

Q282

**2022 – Study Question
Moral Rights**

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Questions

I. Current law and practice

Please answer the below questions with regard to your Group's current law and practice.

References to "moral rights" below are used to encompass all legal rights and concepts used to provide protection to the non-economic rights of authors, regardless of whether they are referred to as "moral rights".

References to "moral rights" cover only moral rights in copyright law and not moral rights in related rights/neighbouring rights laws (e.g., rights on the performance), unless expressly stated otherwise⁵.

Definition of moral rights

1) a) Does your legislation and/or case law regarding copyright recognize moral rights?

Yes.

b) Are moral rights recognized outside copyright law?

Yes. The Neighbouring Rights Act (article 5) recognizes moral rights for performers.

c) What is the purpose of moral rights (the philosophy behind moral rights), e.g., to protect the work itself, the author, the public, etc.?

To protect the author's honour and reputation.

2) Are all types of works protected by moral rights or are moral rights restricted and/or excluded for certain categories of works (software, databases, architecture, etc.)?

No categories of works are excluded.

Categories of moral rights

- 3) **What are the different categories of moral rights, e.g., right of attribution, rights of integrity (distortion or modification), rights of disclosure, rights of withdrawal, right to prevent use in association with a product, service, cause or institution, etc.? Please give a short definition of each category.**

A. Right of attribution.

The right of attribution includes the right to oppose the making public of the work without mention of the name of the author, and the right to oppose the making public of the work under another's name than the author's name.

B. Right of integrity.

The Dutch right of integrity is twofold. It includes the right to oppose against any alteration that could not be prejudicial to the name or reputation of the author or to his dignity as such, unless such opposition would be unreasonable.

Also, it includes the right to oppose against any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his dignity as such. According to case law, other impairment of the work does not necessarily require modifications to the work itself. The right to oppose against any distortion, mutilation or other impairment of the work can also include cases where the work is impaired by the environment, or the context in which the work is used.¹

C. Right to prevent use in association with a product, service, cause or institution.

The Dutch Group considers that under Dutch copyright law, such right would fall under the right of integrity.

D. Right of disclosure.

Although the author of a work can prevent third parties from disclosing his work, in Dutch copyright law this it is not considered a moral right but rather an exploitation right.

Dutch copyright law does not provide in a moral right of the author to oblige a third party to disclose or publish his work. Although there is case law considering

¹ See: Summary relief judge District Court Groningen 10 September 2004, AMI 2004/21 (ceiling painting city theatre Groningen); Court of Appeal s Hertogenbosch 17 December 1990, NJ 1991, p. 444, AMI 1992, p. 35 (*Spronken/Haarlem*). Also compare: Hague Court of Appeal 27 april 1962, NJ 1963, 164 (*Smol/Baruch*), Court of Appeal Amsterdam 5 May 1972, Supreme Court 22 Juni 1973, NJ 1974/61 (*Patrimonium/Reijers*).

that an author can have a clear interest in the publishing of his work, such an interest does not automatically equate to a moral right to that effect.

E. Right of alteration

The author of a work is entitled to make such alterations to the work as he may make in good faith in accordance with social custom.

Exception and limitations to moral rights

4) Does your legislation and case law provide exceptions and/or limitations to moral rights, e.g., for specific categories of works, for the exercise of moral rights by author's heirs, in case of minor modifications of a work or in the absence of the name of the author for specific exploitations, in case of abuse of rights, etc.?

There are no separate exceptions and/or limitations to moral rights in the Dutch Copyright Act. Limitations are primarily regulated within the scope of the right itself. The right of attribution and the right of integrity, specifically the right to oppose against any alteration that could not be prejudicial to the name or reputation of the author or to his dignity as such, are subjected to a test of reasonableness: the author cannot exercise his right of opposition if this would go contrary to reasonableness. The right of integrity, specifically the right to oppose against any alteration that could be prejudicial to the name or reputation of the author or to his dignity as such, is not subjected to a test of reasonableness: here, the only test is whether the alteration in question could be prejudicial to the name or reputation of the author, which is determined by taking into account all relevant circumstances of the case.

