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21 Contemporary Problems of Integrity Protection of Copyrighted Works

In the Light of Article 6bis of the Berne Convention and the Recent Practice of CJEU

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21.1 Erosion of the Right of Integrity?

The right of integrity appeared at different times and with a different substance in various legal systems. Although the Berne Convention (BC) contains a compromise solution in respect of the right of integrity,[1] compared to this minimum requirement there are noticeable shifts towards both endpoints of the scale. While scholarly literature is generally of the opinion that the legal system of the United States of America (US) does not meet the minimum requirements set forth by the BC, and it would be necessary to fill relevant US law with 'concrete content',[2] countries with a Francophone legal system that traditionally provide a 'strong' right of integrity have experienced difficulties in enforcing this right, and are faced with the gradual decline and weakening of the right to integrity.[3]

At first sight, it might seem that some kind of process of unification has begun. However, it is strongly questionable whether the shifts taking place in the various legal systems are indeed moving in one direction, and even if the answer is yes, can this tendency be in itself favourable? If, however, the process is much rather "the hollowing out erosion of the integrity right"[4] affecting the copyright regime of Hungary and several EU states, we must examine the nature, causes and the short and long-term regulatory effects of this erosion.

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1 1886 Berne Convention for the Protection of Literary and Artistic Works, TRT/BERNE/001 (1979). Art. 6bis.

2 *Cf.* R.R. Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States*, Stanford, Stanford University Press, 2009; M. Leaffer, *Understanding Copyright Law*, Durham, Carolina Academic Press, 2014.

3 M.T. Sundara Rajan, 'Tradition and change: The past and future of authors' moral rights', *in* T. Takenaka (ed.), *Intellectual property in common law and civil law*, Cheltenham–Northampton, Edward Elgar, 2013, p. 146.

4 Faludi 2011, p. 164.

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21.2 The Nature and Limits of the Right of Integrity

Papers on the history of copyright law have long discussed the causes and the process of the development of exclusive rights, all the way back to the time of book printing.[5] The fact that "the theory of moral rights, which soon became part of specific laws, international conventions, judicial practice"[6] only started to take shape around the turn of the 21th century in legal dogmatics, does not mean that we cannot find these same interests and needs had not emerged much earlier. In fact, more often than not, the interests protected by moral rights (the interests of authors and the society at large) were the driving force behind the development of copyright law.

In both legal and cultural-historical literature several authors draw attention to the following: "Defoe protests most heatedly against the mutilation of his texts, not unlike Luther. By comparison, the problem of lost income for reasons of textual copies is secondary."[7] Luther, in the 16th century, has also spoken at length and decisively about the issue: the harm caused by unauthorized re-prints "would have been tolerated" had "they not dealt with my books– hurriedly and incorrectly printed – in a way that by the time I laid hands on them, I could hardly recognize them."[8] That is, although the idea of financial motivation may have been reconciled by the creators with the principles of copyright law in in its contemporary sense, but for many, the absence of such protection was inferior to the issue of moral rights, such as the right of integrity.

The emergence of moral rights is partly due to the experience based development of organisations representing rightholders' interests,[9] an in the meantime has been perfectly aligned with the discernible process of the personal rights protection becoming independent from rights associated with ownership.[10] Moreover,

> "the need for the protection of these 'goods' has become extremely urgent on account of technological development; not only because it changed the balance of the parties and made the damages almost irreparable through self-defence, but also because technology is an instrument of power available to everyone,"[11]

5 *E.g.* B. Atkinson & Brian Fitzgerald, *A Short History of Copyright: The Genie of Information*. Springer, Switzerland, 2014; I. Alexander & H.T. Gómez-Arostegui (ed.), *Research Handbook on the History of Copyright Law*, Edward Elgar, Cheltenham–Northampton, 2016.

6 A. Benárd & I. Tímár (ed.), *A szerzői jog kézikönyve,* Budapest, Közgazdasági és Jogi Könyvkiadó, 1973, p. 97.

7 *See*: B. Bodó, *A szerzői jog kalózai*, Budapest, Typotex, 2011, p. 101; A. Horváth, 'A szellemi alkotások jogának története, a szerzői jogi védelem kialakulása, a jogalkotás kezdetei Magyarországon', *Iparjogvédelmi és Szerzői Jogi Szemle*, Vol. 4, 2016, p. 101.

8 Id., p. 100.

9 Benárd & Tímár 1973, p. 97.

10 L. Vékás, 'Az új Polgári Törvénykönyvről'. *Jogtudományi Közlöny*, Vol. 5, 2013.

11 L. Sólyom, *A személyiségi jogok elmélete*, Budapest, KJK, 1983, p. 277.

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warns László Sólyom.

Examining the right of integrity and its development under Hungarian copyright law, the eighth title of the Commercial Act of 1875, which dealt with publishing transactions, contained a relevant provision, obliging publishers to reproduce the manuscript with unaltered content.[12] This included the prohibition of changing the style of the manuscript, yet judicial practice was more flexible regarding smaller, necessary changes, which were probably supported by the author.[13] "Moral rights do not enjoy express protection under Hungarian copyright law"[14] ("this is one of the reasons for seeking reform", wrote Géza Kenedi), but practice and legal literature were of the opinion that the unlimited transfer of rights does not cover the author's "personal rights." At this time, however, the 1884 Copyright Act itself did not mention the right of integrity,[15] and the Commercial Act covered this issue with the restrictions described above, namely, as a part of publishing transactions.

