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Authors' Moral Rights in the Digital Environment

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Abstract

Objective: to answer the question whether the authors' moral rights the in the digital environment correspond to their original purpose, and to determine the impact of the development of social networking platforms, artificial intelligence technologies and non-fungible tokens (NFT) on the transformed role and features of the protection of the author's moral rights under modern conditions.

Methods: the research is based on historical-legal, comparative-legal and formal-dogmatic methods. Legal institutions and legal practice on the issue of protection of the author's moral rights are subjected to critical analysis.

Results: the genesis and normative fixation of the author's moral rights are investigated in historical retrospect. It is noted that at present the protection of these rights is insufficiently regulated at the international level, while national copyright law, for example, of continental European states, provides a sufficiently strong protection of the author's moral rights; however, the effectiveness of the latter is weakening in the digital age. The paper analyzes the changing landscape of copyright relations caused by technological progress: in social networks, in the generation of works by artificial intelligence, and in the creation of digital works of art. The thesis is substantiated that the author's moral rights are undesirable in the context of social platforms. The paper proposes solutions to the issues of authorship of works created by artificial intelligence, violation of author's rights, and integrity in case of full or partial borrowing of a work to generate a new work by artificial intelligence. The role of NFT technologies in solving the problem of preserving the author's moral rights is defined.

Scientific novelty: the work fills a gap in research on the relationship between copyright and technological development. It identifies and evaluates the innovations in the purpose and content of the author's moral rights, caused by the processes of digitalization, and attempts to solve the problem of the author's rights compliance with technological progress.

Practical significance: the obtained results may serve as a conceptual basis for further development and improvement of national legislation and international legal regulation in the field of copyright protection, transformation of the objectives, role and place of the author's moral rights in the digital environment.

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Contents

Introduction

In recent years we have witnessed a technological development similar to the invention of book printing in the 15th century. While copyright did not exist at the time of the invention of book printing, in today's world the protection of intellectual creations is becoming increasingly important. From the point of view of the history of the development of copyright law, Gutenberg's innovation was the spark in the gunpowder barrel, as it quickly helped to spread the artworks, especially books, widely.

At that time, authors felt that they were in a vulnerable position, because their works could usually only be made and sold if they were supported by a patron. This situation resulted that authors did not have a real opportunity to take action to protect their works. If we see this situation in another point of view, we can ascertain that book printing at that time was similar to today's digital technologies. It had a lot of positive effect on culture but at the same time it has paved the way for the spread of illegal copying and distribution as well. After book printing required significant financial outlay from the entrepreneurs, the rulers ensured by granting privileges that the given businessman could exclusively engage in book printing in a certain field and for a certain period of time. This trend and development

were best observed in England; therefore the roots of copyright law were also appeared in the XVII–XVIII. century England. According to this, we can say that the early copyright law derived from the monopoly privileges granted by the Crown to the printers. In line with the printing privileges, the printing trade also developed its own system of regulation through the Stationers' Company in London (Stokes, 2012).

As a result of the English development, copyright law legislation was first emerged in England at the time of the reign of Queen Anne, when she issued her Statute in 1709, which entered into force on 10 April 1710[1]. The proposal of the abovementioned Statute (from 1707) has already used the term that authors have „undoubted property" in their books. This term has been changed to the term „sole right and liberty of printing" in the adopted law, primarily because of positivistic viewpoints. The significance of Queen Anne's Statute can primarily be found in the fact, that it was not only the first written law on copyright in Great Britain, but in the whole world. As part of this process, the Statute was a major step to creating the so-called civil state as well. The Statute of Anne actually created an alienable copyright and it aimed at protecting not only the authors, but publishers too as legal successors of authors.

Following this pioneer activity of the United Kingdom in the field of copyright law, other countries embarked on copyright law legislation. Following the British copyright law, the first copyright law of the United States was adopted in 1790[2]. Even in the same century, the first modern French copyright law was adopted[3], than the Prussian[4] and the Austrian[5] acts were born in the 19th century as well.

The contemporary copyright law protection primarily serves the purpose of creating new works of high artistic and scientific value. In order to ensure this objective, copyright law guarantees the social respect of creators through moral rights and financial appreciation due to the economic rights. This legislative concept is nowadays best seen as a specific tripartite balance of interests, where the legislator has to (and is forced to) balance the interests of the three poles: the author, the user and society. Copyright law is an area of law which is particularly dynamic and evolving, always bearing the social, economic,

1 Copyright Act of 1790. The full title: An Act for the encouragement of learning, by securing the copies of maps, Charts and books, to the authors and proprietors of such copies, during the times therein mentioned.

