auteur countries.

The peculiarity of French law is in this case based on two factors. It is without doubt in France that moral right is at its strongest. It is also in France that moral rights theory is at its most developed stage, hence the use of the singular in 'moral right'<sup>1</sup>. If one adds to that that legal writings sometimes stylise and present it as an absolute right one starts to understand that it can be understood as something of an exotic specialty of the French, which will be for copyright what the frog is in terms of gastronomy... At the opposite end of the spectrum one finds moral rights that have been recognised at a later stage and with more reticence in Britain.

This theme of a difference in principle lends itself to rhetoric and the French do not always resist that temptation. Today I would like to adopt on the other hand a resolutely pragmatic approach, if only to fit in with the tradition of common law.

It would be ridiculous to deny that there are fundamental differences between French moral right and the moral rights in the Copyright Designs and Patents Act 1988 (1), but an examination of the practical solutions leads us to the conclusion that those differences should not be overestimated. (2)

### 1. Principles

Even if France is often presented as the country of moral right the latter is not really a French invention. The expression moral right is French in origin as it has been coined by Morillot<sup>2</sup>. But the concept is not. Even if Morillot was the first one to identify moral right as a bundle of prerogatives there are distinct from the exclusive right of the author, he merely founded it on rules of civil responsibility. For the roots of moral rights one rather needs to look in Germany and more in particular in the writings of Otto Gierke.

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<sup>1</sup> The Code de la Propriété Intellectuelle (CPI) of 1992, that codifies the two laws of 11th March 1957 and 3rd July 1985, uses the expression 'moral rights' (in the plural), but in common use the term 'moral right' retains the preference.

<sup>2</sup> *De la protection accordée aux oeuvres d'art, aux photographies, aux dessins et modèles industriels et aux brevets d'invention dans l'Empire d'Allemagne*, Paris, Cotillon, 1878.

One should even look in England. In 1769, more than a century before Morillot, Lord Mansfield had been the first to invoke, without naming it, moral right in *Millar v Taylor*. That case refers as well to the paternity right, to the right of integrity and even to the right of divulgation.<sup>3</sup> English law was at that stage much more advanced than French law. The Decree of the Royal Council of 30<sup>th</sup> August 1777 makes no reference to moral right, even if it adopts a very personalised approach to copyright. The same conclusion applies for the revolutionary laws of 1791 and 1793.

It is true that with the turning point of *Donaldson v Beckett* five years later moral right did disappear for a long time from the landscape of copyright in the United Kingdom. It is in France that it will appear again, but that will take some time. It will be the courts that will be intervening all along the 19th century, which shows that, even in a civil law country, where the law is in principle stated by the statute, the case law is fulfilling an important and essential role. Practice came in this case before theory. And it took time before legal writings became aware of the evolution. Couhin<sup>4</sup> in 1894 said nothing on the subject and Pouillet devoted to just three pages to it in 1908 in the third edition of his famous treatise<sup>5</sup>. The decisive role will be left to Desbois, who will insert moral right in the legislation in the law of 11 March 1957 that codifies the whole case law.

From that moment onwards moral right becomes important in France and it will even take first place as the law of 1957 refers to it before it refers to exclusive patrimonial rights. And the difference with English moral rights starts to show both in relation to its nature and its content, and in the regime of moral rights.

### 1.1 The nature of moral right.

Whilst in English copyright moral rights have had difficulties to take root, in France moral right is an essential part of copyright, even if in contrast with German law both sets of prerogatives, moral and economic, remained distinct.<sup>6</sup> Contrary to what can be seen in United Kingdom, moral right in France is not based on the personality right and has imposed itself before the Rome Act of the Berne Convention (1928), which recognised moral rights and imposed it on the copyright countries that were reluctant to accept it in the beginning.

The fact that moral right shares the nature of copyright explains that every infringement of its prerogatives is in French law an infringement of copyright that is subject to the same remedies as every infringement of the exclusive economic right. This includes penal sanctions.<sup>7</sup> It also explains why the matter of secondary infringement has been settled in the same way in which it has been settled for the patrimonial rights. In essence whoever participates it in the infringement can incur liability.

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<sup>3</sup> « It is fit that he should judge when to publish, or whether he will ever publish. It is fit he should not only choose the time, but the manner of publication: how many; what volume; what print ».

<sup>4</sup> *La propriété industrielle, artistique et littéraire*, Paris, Larose.

<sup>5</sup> *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation*.

