

Authors' Moral Rights after Death

The Monistic Model of German Law, Austrian Law and the Revised Berne Convention

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Contents

| | |
|---|----|
| 1. Introduction..... | 2 |
| 2. The Current Legal Situation | 4 |
| 3. The Alienability of Strictly Personal Rights as a Preliminary Question | 5 |
| 4. Possible Viewpoints..... | 7 |
| 5. Exercising Moral Rights of the Deceased Author..... | 10 |
| 6. Article 6 ^{bis} of the Revised Berne Convention..... | 16 |
| 7. Interim Results | 19 |
| 8. Possible Obstacles to the Trust Model..... | 20 |
| 9. Term of Protection..... | 23 |
| 10. Other Jurisdictions | 27 |
| 11. Summary..... | 31 |
| 12. Bibliography | 32 |



1. Introduction

a) Moral Rights

The protection of an author's moral rights is recognized during his or her lifetime. An author has at least the right to claim the authorship of her work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to her work, which would prejudice her honor or reputation. If a sculptor ("sculptor A"), for example, creates a sculpture and then a rival falsely contests the authorship of that sculpture, A can go to court and demand that she is acknowledged as the creator of the sculpture and that her rival withdraw and refrain from such allegations. If the mayor of a city wants to remove the head and hands of another of A's sculptures because it obstructs the mayor's view of the Town Hall Square, A could also prevent this modification. Simply put, moral rights protect an author's intellectual, non-pecuniary,¹ interests and her relationship to and association with her works.²

An author's moral rights (i.e. their personality rights with respect to an individual work) are also protected *post mortem auctoris* (after the death of the author), apart from any protection under copyright law. The challenge here is that the author whose interests and intentions are to be safeguarded is already dead. This inevitably puts third parties on the scene, who may have their own ideas of which actions or behaviour are within the scope of what is allowed and what violates the moral rights of the deceased author. What powers do (or ought) these third parties have after an author's death? Copyright law governs – if at all – the inheritability of copyright and

¹ The Copyright Act distinguishes between moral rights (sections 12 to 14 German Copyright Act, sections 19 to 21 Austrian Copyright Act) and exploitation rights (sections 15 *et seq.* German Copyright Act, sections 14 *et seq.* Austrian Copyright Act). The former serve to protect non-pecuniary, intellectual interests, the latter financial and commercial interests. However, the protection of non-pecuniary moral rights often has a financial component, too. For example, the right to recognition of authorship may be linked to an advertising effect that leads to follow-up orders, see Winfried Bullinger, 'Vor §§ 12 ff', in Arthur-Axel Wandtke & Winfried Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (München: C.H. Beck, 4th edn. 2014) para 3.

² Haimo Schack, *Urheber- und Urhebervertragsrecht* (Tübingen: Mohr Siebeck, 8th edn. 2017) paras 43, 353; Horst-Peter Götting, '§ 15. Das Urheberpersönlichkeitsrecht', in Horst-Peter Götting & Christian Schertz & Walter Seitz (eds.), *Handbuch des Persönlichkeitsrechts* (München: C.H. Beck, 2nd edn. 2019) para 3; Adolf Dietz & Alexander Peukert, 'Vor §§ 12 ff', in Ulrich Loewenheim & Matthias Leistner & Ansgar Ohly (eds.), *Urheberrecht* (München: C.H. Beck, 5th edn. 2017) para 3; see also section 11 sentence 1 of the German Copyright Act. Michael Walter, *Österreichisches Urheberrecht* (Wien: Medien und Recht, 2008) paras 886 *et seq.*; Johann Guggenbichler, 'Vorbem zu §§ 19-21 UrhG', in Meinhard Ciresa (ed.), *Österreichisches Urheberrecht* (Wien: Orac, looseleaf, version 16, 2013) para 1; Andrea Toms, 'Section 19', in Guido Kucsko & Christian Handig (eds.), *urheber.recht* (Wien: Manz, 2nd edn. 2017) para 5.

moral rights, but leaves many questions unanswered, including: Are the heirs or other legal successors of the deceased author free in all their decisions on the exercise of moral rights, or do they have to consider the interests and intentions of the deceased author if she left no clear instructions on how to proceed? How long should the law grant protection to moral rights of deceased authors and to what extent?

b) Legal Systems Treated in the Article

This article answers these questions and considers possible legal arguments by drawing on three perspectives: private law, personality rights, and copyright. Based on a detailed analysis of case law and relevant – and similar – statutes of German and Austrian (copyright) law as well as the Revised Berne Convention, it concludes that a good argument can be made that the author's legal successors are bound by the interests and intentions of the deceased author in the exercise or disposition of the moral rights. A lack of orders from an author with respect to her moral rights does not mean that she has surrendered her interests or given free rein to her successors. Rather, the author's interests and intentions are “frozen” once she dies. Thus, the legal successors are mere interest-based trustees. The special, strictly personal nature of moral rights is of crucial importance: moral rights protect the author's relationship to and association with the works she created. Heirs or successors are neither authors, nor do they have any relationship with the deceased author's work. With regard to the term of protection, the monistic model of copyright requires, as the Berne Convention suggests, that moral rights, too, be granted protection until the term of protection for copyright ends.

It should be noted that these questions follow from the monistic model of copyright law. According to this model, moral rights are intertwined with the property-related aspects of copyright, so that they cannot be separated.³ Therefore, the commercial exploitation rights and non-material personality rights of the author form an inseparable unit.⁴ When the author dies, both the commercial and the intellectual

³ BGH (Bundesgerichtshof [German Supreme Court]) 29 April 2014, VI ZR 246/12, GRUR (Gewerblicher Rechtsschutz und Urheberrecht) 2014, p. 702.

⁴ OGH (Oberster Gerichtshof [Austrian Supreme Court]) 16 July 2002, 4 Ob 164/02z, SZ (Entscheidungen des Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen) 2002/96: “Copyright includes moral rights and exploitation rights”; Walter, *Österreichisches Urheberrecht* (2008) para 514; Götting, ‘§ 15. Das Urheberpersönlichkeitsrecht’, in Horst-Peter Götting & Christian Schertz & Walter Seitz (eds.), *Handbuch des Persönlichkeitsrechts* (2nd edn. 2019) para 1; *contra* Guggenbichler, ‘Vorbem zu §§ 19-21 UrhG’, in Ciresa (ed.), *Österreichisches Urheberrecht* (version 16, 2013) para 4. Decisions of the Austrian Supreme Court can be accessed via www.ris.bka.gv.at/Jus/. For this purpose, the checkbox “Entscheidungstexte” has to be selected and the case number entered in the field “Geschäftszahl” without “OGH”.