2 The full title: An Act for the encouragement of learning, by securing the copies of maps, Charts and books, to the authors and proprietors of such copies, during the times therein mentioned.

3 In France the relevant legislation was adopted on 19 July 1793, with the following original title: „Décret de la Convention Nationale du dix-neuf juillet 1793 relatif aux droits de propriété des Auteurs d'écrits en tout genre, des Compositeurs de musique, des Peintres et des Dessinateurs (avec le rapport de Lakanal. See: Rideau, F. (2023). Commentary on the French Literary and Artistic Property Act (1793). In L. Bently, & M. Kretschmer (Eds.), Primary Sources on Copyright (1450–1900). https://clck.ru/38VVtq

4 The Prussian copyright law was born on 11 July 1837. „Gesetz zum Schutze des Eigentums an Werken der Wissenschaft und der Kunst gegen Nachdruck und Nachbildung".

5 In Austria an imperial edict was adopted in 1846, which aimed to protect copyright works. „Gesetz zum Schutze des literarischen und artistischen Eigentums gegen unbefugte Veröffentlichung, Nachdruck und Nachbildung".

technical, and technological characteristics of the times to which it must constantly adapt. However, finding the balance is not an easy task, even the rules that have been drawn up often jeopardise precisely this balance (Ginsburg, 2002), especially in the digital sphere.

In the paper, the answer is sought for the question of whether or not the author's moral rights behave in the digital environment in accordance with their original purpose. The paper reviews the situation of authors' moral rights in relation to the specificities of social media platforms, artificial intelligence and NFT.

1. Feature of moral rights from a traditional viewpoint

1.1. History and dogmatics of moral rights

Intellectual property law and the protection of creators is strongly linked to the protection of personality, and the protection of personality is the basis for the protection of intellectual property itself. The moral rights doctrine originated in France during the 19th century, as droit moral, but the French courts had highlighted already in the early 1500s, that only the author has a right to publish their work (Rose, 1994).

The French roots of moral rights also justify that the protection of these rights is much stronger in continental Europe than in the Anglo-Saxon territories. Jane C. Ginsburg emphasizes the differences and the consequences of these discrepancies between French and Anglo-American copyright laws, which are especially true not only in connection with the French, but other European continental copyright regimes as well. While French (and other continental) copyright law is author-oriented, the Anglo-American copyright law is society-oriented. The author-centralism of French law results strong protection for moral rights, while the other system focuses on economic rights because of social utility (Ginsburg, 1990). The relation to the author and the author's moral rights carries the question of the formality of protection, which is also different in the civil law and the common law systems (Pogácsás, 2022). Consequently, the concept of regulating moral rights is fundamentally different on the one hand in Europe and in the law of countries outside Europe with continental-law roots, and on the other hand in the Anglo-Saxon states, especially in the USA. For instance, moral rights in the U.S. copyright law received legislative protection only in the Visual Artists Rights Act of 1990 (VARA). According to the VARA authors of certain visual artworks have the right to claim or disclaim authorship and they have a limited right to integrity[6]. However, by acknowledging the contemporary situation of moral rights protections in the current era, the U.S. Congress held a hearing on July 15, 2014, on the topic of moral rights protections in the United States as part of a broader review of U.S. copyright law[7].

[6] United States Copyright Office. (2019, April). Authors, attribution, and integrity: examining moral rights in the United States: a REPORT of the register of copyrights; VARA, Pub. L. No. 101-650, §§ 602–603, 104 Stat. 5128, 5128–30 (1990) (codified at 17 U.S.C. §§ 101, 106A(a)).

[7] United States Copyright Office. (2019, April). Authors, attribution, and integrity: examining moral rights in the United States: a REPORT of the register of copyrights.

On the level of international copyright law protection, the Berne Convention of the Protection of Literary and Artistic Works of 1886 is regarded as the Magna Charta of international copyright law. The Article 6bis of the BUE declares two main moral rights: the right to claim authorship, or with other words the paternity right[8] and the right to integrity, or with other words, the right of respect. The latter is mentioned in the BUE as the sole right of the author to object to certain modifications and other derogatory actions of the work[9]. The provision of the BUE on moral rights was included in the Convention at the 1928 Rome revision conference (Ficsor, 2003).

Seeking for moral right provision in the TRIPS Agreement[10] is quite unsuccessful, while it states that "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom"[11]. As a reason for the lack of moral rights in the TRIPS Agreement, some sources of the legal literature emphasize that the potential for harmonization of moral rights is directly related to how much protection nations want to grant and receive (Schéré, 2018) and internationalization of intellectual property is "subsumed within the broader apparatus of trade relations" (Dinwoodie, 2002).

