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Balance of Rights in Directive 2019/790 on Copyright in the Digital Single Market – Is the Opt-out Clause Sufficient for the Protection of Author’s Moral Rights?

Abstract: Digitization is an important process taking place within contemporary legal systems, leaving its fingerprints on different branches of law and forcing changes to traditional industries while not sparing the system of cultural heritage protection. Cultural institutions are nowadays facing the challenge of combining mass digitization with public access to works which are part of their collections. At the same time they are struggling with the applicable copyright law. The new EU Directive on Copyright in the Digital Single Market addresses those needs, introducing a system of extended licencing granted by Collective Management Organizations (CMO) and facilitating an easier access to works which, due to their unresolved copyright status, were not ready to be publicly displayed.

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This article addresses the problem of striking a balance between the private and public interests involved in this process by analysing the opt-out procedure to the new licencing scheme, and confronting it with the traditional protection granted to authors based on moral rights. It seeks to answer the question whether the new opt-out system is sufficient to protect an author's interests arising from his or her moral rights, and whether such interests would also be sufficiently safeguarded after an author's death (*post mortem auctoris*).

Keywords: copyright, cultural heritage institutions, moral rights, digitization, public interest

Introduction

Copyright law finds itself at the crossroads of conflicting interests of the authors and creators of artistic works, their rightholders, intermediaries, and the public.¹ The European legal sphere is facing the challenge of striking a fair balance of interests in the digital age² and creating a sustainable copyright system which would provide an adequate response to the most controversial issues with respect to modern copyright protection. While authors usually seek to protect their freedom of decision over their creations and obtain fair remuneration for usage of their works, the interest of the general public circulates around wide dissemination and easy access to works and their collections. The driving force for authors' interests is to stimulate innovation, the process of creation, investment, and the production of further works.

A copyright system remains sustainable when the interests of the actors involved in the entire process of creation and distribution of works are well-balanced by the public interest. Creators have an interest in economic certainty and a need for recouping the investments they made with regard to the creation of works. They also need resources and content that often happens to belong to the collections of cultural heritage institutions, which represent the general public interest in terms of safeguarding access to works being part of their permanent collections. This identifies the entire system as a closed system of mutual interdependence between private and public interests throughout the entire process of artistic creation. For instance, when both Maria Callas' private correspondence and Pablo

¹ F. Macmillan, *Intellectual Property and Cultural Heritage: Towards Interdisciplinarity. Lenses, Methods, and Perspectives*, in: I. Calboli, M. L. Montagnani, *Handbook on Intellectual Property Research*, Oxford University Press, Oxford 2021, p. 331.

² P. Hofheinz, M. Mandel, *Bridging the Data Gap: How Digital Innovation Can Drive Growth and Create Jobs*, Lisbon Council and PPI, Brussels-Washington, DC 2014.

Picasso's *Nu au collier* were sold to anonymous collectors in 2002,³ it not only impeded useful research insights into those authors' lives and artistic creations, but also paralysed the entire moral rights value as the former rightholders would be unable to, for example, locate the works and have an impact on their future fate and usage.⁴ It often happens that a derivative work, which is being obtained and presented by an art museum or other cultural heritage institution for the public benefit, causes troubling copyright issues. For this reason an art institution has to be reassured by the creator that all the necessary authorizations to use pre-existing works have been obtained.⁵ According to an official policy of the World Intellectual Property Organization (WIPO), certain circumstances may exist whereby copyrights might be limited. One of them is when copyrights serve a specific public interest, i.e. where the so-called "fair use" policy implemented in the copyright laws of certain countries permits the users of some copyright-protected works to use them without prior authorization.⁶

Even though authors usually work with pre-existing cultural artefacts, the creative process itself would not be possible without the authentic experience, personality, mode of living, character, and identity of an author. These are the values which support the idea that moral rights exist in order to protect author's individual artistic perception.⁷

Moral rights under copyright law constitute a complex legal compound of several types of authorizations which are granted only to those creators having a personal bond with the work. Not all of them, however, are of the same character, especially when it comes to the question of their interference with an author's personal rights.⁸

Despite different doctrinal opinions on the transferability of moral rights, the present article adopts the opinion presented in the Berne Convention,⁹ according to which in order to provide for an indispensable level of exploitation and access to authorial works, moral rights may be transferred to subjects which are entitled under copyright law. Such a legal construct seems to fully justify the legal practice of authorial protection. The transfer of moral rights in the above-presented model does not constitute a breach of the protection of authors' moral rights so long as

³ *Picasso Masterpiece Fetches £15m*, 25 June 2002, <http://news.bbc.co.uk/1/hi/entertainment/arts/2064625.stm> [accessed: 23.11.2021].

⁴ P. Masiyakurima, *The Trouble with Moral Rights*, "The Modern Law Review" 2005, Vol. 68(3), p. 425.

⁵ M.P. Markellou, *Appropriation Art and Cultural Institutions*, "Queen Mary Journal of Intellectual Property" 2013, Vol. 3(2), pp. 146-147.

⁶ R. Elster Pantalony, *Managing Intellectual Property for Museums*, WIPO Guide, 2013.

⁷ F. Macmillan, op. cit., p. 336.