<sup>6</sup> This is called « dualism », as opposed to the German « monism ».

<sup>7</sup> See e.g. in relation to the right of divulgation Cass. crim., 13 Dec. 1995 : RIDA 3/1996, p.307, in relation to the right of integrity Cass. crim., 3 Sept. 2002 : RIDA 2003/1, p.347.

## 1.2 The content of moral right.

From a certain perspective moral right in France is less complete than in the United Kingdom in the sense that it does not include the right to object to false attribution, which section 51 of the Copyright Designs and Patents Act 1988 established in the line of the Fine Arts Copyright Act of 1862. The matter has been discussed in France, but the Cour de Cassation<sup>8</sup> did decide that the sale of a painting with a false signature, that was neither a copy nor an imitation of the work of the painter concerned was not an infringement of moral right, but rather an infringement of the right of personality. That solution complies with the idea that moral right simply translates the link between the author and his or her work, which implies that moral right should not arise when no work of the author is affected.

In the opposite sense French law does include in moral right prerogatives that are not recognised in English law. This applies above all to the right of divulgation. At the Rome revision conference the Italian delegation had proposed to introduce this right along the lines of a right to decide if the work should appear. But despite the efforts of PiolaCaselli, this did not convince the copyright countries that were afraid that such a rule could affect contractual arrangements.

In France the right of divulgation, which is currently found in article L. 121-2 of Code de la Propriété Intellectuelle, was recognised for the first time by the Cour de Cassation in a famous case well known to all law students, as it involves both contract law and copyright. We are talking here about the *Whistler* case. Sir William Eden, the father of Anthony Eden, had commissioned the American painter<sup>9</sup> to paint a portrait of his wife, Lady Sybil, for a prize somewhere between 100 and 150 guineas. Sir William was stingy and despite the great quality of the work he only offered to pay 100 guineas. Whistler got angry and refused to deliver the work. At the end of a long procedural battle the Cour de Cassation sided with the painter by ruling that the contract by which a painter accepts to paint a portrait for a certain price is a contract of a special nature in the sense that the property will only be acquired by the commissioner when the artist puts the work at his disposal.<sup>10</sup>

The Court of Appeal in Paris was even more categorical more than 30 years later in another case concerning a painter. The court established the principle that literary and artistic copyright gives its holder a right that is not pecuniary in nature, but that is attached to the person of the author or the artist and that allows him for the duration of his life only to make his work available to the public in a way and on the conditions that he deems acceptable.<sup>11</sup>

When it is understood in this way the right of divulgation gives the author a position of strength. And this position was once more confirmed in a recent decision that arose in the context of a conflict between the son of the philosopher Emmanuel Levinas, who was the holder post mortem of the right of divulgation, and his sister, who had co-inherited the patrimonial rights. The Cour de Cassation clarified on that occasion that a right to make a work available (the right of divulgation), which forms

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<sup>8</sup> Cass. 1re civ., 18 July 2000 : RIDA 2/2001, p.309.

<sup>9</sup>Who had left London where the Royal Academy had not recognised his talent for Paris.

<sup>10</sup>Cass. civ., 14 March 1900 : DP 1900, 1, p.497, rapp. Rau, concl. Desjardins and annotated by Planiol. Whistler would retouch the portrait to make the face of Lady Sybil unrecognisable and launch himself into yet another polemic by writing «The Baronet and The Butterfly », and sending it to Lord William avec the dedication « To the baronet from the butterfly ».

<sup>11</sup> CA Paris, 6 March 1931, *Camoin* : DP 1931, 2, p.88, annotated by Nast.

part of the moral right, includes the rights to determine the means of divulgation and to establish the conditions for such divulgation. The Court derived from this that the son was the only person entitled to decide whether or not to communicate the posthumous works of his father to the public, to choose the publisher and the conditions of such publication.<sup>12</sup> One notes here in passing the interaction between moral rights and patrimonial rights, which brings to mind the famous decision of the German Supreme Court in the *Cosima Wagner* case<sup>13</sup> that highlights the double nature, i.e. moral and patrimonial, of the right of divulgation.

Apart from the right of divulgation, one should mention the right of withdrawal that has been recognized in article L. 121-4. This right allows the author to go back on an assignment of rights for intellectual or moral reasons.