Furthermore, the difference of the attitude to moral rights in the continental and in the common law countries was also significant during the elaboration of the TRIPs Agreement (Ginsburg, 2001; Dworkin, 1995; Adeney, 2006; Adler, 2009; Grosheide, 2009; de Werra, 2009). However, it shall be fixed, that exclusion of moral rights from bilateral and multilateral agreements creates an imbalance between the relevant parties (Schéré, 2018). With the challenges of the digital world, it is even harder to imagine that the international copyright conventions, as basis for copyright protection, will be amended in terms of the declaration of moral rights. Already at the time of the TRIPS Agreement, the issue of the recognition of moral rights was postponed on the grounds of the technological boom of the time. Given the current technological background and its unforeseeable development, it is even more difficult to imagine the harmonisation in the international protection of moral rights.

8 BUE Art. 6bis (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship.

9 BUE Art. 6bis (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right (…) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

10 Agreement on Trade-Related Aspects of Intellectual Property Rights.

11 Art. 9. of TRIPS Agreement.

1.2. Features of the legally declared moral rights

Beside the right to paternity and the right to integrity, as moral rights declared in the Berne Convention, the right to publication of the work is also acknowledged in the national copyright laws. The right to paternity can be interpreted as it incorporates the right to the indication of the name of the author, but these two rights can be regarded as individual rights also.

The right of paternity means the right of the author to claim authorship of the work. The WIPO Glossary mentions that in practice, the author claims authorship in his work by indicating on the copies, or in connection with any non-copy-related use, of his work, that he is the author. On the basis of this right, the author has the right to insist that he shall be identified in this way (Ficsor, 2003).

The right to claim authorship connects to the right of the name (attribution right), as the declaration of authorship is made by the indication of the name of the author on the work. The name right also incorporates the right to anonymity or pseudonym.

Attribution right also includes copying, quoting or describing an excerpt of the work, but the practice may vary from one type of work to another. The right of attribution is not obscured in the case of adaptations, since, where a work is created by adaptation, the name of the author of the underlying work must also appear on the adapted work. The author may exercise the right to indicate his name in a manner appropriate to the nature of the use.

The right of attribution is in principle linked to the right to recognition of authorship, since, unless the contrary is proved, the person whose name is thus indicated in the work in the usual manner is deemed to be the author. In more than one case, the failure to indicate the name of the author, a violation of this right, is a cover for plagiarism.

The concept of 'ghostwriting' shall also be mentioned here. According to the process of 'ghostwriting' the author agrees to create according to the opinion and style of the client or workplace manager, and then the work is published under this person (Sword, 2002; Goldschmidt, 2002). However, the legal literature stresses that this type of work is most common in political and other occasional performances and speeches. The reasons behind 'ghostwriting' may generally be rooted in the serious amount of financial remuneration for the author (Pogácsás, 2014) or in the subordination of an employment relationship.

In line with the right to publication of the work, authors are entitled to decide whether their works can be published. The right also includes the rights that before a work is published, the public may only be informed of the basic content of the work with the author's consent. Typical platforms of publishing information are the websites, brochures, posters or press conferences. Works that are found after the author's death must be considered as if the author had intended them for publication, unless the author or his/her legal successor made a statement to the contrary or if the opposite is proved otherwise. The right to publish the work also incorporates the right to withdraw the work from the public as well.

The right of integrity is the "heart of the moral rights doctrine" (Kwall, 1997) as it is the guardian of the spirituality of the author's works. The protection of the integrity of the work

(non-distortion) is one of the most important and elementary personal rights of authors but also it is the most complex. On the level of international protection, the Berne Convention declared originally as follows: "to object to any distortion, mutilation or other modification of the said work, which would be prejudicial to his honor or reputation"[12]. At the 1948 Brussels revision conference, it was completed as "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation"[13]. The modification reflected, that not all kinds of alterations of a work is a violation, but rather only to those which are likely to be prejudicial to the honor or reputation of the author due to their nature and the way in which they are made and identified. The Commentary of the BUE adds, that the protection of honor and reputation should extend not only to the honor and reputation of the author as an author but also as a human being (Ficsor, 2003). The right to integrity expresses the close relationship between the work and the author, so the basic purpose of the legal regulation can be understood: the work of the author shall be presented to the public without any distortions, or such changes, which would harm the reputation and honour of the author. The reason for this rule is that the author is adjudged on the basis of his works by both society and the profession. This situation makes the right to integrity the most sacred right, because the works shall be published in the way the author created it. The protection of the unity of the work must be identified with the concept of completeness and sacredness. This does not necessarily mean the physical unity of the work, but rather it is intended to ensure the spiritual unity, the integrity of the message of the work. The purpose of integrity protects the work as a whole, including its title, but it also important that it shall not be limited to those works which are materially embodied in copies (Gyertyánfy, 2014).