⁸ H.M. Hurd, *Moral Rights and Legal Rules: A Natural Law Theory*, "Legal Theory" 2000, Vol. 6(4), pp. 423-455.

⁹ Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, entered into force 5 December 1887, last amended 28 September 1979) 828 UNTS 221.

it does not impact the individual bond of an author with her or his work. However, this leaves a healthy dose of doubt as, in the legal practice, the scope of protection granted by the Berne Convention is not unified within all the countries being parties to the Convention. According to Article 6(3) of the Convention, the means of redress used for safeguarding rights granted by the Convention are to be governed by the national legislation of the country of claimed protection, meaning that each signatory State is free to individually decide upon some aspects of its internal copyright protection.¹⁰ Some countries (Canada for example) allow authors to waive their moral rights, whereas others (such as France) do not. What also varies from country to country is the mere duration of moral rights – while in the U.S. moral rights expire upon the death of an author, in Canada they last for as long as 50 years after author's death, and in France they are perpetual.¹¹

The question also arises whether the same transferability of rights applies after an author's death. Reference to this issue, in the context of the exercise of an author's moral rights *post mortem*, is the essential focus of this article. The protection granted to an author vis-à-vis the extent of moral rights covered should be of a uniform character, covering author's personal rights without any time limit. Such personal rights continue to exist after an author's death, therefore it would be unreasonable to deprive them of just legal protection. Moral rights which are exercised by subjects legally eligible to do so or those who were appointed by the author her/himself should thus remain under protection *post mortem auctoris*. Such protection does not infringe on the sphere of an author's personal rights and remains in line with his or her will regarding the future whereabouts of a given work.¹²

The problem however becomes more complex, and perhaps slightly vague, when one takes into account the fact that the process of authorial creation results not only in the emergence of an author's individual interest, but also brings into existence an interest in the public at large.¹³ An author's death leads to a progressive transformation, leaving the individual interest slowly and incrementally displaced by the common public interest. The existing personal link between intangible values of a scientific or artistic character and an author is replaced by a bond linking those values with a collectively-enjoyed cultural heritage.

In the circumstances of the progressive digitization of various branches of the analogue legal environment, it is challenging to assess what shape the authorial copyright protection will have in the upcoming years under the legal space of the European Union (EU). The most crucial element of this protection is the bal-

¹⁰ M.T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology*, Oxford University Press, Oxford 2011, p. 235.

¹¹ S. Garg, *Moral Rights – A Comparative Analysis*, Post-Graduate Diploma in Intellectual Property Rights Law, 2001.

¹² M.T. Sundara Rajan, *op. cit.*, p. 239.

¹³ F. Macmillan, *op. cit.*, p. 340.

ancing of the individual and public interest, the latter of which may prevail over the protection granted by virtue of an author's moral rights, especially after his or her death.

Viewed in such a light, this article aims to address the problem of balancing private and public interests by analysing the opt-out procedure to the new licencing scheme under Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market ("Directive 2019/790").¹⁴ It confronts it with the traditional protection granted to authors based on their moral rights, and seeks to answer the question whether the new opt-out system will be sufficient to protect authors' interests arising from their moral rights and whether such interests will also be equitably balanced *post mortem auctoris*, while at the same time not hindering the interest of the general public. The article also examines the potential weaknesses of the newly-introduced EU licencing scheme, with a specific focus on the practical aspects of the Extended Collective Licencing's opt-out clause. Since the transfer of moral rights themselves is not legally permitted under most EU jurisdictions, the background to the disputes discussed below will be on the transfer of moral rights *post mortem auctoris*.

Moral Rights and Their Exercise *Post Mortem Auctoris*

Moral rights are usually related to the concept of an author's creative personality. This concept, or notion, is used to describe the relationship between an author and the work which he or she created, and reflects the level of control which the author exercises over it. The idea existing behind this notion is that a creative individual has the right "to be publicly identified with his or her work and to avoid misattribution of authorship",¹⁵ and therefore has the right to have his or her name associated with the given work, freely disavow personal association with the work, or prevent another's name from being associated with it.¹⁶ The practical link between the real-life application of moral rights and the existence of cultural heritage institutions is easily visible as the institutions, with museums and art galleries at the forefront, have to scrupulously respect the moral rights attached to the works held in their collections.¹⁷ Whenever they need to alter or use the artwork in a manner influencing the scope of moral rights, they need an additional authorization from the author or his successor(s) in title. The legal uncertainty concerning moral rights arises even more extensively in light of the

¹⁴ OJ L 130, 17.05.2019, p. 92.

¹⁵ B.T. McCartney, "Creepings" and "Glimmers" of the Moral Rights of Artists in American Copyright Law, "UCLA Entertainment Law Review" 1998, Vol. 6(1), p. 36.

¹⁶ Ibidem.

¹⁷ D. Vaver, L. Bently (eds.), *Intellectual Property in the New Millennium: Essays in Honour of William R. Cornish*, Cambridge University Press, Cambridge 2010, fourth part ("Copyright, Moral and Neighbouring Rights"), p. 217.

constantly proceeding level of digitization of collections, bringing a degree of legal uncertainty into national legislations.¹⁸

The legal meaning of the term “moral rights” is embodied in Article 6 of the Berne Convention. This provision defines the term “moral rights” as a right attached to a particular author’s personality – namely to claim authorship over a given work and the legal possibility to object to any kind of its modification or deformation that could potentially lead to the author’s defamation or be prejudicial to the author’s reputation and his or her good name. The Berne Convention requires these rights to be independent from an author’s economic rights.