(non-proprietary) interests are transferred to the author's legal successor.⁵ In general, the arguments made in this article apply to a multitude of jurisdictions that implemented the monistic model of copyright. In contrast, the dualistic model provides for a separation between exploitation rights and personality rights.⁶ In dualistic France, for example, one speaks of a transformation of the moral rights *post mortem auctoris*, according to which the moral rights of the author transform into an obligation of the legal successors to protect the interests and intentions of the deceased.⁷ Thus, moral rights and commercial exploitation rights co-exist and are not necessarily intertwined so that they may be assigned to different persons.

2. The Current Legal Situation

a) Germany

The current German Copyright Act dates back to 1965.⁸ In the current version, sections 12 to 14 of the Copyright Act contain provisions on moral rights. Section 12 regulates the author's right of publication, section 13 contains the author's right to be identified as the author of the work (recognition of authorship) and section 14 stipulates that the author has the right to prohibit the distortion or any other derogatory treatment of her work which is capable of prejudicing her legitimate intellectual or personal interests in the work. Copyright and thus also moral rights are inalienable *inter vivos* in Germany pursuant to section 29(1) Copyright Act, but are inheritable according to section 28(1). Pursuant to section 30, the author's successor in title holds the rights to which the author was entitled under the Copyright Act, unless otherwise provided for. Thus, the successor in title can assert the protection of moral rights with regard to the deceased author.⁹

⁵ Sections 28, 30 German Copyright Act; section 23(1) and sections 14 *et seq.* Austrian Copyright Act.

⁶ Manfred Rehbinder & Alexander Peukert, *Urheberrecht* (München: C.H. Beck, 18th edn. 2018) para 152.

⁷ See *infra* a) - The French View. The German and Austrian Copyright Act does not provide for eternal moral rights, as in France. See Gunda Dreyer, 'Vor §§ 12 ff', in Gunda Dreyer & Jost Kotthoff & Astrid Meckel & Christian-Henner Hentsch (eds.), *Urheberrecht* (Heidelberg: C.F. Müller, 4th edn. 2018) para 39; Walter, *Österreichisches Urheberrecht* (2008) paras 498 *et seq.*

⁸ Copyright Act of 9 September 1965 (Federal O.J. I p. 1273). However, parts of the antecedent Copyright Act are still in force, containing provisions on the right to one's own image (sections 22 to 24 and 33 KunstUrhG).

⁹ BGH 26 Nov. 1954, I ZR 266/52, GRUR 1955, p. 201; 16 May 2013, I ZR 28/12, GRUR 2014, p. 65; Bullinger, 'Vor §§ 12 ff', in Wandtke & Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (4th edn. 2014) para 11; Ansgar Ohly, 'Section 28', in Ulrich Loewenheim & Matthias Leistner & Ansgar Ohly (eds.), *Urheberrecht* (München: C.H. Beck, 5th edn. 2017) para 6.

b) Austria

The current Austrian Copyright Act dates back to 1936.¹⁰ The protection of moral rights is regulated in sec. 19 *et seq.* of the Copyright Act. According to section 19(1), the author has the right to claim and protect her authorship. Likewise, the author may prevent cuts, additions or other changes to the work, its title or authorship description, to which the author has not consented, unless the changes are allowed by law itself. Copyright is inalienable *inter vivos* pursuant to section 23(3), but inheritable according to section 23(1). Similar to Germany, the heirs are successor in title of the author, which is why they can assert the author's moral rights after death.¹¹ The second sentence of section 19(1) expressly mentions that after the author's death, the right to safeguard the authorship of the creator of the work shall, in such cases, be held by the persons upon whom the copyright devolves.

3. The Alienability of Strictly Personal Rights as a Preliminary Question

Article 1(1) and Article 2(1) of the German Basic Law¹² guarantee the inviolability of the dignity of man and the right of everyone to the free development of their personality. These considerations form the basis for the assumption of a general right of personality.¹³ In combination with specifically regulated personality rights (e.g. sec. 12 BGB,¹⁴ sec. 22 *et. seq.* KunstUrhG), the right of personality comprehensively protects humans as members of society. For Austria, section 16 sentence 1 of the ABGB¹⁵ serves a similar purpose. It provides that every human being has inherent rights, evident from common sense, and therefore must be considered as a person.

¹⁰ Federal O.J. 1936/111.

¹¹ Explanatory notes by the legislator on the draft of sections 23, 24 Copyright Act, reprinted in Wilhelm Peter, *Das Österreichische Urheberrecht* (Wien: Manz, 1954) p. 530; OGH 24 Feb. 2009, 4 Ob 242/08d, NZ (Österreichische Notariatszeitung) 2009/93 ("The heir, as the author's successor in title, assumes the full legal status of the testator, in particular including its personality rights"); Walter, *Österreichisches Urheberrecht* (2008) paras 465, 504; Toms, 'Section 19', in Kucsko & Handig (eds.), *urheber.recht* (2nd edn. 2017) para 12.

¹² Grundgesetz für die Bundesrepublik Deutschland (German Constitution), 23 May 1949 (Federal O.J. p. 1).

¹³ BGH 25 May 1954, I ZR 211/53 GRUR 1955, p. 197; 14 Feb 1958, I ZR 151/56, GRUR 1958, p. 408; Johannes Hager, 'Section 823', in Julius von Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch - § 823 A-D* (Berlin: Sellier - de Gruyter, revised edition 2017) para C 2 *et. seq.*; Roland Rixecker, 'Anhang zu § 12', in Franz Jürgen Säcker & Roland Rixecker & Hartmut Oetker & Bettina Limpert (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 1* (München: C.H. Beck, 7th edn. 2015) paras 2 *et seq.*

¹⁴ Bürgerliches Gesetzbuch - German Civil Code.

¹⁵ Allgemeines Bürgerliches Gesetzbuch - Austrian Civil Code.