In line with the abovementioned specialties of the right to integrity, we shall see, that in addition to the same intensity of the intervention, the rights attached to the person can and must be weighed against the interests of the user with different results depending on the type of work, the way of use and the nature of the intervention. For example, some authors emphasize that in fine arts it can be a serious limitation of artistic freedom (Adler, 2009), however it shall be highlighted that in a legal dispute, a balance must be struck between freedom of art and the protection of other creators' moral rights (Sápi & Halász, 2021). It should also be remembered that moral rights, including right of integrity, are not limitless and have their limits in the European copyright systems as well.

[12] Berne Convention for the Protection of Literary and Artistic Works 1886. https://clck.ru/38ogm5

[13] Brussels Diplomatic Conference for the Revision of the Berne Convention, 1948. https://clck.ru/38ogwH

The general limitation of the right to integrity and, exclusive copyright law itself, is the term of protection, i.e. the duration of copyright[14]. After the term of protection expires, the work falls within the public domain. Its general consequence is that when the copyright term ends, anyone can use the work in any way they like, without asking permission and paying royalty for the author. The term of protection has its own effects on moral rights also. On the one hand, the paternity right survives the expiration of the term of protection, but other moral rights (as integrity) cease after the protection period has expired. Therefore, the most powerful modifications usually affect works under public domain.

Another important branch of limitations of copyright (moral) rights, such as parody, which became quite significant in the recent years. Under the current EU copyright law, parody is considered a free use as long as it meets the three-step test, so it does not infringe on the normal use of the work. However, the normal use of the work is violated by a use that is detrimental to the integrity of the original work. Thus, the relationship between the two legal institutions can best be grasped by the fact that although parody is a permitted free use, integrity represents its limitation. Because of this connection, we can observe the practice, which we mentioned earlier, of strongly modifying works – and a prime example of this is parody – whose protection period has already expired.

2. Author's moral rights and social network platforms

It is almost a banality - and therefore strangely familiar, even accepted – that social media poses our privacy (Halász, 2020), our personal rights and our data in danger. Why would the creator and their work be an exception? Are authors also accepting the fact that social media can be harmful to their work, or even to their creativity? Although it is not an infringement of their moral rights as authors to read destructive, disparaging comments about their work in a public post, it can have a detrimental effect on their creative process. Thus, it is futile for the legislator to try to encourage the continuation of creative work if external factors, independent of the author, can have such a strong influence on it.

Furthermore, if we acknowledge that social media facilitates the large number of personal right and copyright infringements, can we also say that social media has an exclusively harmful effect on copyright? The answer to this question is obviously no, since there is nothing evil about the display of copyright works or parts thereof on social platforms. In fact, it is increasingly common to see copyright works being promoted on social media platforms, and thus authors are more aware of their use (Erdős, 2015).

The moral rights of author should be given special attention in the current (media) context, as the digital revolution, which has a major impact on the media (Grazian, 2005), has transformed the map of copyright relations. In this context, it is necessary to continue

[14] Art. 7. of BC.

to stress the guaranteeing nature of moral rights, since moral consideration is at least as important as exclusive economic rights in the encouragement of creative work.

In the context of social media, it is worth referring to the phenomenon of mass production (Pogácsás, 2017), i.e. the mass use and publication of works on these platforms. The best example of this is Instagram[15], where there is a large number of photos that have a truly individual, original character that makes them stand out from ordinary photos and therefore qualify for copyright protection.

Social media also allows users to express themselves freely. Is it therefore a suitable platform for authors to exercise their freedom of expression and, ultimately, to publish their works? Copyright law does not prescribe where publication of works must take place. However, publication on social media is not realistic for all types of works, but for example photographs, short videos (live), poems, short literary works can be published there. However, the right of withdrawal, which is the element of the publication right, is questionable within the framework of social media[16]. The right of withdrawal is even more difficult to interpret in the world of the internet and social platforms. According to the Hungarian Copyright Act, authors are entitled to withdraw their permission for the publication of works; the withdrawal must be in writing and for a well-founded reason. They are also entitled to prohibit the further use of their works that have already been published. They are obliged, however, to compensate for any damage that has been incurred prior to the statement. This does not concern employer's right to further use of the works; nor can this, in the case of the assignment of economic rights, obstruct the person that has acquired the economic rights in his/her use of the work on the basis of the assigned economic rights. At this point, the requirement of written form cannot be clearly guaranteed and, the prohibition of further use of the work may also be problematic. The previously published work can be deleted or hidden from the profile, but once it is posted on social media platforms and the internet in general, there is no guarantee that it will be removed.