Despite this fact, moral rights still remain of essential importance to the structure and economic value of copyrighted works in the art market. The right to “integrity” allows artists to protect their potential economic interest by judging which alterations of their work by owners will have a potentially good or bad influence on the general market overview. New owners of the specific works, acting either within their own private economic interests or in the overall public interest, can affect the personal “brand” of a given artist in either direction, making him or her more marketable or hurting his or her good name or reputation, and thus market recognition. Any limitations taking place on an author’s moral rights can have a potentially severe outcome on her or his reputation, and as a result on economic interest and potential for producing new works.¹⁹ For this reason moral rights remain extremely vulnerable to any alterations which imbalance the author’s and the public interest.

As it often happens that a substantial amount of an artist’s work is in hands of art collectors, museums, or galleries, protecting the author’s reputation in fact protects the vital interests of other persons as well. Namely, not only the author him/herself, but also other individuals – such as current owners of artistic works or the public at large – may have their own interest in safeguarding the integrity of an artist’s work.

Discrepancies between the civil and common law traditions

Artistic control is essential to the very existence of the creative arts, and therefore it is universally recognized that the creators of artistic works have property rights in their creations at their free disposal. The system of protection has been, however, planned differently in various legal systems.²⁰ While in the American common law tradition the rights granted to creative artists have been historically associated with traditional property rights, which enabled artists to have an “exclusive right to

¹⁸ Ibidem, p. 220.

¹⁹ T.-I. Lee, *A Battle between Moral Rights and Freedom of Expression: How Would Moral Rights Empower the “Charging Bull” against the “Fearless Girl”?*, “J. Marshall Review of Intellectual Property Law” 2018, Vol. 17(4).

²⁰ A. Nieuwenhuizen, B. Sievers, V. Ellis, *IP in Art: Perspectives on Moral Rights from the Netherlands, Germany and UK*, 16 December 2020, <https://www.fieldfisher.com/en/insights/ip-in-art-perspectives-on-moral-rights> [accessed: 07.10.2021].

control the reproduction and the performance or the exhibition of their creation”,²¹ in the legal sphere of most European countries the artists were provided with a moral right in their work in addition to the traditional property right. This European recognition of “moral rights” distinguishes them from traditional property rights and contrasts their nature with their economic values. Moral rights extend beyond a simple property interest and include some non-property attributes of a strictly intellectual and/or moral character and legal expression. European legal doctrine emphasizes an intimate bond that exists between an artistic work and its author’s personality, which is to be covered by the scope of protection of moral rights and adds to artistic works some values additional to those of a purely economic nature, thus adding the additional protection of moral rights to personal author’s economic interest.²²

In civil law jurisdictions moral rights are considered as an integral part of copyright law and follow a quite orthodox view which considers them as inalienable and non-waivable.²³ At the same time countries with common law systems are hesitant with regard to what seems to be the most fundamental aspect; namely whether to accept moral rights into their legal systems. This has led to intense disputes with respect to becoming a party to the Berne Convention – disputes which involve the assessment of moral rights as statutory norms (as in the case of, e.g., Great Britain²⁴ or the United States²⁵).

These differences give rise to various legal consequences, leading to a conclusion that civil law countries – which dominate in the geographical region of Europe (i.e. continental jurisdictions) – put more judicial effort into the protection of moral rights, intending their scope of protection to include not only an author’s individual interest, but also to safeguard the cultural patrimony of the general public. The civil law system takes into consideration the importance of cultural heritage protection, its historical value, and civilizational richness. Continental jurisdictions are known to recognize, value, and safeguard the importance of the European cultural heritage, and such a far-reaching protection of the public interest indicates that works of art constitute an essential element of the culture of the European community.

Post mortem auctoris exercise of author’s moral rights

The problem of exercise of an author’s moral rights *post mortem auctoris* is related to the aspect of moral rights’ waivers. The Berne Convention generally remains

²¹ R. Sarraute, *Current Theory on the Moral Right of Authors and Artists under French Law*, “The American Journal of Comparative Law” 1968, Vol. 16(4), pp. 465-467.

²² B.T. McCartney, *op. cit.*, pp. 36-39.

²³ S. Garg, *op. cit.*

²⁴ Section 2 of the Copyright, Designs and Patents Act 1988.

²⁵ *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 82 (2d Cir. 1995).

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silent on waivers of such rights. While many States, e.g. France, disallow waivers, others have no specific provisions regarding this topic. The case law has generally allowed the presumption that authors cannot relinquish or abandon rights of attribution and integrity, while moral rights which are narrowly tailored and involve a foreseeable encroachment of moral rights are generally valid.²⁶

More complexities arise when an author is deceased. Under the provisions of the Berne Convention, Article 6(2) specifically, the right to authorship and to the integrity of the work remains in force even after an author's death, at least for as long as the duration of author's economic rights. They may be exercised by the subjects authorized to do so, which is a matter governed individually by each national legal system.