This provision is considered a pivotal statutory provision of the Austrian legal system.¹⁶

From a civil law perspective, moral rights are specific personality rights of an author. The difference between an author's personality rights – in short, moral rights – and general personality rights is that the former protect the specific interests of an author and not, like the latter, general interests that affect everyone. Personality rights serve the protection of one's dignity and individual personality.¹⁷ Every human being is entitled to these rights from birth without any reservation.¹⁸ Since personality rights serve the protection and the development of each individual, they are strictly personal – that is, inalienable, non-transferable and non-inheritable.¹⁹ Thus, the transfer of strictly personal rights of personality in the sense that person B takes the place of person A would be nonsensical because personal rights only serve the protection of person A.²⁰ Moral rights, too, have these characteristics.

The inalienability and thus the non-inheritable²¹ nature of personality rights is in direct contradiction to the heritability of moral rights pursuant to the German and Austrian Copyright Act.²² Therefore, the special object-related²³ moral rights of the author enjoy a special status in relation to the subject-related²⁴ general personality

¹⁶ OGH 27 Feb. 1990, 10 Obs 40/90, SZ 63/32.

¹⁷ Franz-Stefan Meissel, 'Section 16 ABGB', in Attila Fenyves & Ferdinand Kerschner & Andreas Vonkilch (eds.), *Großkommentar zum ABGB – §§ 1 bis 43* (Wien: Verlag Österreich, 3rd edn. 2014) para 49.

¹⁸ Section 16 sentence 1 ABGB.

¹⁹ BGH 20 Mar. 1968, I ZR 44/66, GRUR 1968, p. 552; Bernd Kannowski, 'Vor § 1', in Julius von Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch – Einleitung; §§ 1-14* (Berlin: Sellier – de Gruyter, revised edition 2018) para 29; Hager, 'Section 823', in Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch – § 823 A-D* (revised edition 2017) para C 50b. Section 1393 sentence 2 ABGB; OGH 11 Sept. 2003, 6 Ob 106/03m, SZ 2003/105.

²⁰ See OGH 11 Sept. 2003, 6 Ob 106/03m, SZ 2003/105: "The lack of transferability is also a characteristic trait of a person's personality rights, which serve the immediate protection of the person [...] All these rights are only due to the entitled person".

²¹ Lena Kunz, 'Section 1922', in Julius von Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch – §§ 1922-1966* (Berlin: Sellier – de Gruyter, revised edition 2017) para 300; Rudolf Welser, 'Section 531' in Peter Rummel & Meinhard Lukas (eds.), *Kommentar zum ABGB – §§ 531-824* (Wien: Manz, 4th edn. 2014) para 7.

²² Germany: section 28(1) Copyright Act; Austria: section 23(1) Copyright Act.

²³ Götting, '§ 15. Das Urheberpersönlichkeitsrecht', in Horst-Peter Götting & Christian Schertz & Walter Seitz (eds.), *Handbuch des Persönlichkeitsrechts* (2nd edn. 2019) para 8.

²⁴ Götting, '§ 15. Das Urheberpersönlichkeitsrecht', in Horst-Peter Götting & Christian Schertz & Walter Seitz (eds.), *Handbuch des Persönlichkeitsrechts* (2nd edn. 2019) para 8.

right, which is due to every human being.²⁵ Dealing with these aspects, the German Bundesgerichtshof points to the monistic model of copyright: “This unequal treatment has its material reason [in the fact] that the moral rights are so intertwined with the proprietary and pecuniary elements of copyright that they cannot be separated.”²⁶ According to the monistic model of copyright, exploitation rights and personality rights of the author form an inseparable unity.²⁷

When the author dies, the heirs take the legal position of the author according to the principle of universal succession²⁸ and can exercise the same rights the author held during her lifetime.²⁹ As a consequence of the monistic model of copyright, it is true for inheritance law that every successor in title³⁰ of the author assumes her copyright and moral rights. While proprietary and pecuniary elements of copyright (the commercial copyright) allow an uncomplicated change of owner, moral rights do not. Personality rights (and moral rights) are tailored to a single person. Moral rights protect the relationship of the author to her work. Nevertheless, the heirs also assume the position that the author held before death with regard to moral rights. The remainder of this article deals with how best to resolve this contradiction.

4. Possible Viewpoints

Despite the strictly personal nature of personality and moral rights, the author's heirs or other legal successors can exercise rights that once belonged to another person. For commercially exploitable copyright, there is no problem at all – heirs or successors assert their own financial interests. This is not quite as clear when it comes to moral rights. Is it their “own” rights or still the rights and interests of the deceased author they are exercising? Since the heirs and successors in title assume the author's position, it could be argued that they are exercising “their” rights. And yet, personality rights are tailored to one person and moral rights only protect the author's

²⁵ Ohly, ‘Section 28’, in Loewenheim & Leistner & Ohly (eds.), *Urheberrecht* (5th edn. 2017) para 2.

²⁶ BGH 29 April 2014, VI ZR 246/12, GRUR 2014, p. 702.

²⁷ OGH 16 July 2002, 4 Ob 164/02z, SZ 2002/96: “Copyright includes moral rights and exploitation rights”; see Walter, *Österreichisches Urheberrecht* (2008) para 514; Götting, ‘§ 15. Das Urheberpersönlichkeitsrecht’, in Horst-Peter Götting & Christian Schertz & Walter Seitz (eds.), *Handbuch des Persönlichkeitsrechts* (2nd edn. 2019) para 1; *contra* Guggenbichler, ‘Vorbem zu §§ 19-21 UrhG’, in Ciresa (ed.), *Österreichisches Urheberrecht* (version 16, 2013) para 4.

²⁸ Germany: Section 1922(1) BGB; Austria: Section 547 ABGB.

²⁹ OGH 24 Feb. 2009, 4 Ob 242/08d, NZ 2009/93. See section 30 German Copyright Act: “The author's successor in title holds the rights to which the author is entitled according to this Act, unless otherwise provided for”.