According to some literature, the integrity of works can be relatively easily damaged in social media, because the content published often uses parts of other works, which can easily distort the original works and misrepresent them to the audience. This has been most evident in recent years in the case of memes, which are often made from scenes from well-known films, photographic works or paintings, with humorous captions. In the case of memes, the integrity of the original work can be fundamentally compromised, since the message and ideas of the original work are often used in a negative way.

It should be borne in mind, however, that the purpose of memes and meme-makers is not to adapt or modify a work, but to convey humor through popular scenes. Thus, the next

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15 The organization is recognized as extremist, its functioning is prohibited in the territory of the Russian Federation.

16 For example the Hungarian copyright law provides for the possibility of withdrawal of a work within certain limits (Art. 11 of the Act LXXVI of 1999 on Copyright Law).

copyright staple for memes is parody, as the European Commission pointed out when it drew up the DSM Directive, allaying the fears of the internet public that funny GIFs and memes would be the victims of content filtering. From the point of view of copyright protection, it should also be pointed out that memes are not considered to be copyright works and are even considered by many to be so-called internet, digital folklore (Pogácsás, 2023).

In the current era of media convergence and digital media, boosted by digitalization, if copyright is getting attention, it is more on economic rights than on moral rights. In our daily lives, it is almost impossible to avoid social media platforms, which become influential players in the media market without producing any content (Koltay, 2018), and thus come into close contact with copyright (moral rights). In some views, the author's moral rights in these areas can be regarded as persona non grata (Pessach, 2003). This is most evident in the context of social platforms, where copyright, and in particular moral rights, are not self-evident.

3. Author's moral rights and artificial intelligence

3.1. Interrelationships between artificial intelligence and copyright

It is no exaggeration to say that in the last few years, artificial intelligence has permeated not only natural science but also social science research, since there are many benefits of AI for people.[17] In addition to computer science and engineering, the impact of artificial intelligence is often addressed in the areas of social sciences, as there are interfaces in all fields. Artificial intelligence raises philosophical and psychological questions (Brozeka & Janik, 2019), educational (García-Peñalvo, 2023), and ethical issues (Carrillo, 2020; Schafer et al., 2015), liability issues (Pusztahelyi & Stefán, 2022), and numerous intellectual property research (Mezei, 2020; Netz, 2018; Salami, 2021) also.[18] The eternal question is, whether AI could be regarded as a person from the point of view of law, or not. The legal literature emphasizes, that as AI systems become more sophisticated and play a major role, there are two reasons why it might be recognized as persons before the law. On the one hand it connects to the issue of liability since there is someone to blame when things go wrong. On the other hand, someone shall be ensured with rights, when things go right, for example in case of intellectual creations (Chesterman, 2020). However, in my point of view it is more complicated than 'ensuring rights'.

To the question of whether AI has moral rights one can give a rather obvious answer – it does not. In fact, answering this question is not the difficult part. The more complex

[17] European Parliament. (2020, September 23). Artificial intelligence: threats and opportunities. https://clck.ru/38VZGs

[18] Guadamuz, A. (2017, October). Artificial intelligence and copyright. WIPO Magazine. https://clck.ru/38VZHo; (2019, October 1). WIPO Conversation on Intellectual Property and Artificial Intelligence (September 27, 2019). WIPO. https://clck.ru/38VZK6

question is a bouquet of questions: Should or can copyright protection be granted over (partially) generated works by AI? If so, under what conditions? Who should be considered as a rightholder? It is tempting to consider that it is the person in whose interest the AI is working, i.e. the person who uses it. Anikó Grad-Gyenge highlights, that from a legal point of view, it is not inconceivable that the creator of the AI, or rather the person in whose interest the AI works, should become the copyright owner of the product that AI produces (Grad-Gyenge, 2023). But beyond these basic questions, the scope of the rights that is particularly exciting. As it is stressed in the legal literature, the purpose of AI systems is generally not to create works of authorship (or products that appear to be works of authorship). They are usually created to serve a specific purpose that cannot traditionally be achieved by the human mind, or even by previously established computer tools, or only at much greater expense. However, they also include those whose primary purpose is to produce, through some kind of processing, analysis, 'learning' of existing intellectual outputs, products that can ultimately become a substitute product/service in the cultural goods market (Grad-Gyenge, 2023).