Judicial practice was of immense importance in the development of the right of integrity – together with authors' other moral rights. It is more and more clear, that although exclusive rights were 'transferable' under the Copyright Act, in fact, "most of the contracts – which concerned the scope of the rights transferred –, although they referred to the transfer of 'full ownership', were merely license agreements."[16] According to Elemér P. Balás, this is largely attributable to the fact that the general protection of personality law in private law has become increasingly acknowledged, whereby the "enormous gaps"[17] of the second Hungarian Copyright Act[18] were filled with increasingly ambitious, extensive interpretation by judicial practice.[19] The Copyright Act of 1921 stated only that the author may, even in the case of a transfer of exclusive rights, make changes to his work until the end of the reproduction, in case this does not violate the legitimate interest of the person to whom the copyright had been transferred (in application to newer editions of the work, as well).[20] However, in legal literature and practice, based on the 1928 text of the BC, a general law on integrity was also taking shape. According to this it is in the author's "intellectual sphere of interest that nobody can distort

12 Commercial Act XXXVII of 1875, Art. 519. "The publisher shall publish without change and appropriately market the work received as manuscript or as agreed original at his own expense."
13 P.E. Balás, 'Szerzői jog', in: K. Szladits (ed.), *A magyar magánjog I. Általános rész, személyi jog*, Budapest, Grill Károly Könyvkiadóvállalat, 1941, p. 685.
14 G. Kenedi, *A magyar szerzői jog*, Budapest, Athenaeum, 1908, p. 53.
15 Act XVI of 1884 on Copyright Law.
16 D.I. Legeza, *"Egyszer mindenkorra és örökáron." A szerzői jog és forgalomképessége Magyarországon a reformkortól 1952-ig*, Doctoral dissertation, University of Szeged, 2017, p. 198.
17 Balás 1941, p. 686.
18 Act LIV of 1921 on Copyright Law.
19 *See* especially Judgment P. I. 348/1932. of the Hungarian Supreme Court.
20 Act LIV of 1921 on Copyright Law, Art. 3, third sentence.

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his work and generally utilize it in such a way that is disadvantageous the author's reputation."[21]

Based on the above, Hungary is among the countries that prohibit *all arbitrary, unauthorized alteration* of works.[22] This choice has already been expressed by the third Hungarian Copyright Act, stating that any unauthorized alteration or use of the work infringes the moral rights of the author.[23] The 1928 text of the BC reflected the view that only alterations that are *in some way disadvantageous* to the author may be considered in violation of the right of integrity.[24] The current text of the international convention can in fact be interpreted – and, for example, the applicable Hungarian Copyright Act in force[25] is interpreted in the same way by Hungarian judicial practice[26] – in the two following ways: on one hand, the author can take action against any kind of distortion, mutilation or alteration of the work (in case of direct interventions) or take action against uses that are harmful to the author's honour or reputation (the case of indirect interventions).[27]

21.2.1 Connection to the Author

Continental law regimes generally derive the right of integrity from the relationship between the work and the author, and the personal connection to the work.[28] This connection to the person, however, is hardly discernible in the age of mass reproduction and impersonalized cultural goods. There are countless terabytes of creations and performances per day[29] to which their creator or producer is extremely loosely connected, and in particular for some genres, not only the process of creation but also the life span of the work has drastically shortened. Still, it can be said that "creative work, especially

21 Balás 1941, p. 687.

22 Benárd & Tímár, 1973, p. 106.

23 Act III of 1969 on Copyright Law, Art. 10.

24 International Convention for the Protection of Literary and Artistic Works Signed at Berne On the 9th September, 1886, Revised at Berlin On the 13th of November, 1908, and Revised at Rome On the 2nd June, 1928, Art. 6bis (1) "Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation."

25 Since the relevant French text itself contains the word "or" which helps interpretation:".. de s'opposer à toute déformation, mutilation ou autre modification de cette oeuvre ou à touteautre atteinte à la même oeuvre, préjudiciable a son honneur ou à sa réputation."

26 This issue did not change at the last, strongly criticized modification of Art. 13 of Act LXXVI of 1999 on Copyright (hereinafter mentioned as Copyright Act). *See* in detail: A. Grad-Gyenge, 'Első oldal', *Infokommunikáció és Jog*, Vol. 54, 2013.

27 P. Gyertyánfy (ed.), *Nagykommentár a szerzői jogi törvényhez*, Budapest, Wolters Kluwer, 2014, p. 112.

28 Faludi 2011, p. 164.

29 "72 hours of video are uploaded to YouTube every minute." Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values. European Commission, Brussels, 2013.4.24. COM(2013) 231 final. 2. point. Since then, the volume has reached 400-500 hours per minute. *See* the statistics of 2017 of YouTube at: https://goo.gl/u3UBbS.