Dutch case law has accepted as a further limitation to the right of integrity that the total destruction of an object in which a copyright protected work is embodied, cannot be considered an alteration or impairment which the author can oppose based on his moral rights. This limitation has been accepted in the interest of the public space, which is by definition scarce. The author of such work can however oppose the destruction of an object in which a copyright protected work is embodied, if such destruction would be considered an abuse of right.

Dutch civil law possibly provides for external limitations to moral rights, such as abuse of rights. As a general rule of Dutch civil law, a person to whom a right belongs may not exercise the powers vested in it as far as this would mean that he abuses these powers (article 3:13 (1) Dutch Civil Code). It is however unclear whether the limitations in the provision on moral rights itself are exhaustive or not.

Duration of moral rights

5) **What is the duration of moral rights?**

The duration of moral rights is governed by the same rules as the duration of the exploitation rights. Moral rights can last for 70 years after the death of the author, on the condition that the author has specifically designated a person by testamentary disposition in whom these rights are to be vested after his death.

Ownership of moral rights

6) **a) Who is the initial owner of moral rights, e.g., the author, co-authors, investor, publisher, movie producer, etc.?**

The author, co-author.

b) Can legal entities, such as an association, a foundation, collective rights organizations, a corporate company, etc., be the initial owners of moral rights?

Yes, employers and legal entities have been granted the right to invoke moral rights against third parties by (lower) Courts, but this but this topic is not uncontroversial in legal literature and there is no Supreme Court decision confirming these decisions.

Pursuant to art. 7 and 8 of the Copyright Act, employers and legal entities that lawfully publish works as their own without mentioning the name of the actual author are regarded as the 'author' of the work for the purposes of the Copyright Act. These so called 'fictitious authors' are able to invoke the moral rights that are granted to 'authors' in general, since the law does not exclude this possibility. However, in legal literature it is defended that it seems incorrect to grant such fictitious authors moral rights and that only the actual (individual) maker should be granted these rights.

Specifically with respect to legal entities, there is also an exception to their initial ownership of copyright. Pursuant to article 8 of the Copyright Act, the legal entity which discloses a work to the public as its own without indicating a natural person as the author, is considered to be the author of that work *unless* in the specific circumstances that disclosure to the public was unlawful. Some have argued that disclosure to the public of a work by a legal entity without indicating a natural person as the author goes contrary to the right of attribution and is therefore in principle unlawful. This would render article 8 of the Copyright Act a dead letter.

It is noted that the Neighboring Rights Act explicitly provides that moral rights

in neighboring rights for performers should be respected by the performer's employer. Such a provision is not included in the Copyright Act.

- c) Do the circumstances of the creation of the work influence who the initial owner is of moral rights (e.g., work made for hire, collective work, work created by employees, etc.)?**

Yes, see our answer to question 6 b).

- d) If the duration of the moral rights exceeds the duration of the author's life, who is the owner of the moral rights after the death of the author/owner?**

After the death of the author and until copyright expires, the moral rights rest with the person that the author has designated by testamentary disposition. If there is no such testamentary disposition, the moral rights expire.

- e) Who is the owner of moral rights of orphan works?**

The unknown author.

Moral rights and the owner of the tangible asset integrating the work

- 7) Are the property rights of the owner of a tangible asset integrating a work (painting, sculpture, architecture, etc.) limited by moral rights? For example, do moral rights prevent the owner of a building from updating or destroying it?**

Yes, the property rights of the owner of a tangible asset integrating a work (painting, sculpture, architecture, etc.) can be limited by moral rights. Moral rights can prevent the owner of a building from updating, renovating or altering the building. Dutch case law has many examples of architects successfully preventing alterations to the buildings they designed. The destruction of a building cannot be opposed on the basis of moral rights, though. For limitations to such rights, see the answer to question 4 above.