3.2. The role of moral rights in the "AI-copyright equation"

If we can accept that there are works which are partially made by AI (in most of the cases with the control and guidance of a natural person), the justification for the granting of moral rights is arisen. Originally, "the copyrightability of AI-generated content is inherently linked to the ownership of the corresponding copyrights." (Miernicki & Ng, 2021).

The original function and justification of moral rights is to express a close moral and intellectual relationship with the creator, thereby encouraging further creation. From this point of view, in case of works generated exclusively by AI, there is no need to talk about moral rights, since there is no person to whom they can be linked. The author of this publication agrees with the thought line, which is represented by Martin Miernicki and Irene Ng, that "[i]t is questionable whether the ability to produce copyrightable content is equivalent to having a personality sphere that moral rights aim to protect." (Miernicki & Ng, 2021). However, the creator of the AI can have moral rights in relation to the AI, but not on new works generated by the AI, since they are already independent of him.

Therefore, the main question is the existence of individuality and originality as a result of human, creative input. Jane C. Ginsburg pointed out, that "If the human intervention in producing these outputs does not exceed requesting the computer to generate a literary, artistic or musical composition of a particular style or genre, one may properly consider these works to be computer-generated because the human users do not contribute sufficient intellectual creation to meet minimum standards of authorship under the Berne Convention." (Ginsburg, 2018).

It should not be forgotten that moral rights do not simply "float above the head of the creator", but in many cases they represent an economic value (as a kind of brand) and their infringement, restoration and pecuniary consequences can be the basis of specific legal

disputes. Thus, the moral rights really show their economic side in case of an infringement. It is worth thinking not only about whether and how can rights be granted for the creator or user of the AI, but also on the issue, if the AI infringes the moral rights of other creators (e.g. attribution right or integrity right), who shall be regarded a liable person for that. After all, rights also entail with obligations. It would seem logical that if the creator or user of the AI is granted moral rights, he or she should also be considered as liable from the other side. As it has been already pointed out in the previous chapter, we are both creators and users as a result of the mass production of creation in the digital era. If we accept the copyright protection of the content generated by the AI, we must also consider it as a user from the other side.

In March 2016, a musical, under/with? the title 'Beyond the Fence' was presented at the Art Theatre in London, and although critics said it was not a particularly enjoyable piece, the main attraction was not the quality of the performance, but the fact that it was the first stage work created largely by artificial intelligence, albeit with human post-production. The play is therefore not entirely computer-generated, as the composer Benjamin Till and the writer and actor Nathan Taylor are credited with the human interventions behind it. The creators dreamed up and created the piece using a "recipe for success", generated by machines, because the musical score is modelled on the most famous and successful musicals in the world. However, expectations for Beyond the Fence fell short of reception. Some argued that it was more like an advertisement than a real play and that the production was too predictable, others that, while it must be acknowledged that computers can write music in today's world, it is clear that good music cannot, and some simply argued that no artificial intelligence could put the elements together to make a real musical, as the process requires a human being[19].

Some authors point out that although for a long time machines and algorithms were only tools in the hands of creators, this situation has changed and they are now much more often part of the creative process (Hristov, 2017). Creativity itself, which the quoted author also attributes to the activity of AI, permeates the complexity of creative work. The concept of creative activity is based on individual ability and creativity, which contributes to economic prosperity by generating intellectual wealth (Simon, 2014). Creativity is also linked to the condition for copyright protection that the work must result from the intellectual activity of the author. Intellectual activity is in fact the basis of creativity. Beside the creativity of a machine depends mainly on the human being who created it, so that whatever data is fed into an "artificial brain", even if it is "made according to a recipe for success" – as in the music of the abovementioned Beyond the Fence – falls short of the creative activity, the intellectual creation, and thus of the legal requirement that the work must have an individual character.

[19] Souppouris, A. (2016, March 2). The first 'computer-generated' musical isn't very good. Engadget. https://clck.ru/38VZMZ

A crucial question, and one related to moral rights, in particular the right to paternity and attribution, is also whether, if a work is based on a "recipe for success", or if the AI-user incorporates other works or parts of works as source material or inspiration into the AI, this constitutes copyright infringement. The answer to this question depends on several things. On the one hand, it is important whether the elements and parts of works that are used for machine learning, for the generation of the AI work, are recognizable, i.e. identifiable. If so, the permission of the original author is required to use the work. If permission is not sought, copyright infringement occurs, and economic rights and moral rights (especially right to paternity and attribution right) are infringed. Furthermore, plagiarism may also arise in certain cases. From the viewpoint of the right to integrity, there is also the question of whether the author whose work is being used should be aware that his or her work or part of the work is being used to create an AI-generated work. In my view, yes, the original author should know, because he or she might not grant permission if knew about that fact. The integrity of the work enters into the equation where the original author can claim that the use of his work by AI is prejudicial to his moral rights, to the integrity of his original work.