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art, literature and literary work is still the most personal in the same way as in Kant's time, in the 18th century, even though these features in the modern genres sometimes may not be identified by outside observers."[30]

In cases where the author or neighbouring right owner is closely linked to his work or performance, this relationship often becomes looser in the digital world, despite the author's will. While the dissemination and reception of works is supported by a number of copyright provisions (from free use rules to mandatory collective rights management or exhaustion to the length of protection), the legislator also seeks, within a reasonable bounds that the *connection* with the creator or the producer *not disappear completely*. However, practice often reveals an entirely different picture: enforcing the explicitly declared moral rights, in particular with regard to certain genres and uses, has many obstacles.

At other times, the rightholder has such a weak connection to the work or performance, that he would not be reluctant to resign "for the sake of simplicity" or "offering" the work to the community, or sometimes even for a reward (eg. "ghost writing"). However, in most European states, the author or producer *does not have the right to dispose* over whether a work is or is not the subject of copyright protection, and moreover, under Hungarian law, he cannot transfer *moral rights,* and such rights may not devolve to another person in any other manner. The author does not even have the legal option to waive the moral rights.[31] However, there is no obstacle to reach an agreement (in accord with the specific genre) which could cover the precise manner and terms of exercising the exclusive rights, at the same time leading to the same result as an (otherwise invalid) waiver, if the rightholder refrains from enforcing his moral rights. This solution, however, also leads to uncertainty. Although the rightholder may give up the option of enforcing a claim arising out of an infringement in an agreement concluded with the perpetrator (as a contractual obligation), it is difficult for a member of the public to decide on a given 'freely available' (and here I am intentionally using this non-copyright phrase) work or performance, whether it was made available by the rightholder with the intention of waiving his moral rights, or that he decided not to indicate his name, or that the work became freely accessible as a result of an infringement. In this latter case, it could be unclear that the rightholder reconciled with the infringement, and does not intend to enforce his rights, or just the contrary. (Although these situations may be clearly decided from a legal point of view, however, they create uncertainty for members of the public in practice.)

In many cases the rightholder *does not intend to enforce the right of integrity*: he would simply want to waive it, transfer it, or he simply does not want to exercise it in practice. This loose attachment or connection is understandable in relation to certain genres (espe-

30 Gyertyánfy, 2014, p. 117.

31 Copyright Code Art. 9(2).

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cially in functional works) and both legislators and the judicial practice are aware of it, and take it into account.

The continental and the common law legal regimes take a different approach the nature, intensity and limits of the author-work relationship Despite the differences in the historical roots, the starting point in both legal regimes is that "[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"[32] However, the substance and expression of this moral protection, as well as the relation to property rights, are very different in common law legal regimes. Because this regime serves the public interests by protecting property and investments, the personality-privacy based, inalienable protection seems incompatible with it. That is why common law countries have a limited right of integrity: subject to limitations and the possibility of waiving the right. In these legal regimes, this right is not based on the author-work relationship, or on the recognition of the author who created the individual-original work, but was introduced as an inevitablesolution in the wake of international obligations. As a result, they were both introduced to the legal system and in the same time, they were not – since we are talking about 'moral rights' without guarantees underpinning the personal nature of the right. The most delicate point of finding the right place for the integrity right is its relation to the property rights of the author. If it is defined as an instrument bound by its nature to the author, and limiting property rights, common law legal regimes will consider it to be an 'unpredictable' limit on commercial flow. There is no doubt that the right of integrity may be the most influential of moral rights on the commercial flow.[33] And if it is interpreted as a personality-type right, which is based on a close author-work relationship providing the author with strong control over the work, it can have a serious impact on the use of works. This raises practical problems in the case of particular genres and functional works (software, architectural works, works ordered for advertising, etc.) which are solved by the jurisprudence of each country based on the weighing of conflicting rights. However, the right of integrity raises new questions about the latest trends in digital works and uses.

21.2.2 Issues Surrounding 'the Copy of the Work'

The work-author relationship that is at the root of the right of integrity is quite different in the light of 'specific' digital works, digital copies and digital uses. Situations where the expression of individual-originality occurs in a single original copy, when only few copies are made or when there a large number of identical copies are made of the work cannot

32 Universal Declaration of Human Rights (proclaimed by the United Nations General Assembly in Paris on 10th of December, 1948) Art. 27(2).

33 Faludi 2011, p. 163.

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be considered identical situations. Cases where only one (or a few) original copies are available, have been followed by specific rules in copyright regimes, aimed at balancing the interests of the owner(s) of the copy(ies) and the author. In such cases, it is not unusual for the right of integrity to fade into the background.[34] Practice shows that the boundaries and possibility to limit of the right of integrity depends on many factors. A work of art, mass produced, but artistic household objects and an artwork designed for advertising purposes fall under different considerations. In addition to the type of work, and the purpose of creating the work itself, "it is not indifferent how prestigious, famous and renowned the author is. It may also be decisive whether the changed copy is the only original instance of the work, or is it a copy personally owned by someone (or perhaps not even publicly accessible)."[35]

More and more often, works have no 'original analogue' copy, instead they are originally made as digital works. In addition, a number of 'originally analogue' copies are reproduced in digital form, and the digital copy of the work – albeit in a different way than the original – is also merged in the chain of uses. This also raises serious questions about property rights (see, for example, the issue of digital exhaustion),[36] but it also has a tangible effect on the right of integrity. Would Arturo Di Modica have found the use of his work to be an infringement, distorting his artistic message, if Kristen Visbal's sculpture 'Fearless girl' would not directly be placed opposite to his original sculpture 'Charging bull', but the marketing company would have made a digital montage of the two sculptures and used that instead in its campaign?[37] Would such a reorganization be considered a content created by the user, or as a parody? Does the author's right to integrity always have the same weight?