Moral rights and contracts

- 8) a) Can moral rights be subject of contracts?**

In principle, moral rights remain with the author even if the author transfers his exploitation rights. Moral rights cannot be transferred except by testamentary disposition, in case of the death of the author.

The right to oppose against any alteration that could be prejudicial to the name or reputation of the author or to his dignity as such, cannot be waived. Therefore, it

does not seem possible to agree on a certain – limited – exercise of this right. The right of attribution and the right to oppose against any alteration that could not be prejudicial to the name or reputation of the author or to his dignity as such, can be waived. Therefore, it is also possible to agree on a certain – limited – exercise of this right.

b) Can the initial owner of moral rights transfer (e.g., through a contract for valuable consideration or free of charge) these to third parties?

No. The only transfer possible is by testamentary disposition, in case of the death of the author.

c) Can the owner of moral rights renounce or waive them?

The right to oppose against any alteration that could be prejudicial to the name or reputation of the author or to his dignity as such, cannot be renounced or waived.

The right of attribution and the right to oppose against any alteration that could not be prejudicial to the name or reputation of the author or to his dignity as such, can be renounced or waived.

d) Can the law relating to moral rights be overridden by contractual provisions?

No.

Infringement of moral rights

9) Is infringement of moral rights qualified as is copyright infringement?

Yes.

10) What are the conditions for an infringement of moral rights to be recognized, e.g., proof that the infringement violates the honour, reputation, dignity, legitimate interests of the author, etc.?

The conditions for an infringement of moral rights to be recognized, differ for the various moral right. For the right of attribution, the elements an author needs to establish are the making public of the work without the author's name, or the making public of the work under another's name than the author's name. For the right of integrity, the author needs to establish that the work is altered and his opposition is not contrary to reasonableness, or that the work is altered and this alteration could be prejudicial to the author's name or reputation or his dignity as such.

Moral rights on related rights

11) a) Does your related rights legislation recognize moral rights, for

example for performers?

Yes.

b) If YES, please indicate if moral rights in related rights legislation are identical to moral rights in copyright law?

Moral rights in neighbouring rights for performers are almost identical to moral rights in copyrights.

c) If they are not identical, please indicate the main differences from moral rights in copyright law.

There is no moral right of alteration for performers.

II. Policy considerations and proposals for improvements of your Group's current law

12) Could your Group's current law or practice relating to moral rights be improved? If YES, please explain.

Yes.

Allocation of moral rights to fictional authors c.q. legal persons

Because of the close and/or intimate relationship between the actual author and the work, it is disputed in literature whether the moral rights of art. 25 Copyright Act may accrue to a fictional author c.q. a legal person that pursuant to art. 7 of 8 Copyright Act is regarded as the author of a work.

An argument in favor of allocation of moral rights accruing to a legal person is in the first place article 2:5 Dutch Civil Code that sets out that as far as property law is concerned, a legal person is equivalent to a natural person, unless provided otherwise by the law. Article 25 Copyright Act does not provide that legal persons cannot exercise moral rights.² Secondly it is acknowledged in case law that the fictional author may acquire moral rights.³

Since a legal person can have its own independent interest in such a personality right though, it may be helpful – in view of the debate about this in literature – to more clearly lay down in the law that a fictional author (pursuant to art. 7 of 8 Copyright Act) can also exercise moral rights, in particular the right

² See Court of Appeal Amsterdam, 31 July 2003, Tarriverdi / Stadsomroep, ECLI:NL:GHAMS:2003:AP0573, para. 4.15;

³ See again Court of Appeal Amsterdam, 31 July 2003, Tarriverdi / Stadsomroep, ECLI:NL:GHAMS:2003:AP0573, para. 4.15, albeit that this judgment sets out that the moral rights continue to also belong to the actual author; as to the latter see also Court of Amsterdam, 13 July 2011, S v Vrije Universiteit, 478848 / HA ZA 10-4087.

to object to modification of the work.