Some European countries, like France,²⁷ Italy,²⁸ or Portugal,²⁹ provide for the perpetual protection of moral rights, which means that they do not cease to be valid. Others, like Germany³⁰ or the UK,³¹ do not recognize their perpetuity as such and allow the moral rights to lapse together with the economic rights, which is an approach in line with the provisions introduced by the Berne Convention. Yet another approach to the validity of moral rights is binding in some common law countries, such as e.g. the U.S.,³² where they are only valid until the end of the lifetime of an author.

Relatives or public institutions that exercise an author's moral rights *post mortem auctoris* in fact represent the interest of the author. The legal basis for such actions might be found in the construction of a broadly defined concept of *droit moral*, or in the institution of *sui generis* indirect substitution. If an author was willing to appoint a representative of his or her own interest to act upon his or her death, then such construction cannot be considered as an interference with the sphere of one's personal rights. Such appointed persons or institutions dispose of both the author's moral rights and their own personal rights, which enable them to represent both private and public interests as regards a given cul-

²⁶ B.T. McCartney, *op. cit.*

²⁷ *Loi n° 92-597 du 1^{er} juillet 1992 relative au code de la propriété intellectuelle (partie Législative) (1)* [Law No. 92-597 of 1 July 1992 Relating to the Intellectual Property Code], *Journal officiel de la République française* 153, 3 July 1992 (consolidated version of 2 March 2006), Art. L121-1.

²⁸ *Legge 22 aprile 1941 n. 633 Protezione del diritto d'autore e di altri diritti connessi al suo esercizio* [Law No. 633 of 22 April 1941 Protection of Copyright and Rights Related to its Exercise], *Gazzetta Ufficiale* 166, 16 July 1941 (as last amended by Legislative Decree No. 95 of 2 February 2001).

²⁹ *Lei n.º 45/85 de 17 de Setembro Alteração de Decreto-Lei n.º 63/85, de 14 de Março, e do Código do Direito de Autor e dos Direitos Conexos* [Law No. 45/85 of 17 September Amending Decree-Law No. 63/85 of 14 March, Code of Copyright and Related Rights], *Diário da República* 214, 17 September 1985, Art. 56.

³⁰ *Gesetz über Urheberrecht und verwandte Schutzrechte vom 09.09.1965* [Copyright and Related Rights Act of 9 September 1965], *Bundesgesetzblatt 1965 Teil I Nr. 51 S. 1273*, Section 14.

³¹ Registered Designs Act 1949 (as last amended by the Copyright, Designs and Patents Act 1988).

³² 17 U.S.C. §106A of the Visual Artists Rights Act of 1990 (VARA).

tural work. The evolution of interests which takes place after an author's death causes these two to blend together and bonds with the general importance of cultural heritage protection. Works which continue to circulate in the sphere of an art market, or which are about to be published to the general audience after author's death, require even a wider range of legal protection, as without proper supervision they would be exposed to the misuse or abuse of their primary role or function, and lead to the diminishment of their market value and cultural importance.³³

The Digital Single Market, Public Access to Cultural Heritage, and Copyrights

Faced with the aforementioned challenges, Directive 2019/790 (also called “the directive” or the ACTA2 Directive) constitutes a modern attempt to regulate those matters related to copyright which are impacted by the rapidly emerging technical advances and a constantly accelerating process of digitization of many spheres of the analogue legal environment. The directive was also designed and adopted to provide for wider cross-border access for the use of protection laws in order to potentially benefit an industry of the creative sector, press publishers, cultural heritage institutions, and as a result to enhance citizen's participation in this field.³⁴

A vast part of works that could be easily digitized and presented to the public consist of so-called “out-of-commerce” works. This status prevents them from being used and facilitated by cultural heritage institutions, as complicated licencing procedures often make it impossible to digitize them and to eventually make them available within the cross-border transfer of Europe's cultural heritage.

Collective licencing mechanism

Copyrights have always constituted a challenge for cultural heritage institutions, defined as publicly accessible libraries and museums, archives, educational establishments etc. holding in their permanent collections works that are classifiable as cultural heritage.³⁵ Such institutions have found the rightful display of their works and the resolution of their copyright status to be both labour- and cost-intensive. This gave rise to the urge to introduce a new mechanism that would eventually make it possible to publicly display works which are no longer economically exploited by

³³ M.T. Sundara Rajan, op. cit., p. 9.

³⁴ Department of Enterprise, Trade and Employment, *Transposition of EU Directive on Copyright and Related Rights in the Digital Single Market (EU) 2019/790*, May 2021.

³⁵ E. Rosati, *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790*, Oxford University Press, Oxford 2021, p. 134.

their rightholders (or which were never commercially available before).³⁶ Directive 2019/790 opens up a broader digital availability of out-of-commerce works, aiming to ensure EU-wide access to works being part of the collections of EU cultural heritage institutions which are no longer available to the public through conventional channels of commerce.³⁷