If we look back to the origins of the right to integrity, in the beginning, there was a demand that the author's message must remain unchanged in the work, and the "glamour of the personality"[38] of the author, the expressed and individual-original character of the author must not be distorted. "Suddenly the exact form and manifestation of an artwork became important. But book printing made the work substitutable, and put the focus on the substance and the creator."[39] It has become clear at the beginning of copy-

34 *E.g.* in the case of building reconstructions, *see* the expert opinion of the Council of Copyright Experts (Hungary), Case No. 38/07/1.

35 Gyertyánfy, 2014, p. 113.

36 P. Mezei, *Copyright Exhaustion. Law and Policy in the United States and the European Union*, Cambridge University Press, Cambridge, 2018, pp. 113-170.

37 "An innocent, but firm and self-conscious little girl of 130 centimetres stands opposite to a nearly three and a half meter high, a multi-ton, violent monster. In the world of economics, the group fighting for equal opportunities for women chose this overwhelmingly telling symbol, and the image circled the globe. Still, the creator of the original bull-statue is not happy." P.B. Tóth, 'A rettenthetetlen lány esete a támadó bikával.' *Dal+Szerző*, Vol. 4, 2017, p. 40. *See* more: https://goo.gl/H5JHLg.

38 "As stated in recital 17 in the preamble to Directive 93/98, an intellectual creation is an author's own if it reflects the author's personality." Judgment of 1 December 2011 in Case C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, [2011] ECR 12533, para. 88.

39 Horváth, 2016, p. 96.

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right law that the author enjoys an ever more central role, but at the same time, his responsibility increases as well:[40] "personality rights is equivalent in personal responsibility, counterbalancing personal responsibility in literary and artistic terms, personal responsibility in public affairs."[41] The right of integrity can be justified on the basis of this argument, for example, in the Commentary made to the Copyright Code: it is the author's most personal interest, that the audience not receive a false impression of the work.[42] To ensure this, new solutions are being developed in the era of digital copies and digital uses (see Section 21.3), so that the right of integrity cannot be "interpreted as a limit to innovation."[43] Should we treat the right of integrity differently in economic and social models based on joint production,[44] in the specific digital environment with its specific modes and pace of use, when talking about content created by the user? What will be the effect of regulation, if one of the goals of copyright law is to promote cultural life, but the more intricate the network and the faster cultural products are flowing, creating a colourful mass, the more difficult it is to create tailor-made rules? Are we increasingly drifting away from the personality law approach?[45]

The substance of the right of integrity has so far adapted to a number of factors that appeared both on the side of the creator and on the side of the user and in the work itself. It is a fundamental question whether the erosion experienced in different areas and cases – emerging differently in each the legal regime –, should push us in the direction of compromises under *international and EU law*, or whether the new situation may be managed with the available legal instruments? Can it retain its moral nature, and should new limits be introduced? Is it even possible to introduce new limits to the right of integrity without sacrificing the very essence of the right itself?

40 A. Gács, *Miért nem elég nekünk a könyv: A szerző az értelmezésben, szerzőségkoncepciók a kortárs magyar irodalomban*, Budapest, Kijárat Kiadó, 2002, p. 35.

41 Balás 1941, pp. 693-694.

42 Gyertyánfy, 2014, p. 111.

43 Green Paper, Copyright in the Knowledge Economy. Brussels, 17.6.2008, COM(2008) 466 final, Section 3.4.

44 B. Bodó, *Open-source kultúra. A szabadon hozzáférhető tudásra és a társas termelésre épülő társadalmi, gazdasági modellek múltja, jelene, jövője*, Typotex, 2013. *See*: https://goo.gl/zy2pK3.

45 Gy. Boytha, 'Die Entwicklung des Begriffs des Urheberrechts aus der Sicht des Europarechts', *in*: Z. Csehi (ed.), *Boytha György válogatott írásai*, Budapest, Gondolat, 2015, p. 459. "Zugleich nimmt aber die Bedeutung der Urheberpersönlichkeitsrechte ständig zu: im interaktiven elektronischen Internet – Verkehr ist die Integrität von Urheberwerken und die Nennung ihrer Autoren immer mehr gefährdet."

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21.3 Proper Exercise of Rights

Several scholars warn us[46] that too far-reaching limits on copyright law, and certain new digital free uses (e.g. UGC exceptions) may lead to the *unfeasibility* of the right of integrity. Even in the age of digital works, the right to integrity has a serious role and meaning[47] – notwithstanding the fact that some significant changes are taking shape. As Jacques de Werra put it, it is of utmost importance that the right of integrity should be ensured where it is needed, but at the same time – while keeping in mind the requirement of reasonableness – it is possible to bring a little flexibility into the system, concurrently preventing the author from abusing the right of integrity.[48]

The implementation of these requirements is primarily the responsibility of national legislators and the judiciary, which necessarily leads to different levels of protection in each country. This solution, which is tailored to national traditions and cultural underpinnings, has its own benefits,[49] yet Mira T. Sundara Rajan warns that in digital age there are more disadvantages to this solution than positive effects. She asserts that because of the harmonization of property rights, and because moral rights are regulated differently in every country, moral rights are fading to the background resulting in a greater higher focus on property rights, and a stronger emphasis on the commodity approach.[50] Whatever the possible impact of this may be, there is a very little chance to develop a single moral right worldwide (or even at the European Union level). Nevertheless, considering the trends taking place at the two endpoints of the scale, the following findings can be made.