³⁰ *E.g.* a legatee (section 2174 BGB, section 649(1) ABGB).

relationship with her work. This leads to two possible viewpoints: 1. The legal successors may exercise moral rights without being bound by any previous interests and intentions of the deceased author (the “succession model”);³¹ or 2. the successors in title are mere administrators or trustees of the deceased author’s interests and intentions and are still bound by her interests and ideas (the “trust model”).³²

³¹ For German law: Bullinger, ‘Vor §§ 12 ff’, in Wandtke & Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (4th edn. 2014) para 12 and section 30 para 13; Winfried Bullinger, *Kunstwerkfälschung und Urheberpersönlichkeitsrecht* (Berlin: Schmidt, 1997) pp. 198 *et seq.*; Adolf Dietz, ‘Das Urheberpersönlichkeitsrecht vor dem Hintergrund der Harmonisierungspläne der EG-Kommission’ (1993) *ZUM (Zeitschrift für Urheber- und Medienrecht)* 309 p. 317; Dreyer, ‘Vor §§ 12 ff’, in Dreyer & Kothhoff & Meckel & Hentsch (eds.), *Urheberrecht* (4th edn. 2018) para 34; Friedrich Karl Fromm, ‘Die neue Erbrechtsregelung im Urheberrecht’ (1966) *NJW (Neue Juristische Wochenschrift)* 1244 p. 1245; Stefan Gloser, *Die Rechtsnachfolge in das Urheberrecht* (Köln: Heymann, 2012) pp. 124 *et seq.*; Götting, ‘§ 15. Das Urheberpersönlichkeitsrecht’, in Horst-Peter Götting & Christian Schertz & Walter Seitz (eds.), *Handbuch des Persönlichkeitsrechts* (2nd edn. 2019) para 11; Eike Grunert ‘Urhebererben und Regietheater’, in Winfried Bullinger & Eike Grunert & Claudia Ohst & Kirsten-Inger Wöhrn (eds.), *Festschrift für Artur-Axel Wandtke* (Berlin: De Gruyter, 2013) 45 p. 51; *Id.*, *Werkschutz contra Inszenierungskunst - Der urheberrechtliche Gestaltungsspielraum der Bühnenregie* (München: C.H. Beck, 2002) pp. 120 *et seq.*; Helmut Haberstumpf, *Handbuch des Urheberrechts* (Neuwied: Luchterhand, 2nd edn. 2000) para 381; Heinrich Lange & Kurt Kuchinke, *Erbrecht* (München: C.H. Beck, 5th edn. 2001) p. 109 footnote 173; Jan Bernd Nordemann, ‘Section 30’, in Axel Nordemann & Jan Bernd Nordemann (eds.), *Urheberrecht* (Stuttgart: Kohlhammer, 12th edn. 2018) para 10; Axel Nordemann, ‘Section 23’, in Ulrich Loewenheim (ed.), *Handbuch des Urheberrechts* (München: C.H. Beck, 2nd edn. 2010) para 22; Ansgar Ohly, ‘Section 30’, in Ulrich Loewenheim & Matthias Leistner & Ansgar Ohly (eds.), *Urheberrecht* (München: C.H. Beck, 5th edn. 2017) para 7; Schulze, ‘Vorbemerkung zu §§ 12 ff’, in Dreier & Schulze (eds.), *Urheberrechtsgesetz* (6th edn. 2018) para 11 and section 30 para 4; Spautz & Götting, ‘Section 28’, in Ahlberg & Götting (eds.), *Urheberrecht* (4th edn. 2018) para 2 and section 30 para 1. For Austrian law: Winfried Kralik, *Das Erbrecht* (Wien: Manz, 3rd edn. 1983) p.13; Clemens Thiele & Clemens Waß, ‘Urheberrecht post mortem - Rechtsnachfolge bei Werkschöpfen’, (2002) *NZ* 97, p. 99; Clemens Thiele, ‘Urheberrecht und Erben’, in René J. Bogendorfer & Meinhard Ciresa (eds.), *Urheberrecht* (Wien: Linde, 2009) 51 p. 66; Thomas Wallentin, ‘§ 16: Gewerblicher Rechtsschutz, Urheberrecht und Erbrecht’, in Michael Gruber & Susanne Kalss & Katharina Müller & Martin Schauer (eds.), *Erbrecht und Vermögensnachfolge* (Wien: Verlag Österreich, 2nd edn 2018) para 55. Walter, *Österreichisches Urheberrecht* (2008) para 504 states that the heirs, because of their position as universal successor, may exercise moral rights and other rights that once belonged to the author.

³² For German law: Torben Asmus, *Die Harmonisierung des Urheberpersönlichkeitsrechts in Europa* (Baden-Baden: Nomos, 2004) pp. 197 *et seq.*; Christoph Clément, *Urheberrecht und Erbrecht* (Baden-Baden: Nomos, 1993) pp. 64 *et seq.*; Adolf Dietz & Alexander Peukert, ‘Section 15’, in Ulrich Loewenheim (ed.), *Handbuch des Urheberrechts* (München: C.H. Beck, 2nd edn. 2010) para 16; Dietz & Peukert, ‘Vor §§ 12 ff’, in Loewenheim & Leistner & Ohly (eds.), *Urheberrecht* (5th edn. 2017) para 22 and section 42 para 9; Otto-Friedrich Frhr. von Gamm, *Urheberrechtsgesetz* (München: C.H. Beck, 1968) section 11 para 7 and section 30 para 4; Alexander Jänecke, *Das urheberrechtliche Zerstörungsverbot gegenüber dem Sacheigentümer* (Frankfurt am Main: Lang, 2003) pp. 179 *et seq.*; Hermann Kroitzsch & Horst-Peter Götting, ‘Section 14’, in Hartwig Ahlberg & Horst-Peter Götting (eds.), *Urheberrecht* (München: C.H. Beck, 4th edn. 2018) paras 21, 28; Gerda Krüger-Nieland, ‘Das Urheberpersönlichkeitsrecht, eine besondere Erscheinungsform des

A review of the literature does not reveal a prevailing opinion³³ and a decision on this issue by the Bundesgerichtshof³⁴ is open to diverging interpretations.³⁵ At first glance, the “trust model” is challenged by the fact that the author’s moral rights pass to one or more heirs upon her death. This is also the view taken by legal scholars who argue that the author’s successors are not bound by the deceased interests and intentions, wholly assume the author’s legal status and thus can exercise their newly gained moral rights without any restrictions. Under this view, the author has had the opportunity during her lifetime to bind her successors to her interests and intentions by imposing restrictions³⁶ on them or appointing an executor³⁷. In the absence of such dispositions, the legal successors are not bound.³⁸