The difference with English law can also be observed in relation to the two rights or prerogatives that have been recognised on both sides of the Channel. In French law the right of paternity<sup>14</sup> does not go accompanied by a need to assert it, as imposed by section 77 of the Copyright Designs and Patents Act 1988. It is by the way difficult to reconcile this formality with the text of article 5.2 of the Berne Convention.

The right of integrity on the other hand has a wider scope in French law. This can be seen on three points. First of all, the right of integrity is in French law applied in principle to all works, whereas section 80 of the CDPA contains many exceptions. Secondly, French law does not subject the right of integrity to the condition that the honour or reputation of the author has been affected<sup>15</sup>, as article 6bis of the Berne Convention and section 80<sup>16</sup> do. From this one can derive that in French law the right of integrity allows the author to oppose the destruction of the material support of the work, such as the painting or sculpture. Finally, the right of integrity also gives the author the right to oppose every use of the work in a context that denigrates the meaning of it, even without altering the work. This fits in badly with the requirement in English law of a 'treatment', which is limited to an addition to, deletion from or alteration or adaptation of the work. In this context the French courts found fault with the utilisation of a religious piece of music composed by Gabriel Massenet as background music for a publicity movie that highlighted the strengths of a building promoter (project developer).<sup>17</sup> The Tribunal de Grande Instance in Paris ruled in the same line that that the free choice of the director of a play in favour of male or female actors could not be invoked to overturn the moral right of the descendants of the author Samuel Beckett who had expressed a clear wish not to authorise women to play the characters in his play *Waiting for Godot*.<sup>18</sup>

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<sup>12</sup> Cass. 1re civ., 25 March 2010 : RIDA 3/2010, p.385.

<sup>13</sup> BGH, 26 Nov. 1954, GRUR 1955, 201.

<sup>14</sup> The word 'paternity' which is not used in the Statute itself is sometimes criticised for being sexist, but for the time being it is commonly used (for how much longer?).

<sup>15</sup> In this sense see clearly Cass. 1re civ., 5 Dec.2006 : RIDA 1/2007, p.359 : « Toute modification, quelle qu'en soit l'importance, apportée à une oeuvre de l'esprit, porte atteinte au droit de son auteur ».

<sup>16</sup> See e.g. for an application High Court, Chancery Division, Justice Lewison, 23 May 2003, *Confetti Records v Warner Music UK* [2003] EWHC 1274 : To constitute derogatory treatment, the treatment of the work had to prejudice the author's honour or reputation.

<sup>17</sup> TGI Paris, 1re ch., 15 May 1991 : RIDA 2/1992, p.209.

<sup>18</sup> TGI Paris, 3e ch., 15 Oct. 1992 : RIDA 1/1993, p.225. The opposite conclusion was reached in the Netherlands (President Rechtbank Haarlem, 29 April 1998 : AMI 1998/4, p.83, annotated by Cohen Jehoram).

One could simplify and argue that on this point English law goes for a Berne minus approach, while French law goes for a Berne plus approach.

### 1.3 The moral right regime.

The moral right regime in France is evidently linked to its nature as well as to the strength that the law wants to give it. This can be seen notably from its perpetual duration and its public policy character.

Article L.121- 1 turns moral right into a perpetual right in order to strengthen it. This is not required by the Berne Convention and it is inconceivable in English law, if only because in common law any means of action disappears with the death of the author. One should note that this perpetual term makes moral right a perfect tool to defend cultural heritage, which shows well that French law is not immune for the interests of the collectivity<sup>19</sup>, even if France opposed the extension of moral rights to the protection of masterpieces during the revision conference in Brussels in 1948.

Moral right has in French law also a public policy character. The idea is that there is a need to protect the author against him or herself. This means first of all that moral right cannot be assigned or transferred, as is specified in article 121-1 of the Code de la Propriété Intellectuelle. But on top of this outcome, which is identical in English law, this also means that moral right cannot be waived. This is to be contrasted with the waivability of moral rights contemplated by section 87.2 CDPA.

French law goes even further by considering moral rights in a private international law context to be a *loi de police* or international mandatory rule which the French judge is obliged to apply irrespective of the applicable law that is identified by the conflicts rule. The Cour de Cassation so decided in the *John Huston* case<sup>20</sup> in relation to the colorization of the film *Asphalt Jungle*. Such a solution would not be accepted in the United Kingdom, if only, if I did understand correctly, because moral right is merely considered to be a treaty-mediated imposition.

These are the principles. Next we have to consider how these are applied in practice.

