

THE ECONOMIC ANALYSIS OF MORAL RIGHT

Introducing a topic of the economic analysis of moral right is falling into a two-fold heresy. In most continental countries legal science is considered as an autonomous science and law professors are sceptical about the economics of legal rules¹. Moreover moral right developed in Europe² as a legal device conceptually distinct from the economic right. It derives from natural law, safeguards the authors' and performers' non-economic interests that arise from the creative act and falls within the realm of personality right.

The economic analysis is a relatively new approach that applies methods of economics to laws. Economic concepts are used in order to explain the effects of laws, to assess the economic efficiency of legal rules and to predict which legal rules shall be promulgated. Law is a purpose-independent system designed to enable individuals to increase the predictability of each others' behavior and thus to better coordinate their affairs³. A basic assumption of the economic thinking is that firms and owners are acting with bounded rationality, in the sense that they want to maximize their profit and minimize any transaction cost. But the limited cognitive processing power of people, since it is impossible to assimilate all the information at our disposal and accurately work out the consequences of the available information, poses some limits on their ability to make a truly rational decision achieving such an end.

Copyright is a natural field of economic analysis, in the sense that copyright law is the most acceptable means for promoting efficient allocation of resources that result from the creative act. The "public good" character of intellectual works justifies the creation of intangible property rights for hindering the progress of "free riders"⁴. The cost of creating an intellectual work is often high while the cost of its reproduction and its distribution is rather low. Limiting the access to a work by providing a legal monopoly acts as an incentive for creating the work in the first place. Economic efficiency is achieved by striking a proper balance between providing the incentives for creators, on

¹ G. De Geest, *Law and economics in Belgium*, <http://encyclo.findlaw.com/0310book.pdf>.

² For the development from a legal concept of a natural and personal moral right until its effective protection, see I. Kikkis, *Le droit moral de l'auteur dans la société de l'information*, Thèse, Université de Nantes 2004, p. 11-16, E. Adeney, *The moral rights of authors and performers, An International and Comparative Analysis*, Oxford, 2006, p. 9-159.

³ T. Zywicki-A. Sanders, *Posner, Hayek and the Economic Analysis of Law*, http://www.law.gmu.edu/assets/files/publications/working_papers/07-05.pdf, p. 32.

⁴ R. Benko, *Protecting Intellectual Property Rights: Issues and Controversies*, Washington DC: American Enterprise Institute, p. 17.

the one hand, and ensuring access to culture of the public as well as diminishing the administrative costs of copyright protection⁵, on the other.

Moral right allows creators and performers to control the treatment and presentation of their work or performance by others. It is the master piece of a system that places the author at the center of the legal protection and offers some modicum of power to performers. Many jurists are reluctant to an economic analysis that stresses the market in the focus of the legal rationale. It is not acceptable for them to reduce the author and the performer to a mere rational agent intending to maximize his profit, to interchange the nobility of a natural right with a legal protection of a professional and social status.

Nevertheless an economic analysis offers a more pragmatic approach of the legal concept, capable of revealing the hidden richness of the notion of moral right without understating its capacity to protect a wide range of different interests that matter to a variety of different stakeholders. Suffice it to mention the reinforcement of authors' and performers' bargaining power, the safeguard of a professional and social standing, the maintenance of the economic advantages of their reputation, the prevention of consumers' deception, the raising of a bulwark against dilution of natural culture⁶.

For the purpose of this study aiming at the better systematic understanding of legal rules of moral right, I will focus at the situations of market failure that induced those rules (A) before assessing their economic efficiency (B) under a normative vision.

A. Moral right and market failure

A perfectly efficient market requires full available information for all agents and free competition. Departures from this perfection, commonly known as market failures, would incur further costs for firms that want to trade intellectual goods and for users. Thus Copyright is justified by the presence of market barriers as high transaction costs, positive externalities, non-monetizable benefits or anti-dissemination motives⁷.

Copyright is an answer to a form of market failure stemming from the presence of public goods, with two defining traits: the non-rivalrous use and the non-

⁵ W. Landes-R. Posner, *An Economic Analysis of Copyright Law*, <http://cyber.law.harvard.edu/IPCoop/89land1.html>, p. 1.

⁶ E. Adeney (n. 2 above), p. 3.

⁷ W. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, Colum. L. Rev., 1982, vol. 82, p. 1627-1635.

excludability⁸. An intellectual work is virtually inexhaustible, in the sense that anyone can simultaneously use a book without preventing others from using and without diminishing its value. Moreover, physical control of an intellectual work does not offer its usual potential as a mode of inexpensive enforcement for excluding free riders⁹. In a free market, there is no means to exclude those users that have not paid for access and use of the work. As a result of their “public good” character, intellectual works would have been under-produced if left to the free market.