Those who argue in favour of the “trust model” invoke the nature of personality rights and the protective purpose of *post-mortem* protection: personality rights are always tailored to one person, even the death of the author and the transfer of moral rights to the legal successors does not change that. Moreover, the general *post-mortem* protection of personality rights also gives rise to a fiduciary relationship, according to

allgemeinen Persönlichkeitsrechts?’ in Ernst von Caemmerer & Robert Fischer & Karl Nüßgens & Reimer Schmidt (eds.), *Festschrift für Fritz Hauß* (Karlsruhe: VVW, 1978) 215 p. 220; Hannes Ludyga, ‘Entschädigung in Geld und postmortale Verletzung des Urheberpersönlichkeitsrechts’ (2014) ZUM 374 p.376; Manfred Rehbinder, ‘Die Familie im Urheberrecht’ (1986) ZUM 365 p. 370; Rehbinder & Peukert, *Urheberrecht* (18th edn. 2018) para 989; Hauke Sattler, *Das Urheberrecht nach dem Tode des Urhebers in Deutschland und Frankreich* (Göttingen: V&R unipress, 2010) pp. 58 *et seq.*; Haimo Schack, ‘Das Persönlichkeitsrecht der Urheber und ausübenden Künstler nach dem Tode’ (1985) GRUR 352, pp. 356 *et seq.*; *Id.*, *Urheber- und Urhebervertragsrecht* (8th edn. 2017) para 651; Theresia Schilcher, *Der Schutz des Urhebers gegen Werkänderungen* (München: VVF, 1989) pp. 43 *et seq.*; Eugen Ulmer, *Urheber- und Verlagsrecht* (Berlin & Heidelberg & New York: Springer, 3rd edn. 1980) pp. 357 *et seq.*; Christoph Wallner, *Der Schutz von Urheberwerken gegen Entstellungen unter besonderer Berücksichtigung der Verfilmung* (Frankfurt am Main: Peter Lang, 1995) p. 58; Marcus von Welser, *Die Wahrnehmung urheberpersönlichkeitsrechtlicher Befugnisse durch Dritte* (Berlin: Spitz, 2000) pp. 148 *et seq.* For Austrian law: Mirko Handler, *Der Schutz von Persönlichkeitsrechten* (Wien: Verlag Österreich, 2008) p. 368.

³³ Sometimes, the “succession model” is quoted as being the prevailing opinion, e.g. Bullinger, ‘Vor §§ 12 ff’, in Wandtke & Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (4th edn. 2014) para 12.

³⁴ BGH 13 Oct. 1988, I ZR 15/87, GRUR 1989, p. 106.

³⁵ According to Dietz & Peukert, ‘Vor §§ 12 ff’, in Loewenheim & Leistner & Ohly (eds.), *Urheberrecht* (5th edn. 2017) para 22; Clément, *Urheberrecht und Erbrecht* p. 62 the decision favors the “trust model”; according to J.B. Nordemann, ‘Section 30’, in Nordemann & Nordemann (eds.), *Urheberrecht* (12th edn. 2018) para 10, the decision favors the “succession model”.

³⁶ Section 1940 and sections 2192 *et seq.* BGB; section 695 and sections 709 *et seq.* ABGB.

³⁷ Sections 2197 *et seq.* BGB and section 28(2) German Copyright Act; section 816 *et seq.* ABGB.

³⁸ Thiele & Waß, ‘Urheberrecht post mortem - Rechtsnachfolge bei Werkschöpfern’, (2002) NZ 97, p. 99.

which the interests and intentions of the deceased, and not those of the successors in title who protect them, are considered.

5. Exercising Moral Rights of the Deceased Author

a) No Mandatory Formal Requirements for the Author

Dispositions regarding property or other assets are subject to the mandatory formal requirements for wills or testamentary dispositions.³⁹ For instance, if the author has repeatedly announced that only his daughter, but not his wife, should inherit the copyright (which has proprietary character), he must draw up a will in order to prevent intestate succession from happening. However, dispositions which are not of a proprietary nature do not require adherence to specific formal requirements.⁴⁰ Therefore, in the case of moral rights, the author can express and lay down his interests and intentions in any form available and is not bound by formal requirements.⁴¹ The author is not obliged to draw up a will in order to protect his interests and intentions, but a will that fulfills the requirements set by inheritance law or the appointment of an executor is highly recommended in order to prevent or at least minimise conflicts.

Since dispositions concerning moral rights may also have proprietary implications,⁴² it may still be necessary to comply with formal requirements set by inheritance law.

³⁹ Dieter Leipold, 'Einleitung zu §§ 1922 ff', in Franz Jürgen Säcker & Roland Rixecker & Hartmut Oetker & Bettina Limperg (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 10 (München: C.H. Beck, 7th edn. 2017) para 1; Rudolf Welser & Brigitta Zöchling-Jud, *Grundriss des bürgerlichen Rechts vol. II* (Wien: Manz, 14th edn. 2015) paras 1836, 1842.

⁴⁰ Leipold, 'Einleitung zu §§ 1922 ff', in Säcker & Rixecker & Oetker & Limperg (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 10 (7th edn. 2017) para 3; Martin Schauer, '§ 16: Verlassenschaft und vererbliche Rechtsverhältnisse', in Michael Gruber & Susanne Kalss & Katharina Müller & Martin Schauer (eds.), *Erbrecht und Vermögensnachfolge* (Wien: Verlag Österreich, 2nd edn 2018) para 3.