46 Faludi 2011, p. 167; M. Ficsor *et al.*, 'A Szerzői Jogi Szakértő Testület tanulmányai a szerzői jog digitális világhoz való alkalmazkodásáról. A Szerzői Jogi Szakértő Testület UGC-munkacsoportjának beszámolója a felhasználók által generált tartalom szerzői jogi kérdéseivel kapcsolatban', *Iparjogvédelmi és Szerzői Jogi Szemle*, Vol. 4, 2014, p. 105.

47 "It can thus be hoped, and this may be the most important challenge of the right of integrity in the future, that these judicial authorities will keep in mind that the right of integrity should not be neglected because it is perhaps the most essential right of an author given that it ultimately aims at making sure that the work that the author has created is disclosed to the public in the way in which the author wanted it to be disclosed." J. de Werra, 'The moral right of integrity', *in*: E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Cheltenham–Northampton, Edward Elgar, 2009, p. 282.

48 Id. 282.

49 G. Faludi, 'A paródia a szerzői jogban', *in*: B.A. Keserű & Á. Kőhidi (ed.), *Tanulmányok a 65 éves Lenkovics Barnabás tiszteletére*, Budapest–Győr, Eötvös, 2015.

50 M.T. Sundara Rajan, *Moral Rights and Copyright Harmonization: Prospects for an 'International Moral Right'* (April 5, 2002). 17th BILETA Annual Conference Proceedings, pp. 9-10.

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21.3.1 The Right of Integrity Finding Its Place in the US Legal Regime

The regulation of the US and the ensuing active debate on the right of integrity evoke, in many respects, 'nostalgia' in those who are familiar with the process of the evolution of this right on the old continent.

This is because on the one hand, we may feel that the very narrowly tailored integrity right is 'stuck' in pre-digital times, given the narrow scope and conditions for exercising the right as set out by VARA.[51] The regulation of one or some of the 'offline' copies of certain visual works may be somewhat archaic without providing protection for – the ever so common and urgent – issues arising from the integrity right of digital works and their copies. Despite existing initiatives, there are not too many optimistic opinions in legal literature. At the same time, Jane C. Ginsburg points out that, although still questionable at the social, (legal) scholarly and legislative level, whether there is any need to broaden (or introduce) the right of integrity in the digital age, practical experiences are more than telling. Thus, while one might argue that in digital works there is nothing to 'preserve' on a conceptual level, because they are merely a simple, re-buildable 'element' of digital communication, at the same time, Flickr's major Creative Commons (CC) license is NCND (NonCommercial-NoDerivatives), meaning that most authors want their work to join the digital use chain without change.[52]

Although, apart from VARA, some property rights under copyright law, trademark, personality, competition law and contractual rules aim to comply with Article 6[bis] of the BC, it is highly controversial whether this will really succeed.[53] In this regard, a wider recognition of the existence of 'artistic control' is demanded with growing insistence by the authors. Many authors – for lack of a better instrument – express their own desperation and grievances on their blogs. For example, Stephenie Meyer, the popular writer of the Twilight Trilogy – whose vampire novels are not subject to the scope of VARA – was deeply outraged when one of her unfinished manuscripts was made illegally available on the Internet. Her bitterness was not caused by the violation of her property rights (she considered that this incident would have had no negative effect on the turnovers of the finished work), she mostly objected that her work was made public incomplete, flawed, in the middle of the creative process – blocking these processes permanently.[54] Here again, recalling the past, we are reminded that her situation is extremely similar to that of Konrad Largus, a few centuries earlier, in the days before the 'author's right' emerged in civil law jurisdictions. The Wittemberg scholar's "immature, not for print" lectures were printed by a printing house without the permission of the author, and since the

51 Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A, § 101, § 113.

52 J.C. Ginsburg & E.E. Subotnik, 'Speaking of Moral Rights. A conversation', *Cardozo Arts & Entertainment Law Journal*, 2012, Vol. 30, No. 1, p. 101.

53 J.D. Lipton, 'Moral Rights and Supernatural Fiction: Authorial Dignity and the New Moral Rights Agendas. Fordham Intellectual Property', *Media & Entertainment Law Journal*, Vol. 3, 2011, p. 499.