Copyright legal system acts in diverse ways to restore the conditions of perfect competition and allow the market to function. Moral right becomes an instrument for promoting the efficient allocation of resources. In a market where information is incomplete or unreliable, moral right facilitates identification of the work’s owners, and thus makes easy to locate them and obtain further information on the validity and duration of copyright claimed. Moral right influences the flow of information in a society in a different way than economic rights that affect the supply of available information. Its primordial role is to act on the information seeker’s ability to judge the quality of the available information sources and to help him to choose between amongst competing sources¹⁰. Another economic function of moral right is to control reputational externalities to the potential benefit not just of the individual artists, but of other owners of the artist’s works as well as of the public at large¹¹.

It is frequently argued that moral right embraces personal, non-pecuniary interests, totally distinct from the economic, commercial interests protected by Copyright. This is an affirmation partially true, because there is a strong imbrication¹² of pecuniary and non-pecuniary interests protected by moral right. From the point of view

⁸ R. Van den Bergh, *The role and social justification of copyright: “a law and economics approach”*, I.P.Q. 1998, p. 20.

⁹ W. Gordon (note 7 above), p. 1611.

¹⁰ M.A. Willkinson-N. Gerolami, *The author as agent of information policy: The relationship between economic and moral rights in copyright*, *Government Information Quarterly* 26 (2009) 321-332, p. 328.

¹¹ H. Hansmann-M. Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, *Journal of Legal Studies* January, 1997.

¹² Imbrication between pecuniary and non-pecuniary interest means that moral right may serve to support the value of artist’s work but it does not mean that it serves directly the pecuniary interests of the artist, in the sense that the artist can seek a double remuneration for both economic and moral right. We cannot adhere to the opinion of German specialists that moral rights might serve eventually even mainly pecuniary interests (A. Dietz, in Schricker Kommentar, Vor §§ 12 ff, n. 12). See also A. Bertrand, *Le droit d’auteur et les droits voisins*, 2nd edition DALLOZ, 1999, n.1.532.

of acquisition, duration and international protection there is no difference between moral and economic right¹³.

The long duration of moral right exceeding the artist's life is consistent with the view that moral right serve to support the value of the artist's work to society at large. The intellectual work after the death of the author acquires a collective dimension, in the sense that society has an interest that future generations could form an exact opinion of the work without being misled from the opportunistic actions of successive owners. Art collectors, museums and users are interested in the stability of meaning or value of cultural products. Damage to one of the author's work incur external costs for artist's other works and jeopardizes ideas socially valuable, such as persuasive statements of social critique or ideal contained in great works of art. This is the reason why after the artist's death some prerogatives of the moral right vest in a public authority¹⁴.

The protection of author's and performer's pecuniary interests is also present while the artist exercises the moral right¹⁵. Forming a reputation as a capital of consecration implying the power to consecrate cultural products could be the only legitimate pretention of an artist but it is equally important that the artist profits from this operation. Therefore there is no paradox to claim that the exercise of moral right matters during negotiations for the exploitation of intellectual works and reinforces the bargaining power of the artist. There are several cases where pecuniary and non-pecuniary interests coincide. An unauthorized adaptation of the intellectual work could infringe both economic right and right of integrity. The right of disclosure could influence the exercise of economic rights and inversely the exploitation of the work could limit the moral prerogatives of the artist.

Moral right could be invoked by the artist to prevent an exploitation of a work in a way deemed to harm the reputation of the artist or without the appropriate

¹³ G. Koumantos, *Copyright*, 7th edition, Sakkoulas, Athens, 2000, p. 34: Copyright is unitary from the point of view of acquisition, duration, international protection and the sum of two distinct rights from the point of view of transmission and limitations.

¹⁴ It is the case in Denmark and Sweden for the right of integrity if cultural interests are involved (art. 53 of Danish law, art. 51 of Swedish law), in Spain Italy, Portugal and Greece for the right of paternity and the right of integrity (art. 25 of Spanish law, art. 23 of Italian law, 56 par. 2 and 57 of Portuguese law and art. 29 par. 2 of Hellenic law).

¹⁵ It is worth noting that pecuniary interest is considered for the evaluation of the damage caused by the infringement of moral right, i.e. the omission of the name of the architects CA Paris, 20 oct. 1995, JurisData n.023723. If it is true that the exercise of the right of integrity could serve a pecuniary interest, the reasoning shall not be pushed too far by admitting that pecuniary motivation could justify the exercise of the moral right.

attribution of the work to the creator. The name of the artist has acquired a market value¹⁶ that is reflected in the market value of the work. It is in the artists' interest to impede any depreciation of the reputation of their work by opportunistic adulteration of individual works¹⁷.