Right of integrity

According to the memorandum accompanying the amendment act from 1972 as well as the Supreme Court in its recent “4 Jaargetijden-judgment”,⁴ it is not necessary for the exercise of moral rights that there is alteration of the work itself. The work may also be affected if it is made public in an inferior form or atmosphere or exhibited in an environment of lesser quality, giving rise to an author’s wish to invoke his or her moral rights.⁵

A policy consideration is to make it clearer that the words “other alteration of the work” in article 25 Aw do not require an alteration of the work itself, but that such alteration may also consists of an alteration of the context in which the work is made public.

- 13) Could any of the following aspects of your Group's current law relating to moral rights be improved? If YES, please explain.**
- a) the definition of moral rights**
 - b) categories of moral rights**
 - c) exceptions and limitations to moral rights**
 - d) the duration of moral rights**
 - e) ownership of moral rights**
 - f) moral rights and the owner of the tangible asset integrating the work**
 - g) moral rights and contracts**
 - h) the regime of moral rights**
 - i) infringement of moral rights**
 - j) moral rights and related rights**

As to infringement of moral rights (category sub i)), see the observations made under 12 above.

- 14) Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?**

Under Dutch copyright law, an author is entitled to waive certain moral rights under Article 25 Dutch Copyright Act (the right of attribution and the right to oppose against any alteration that could not be prejudicial to the name or reputation of the author or to his dignity as such, see question 8 (c) above). However, it is unclear whether a waiver of moral rights under Dutch law

⁴ Supreme Court 29 March 2019, NJ 2019/324

⁵ See also Court of Groningen, 10 September 2004, X v Gemeente Groningen, ECLI:NL:RBGRO:2004:AR1050, para 2.5 – 2.10.

(*afstand van recht*) has a so-called erga omnes effect or only inter partes (e.g. between the author and its contractual party). Although, there are good arguments to claim that a waiver of moral rights has an erga omnes effect in practice, the Dutch Group proposes to make this more explicit.

III. Proposals for harmonisation

Please consult with relevant in-house / industry members of your Group in responding to Part III.

15) Do you believe that there should be harmonisation in relation to moral rights? Please answer YES or NO.

Yes.

If YES, please respond to the following questions without regard to your Group's current law or practice.

Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

Definition of moral rights

16) a) Should moral rights be recognized? Please answer YES or NO.

Yes.

b) If YES, should this be in copyright law?

Yes.

17) a) If YES to question 16), should all types of works be protected by moral rights? Please answer YES or NO.

Yes. Although for some types of work, infringement of moral rights can be difficult to envision (eg, software, database rights, and other types of works created by authors which are fairly anonymous to the public), the Dutch Group sees no cogent reason to exclude types of works up front.

b) If NO, for which categories of works should moral rights be restricted and/or excluded?

N/a.

Categories of moral rights

18) What should be the different categories of moral rights? Please tick the boxes as appropriate and give a short definition of them:

Right of attribution.

The right of attribution should include the right to oppose the making public of the work without mention of the name of the author, and the right to oppose the making public of the work under another's name than the author's name.

Right of integrity.

The right of integrity should include at the minimum the right to oppose against any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his dignity as such. In this context, an opposable impairment should not necessarily require modifications to the work itself, but should also include cases where the work is impaired by the environment, or the context in which the work is used.

Furthermore, the right of integrity should also include the right to oppose against any other alteration of the work that could not be prejudicial to the name or reputation of the author or to his dignity as such, subject to a test of reasonableness.

right of disclosure

right to prevent use in association with a product, service, cause or institution

The Dutch Group consider that use in association with a product, service, cause or institution could amount to an impairment of the work. In such case, this right would be included in the right of integrity.

other, namely

Exception and limitations to moral rights

**19) a) Should moral rights be subject to exceptions and/or limitations?
Please answer YES or NO.**

Yes.

b) If YES, which? Please tick the boxes as appropriate

for specific categories of works, namely

in case of minor modifications of the work

in case of abuse of rights

depending on the owner of moral rights (author, investor, employer,

- author's heirs, etc.)
□ other, namely

Duration of moral rights

20) What should be the duration of moral rights?