⁴¹ BGH 26 Nov. 1954, I ZR 266/52, GRUR 1955, p. 201; Leipold, 'Section 1922', in Säcker & Rixecker & Oetker & Limperg (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 10 (7th edn. 2017) para 123; Heinrich Hubmann, *Das Persönlichkeitsrecht* (Köln & Graz: Böhlau, 2nd edn. 1967) pp. 347 *et seq.* with further references; Joachim Pierer, *Postmortaler Schutz von Persönlichkeitsrechten* (Wien: Verlag Österreich, 2018) p. 120; Constanze Fischer-Czermak & Joachim Pierer, 'Sections 552, 553 ABGB', in Attila Fenyves & Ferdinand Kerschner & Andreas Vonkilch (eds.), *Großkommentar zum ABGB - §§ 552 bis 646* (Wien: Verlag Österreich, 3rd edn. 2017) para 24. *Contra* Schack, 'Das Persönlichkeitsrecht der Urheber und ausübenden Künstler nach dem Tode' (1985) GRUR 352, p. 358; *Id.*, *Urheber- und Urhebervertragsrecht* (8th edn. 2017) para 653.

⁴² *Supra* footnote 1; Schack, 'Das Persönlichkeitsrecht der Urheber und ausübenden Künstler nach dem Tode' (1985) GRUR 352, p. 358; Reh binder & Peukert, *Urheberrecht* (18th edn. 2018) para 993.

Before discussing the particular nature of personality rights, the section that follows examines whether any conclusions can be drawn from the lack of explicit orders by an author.

b) Lack of Explicit Orders by the Author

Scholars advocating for the “succession model” often argue that the author has had the opportunity during her lifetime to bind her successors to her interests and intentions by imposing restrictions on them or appointing an executor. What then is the explanatory value of the author’s silence?

Silence generally has no explanatory value.⁴³ From the mere silence of the author, therefore, no conclusions can be drawn. Of course, it is possible to deviate from this principle if those who attach legal significance to silence prove that the author, with her silence, wanted to bring about precisely one single legal consequence.⁴⁴ However, such an endeavor will usually fail.

Therefore, it cannot be inferred from the absence of express dispositions of the author whether the successors in title are bound by the interests and intentions of the deceased or not.

c) Moral Rights Protect Only the Author

Pursuant to section 11 sentence 1 German Copyright Act, copyright protects the author’s intellectual and personal relationships with her work and the use of her work. Moral rights are designed to prevent “a work of the author from being presented to the public in a different form or with a different designation of authorship than the author’s intentions”.⁴⁵ Arguing that the author’s successors could exercise their inherited moral rights at their own discretion means that the successors are to be protected by the moral rights which used to be the deceased author’s moral rights.

⁴³ BGH 1 June 1994, XII ZR 227/92, NJW-RR (Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht) 1994, p. 1163; 11 Oct. 2017, XII ZR 8/17 NJW 2018, p. 296; Werner Flume, *Das Rechtsgeschäft* (Berlin & Heidelberg & New York: Springer, 4th edn. 1992) pp. 64 *et seq.*; Reinhard Bork, ‘Section 146’, in Julius von Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch – §§ 139-163* (Berlin: Sellier - de Gruyter, revised edition 2015) para 5; Rudolf Welser & Andreas Kletečka, *Grundriss des bürgerlichen Rechts vol. I* (Wien: Manz, 15th edn. 2018) para 335.

⁴⁴ Jan Busche, ‘Section 133’, in Franz Jürgen Säcker & Roland Rixecker & Hartmut Oetker & Bettina Limperg (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. I* (München: C.H. Beck, 7th edn. 2015) para 61.

⁴⁵ OGH 12 Oct. 1993, 4 Ob 101/93, SZ 66/122; 22 June 1999, 4 Ob 159/99g, GRUR Int (Gewerblicher Rechtsschutz und Urheberrecht International) 2000, p. 449; 11 May 2010, 4 Ob 49/10z, GRUR Int 2010, p. 1093; *see also* Schack, *Urheber- und Urhebervertragsrecht* (8th edn. 2017) para 651.

The total exchange of the protected person is nonsensical, because the legal successors are neither the author of the work, nor do they have their own strictly personal interests related to the work that would be independent from the author's interests and intentions.⁴⁶ It is the copyright that is inheritable, not the authorship itself.⁴⁷

This is especially evident in the author's right to claim authorship of the work.⁴⁸ A successor in title can only exercise this right towards naming the actual author, but he or she cannot take the deceased author's place and be named as the author instead.⁴⁹ If the successor was exercising his *own* rights, the deceased author would no longer have any influence at all, and successors could supersede the author. The Austrian legislator stated in the explanatory remarks on sections 19 to 21 Copyright Act: "The source and object of these rights is above all the work; they do not serve directly and exclusively for the protection of the personality of the author, but for the protection of his interests in the work, especially in the preservation and reproduction of the work in intact form and in preserving and emphasizing the connection of the work with its author."⁵⁰ Similar statements were made by the German legislator in 1965: "Moral rights of the author are real personality rights, as they always remain inseparably connected with the person of the author. [...] This permanent relationship to the person of the author is expressed in numerous other provisions of the draft: first and foremost, in the provision of section 29, [...] on the right of revocation because of changed conviction (section 42) [...]."⁵¹

⁴⁶ Clément, *Urheberrecht und Erbrecht* p. 55.

⁴⁷ Gernot Schulze, 'Section 28', in Thomas Dreier & Gernot Schulze (eds.), *Urheberrechtsgesetz* (München: C.H. Beck, 6th edn. 2018) para 3; Wolfgang Spautz & Horst-Peter Götting, 'Section 28', in Hartwig Ahlberg & Horst-Peter Götting (eds.), *Urheberrecht* (München: C.H. Beck, 4th edn. 2018) para 3; Wallentin, '§ 16: Gewerblicher Rechtsschutz, Urheberrecht und Erbrecht', in Gruber & Kals & Müller & Schauer (eds.), *Erbrecht und Vermögensnachfolge* (2nd edn 2018) para 46; Walter, *Österreichisches Urheberrecht* (2008) para 504.

⁴⁸ Section 13 German Copyright Act; section 19 Austrian Copyright Act.

⁴⁹ Schulze, 'Section 13', in Dreier & Schulze (eds.), *Urheberrechtsgesetz* (6th edn. 2018) para 13.

⁵⁰ Explanatory notes by the legislator on the draft of sections 19 to 21 Copyright Act, reprinted in Peter, *Das Österreichische Urheberrecht* p. 519.