The new Extended Collective Licencing (ECL) mechanism introduced by Directive 2019/790 is a scheme already known in the jurisdictions of various European States – Sweden, Norway, Denmark, UK, or Hungary, to name just a few. Its primary role is to grant the representatives of the Collective Management Organizations (CMOs) the ability to issue licences to cultural heritage institutions (CHIs) for the use of out-of-commerce works; licences which include their digitization and distribution.³⁸ The objective of the rule introduced in Article 8 of Directive 2019/790 is to enable CHIs to make the out-of-commerce works gathered in their collections available online without the need to clear their rights on a work-by-work basis.³⁹ Article 12 of this instrument extends the scope of application of the licence concluded between a CMO and a CHI by making it applicable to other unrepresented rightholders (rightholders who did not authorize the CMO to represent them), or extending it also to an organization having a legal mandate to, or being presumed to, represent rightholders who did not authorize the organization directly.⁴⁰ Such a possibility to conclude a collective licence with an extended effect is to be available where “the transaction cost of individual rights clearance with every rightholder concerned is prohibitively high” (Recital 45 of Directive 2019/790), and is limited to well-defined areas of use only.⁴¹

The subject of the licence pertains to all copyright-protected works having an out-of-commerce status, meaning all the works – together with their various versions and translations – which are not available to the public by conventional commercial channels, or those that were never actually intended for commercial use.⁴²

³⁶ A. Françon, *Authors' Rights Beyond Frontiers: A Comparison of Civil Law and Common Law Conceptions*, “Revue Internationale du Droit d'Auteur” 1991, Vol. 149.

³⁷ P. Keller, *Explainer: What Will the DSM Directive Change for Cultural Heritage Institutions?*, June 2019, https://pro.europeana.eu/files/Europeana_Professional/Publications/Explainer_What_will_the_DSM_directive_change_for_cultural_heritage_institutions_090619.pdf [accessed: 15.08.2021].

³⁸ *Ibidem*.

³⁹ E. Rosati, *Copyright in the Digital Single Market...*, p. 176.

⁴⁰ T. Synodinou, *The New Copyright Directive: Out of Commerce Works (Articles 8 to 11): Is It Possible to Untie the Gordian Knot of Mass Digitization and Copyright Law Without Cutting It Off? – Part I*, 29 July 2019, <http://copyrightblog.kluweriplaw.com/2019/07/29/the-new-copyright-directive-out-of-commerce-works-articles-8-to-11-is-it-possible-to-untie-the-gordian-knot-of-mass-digitisation-and-copyright-law-without-cutting-it-off-part-i/> [accessed: 16.08.2021].

⁴¹ E. Rosati, *Copyright in the Digital Single Market...*, p. 230.

⁴² *Ibidem*.

In the practice of cultural heritage protection, a CMO is eligible to conclude a non-exclusive licence for non-commercial purposes with a CHI, which enables it to digitize and to make available to the public works which are out-of-commerce. Such a licence may be extended and covers the entire territory of the EU. This makes possible an easy flow of works between the internal systems of cultural heritage protection of EU Member States, and provides the institutions engaged therein with the capacity to disseminate their collections as widely as possible, which is in accordance with the goals of the European Digital Single Market. Extended licencing also ensures the proper flow of works between the territories of Member States in line with the Single Market's cross-border effect and lowers transaction costs by facilitating mass rights clearance.

The opt-out mechanism

Directive 2019/790 provides the possibility for rightholders to opt out from the Extended Collective Licencing scheme in order to prevent CHIs from making authors' works publicly available. This might be executed both prior to and during the licencing term. Article 8(4) introduced an important element differentiating between the traditional scheme and the directive's scheme of the ECL opt-out clause. The traditional scheme, which already finds application in the jurisdictions of a few European countries, allows the rightholders to opt out only once the licences are already concluded. It does not take into consideration the possibility of an author or other rightholders to withdraw from a licencing scheme before it is granted, which limits their protection over their work and makes them more prone to potentially negative legal consequences and the unfair exploitation of their works.

The opt-out clause included in the provisions of Directive 2019/790 is of fundamental importance, as it is considered as a tool enabling an author (or rightholder) to impose his or her will regarding the future usage and circulation of her or his work. It is the possibility to opt out from granting a licence to the CMO that intersects with the idea of copyright protection and preservation of an author's autonomy vis-à-vis the exercise of rights in the work created by him or her. An ECL opt-out system, in order to be effective and compliant with the other acts of European law, should ensure that authors are individually informed of the scope of the use of rights carried out by the CMO.

Directive 2019/790 does not directly refer to the question of whether the opt-out mechanism is available also after an author's death, leaving room for potentially varying interpretations. The EU legislator decided, however, to use the word "rightholder" when touching upon matters related to the rights of authors and other entities eligible to make decisions in his or her name. Such a formulation leaves room for an interpretation that the right to withdraw a work from out-of-commerce status is granted to all those who rightfully represent a deceased author's interest, for example her or his next of kin or public authorities of the country of the author's origin.

The dual regime of Directive 2019/790

The core of the mechanism established in Directive 2019/790 is the dual regime, which consists of the Extended Collective Licencing mechanism and the mandatory opt-out scheme. The public interest is here of fundamental importance, as it constitutes a driving force for the provisions introduced by this Directive and for the CHIs that are the main beneficiaries of both systems.⁴³

The basis of both schemes is the use of a work without an author's prior consent. Collective licencing mechanism requires that an author is conscious of the ongoing licencing procedure and that his or her consent has been given, even at a late stage of the proceedings. This is why the opt-out mechanism is given to an author – as a guarantee that author's voice is effectively heard – either before the initiation of or during a licencing procedure.