The duration of moral rights should follow the duration of copyright in general, i.e. 70 years after the death of the author.

Ownership of moral rights

21) a) Who should be the initial owner of moral rights?

The author and co-author.

b) Should legal entities (i.e. others than natural persons) be able to be the initial owner of moral rights?

The Dutch Group is divided on the question whether employers should be able to be the initial owner of moral rights. Some members of the Group find it reasonable that if the employer is entitled to the moral rights if the employment relationship also entails the employee making works; in such case it would not be fitting that the employee can exercise any moral rights vis-à-vis the employer. Other members of the Group note that moral rights serve to protect the close and/or intimate relationship between the work and the actual author who made the creative choices; awarding the moral rights to the employer would not be reconcilable with this purpose.

c) Should the circumstances of the creation of the work influence who the initial owner is of moral rights?

Yes, but only in case of an employment relationship.

d) If the duration of the moral rights exceeds the duration of the author's life, who should be the owner of the moral rights after the death of the author/owner?

After the death of the author and until copyright expires, the moral rights should rest with the person that the author has designated by testamentary disposition.

e) Who should be the owner of moral rights of orphan works?

The unknown author.

Moral rights and the owner of the tangible asset integrating the work

- 22) Should the property rights of the owner of a tangible asset integrating a work (painting, sculpture, architecture, etc.) be limited by moral rights? Please answer YES or NO. If YES, please explain how.**

Yes. A limitation of the property rights of the owner of a tangible asset embodying a work inevitably follows from accepting a right of integrity. Accepting such a right implies that the author of a work can, under certain circumstances, prevent changes to an object embodying the work, thereby limiting the property rights of the owner of that object.

Moral rights and contracts

- 23) a) Should it be possible to contract on moral rights? Please answer YES or NO and explain.**

Yes and no. It should be possible to contract on the exercise of moral rights insofar as the author can renounce or waive these moral rights.

- b) Should the initial owner of moral rights be able to transfer these to third parties? Please answer YES or NO and explain.**

No. The Dutch Group has multiple objections against the possibility of transfer of individual moral rights. One: moral rights protect the bond between the author and the work and are therefore inextricably linked to the author of that work. Two: it would lead to chaotic and unpredictable results if moral rights could be individually transferred to third parties. Three: the Dutch Group sees no sufficient rationale for the possibility of transfer of individual moral rights to a third party.

- c) Should the owner of moral rights be able to renounce or waive them? Please answer YES or NO and explain.**

To protect the interests of the author against contracting parties who are economically more powerful, it should not be possible to renounce or waive the right of integrity i.e. the right to oppose against any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his dignity as such.

It should be possible to renounce or waive the other moral rights.

- d) Should it be possible to override the law relating to moral rights by contractual provisions? Please answer YES or NO and explain.**

No. The law relating to moral rights outlined above strikes a balance between the rights of the authors and the interests of the other parties involved. It provides both sufficient protection for the authors and sufficient flexibility.

Infringement of moral rights

- 24) Should infringement of moral rights be qualified as copyright infringement? Please answer YES or NO.**

Yes.

- 25) What should be the conditions for an infringement of moral rights to be recognised?**

The conditions for an infringement of moral rights to be recognized differ for the individual moral rights concerned. For example, the conditions for an infringement of right of attribution are the making public of the work without mention of the name of the author, or the making public of the work under another's name than the author's name. The conditions for an infringement of the right of integrity are the distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his dignity as such, or the alteration of a work that could not be prejudicial to the name or reputation of the author or to his dignity as such, subject to a test of reasonableness.

Moral rights on related rights

- 26) a) Should related rights law recognize moral rights, for example for performers? Please answer YES or NO.**

Yes.

- b) If YES, should moral rights in related rights laws be identical to moral rights in copyright law?**

Yes.

Other

- 27) Please comment on any additional issues concerning any aspect of moral rights you consider relevant to this Study Question.**

N/A

- 28) Please indicate which industry/cultural sector views provided by in-house counsel are included in your Group's answers to Part III.**

N/A