4. Author's moral rights and NFT

Beside artificial intelligence, the features and effect of NFT (non-fungible tokens) on copyright law is the issue, which should be of interest to intellectual property legal scholars. Many sources deal with the interrelationship of NFT and copyright law. Consequently, the aim of this article is not to repeat the ascertainments of these legal literatures at all, but to focus on moral rights of author in line with the NFT. Generally, as a definition, NFT can be regarded as a new type of unique and atomic tokens based on blockchain, which differs from other digital assets, such as tokens and coins, in being inseparably connected to the basic asset. It also means that each NFT is unique, so cannot be divided or united with others. NFTs are defined and operated by a 'smart contract', which is a small bit of code that makes up a simple computer program that runs the operation of an NFT (Murray, 2023). The most important, main point of NFT in line with intellectual property law, what is highlighted by Michael D. Murray, "NFTs are not the artwork, and the artwork is separate from the copyright over the artwork." (Murray, 2023).

NFTs connect to a digital artwork, which means from the viewpoint of copyright law, they have effect on such artworks, that belong to the fine arts in the widest sense, or with other words: visual arts. It is also significant to give a definition about visual arts and fine art, with regard to the differences of the two phrases. Visual material can take many forms, such as fine art, photography, illustrations, graft and applied art (such as jewelry and ceramics), design, architecture and prints, such as engravings[20]. The sources emphasize that

[20] Koskinen-Olsson, T., & Lowe, N. (2012). Management of Rights for Visual Arts and Photography: Educational Material on Collective Management of Copyright and Related Rights – Module 5. WIPO.

in the fine arts, there was a genre hierarchy determined by the degree of creative imagination necessary, with historical fine art paintings ranked above still life. In one fine art definition, it is characterized as visual art that was developed largely for intellectual and aesthetic reasons and is valued for its beauty and substance, such as sculpture, drawing, painting, graphics, and architecture. Fine art includes drawings, paintings, sculptures, printmaking[21]. Graphic works, such as paintings, drawings, engravings are under visual arts.

For the purpose of this study, the first question to be answered is whether the protection of moral rights is important in the creation of a digital artwork. The answer is clearly yes, since the NFT is intended to guarantee originality and thus originate from the author. The existence of moral rights is therefore essential here, but not because it is important for copyright. From the point of view of the NFT, it is important because of the declaration of ownership and authenticity, its visibility and its realization in material goods. By comparison, in the case of copyright law, moral rights are the moral, ethical recognition of the author, a more exalted recognition, separate from material goods. Thus, these objectives serve different needs.

NFT cannot be referred to digital rights, as the key function of a NFT is a certification, that the digital piece of art is original. So, as it shows its ownership issues, NFTs are mainly used to confirm the property right to physical assets or mainly digital goods, digital artworks. Therefore, which is vital for copyright issues, "an artist can sell an NFT representing a work, the artist is not proscribed from retaining the copyright to the work and creating more NFTs." (Vjayakumaran, 2021) This is simply because of the dichotomy between ownership and copyright in most cases of works of visual art. In plain language, just because someone have a Birkin-bag in the metaverse,[22] it doesn't mean she can wear it to the evening theatre performance.

In the context of NFTs, we are witnessing the centuries of tension between copyright (authorship) and property (ownership) law, which issue leads us to moral right once again. In this context, two issues might be observed. On the one hand, the question to be examined is what is important to the person who owns an NFT work of art if he or she is the owner and not the author. The right of attribution (and therefore the right to paternity) it vital for the NFT owner, since the nature and objective of NFT. On the other hand, all three moral rights are significant for the person, who created the digital artwork. Paternity and attribution rights are indeed preserved by the NFT in theory, which is undoubtedly important for the author. The right to publication becomes redundant, since it is obvious that the author can publish the work in this way. However, the right of withdrawal, as in the case of social

21 Anthony, J. (2023, February). Fine Art Definition – A Brief Introduction to the Fine Arts. Artfile Magazine https://clck.ru/38VZNs