## 2. Practical reality.

Without denying the differences that have been identified, one is obliged to recognise that an examination of the practical application of moral right by the case law requires one to relativise them, both in terms of content and in terms of the regime of moral right.

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<sup>19</sup> The role to defend moral right after the death of the author given by the Statute to the Minister for Culture goes in the same direction.

<sup>20</sup> Cass. 1re civ., 28 May 1991 : RIDA 3/1991, p.197.

## 2.1 The Content of moral right.

The right of withdrawal is a rather theoretical right because the statute itself (Article L.121-4) subjects the exercise of the right to the indemnification by the author of the assignee for the damage which the author causes to the latter by going back on his word before the right can be put into practice. This means that the right of withdrawal is rarely used. The only decision by the Cour de Cassation on this point<sup>21</sup> came in a case where the withdrawal by the author was judged to be abusive because its sole aim was to obtain a higher royalty rate, whereas from a French perspective moral right has as its sole purpose to protect non-pecuniary interests.

In turn, the right of paternity is often not respected in practice, as there are plenty of ghost writers around. Sure, the real author can at all times change his or her mind and then demand that his or her status as an author be recognized, but he or she does not do so for obvious economic reasons. Even worse, this right of paternity is more or less dead letter in the area of applied arts. One even comes across judgments that do not hesitate to state publicly that this right cannot be applied in this area.

The right of divulgation, which has more or less been withdrawn from civil servants (Article L.127-1), is after the death of the author subjected to stringent judicial scrutiny. Any decision of the legatee can be undone whenever there is a clear abuse (Article L. 121-3). One should also take note of the point, even if the matter is still in dispute, that the dominant trend in the case law is that the right is exhausted through its first use. This is a reasonable solution that has also been adopted in other countries such as Belgium, Spain, Greece and Switzerland whose legislation also contains the right of divulgation.

In relation to computer programs the right of integrity has been reduced to the scope of article 6bis of the Berne Convention.<sup>22</sup> There are also restrictions for audiovisual works in the sense that it can only be relied on in relation to the final version of the work (Article L. 121-5). As in Germany the statute considers that the economic interests at play in the audiovisual industry justify a restriction of the moral right.

## 2.2 The moral right regime.

When it comes to the perpetual nature of moral right one needs to recognise that it has above all a symbolic value. Indeed, an examination of the case law shows that moral right is almost never exercised beyond the term of 70 years after the death of the author. One can find of course the opposite example in the *Les Misérables* case, concerning the novel by Victor Hugo, but as I will later explain moral right has been put to one side in that case.

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<sup>21</sup> Cass. 1re civ., 14 May 1991, *Chiavarino*: RIDA 1/1992, p.272, annotated by Sirinelli.

<sup>22</sup> Art. L.121-7 : « sauf stipulation contraire plus favorable à l'auteur, celui-ci ne peut ... 1° s'opposer à la modification du logiciel, par le cessionnaire des droits mentionnés au 2° de l'article L.122-6, lorsqu'elle n'est préjudiciable ni à son honneur ni à sa réputation ».

One should also relativise the public policy character of moral right. In particular the ban on renunciation is not absolute. This is particularly true for the paternity right. The author has the right to accept that his or her name will not be shown on the work as he or she benefits from the right of anonymity. It is true that the author can at any time change his or her mind, which limits the scope of the renunciation.

But this option to retract does not exist for contracts relating to the integrity right, which are not systematically denounced. Let us leave to one side those cases in which the author consents explicitly to a modification of his work that has already been put in place by whoever is exploiting the work or by a third party. The operation has been analysed in French law as a mere exercise of the right of integrity, which excludes any idea of renunciation. It seems that we are not that far away from what section 87.1 CDPA calls 'consent'.

But the case law goes further and allows real renunciations, which means that the author can consent in advance not to exercise his or her right of integrity. What is expressly ruled out are blanket renunciations. In this way in a case dealing with the use of a song for publicity purposes the Cour de Cassation did put forward the principle that the non-assignability of the right of integrity, as a public policy principle, makes it impossible for the author to abandon to the benefit of the assignee in advance and in a blanket way the exclusive way to judge the utilisation, distribution, adaptation, withdrawal, combination and change which the assignee would like to make.<sup>23</sup> *A contrario*, a renunciation with a limited scope is acceptable. This was confirmed by another decision in the same case that went in favour of the author of the song and found that they had not given in advance their specific consent.<sup>24</sup> That means in practice that the user of the work would have escaped in case he had made the authors sign such a specific authorisation.