54 P.K. Yu, 'Moral rights 2.0.', *Texas A&M Law Review*, Vol. 1, 2014, p. 887.

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author was unable to bring a suit before the court for the infringement, he objected in a pamphlet (he obviously didn't have a blog) against the misdeed.[55]

Despite pressure from authors and legal scholars,[56] there is no perceptible shift in legislation, and although more and more decision-makers consider it important,[57] there is no shortage of alternative proposals. While digital works and digital uses challenge (also) the right of integrity – which was shaped to the requirements of the 'offline' world –, we must also see that it offers a number of new opportunities to secure *the interests behind the right, keeping in mind its purpose*. We can say with great confidence that this 'fills a gap' in the US legal system.[58] The opinions that view the possibility of a stronger integrity right as threatening the freedom of creative (re)thinking, freedom of expression and transformative artistic expressions (or the First Amendment of the US Constitution in general) divert the development of the legal regime in a way, which seeks to achieve these goals by instruments other than the right of integrity.[59]

The proposals aiming to achieve an appropriate balance would focus on the exclusive right to appear as the author of the work, while also tightening the boundaries of control over the work. As Neil Weinstock Netanel puts it, there is no identifiable interest on the author's side in the era of digital communication and digital creation to prevent his work from being used in a context which he does not agree with, but there is an acceptable interest in preventing the impression that they endorse a message they find 'repugnant'.[60] He considers this extremely easy to implement – with modern technology, and in the case of digital works. However, this can be a solution to just a certain number of problems regarding the integrity right (without answering questions arising from a lack of compliance with international obligations). In line with Jessica Litman's opinion, he believes that the interests of all stakeholders cannot be fully taken into account. Namely, given the nature of digital uses it is necessary to make compromises regarding the scope of the right of integrity,[61] more specifically the author's moral rights could primarily appear

55 Horváth, 2016, pp. 98-99.

56 A.N. Greco, 'The Scholarly Publishing Community Should Support Changes to US Copyright Law', *Journal of Scholarly Publishing*, Vol. 49, 2018, p. 248.

57 "In the Office's view, any comprehensive review of the functioning of the copyright system must give serious and sustained attention to the individual rights of authors – apart from corporate interests – and the need to ensure that those personal interests are adequately protected." Statement of Maria A. Pallante United States Register of Copyrights and Director of the U.S. Copyright Office before the Committee on the Judiciary United States House of Representatives: "The Register's Perspective on Copyright Review." April 29, 2015. 28.

58 J.C. Ginsburg, 'Have Moral Rights Come of (Digital) Age in the United States?', *Cardozo Arts & Entertainment Law Journal*, Vol. 19, 2001, p. 15.

59 A. Adler, 'Against Moral Rights', *California Law Review*, Vol. 97, 2009, p. 263.

60 N. Weinstock Netanel, *Copyright's Paradox*, Oxford, Oxford University Press, 2008, p. 216.

61 That is, the author's right of integrity derived from the freedom of speech (that the thought he expressed which is in connection with him should remain unchanged), conflicts with the users' – as new creators' – right to freedom of speech. *Cf.* L.K. Treiger-Bar-Am, 'Adaptations with integrity', *in*: H. Porsdam (ed.), *Copyright and other fairy tales. Hans Christian Andersen and the commodification of creativity*, Cheltenham–Northampton, Edward Elgar, 2006, p. 61.

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in a strong protection for the right to have his name indicated. The purpose of the integrity right is to ensure that no false impression be made in connection with the author's message: This can be achieved by properly naming the author and by duly referring back to the original work (the easiest way being to link it). Providing broader exclusive rights should not be considered appropriate.[62]

Some authors would simply settle the issue through contractual arrangements, but Jacqueline D. Lipton warns that this in itself cannot be a solution to every case[63] (for example, in the case of the aforementioned, illegally published, unfinished manuscript).[64] Ginsburg sees the future in CC-like, click-on agreements, which offer solutions beyond free uses – covering the issue of the right of integrity. This should be coupled with a legal background that allows proper enforcement.[65]

Therefore in the US, while there is a need to tighten the work-author relationship, at the same time the widespread occurrence of digital works and massive amount of digital uses is far from beneficial to the right of integrity It pushes the legal regime towards taking into account existing creative interests in other ways. However, so far, without much result.

21.3.2 Problems Arising in Civil Law Jurisdictions

As described above, the current environment transformed by digital opportunities works against the 'strengthening' of the right to integrity in the US. Meanwhile, in civil law jurisdictions – in light of the need for a stable balance – there are expectations, to narrow down the right of integrity in the spirit of creative freedom (amongst others). The question is, however: if *opportunities to intervene with the right of integrity increase*, how far can these forms of intervention go before compromising the very essence of the integrity right itself?

21.3.2.1 Internal and External Limits

Since works are being used in an economic and/or technical environment, they can "rarely remain completely untouched."[66] When exercising the integrity right, the balancing of interests is inevitable with due consideration to the user's interest or, where relevant, the practical interest of the copy's owner. Although the results of this balancing

62 J. Litman, *Digital Copyright*, New York, Prometheus, 2006, p. 35.

63 "The function of moral rights in the contract scenario is not so much to establish absolute rights of authors in their works, but to guide contract interpretation, to establish default rules, and to set compulsory terms with respect to very specific issues in copyright contracts." C.P. Rigamonti, 'Deconstructing Moral Rights', *Harvard International Law Journal*, Vol. 2, 2006, p. 372.

64 Lipton, p. 539.

65 J.C. Ginsburg, 'Moral Rights in the US: Still in Need of a Guardian Ad Litem', *Cardozo Arts & Entertainment Law Journal*, Vol. 73, 2012, p. 16.