The possibility for author's opt-out is a response to the information policy established by the Court of Justice of the European Union (CJEU) in its famous *Soulier* case,⁴⁴ which was of vital importance in enabling the European Commission to follow a fresh new approach. It emphasized the preventive nature of copyright in order to rule out the opt-out mechanism from the French legal system, which allowed a CMO to authorize the digital reproduction and publication of out-of-print works. Even though French law provided authors with a variety of safeguards enabling them to effect in practice the protection given them on the basis of copyrights, it was declared by CJEU as being not in compliance with the system of EU law.⁴⁵ What the court stressed the most was the lack of a mechanism that would ensure that an author is adequately informed of the planned reproduction of his or her works and their availability to the public. In order to uphold this problematic and costly requirement, the Directive delivered to CHIs a set of general publicity measures, which are a less rigid approach than the individual measures with respect to how information regarding the future use of author's work by a third party should be provided. The directive provides it should be listed, in accordance with Article 10, in national public registers or individual online portal established and managed by the European Union Intellectual Property Office (EUIPO). This is designed to ensure legal clarity and foster a sector-specific dialogue between an author or right-holder and the institutions who were granted a licence.⁴⁶

⁴³ J. Axhamn, *The New Copyright Directive: Collective Licensing as a Way to Strike a Fair Balance between Creator and User Interests in Copyright Legislation (Article 12)*, 25 June 2019, <http://copyrightblog.kluweriplaw.com/2019/06/25/the-new-copyright-directive-collective-licensing-as-a-way-to-strike-a-fair-balance-between-creator-and-user-interests-in-copyright-legislation-article-12/> [accessed: 20.08.2021].

⁴⁴ C-301/15, *Soulier and Doke*, Judgment of 16 November 2016, EU:C:2016:878.

⁴⁵ C. Geiger, G. Frosio, O. Bulayenko, *Facilitating Access to Out-of-Commerce Works in the Digital Single Market – How to Make Pico della Mirandola's Dream a Reality in the European Union*, <https://www.jipitec.eu/issues/jipitec-9-3-2018/4803> [accessed: 20.08.2021].

⁴⁶ E. Rosati, *Copyright and the Court of Justice of the European Union*, Oxford University Press, Oxford 2019, Chapter 8.

The Opt-out Mechanism under Directive 2019/790 as an Effective Enjoyment of Authors' Rights

The challenges presented by mass digitization in the actions taken daily by the CHIs were a clear signal that a major overhaul was needed in order to alter the nature of copyright protection. The regulatory model of the rightholder's opt-out established by Directive 2019/790 is intended to be perceived by the subjects eligible to benefit from it as a solution to the problem of certain massive digital uses of copyright-protected works. The strongest guarantee of the legitimacy and compatibility of those opt-out mechanisms with the protection of international copyright law procedure is the fact that an author's or rightholder's power to oppose the licencing scheme and withdraw from its system is limitless.

The nature of the opt-out itself suggests, however, its rather economic convenience. The exercise of the right to withdraw works from the out-of-commerce domain does not exclude an author/rightholder from exercising his or her right to remuneration claims over the given work, namely for the actual use of the work being subject to the licence.⁴⁷ This can be justified on the grounds of protection of the public interest and ensuring that a cultural heritage institution gets a faster and more economically fair means for sharing works being part of their collections.

The power to withdraw a work from its out-of-commerce status without too many formalities ensures that rightholders are able to oppose the use of a work concerned at any time, including situations either before or after the conclusion of a licence and after the commencement of use of the work concerned. An author has the right to receive appropriate information on the future use of his or her work and to withdraw the work from the out-of-commerce status unconditionally. As much as Directive 2019/790 postulates that the use of works or other subject matter should respect the moral rights of an author (Recital 23), and that out-of-commerce works should be without prejudice to any legal constraints, including national rules on moral rights (Recital 37), the withdrawal introduced by Directive 2019/790 seems to also fulfil the legal standards assigned to a withdrawal considered as an element of the exercise of moral rights by putting an end to the circulation of a work within a domain shared with a broader audience, such as, e.g., the sharing of a work online by a CHI. Such a model, as a process being relatively easy to conduct, based on clear criteria, and giving an author/rightholder a broad scope of autonomy in deciding upon the future application of a work, is not to be considered as a formality which is forbidden by the Berne Convention as it does not interfere with an author's/rightholder's free and effective enjoyment of a copyright.

However the exercise of the opt-out – whether done before, after, or during the process of granting a CHI a licence – bears the hallmarks of a breach of the principle of the preventive nature of copyrights. It may result in a situation where

⁴⁷ T. Synodinou, *op. cit.*

an author of a given work is deprived of his or her right to determine whether he/she consents or not to the CHI being given a licence, and finds him/herself in a state where certain decisions or alterations to his or her artistic work have already been made. The Extended Collective Licencing mechanism was planned in such a way that it gives an advantage to the CHI applying for the licence. The starting point of the ECL's procedure is granting an institution a licence. It is the rightholder who is saddled with the duty of taking the legal initiative if he or she wishes to intervene into an on-going or already finished licencing scheme.