⁵¹ Explanatory notes by the legislator on the draft of the German Copyright Act, BT-Drucks. IV/270, p. 44.

d) “Freezing” the Author’s Interests and Intentions

Some proponents of the “succession model” base their argument on an *argumentum e contrario* with regard to section 42(1) German Copyright Act.⁵² Pursuant to section 42(1), the author may recall a right of use to the holder if the work no longer complies with her beliefs and therefore the use of the work can no longer be expected of her. Section 42(1) continues, that the author’s successor in title may exercise the right of revocation only if he or she can prove that the author would have been entitled to exercise this right prior to her death and that she was prevented from exercising or provided for its exercise by testamentary disposition. Proponents claim that since only section 42(1) makes explicit reference to the the binding nature of deceased author’s disposition, legal successors may otherwise ignore the deceased’s interests and intentions. However, section 42(1) can be read to emphasize the relevance of the deceased author’s interests and intentions and thus reinforce the “trust model”.⁵³ According to the drafters of the Copyright Act, only the author himself and not her successors in title can change beliefs with regard to the work, because it is still the author’s work. After the death of the author, her convictions cannot change anymore.⁵⁴ In the case of the copyright and its proprietary and pecuniary elements itself, the author’s successors in title can act freely according to their own beliefs. However, if such an action affects the personal sphere of the author (e.g. the relevance of her beliefs with regard to her work) and thus her moral rights, section 42(1) provides for the relevance of the author’s interests and intentions only. At the interface between copyright (right of use) and moral rights (recall because of changed beliefs), the legal successors have no freedom of choice.

These two arguments raise the question of whether section 42(1) sentence 2 of the German Copyright Act is an expression of a general principle or merely an exception. If section 42 does indeed express a “basic idea of moral rights”,⁵⁵ it is better classified

⁵² Bullinger, ‘Vor §§ 12 ff’, in Wandtke & Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (4th edn. 2014) para 11; Schulze, ‘Vorbemerkung zu §§ 12 ff’, in Dreier & Schulze (eds.), *Urheberrechtsgesetz* (6th edn. 2018) para 8.

⁵³ Dietz & Peukert, ‘Vor §§ 12 ff’, in Loewenheim & Leistner & Ohly (eds.), *Urheberrecht* (5th edn. 2017) para 22. Hauke Sattler, too, argues that it can not be inferred from section 42(1) Copyright Act that the interests of the deceased author are “basically irrelevant”, Sattler, *Das Urheberrecht nach dem Tode des Urhebers in Deutschland und Frankreich* p. 58.

⁵⁴ Schulze, ‘Section 42’, in Dreier & Schulze (eds.), *Urheberrechtsgesetz* (6th edn. 2018) para 19; Adolf Dietz & Alexander Peukert, ‘Section 42’, in Ulrich Loewenheim & Matthias Leistner & Ansgar Ohly (eds.), *Urheberrecht* (München: C.H. Beck, 5th edn. 2017) para 9.

⁵⁵ Arthur-Axel Wandtke, ‘Section 42’, in Arthur-Axel Wandtke & Winfried Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (München: C.H. Beck, 4th edn. 2014) para 1.

as an expression of a general principle.⁵⁶ However, we do not know precisely. Its formulation might have become necessary because, in the context of the exercise of commercial copyright, successors in title might be doubtful on whose interests prevail after death. The legislator remarked with regard to section 42: “The right of revocation for changed conviction serves the personal interests of the author to a special degree. Therefore, only she can exercise this right, not her legal successors.”⁵⁷ One can argue that section 42(1) sentence 2 implies that the interests and intentions of the author are “frozen” at death and the legal successors are mere trustees or administrators. Then, they are bound by the interests and intentions of the deceased author and can only deviate from this “frozen” state if the author has authorized the legal successors to do so, or if she was prevented from doing so.⁵⁸ One has to be careful when generally applying this rule laid down in a provision regulating one specific case. However, what speaks in favor of this view is that the Copyright Act only solely relies on the deceased author’s interests when laying down a rule for the author’s postmortal interests. Moral rights, too, serve the personal interests of the author. In the end, a holistic viewpoint lends substance to the thesis of “freezing”, in particular, that moral rights protect only the author and not her legal successors.

e) The Judgment of the Bundesgerichtshof on the Oberammergau Passion Play

The Bundesgerichtshof has dealt with aspects of moral rights after the author’s death in several judgments.⁵⁹ The first judgment resulted from a vow of the villagers of the southern Bavarian village Oberammergau. When the plague raged in 1633, villagers vowed to hold Passion Plays every ten years should they be spared or freed from the plague. That is what happened. In 1930, the longtime director of these Passion Plays designed a new stage scenery, which continued to be used long after his death. However, when changes were made to the stage design, the director’s daughter, as her father’s heir, alleged that this unauthorized change would interfere with his copyright and moral rights. On the merits, the BGH decided that the action should be dismissed because the Passion Plays were tacitly granted a right to adapt or

⁵⁶ Dietz & Peukert, ‘Vor §§ 12 ff’, in Loewenheim & Leistner & Ohly (eds.), *Urheberrecht* (5th edn. 2017) para 22.

⁵⁷ Explanatory notes by the legislator on the draft of the German Copyright Act, BT-Drucks. IV/270, p. 61.

⁵⁸ See J.B. Nordemann, ‘Section 42’, in Nordemann & Nordemann (eds.), *Urheberrecht* (12th edn. 2018) para 13: “The author knows her own conviction best. It would therefore be unfortunate if the legal successor could recall a right of use due to changed conviction of the author, if the author herself would not have exercised her right to recall”.