66 Gyertyánfy, 2014, p. 111.

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differ from country to country, Hungary's judiciary practice draws – correctly – the scope for exercising the integrity right sufficiently narrow, to avoid the possibility of abusing the right.[67]

Initially, internal and external barriers were necessary to limit the integrity right, which was originally designed for the 'offline' environment. In the online world, these boundaries are continuously shaped and in flux. In many ways the work that has been made public breaks away from its creator and "acts independently of his will."[68] This separation is even more apparent in the case of digital works and uses, but the constantly simplified, 'automated' licensing and the restructuring of how property rights may be exercised do not rule out the possibility to the take into account the intangible interests of the *original author*. But these interests shall be given a different weight from case to case and from area to area. The digital environment itself has not made this right obsolete, moreover, as mentioned in the previous chapter, digital technology can help to more easily exercise and enforce the same.[69]

The question is: what does the demand for 'making the right more flexible' actually mean.[70] We can see that the *causes of legitimate interference* with the integrity right can be expanded or there may be changes in *what we consider to be an intervention*.[71]

The civil law standpoint seems to persist in maintaining the author-work connection, even in the case of digital works, which, of course, can be accompanied by the author's self-restraint (by agreement on the conditions of exercising the right or simply by not exercising it). Although some authors would prefer to disclaim the right to adjust better to digital needs and new opportunities,[72] this may be incompatible with the true nature of the right. Instead, emphasis is placed on making the control over the possibilities to

67 *See e.g.* the following Hungarian case: BDT2015. 3392. I. Copyright legislation is important in the area of freedom of information because the free use of the work may be limited by the right to be recognised as the author, the author's name right, the right of integrity, the rules of quotation and attribution of the source. The right of access to data of public interest may not be generally restricted with reference to intellectual property rights, not even if the work containing the data is protected under copyright law.

68 Benárd & Tímár 1973, p. 109.

69 Yu, pp. 17-18.

70 A. Giannopoulou, 'The Creative Commons Licences through Moral Rights Provisions in French Law', *International Review of Law, Computers and Technology*, Vol. 1, 2014, p. 60.

71 Peter Gyertyánfy also categorizes the Hungarian cases on integrity right based on the causes of intervention. P. Gyertyánfy, 'A szerzői jog bírói gyakorlata 2006-tól: a védelem tárgya és a mű egységes', *Iparjogvédelmi és Szerzői Jogi Szemle*, Vol. 4, 2012, p. 45.

72 C. Lerman, *Creative Commons, Unwaivable Moral Rights and the Need for New International Substantive Minima*, February 20, 2012, *see*: https://ssrn.com/abstract=2159697.

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exercise the right more effective (and in this respect the original rightholder, the author, has a stronger control over the work than successors[73]).

Beyond the possibilities for intervention based on existing artistic reasons or the ownership of the copy, the pursuit of new 'frontiers' mostly arise in connection with user generated content, transformative use, and *de minimis* uses.[74] These changes are in fact stimulating new solutions regarding the exercise of property rights, but according to the legislator, there is no reason to *generally* narrow down the integrity right. In order to ensure freedom of expression and artistic freedom, existing limitations (such as the free possibility of parody) seem appropriate.[75] In individual cases, along with the principle of the proper exercise of law and consideration of interest, the consistent application of *existing external and internal limits* is still required.

21.3.2.2 Consideration of Interest

The ruling of the Court of Justice of the European Union in the *Deckmyn* case provides many lessons regarding the right of integrity. The court *implicitly* acknowledges that moral rights have an impact on property rights and may even be a barrier to free use, but this is not stated clearly (and nor should it be, since moral rights are not subject to EU legal harmonization).[76] However, from a civil law point of view, the judgment may seem overly cautious (in particular because out of necessity it responds to the questions of the preliminary ruling proceedings in an innovative way), while in the United Kingdom it is an indication that moral rights are becoming stronger, which has a serious effect on the customary system of fair uses (*fair dealing*).[77] In any case, in the legal literature, the CJEU's *Deckmyn* decision is considered to be a form of covert harmonization of moral

73 *Cf.* for example Budapest-Capital Regional Court of Appeal Case 8.Pf.20.940/2014/5: "According to common knowledge, the task of the lector, as the court of first instance has rightly stated, is to check manuscripts professionally, to correct mistakes, inaccuracies or make suggestions regarding the work. The plaintiff's legal predecessor requested the defendant to carry out proofreading activity, so the plaintiffs cannot complain that the defendant continued the duties of the lector after the death of the translator. The defendant and T …- T … J … worked together as lectors for several years, so it is unlikely that, following the death, the defendant continued to work in a way that infringed the integrity of the work, the author's reputation and honour, contrary to the requirements of Art. 13."

74 M. Ficsor *et al.*, p. 153.

75 On the priority of artistic freedom *see e.g.* the decision of the German Federal Constitutional Court in Metall auf Metall (currently the German Supreme Court is awaiting the CJEU's answers).

76 *See*: Judgment of 3 September 2014 in Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*, ECLI:EU:C:2014:2132, para. 27: "It follows that the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive, and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k)."

77 J. Griffiths, 'Fair dealing after Deckmyn: the United Kingdom's defence for caricature, parody and pastiche', *in*: M. Richardson & S. Ricketson, *Research handbook on intellectual property in media and entertainment*, Cheltenham–Northampton, Edward Elgar, 2017, p. 64.