The opt-out procedure has been designed in such a way as to allow all the eligible rightholders to control the right to withdraw from the licencing scheme offered by Directive 2019/790. Rightholders are legally allowed to represent the interests of the deceased author and act in accordance with his or her will, ensuring that the work remains integral. If done *post mortem auctoris*, the opt-out might turn out to be an essential tool for carrying out an author's will at a moment when an author's artistic work and entire legacy is most prone to potential misuse. It seems unclear, however, how different national jurisdictions will treat the possibility to conduct an opt-out *post mortem auctoris* by a pre-appointed representative/rightholder in instances where they themselves have extreme views on the very idea of the exercise of author's moral rights after his or her death.

Possible complications with respect to the practical use of this procedure may also arise as a consequence of the significant discrepancies in the level of harmonization of the EU's copyright law.⁴⁸ Due to the lack of a self-standing "copyright competence" of the legislative authorities of the EU, its actions must rely on the piecemeal harmonization of copyrights, as only matters of cross-border relevance have been harmonized. This may lead to major problems in unification of the standards of the licencing procedures, and eventually give rise to situations where different national jurisdictions provide differing formal requirements for the same type of mechanism. While in some countries it may turn out to be much less problematic in terms of the formalities and time required for a CHI to get a licence, in others it might turn out to be much more challenging for a rightholder to opt-out from the licencing scheme. Such disproportions do not favour the postulated facilitation and acceleration of the public availability of out-of-commerce works.

The Balance of Rights Between the Needs of Cultural Heritage Institutions and the Rights of Authors

The concept of moral rights came into existence as an aspect of authors' freedom of expression and emerged most rapidly in countries with a high level of political oppression. Moral rights need to be balanced against freedom of expression, which

⁴⁸ A. Ramalho, *Conceptualising the European Union's Competence in Copyright: What Can the EU Do?*, "International Review of Intellectual Property and Competition Law" 2014, Vol. 45.

in fact highlights that the problem is one of balancing mutual rights and freedoms. Both the freedom of expression of an author and the expressive freedom of the public must be given adequate recognition in the decision-making process of formulating copyright legislation.⁴⁹ Directive 2019/790 aims to strike a fair balance between the interest of the artist or the holder of copyright rights on the one hand, and the users of works subject to copyrights on the other.⁵⁰

The individual interest of an author and the public interest safeguarded by CHIs may seem far apart at first glance, but after some consideration it is easy to assess some intersections between these two, which are especially visible after an author's death, when his legal representative becomes the holder of both of them. While the private interest of an author, his *post mortem* representative, or other rightholder to a given work focuses on satisfying the needs arising out of his or her basic moral rights (personality, freedom of artistic expression, authenticity of the work, etc.), public institutions reflect the importance of public interest in the field of preservation of cultural heritage properties, which includes the repatriation of looted artefacts, publicly-funded acquisitions of artistic works, export restrictions on some iconic works, etc.⁵¹

The incentives for copyright exceptions include historical, aesthetic, and very often also socio-economic reasons, such as, *inter alia*, a compulsory licencing scheme and defence of the public interest to facilitate wider access to cultural works. Moral rights seem to be a legal mechanism binding these two interests together, as they are able to serve analogous purposes by complementing national heritage laws and allowing individuals to vindicate the public interest in the cultural heritage preservation process. This indicates the existence of certain spheres where public and private interests intersect, and that moral rights might have both a personal and cultural heritage basis, where instead of advancing only the individual interest of an author they enhance the public interest as well. Viewed in such a light, the moral right of integrity makes it possible to outlaw prejudicial changes to cultural treasures; the right of access conserves copyright works being in a third party's possession; and the right of attribution makes it possible to identify authors of important cultural works and facilitate their conservation.

However, the sphere which seems to be prevailing in the public debate over the balance between public and private interests, and which was supposed to be covered by the regulation of Directive 2019/790, is that of comprehensive public access to essential artistic works of both artistic and historical value which constitute a protected cultural patrimony. While it is quite obvious and understandable that access to some of the works must be restricted due to the higher needs of

⁴⁹ M.T. Sundara Rajan, *op. cit.*, p. 535.

⁵⁰ I. Stamatoudi, P. Torremans, *The Digital Single Market Directive*, in: I. Stamatoudi, P. Torremans, *EU Copyright Law: A Commentary*, 2nd ed., Edward Elgar Publishing, Cheltenham 2021, p. 714.

⁵¹ P. Masiyakurima, *op. cit.*, p. 425.

security, privacy, or conservation, it seems that the exclusive property rights resulting from copyright ownership very often reduce the public access to significant works stored in private collections of an author or rightholder, making them unavailable to the general public and thus impeding their cultural, educational, and sociological value.

The question thus remains where the boundary lies between the freedom of artistic expression and an author's free will to decide about the present and future whereabouts of his or her work(s) and the need to enhance and protect the public interest.

Directive 2019/790 reverses the earlier approach to the balance between the private and public needs, as it puts the protection of the public interest in first place by constructing the entire scheme based on granting a licence to cultural heritage institutions by a collective management organization. The main actor is thus the CHI and as a general rule the public is to be given an access to out-of-commerce works. An author or his or her appointed representatives are eligible to exercise their waiver from the Directive 2019/790 licencing scheme by opting-out from the system. However in order to do so they must make an active secondary move in the process, since remaining passive means that they refuse to exercise the author's moral rights to individual and personal control over the artistic work.