Finally and above all, the exercise of moral right gives rise to judicial scrutiny, which is imposed in a systematic way that shows well, contrary to what is often assumed, that such exercise does not have a discretionary character. Such scrutiny has been put in place by the statute in a general way and whenever the moral right has been exercised in an abusive way by legatees of the author (Article L. 121-3). But the case law has always accepted that it can also operate in those cases where the author him or herself exercises the moral right. It is rarely applied in relation to the right of the divulgation and the right of paternity where it is difficult to characterise the abuse. In relation to the right of withdrawal the only decision is the one already mentioned where the author lost the case for having exercised the moral right with a pecuniary aim.<sup>25</sup>

On the other hand, there is a wealth of case law concerning the right of integrity. An examination of that case law shows clearly that that right is not as absolute as the statute may lead one to think. In the first place the courts refuse to admit that certain forms of exploitation by their nature affect the integrity and spirit of the work. E.g. the Cour de Cassation did decide in relation to a compilation of musical works on a single support that the exploitation of a work as part of a compilation cannot affect the moral right of the author, requiring his consent, unless there exists a risk that the work will

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<sup>23</sup> Cass. 1re civ., 28 Jan. 2003, *Barbelivien*: RIDA 2/2003, p.415.

<sup>24</sup> Cass. 1re civ., 2 April 2009 : RIDA 2/2009, p.435.

<sup>25</sup> Cass. 1re civ., 14 May 1991, *Chiavarino*, above. The reasoning applies in a general way to all aspects of the moral right.

be altered or that the reputation of the author will be affected.<sup>26</sup> In the *Les Misérables* case the court also decided that one could not prohibit by way of principle an author to write a sequel to an earlier work written by someone else.<sup>27</sup>

In the second place the case law decides in a consistent manner that one needs to reconcile the exercise of moral right with the respect for other competing prerogatives. This is first of all true for the property right in the support of the work. The most frequent applications of this principle are found in relation to architectural works. Suffice it here to quote the decision of the Cour de Cassation that confirms that it is for the judicial authority to decide if the alterations to the architectural works are justified, taking into account their nature and their importance, and by the circumstances that led to the owner to make these alterations.<sup>28</sup>

The exercise of moral right can also be restricted by fundamental rights. The Cour de Cassation ruled in the *Les Misérables* case<sup>29</sup> that the freedom to create stops the author or his or her legatees from objecting to a sequel being created at the end of the exclusive right in the work from which they benefitted and the Court considered that the Court of Appeal in Paris had infringed article 10 of the European Convention on Human Rights and Fundamental Freedoms by deciding that a sequel to the famous novel by Victor Hugo infringed the moral right of Victor Hugo. When the case returned to the Court of Appeal in Paris that court decided in the same sense and indicated that the moral right was not absolute.<sup>30</sup>

It is this conclusion that should retain our attention. Contrary to what is sometimes stated, including in France, French moral right is not the right to be capricious. It is strenuously followed up by the courts, that will not let it become omnipotent. In Germany the tool used is called the 'balancing of interests'. That expression is not used in France, but the compass is the same. The decision relating to architectural works<sup>31</sup> stated that clearly by affirming the necessity to establish a balance between the prerogative copyright and those of property right.

It can be seen here that pragmatism is not an asset that is monopolised by English lawyers. The reason for which French lawyers are not normally credited for possessing that asset is found in their preference to restate the big principles. But they realise that reality does not always ply itself to these principles. From their side common lawyers, in as far as I know them, are wary of unduly broad statements and they prefer specific tailor-made solutions. But common lawyers also appreciate that the need for the law to be predictable implies a coherent set of rules.

Are we therefore in the end as different as we sometimes believe ourselves to be?

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<sup>26</sup> Cass. 1re civ., 7 Nov. 2006, *Pierre Perret* : RIDA 1/2007, p.319

<sup>27</sup> Cass. 1re civ., 30 Jan. 2007 : RIDA 2/2007, p.249.

<sup>28</sup> Cass. 1re civ., 7 Jan. 1992 : RIDA 2/1992, p.194.

<sup>29</sup> Cass.1re civ., 30 Jan. 2007, above.

<sup>30</sup> CA Paris, 4e ch., 19 Dec. 2008 : RIDA 2/2009, p.444.

<sup>31</sup> Cass. 1re civ., 7 Jan. 1992, above.