22 Barber, J. (2022, February 17). Hermès' MetaBirkin NFT dispute and the future of metaverse IP. WIPR Bulletin. https://clck.ru/38VZPQ

media, is problematic, practically impossible. Although the right to integrity is important to the owner of the work, however he or she does not aim to alter or distort the work. If a simple collector, art enthusiast, acquires an original Banksy, he or she probably does not intend to modify it or to repaint it. At first glance, it may seem enticing to the author that the NFT makes the work unalterable, i.e. no one can diminish its integrity. And if someone (from the copyright viewpoint, a user) intend to exercise the own creativity by adapting or altering the works of others, the NFT will not stop them, since it only preserves the immutability (integrity) of a given copy. Even though an original, physical version of a digital work of art provided as an NFT, can also be existing, and anyone can create a remixed, modified version of the original work, thereby violating its integrity. Furthermore, it must be seen that NFT does not protect and condense moral rights in general, but only in the case of visual works, and exclusively for the specific copy, especially for attribution right.

Conclusions

The study overviewed the dogmatic basis of authors moral rights, their international protection and development, and the place in the digital age. The backbone of the study dealt with the question of whether moral rights behave in the same way in the digital space as they do in classical copyright relations. The simple answer to this question is that they do not behave in the same way. The purpose and rationale for the creation of moral rights were completely different from the environment in which they are now to be applied. The greatest challenge for copyright is to keep pace with technological developments, but this is particularly difficult in the case of moral rights. The protection of moral rights is characterised by a duality: there is a lower harmonised protection at international and EU level, as different countries treat moral rights differently. This means that, in addition to the minimum international protection, the national legislation shall protect moral rights in the national copyright law. In most European states moral rights are strongly protected by legislation. However, it shall be recognized that effective protection is difficult to enforce in practice, as it is much more difficult to quantify the amount of damage of moral rights in case of infringement, as opposed to the easier quantification of economic rights.

Technical progress cannot and should not be stopped. The dogmatics of moral rights are given, in some respects set in a stone. It could be said that two different points on completely different trajectories should be approaching, which seems almost impossible. Neither point can realistically be expected to change. In fact, the key lies in ensuring that people who use technological achievements and digital tools in this environment do not forget about the creative human and respect their creations.

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Моральные права автора в цифровой среде

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Ключевые слова

авторское право,
искусственный интеллект,
моральные права автора,
невзаимозаменяемые токены (NFT),
охрана (защита) авторских прав,
право,
право интеллектуальной собственности,
социальные сети,
цифровая среда,
цифровые технологии

Аннотация

Цель: ответить на вопрос, соответствуют ли моральные права автора в цифровой среде своему первоначальному предназначению, и определить влияние развития платформ социальных сетей, технологий искусственного интеллекта и невзаимозаменяемых токенов (NFT) на трансформацию в современных условиях роли и особенностей защиты моральных прав автора.

Методы: в основу исследования положены историко-правовой, сравнительно-правовой и формально-догматический методы. Правовые институты и юридическая практика по вопросу защиты моральных прав автора подвергаются критическому анализу.

Результаты: в исторической ретроспективе исследуется генезис и нормативное закрепление моральных прав автора. Отмечается, что в настоящее время защита этих прав получила недостаточную правовую регламентацию на международном уровне, тогда как национальное авторское право, например, континентальных европейских государств, предоставляет моральным правам авторов достаточно сильную защиту, эффективность которой, однако, ослабевает в цифровую эпоху. Анализируется изменение ландшафта авторско-правовых отношений, обусловленное технологическим прогрессом: в рамках социальных сетей, при генерации произведений искусственным интеллектом, а также при создании цифровых произведений искусства. Обосновывается тезис о нежелательности моральных прав автора в контексте социальных платформ. Решаются вопросы авторства произведений, созданных искусственным интеллектом, нарушения прав на авторство и целостность в случае полного или частичного заимствования произведения для генерации искусственным интеллектом нового произведения. Определяется роль технологий NFT в решении проблемы сохранения моральных прав автора.

Научная новизна: настоящая работа восполняет пробел в исследованиях взаимосвязи авторского права и технологического развития. В ней выявляются и оцениваются новации предназначения и содержания моральных прав автора, обусловленные процессами цифровизации, а также предпринимаются попытки решения проблемы соответствия авторского права технологическому прогрессу.

Практическая значимость: полученные результаты исследования могут служить концептуальной основой дальнейшего развития и совершенствования национального законодательства и международного правового регулирования в области защиты авторских прав, трансформации целей, роли и места моральных прав автора в цифровой среде.

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