Provided all the actors of this legal mechanism are sufficiently informed about their rights, the system ideally provides for a well-developed balance between the public and private needs by facilitating access to out-of-commerce works, while at the same time not hindering an author's right to keep control over a work created by him or her.

Final Remarks

The collective licencing mechanism has a massive potential to facilitate the online availability of sets of works which are out-of-commerce, yet stuck in the collections of CHIs because of their complicated copyright status. Directive 2019/790 has introduced a model separating ownership and the exercise of copyrights, which at the same time has managed not to infringe on an author's control over his or her works. Nowadays an individual exercise of a copyright is very often much hindered. This is particularly true regarding the issue of exploitation of works and other objects of exclusive rights, especially in digital form.⁵² The relationship existing between the artist and institution or entity representing the social interest has been quite drastically transformed. Technology has somehow forced the public to play a more active role in the enjoyment of culture, giving rise to an urge to have it lim-

⁵² R. Markiewicz, *Prawo autorskie na jednolitym rynku cyfrowym. Dyrektywa Parlamentu Europejskiego i Rady (UE) 2019/790* [Copyright in the Digital Single Market. Directive (EU) 2019/790 of the European Parliament and of the Council], Wolters Kluwer Polska, Warszawa 2021, Chapter 4.

itlessly available.⁵³ The author continues, however, to be heavily dependent on the public, which is supposed to respect his or her work and grant him/her appropriate social recognition. Moral rights should continue to be a tool allowing for such recognition and honouring creators.⁵⁴

The value which is nowadays placed on products of artistic expression generates a problem vis-à-vis the justifications for moral rights. Moral rights, serving the fulfilment of various purposes, might soon become displaced due to the rapid technological advances, the challenges associated with the economic exploitation of artistic works, and a surge in the public demand for fair access to them.⁵⁵ Thus it is essential for an international copyright sphere to provide for a well-developed balance between the needs of the private entities bearing individual copyrights to artistic works and those representing the general public interest.

From today's perspective the actual effectiveness of the system established by Directive 2019/790 seems impossible to fully assess.⁵⁶ The balance achieved via the provisions of Directive 2019/790 seems, however, to put cultural heritage institutions in a privileged position, as they will be able to relatively easily grant collective licences to a chosen group of artistic works. Even though an author's interest is theoretically safeguarded by the possibility to facilitate the protection of his or her moral rights by opting out from the licencing scheme at any freely chosen moment, an author or his/her representative are deprived of the preventive function that copyright is supposed to perform, at least when the opt-out is done only after the licence for the usage of the out-of-commerce work is granted. In such a case it might be too late to safeguard all the personal interests of an author over his or her work. What also raises some doubts is the collectiveness of the system itself, which might also be a disadvantage to an author's interest, as his or her work will be treated under the same conditions as works of a different artistic category or value.

Another fact which might not bring much reassurance to the enthusiasts of the new legislation might be that copyrights remain a sphere which is not extensively unified and harmonized within all the Member States of the EU, resembling a patchwork structure and giving perhaps too much of a decisive freedom to specific States, the individual preferences of their authorities, and differentiations based on cultural and political backgrounds. At the same time, even those tiny bits and

⁵³ N. Klass, H. Rüpp, J. Wildgans, *Bringing Europe's Cultural Heritage Online: Initiatives and Challenges*, in: I. Stamatoudi, P. Torremans, *EU Copyright Law: A Commentary*, 2nd ed., Edward Elgar Publishing, Cheltenham 2021, p. 939.

⁵⁴ M.T. Sundara Rajan, op. cit., p. 533.

⁵⁵ P. Masiyakurima, op. cit., p. 433.

⁵⁶ F. Ferri, *The Dark Side(s) of the EU Directive on Copyright and Related Rights in the Digital Single Market*, "China-EU Law Journal" 2020, <https://doi.org/10.1007/s12689-020-00089-5>.

pieces that have been harmonized remain essential.⁵⁷ A critical difference which may eventually hinder the entire logic of the licencing scheme introduced by Directive 2019/790 concerns the matter of opting out of the licencing procedure done by a legal representative of an author to the work. In addition, the exercise of moral rights *post mortem auctoris* remains controversial and continues to be significantly different in various national legislations (ranging from those accepting the perpetuity of moral rights *post mortem auctoris* to others which introduce time limits on their validity, or even provide for their expiration upon the death of the author). This might lead to practical confusions concerning the entities willing to exercise moral rights in the name of a deceased author, especially during cross-border activities related to the protection of the authorial interest (such as, e.g., opting out of the licencing scheme).

Together with the first attempts to exercise the legal opportunities created by Directive 2019/790 in practice, it may become clear that the unification of legal norms regarding the status of out-of-commerce works, their licencing scheme, and the opt-out contained in the new Directive 2019/790 make its aim very apparent. An author's interest is not safeguarded on the same level of protection by each Member State, provoking instances of legal uncertainty and *forum shopping* for the preferential level of authorial protection, whereby both creators or rightholders and representatives of CHIs seek to be subject to the legal system of the Member State which best protects their interests (legal protection of authors; or the availability of and access to out-of-commerce works).

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⁵⁷ I. Stamatoudi, P. Torremans, op. cit., p. 1120.

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