Ultimately moral right could be defended as establishing legal assurances of the sources of works in order that the public may assess of those works and identify reliable and relevant information for their needs¹⁸. The right to integrity serves the interest of the society to maintain the meaning of intellectual works as construed by the author. The right to paternity or attribution is an exceptional symbolic means of appropriation of intellectual resources and functions in a similar way as a trademark. It is both a source of liability and an indicator of quality that operates in the public interest in so far as it increases the supply of information to consumers and thereby increases the efficiency of the market.

B. Moral right and economic efficiency

Moral right provisions by striking a balance between the incentive to benefit from the commercial adaptation or exploitation of the work and the preservation of the social significance of the work foster the economic and social conditions necessary for efficient and effective information transfer flow. Moral right is also an instrument for promoting efficient allocation of resources. It is allocated to the persons that value more, authors and performers. From the point of view of productive efficiency, the results of the application of moral right could not be realized at a lower cost by application of another legal rule.

In the first place, free market and contractual mechanisms fail to produce an optimal amount of license agreements that preserve the integrity of an intellectual work. Creators fail to adequately account for the risks in their licensing decisions of the liberties that companies will take during the exploitation of their work and of the impact that these changes will have on the public. Since the interests in integrity are non-monetizable ones, creators have very little information regarding their fair value and they are reluctant to sacrifice a potentially lucrative market for the principle of moral right.

¹⁶ A. Berenboom, *Le Nouveau Droit d'Auteur*, LARCIER, 2nd edition, 1997, n. 99.

¹⁷ R. Van den Bergh (note 8 above), p. 30.

¹⁸ M.A. Willkinson-N. Gerolami (note 10 above), p. 329

The existing remedies of a broad view of derivative works and unfair competition have not shown the same efficiency. It is true that taking a broad view of the derivative work may allow the author to protect many of the interests as the moral right. But this right could be transferred and cannot with the same force be opposed to the company-licensee of the author. Not to mention that in case of a work-made-for-hire copyright is vested in the producer. The protection provided by the legal rules of unfair competition could be of some help only in those cases that the degree of alteration is substantial and the altered version is so distorted that it makes no sense or results to the confusion of the public. Finally trademark law cannot adequately serve the interest of evaluating the authoritativeness of information sources since the American Supreme Court held that trademark legal rules could not be used to enforce a claim which was essentially a moral rights claim for paternity (*Dastar Corp. v. Twentieth Century Fox Film Corp. et al.*)¹⁹.

From the point of normative economic view rules of moral right seem to be efficient and improvement of existing law coincides with an expansive application of moral right to the common law system and the harmonization of moral right in the EU. Although in the 1995 Green Paper²⁰ the EC, considering the vital importance of moral right in a rapidly changing digital environment, had argued that the question of moral right was an urgent one, finally showed reluctance to any harmonization in this field. The reason advanced is that moral right has no incidence to the functioning of the internal market.

Questioning whether the differences of the legal rules of moral right in the EU MS could hamper the course of the functioning of the internal market, the Commission recognized that those rules have a significant economic impact²¹. Despite the EC's conclusion that there is no need for a priority action, I believe the differences are such significant that they will finish by disturbing the course of the internal market. The protection provided by moral right in the different EU states results to a significant imbalance, due to the inequality of the level of protection and the diametrical opposite solution of the issue whether and to what extent an author can waive his moral right²². The counter-productive and outdated absence of waivers in many EU MS could impose significant transaction costs for cultural industries arising from cumbersome negotiations or costly disputes. Isolation of markets and delocalization of cultural production with significant unjustified competitive advantages result from the fact that in the same market legal rules of moral right do not bind equally all entrepreneurs.

¹⁹ M.A. Willkinson-N. Gerolami (note 10 above), p. 330.

²⁰ Green Paper 19 July 1995, COM (95) 382 final.

²¹ EC Communication of 20/11/1996, COM (96) 568 final, p. 27.

²² W. Grosheide, *Moral rights*, in E. Derclaye, *Research Handbook on the future of EU Copyright*, Cheltenham 2009, p. 265, J. de Werra, *The moral right of integrity*, in E. Derclaye, *Research Handbook on the future of EU Copyright*, Cheltenham 2009, p. 274, I. Kikkis, (note 2 above), p. 256-258.