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rights – or at least an accelerant for harmonization.[78] Its important message is that copyright maintains a sort of control over the fate of the work for the author not only in an economic sense, but also in an artistic sense.[79]

At the same time, we also need to see that – in part necessarily, due to the absence of harmonization – the substance of moral rights has been reduced by the decision, to a certain degree. The court emphasizes that the concrete application of the parody exception, within the meaning of Article 5(3)(k) of Directive 2001/29 must respect the appropriate balance between – on one hand – the *interests and rights of the persons* referred to in Articles 2 and 3 of the Directive, and – on the other hand – the *freedom of expression* of the user.[80] However, while considering the interests, the balance was only tilted to the benefit of the former, based on the infringement of a fundamental right. The court recalls the importance of the principle of non-discrimination based on race, colour and ethnic origin, as clarified by Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and, among others, confirmed in Article 21(1) of the Charter of Fundamental Rights of the European Union.[81] In other words, the infringement of the integrity right alone would not have been enough, or it could be said that the "political cartoon" could only be considered infringing, because the user violates other fundamental rights as well (here, the non-discrimination principle). While in the view of the European Union's approach to moral rights this innovative decision is understandable, the recognition of the integrity right as an *independent* right may confuse national practices of weighing interests.

21.4 Instead of a Conclusion

Article 6[bis] of the BC establishes the basic requirement to ensure that the author's message should remain unchanged in the work,[82] and the expressed and individual-original character of the work should not be distorted.[83] As Jane C. Ginsburg emphasizes: "The interest in question here relates to the way in which authors present their works to the world, and the way in which their identification with the work is maintained."[84] These rights are given

78 E. Rosati, 'Just a Matter of Laugh? Why the CJEU Decision in Deckmyn is Broader Than Parody', *Common Market Law Review*, Vol. 2, 2015, p. 529.

79 J.C. Ginsburg, 'The author's place in the future of copyright', *in*: R. Okediji (ed.), *Copyright law in an age of exceptions and limitations*, Cambridge University Press, 2015, p. 19.

80 Case C-201/13. *Deckmyn v. Vandersteen*, para. 27.

81 Case C-201/13. *Deckmyn v. Vandersteen*, para. 30.

82 S. Frankel & D.J. Gervais, *Advanced Introduction to International Intellectual Property*, Cheltenham–Northampton, Edward Elgar, 2016, p. 25.

83 "[…] so as to preserve the work in the form in which it was created." G. Davies & K. Garnett QC, *Moral Rights*, 2nd edition, London, Thomson Reuters, 2016, p. 6.

84 R. Gorman & J.C. Ginsburg & A.R. Reese, *Copyright Cases and Materials*, 9th edition, St. Paul (Minnesota), Foundation Press, 2017, p. 773.

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to the author alone, and may not be transferred with economic rights.[85] This objective is achieved by countries in different ways that are fundamentally different in nature. In addition, considering we are talking about the realization of a minimum right established by the BC, there are great differences in the standards chosen by each member state. The effects of the strong disparities between civil law and common law approaches are not only detectable in the reluctance of the United States and the United Kingdom to join the BC, or by the TRIPs Agreement's distinctive approach to moral rights (more specifically on Article 6bis of the BC).[86] It is also discernible from the absence of such harmonization in the European Union[87] and the strong disparities still have perceptible effects. Although no proceedings were launched against member states before the International Court of Justice, this does not mean that Article 6bis of the BC has not been infringed. In addition to the critical legal literature, there has been no official action against countries which failed to implement requirements of BC provisions.[88] The cumbersome efforts of copyright reform are not furthered by the fundamental differences between member states, and despite the lack of harmonization, it is becoming clearer that because of their close connection with property rights, EU legal practice cannot completely disregard moral rights – or at least the interests behind them. This is well illustrated by the jurisprudence of the Court of Justice of the European Union as it seeks to protect the interests protected by moral rights through alternative means (often through property rights).

In the light of all these, we can only formulate closing questions rather than closing remarks. Perhaps the most fundamental of these is that whether the erosion of individual rights in certain areas and cases – manifesting differently in legal systems – should lead us to establish new compromises in *international and EU legislation*, or can we handle the new situations through the currently available legal instruments? Does the right of integrity retain its moral nature (or rather is the right deserving of the name), is it necessary to introduce new limitations and can be new barriers be introduced to the integrity right without losing very essence of the right itself?

In any case, answers may not be postponed for long in the era of extraterritorial uses – because of the strong connection between the authors' moral and the property rights. Neither international law nor EU law can avoid coming up with answers for much longer.[89] In the current regulatory environment, we can only agree with Gábor Faludi's motto that only a wise, sufficiently weighing judicial practice, and the enforcement of the principle of proper exercise of law allows for a balanced application of the right of integrity.

85 C. Seville, *EU Intellectual Property Law and Policy*, 2nd edition. Cheltenham–Northampton, Edward Elgar, 2016, pp. 12, 21.
86 T. Dreier & P.B. Hugenholtz (ed.), *Concise European Copyright Law*, 2nd edition, Alphen aan den Rijn, Wolters Kluwer, 2016, pp. 36, 224-225.
87 J.C. Ginsburg & E. Treppoz, *International Copyright Law: U.S. and E.U. Perspectives*, Cheltenham–Northampton, Edward Elgar, 2015, pp. 303-304.
88 Dreier & Hugenholtz, p. 35.
89 *Cf.* especially Davies & Garnett, pp. 1253-1254.