⁵⁹ BGH 13 Oct. 1988, I ZR 15/87, GRUR 1989, p. 106; 19 Mar. 2008, I ZR 166/05, GRUR 2008, p. 984; 9 Nov. 2011, I ZR 216/10, GRUR 2012, p. 172.

transform. There was also no reference to the (original) authorship of the plaintiff's deceased father, creating no danger that the changed set design would be attributed to him.⁶⁰ Interestingly, in coming to this decision, the court stated that: "...the assessment shall be based on the personal interests of the author, which are exercised by the claimants as his legal successors after his death; whereas possible own interests of the plaintiffs - i.e. interests not connected to the deceased and not inherited - are to be disregarded".⁶¹

In two later judgments, the Bundesgerichtshof relied on the interests and intentions of the deceased author. In 2008, the Court considered the lawsuit of the daughter of a deceased architect who had designed the sanctuary (chancel) of a church which was remodeled by the defendant church. Regarding the issue of moral rights, the Court ruled that the Appellate Court rightly observed "that the interests of authors do not necessarily have the same weight years or decades after the death of the author as during his lifetime."⁶² Another case in 2011 also involved the redesign of a building. An heir to the Stuttgart main railway station's architect complained against the modification and alteration of the station as part of the "Stuttgart 21" project. Again, the Bundesgerichtshof held that the assessment was to be based on the interests of the deceased author.⁶³

Thus, the Bundesgerichtshof has clarified that the assessment shall be based on the personal interests of the author. The author's successors are able to exercise these interests only for the good of the deceased author, regardless of their own interests. This follows from the fact that the successors are not the authors of the works in question. However, it should be noted that in these cases the successors defended the work of the deceased author against interference by third parties; their interests and those of the deceased author might have been the same. The question of whether successors are bound to the interests of a deceased author would be fully clarified only in a lawsuit in which the legal successors themselves exercise the moral rights of the deceased author allegedly in violation of the author's interests.

⁶⁰ Ulrich Loewenheim, 'Case Comment: BGH 13.10.1988 I ZR 15/87 "Oberanmergauer Passionsspiele II"' (1989) GRUR 106, p. 110 notes that this reasoning seems problematic, since withholding the author's identity would allow for infringement of copyright or moral rights without any consequences.

⁶¹ BGH 13 Oct. 1988, I ZR 15/87, GRUR 1989, p. 106.

⁶² BGH 19 Mar. 2008, I ZR 166/05, GRUR 2008, p. 984 (para 29).

⁶³ BGH 9 Nov. 2011, I ZR 216/10, GRUR 2012, p. 172 (para 5).

6. Article 6^{bis} of the Revised Berne Convention

Article 6^{bis} of the Revised Berne Convention for the Protection of Literary and Artistic Works (RBC) provides further guidance on this issue.

a) The Berne Convention as an International Treaty

Increased internationalization at the end of the 19th century made it critical to view copyright protect from an international perspective. This led to the international treaty known as the Berne Convention for the Protection of Literary and Artistic Works. The treaty was signed in September 1886 in Bern by representatives of Germany, United Kingdom, France, Belgium, Spain, Italy, Switzerland and Tunisia, and entered into force in December 1887. Other countries were allowed to join any time, and still do to this day. After the end of World War One, Austria committed to joining the Berne Convention in the Treaty of Saint-Germain-en-Laye.⁶⁴ Pursuant to Article 1, the Contracting Parties form a “Union for the protection of the rights of authors over their literary and artistic works”. In accordance with Article 2 of the Berne Convention of 1886, authors (or their successors) holding the citizenship of one of the countries of the Union were treated as if they were citizens of any other country of the Union. They were able to claim the same rights as authors, which the respective member states only granted to their citizens through their national laws.⁶⁵

b) The Protection of Moral Rights

Berne Convention sets certain minimum standards that each country of the Union has to grant. The Convention has been revised several times and is now called the Revised Berne Convention (RBC). The protection of moral rights was added under Article 6^{bis} in 1928.⁶⁶ In the 1928 version, Article 6^{bis} provided that the author, irrespective of her intellectual property rights and even after their transfer, must retain the right to claim authorship of the work and oppose any disfigurement, mutilation or any other change in the work that is detrimental to her honour or reputation. Article 6^{bis}(2) left it to the legislation of the member states to lay down the conditions for the exercise of these rights. A reference to *post mortem auctoris* (after the death of the author) was missing in this first version of Article 6^{bis}.

⁶⁴ Article 239(1).

⁶⁵ Article 5 of the current version of the RBC, 28 Sept. 1979.

⁶⁶ “6^{bis}” indicates that this provision has been added subsequently. It results from French as primary treaty language and is comparable to a counting method in the sense of “Article 6.a.”.

c) The Protection of Moral Rights Post Mortem Auctoris

When the RBC was revised again in Brussels in 1948, the first paragraph of Article 6^{bis} remained essentially unchanged, while the revised version of paragraph 2 made reference to the author's death in the context of her moral rights. The new version provided that the moral rights granted to the author in accordance with Article 6^{bis}(1) shall, after her death, be maintained at least until the expiry of the copyright. In accordance with Article 7(1) RBC, this would have constituted the protection of moral rights for a period of 50 years after the death of the author. However, there was a serious restriction, in that this protection *post mortem auctoris* would apply only “[i]n so far as the legislation of the countries of the Union permits”. That is, this type of protection, in contrast to the protection of moral rights during the author's lifetime, was merely a voluntary, and not an obligation for member states.⁶⁷

This non-binding nature was abandoned during the next revision of the RBC 1967 in Stockholm. Again, paragraph 1 of Article 6^{bis} remained unchanged in substance, but the reference to mere life-long protection of moral rights was deleted in order to align the provision with the recasted paragraph 2. The new version of paragraph 2 then read: “The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained...”. With regard to the granting of *post-mortem* protection of moral rights, the non-binding nature of paragraph 2 has been replaced by a mandatory provision. Instead of a voluntary protection option - if present in national law - the RBC in the version of Stockholm 1967 now envisaged a minimum standard granted by all member states.

With regard to the standing to sue, Article 6^{bis}(2), first sentence of the RBC stipulates that moral rights may be exercised by the persons or institutions authorized by the legislation of the country where protection is claimed. Individuals will usually be the heirs of the author, while one thinks primarily of collecting societies when it comes to institutions.

d) Current State

Article 6^{bis} was a compromise provision from the outset. To find a balance between the different legal cultures of common law and civil law, the 1928 revision of the Berne Convention provided for protecting those moral rights that were equally, directly or indirectly, recognized in both systems. This included the right to claim

⁶⁷ World Intellectual Property Organization (WIPO), *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (Geneva: WIPO, 1978) p. 43 (para 6bis.8.).

authorship of the work and the right to object to any distortion, mutilation or other modification of the work, which would be prejudicial to the honor or reputation of the author.⁶⁸ This compromise was also taken into account in the recasting of paragraph 2 of Article 6^{bis} during the Stockholm Conference.⁶⁹ Although *post-mortem* protection of moral rights was now mandatory, the last sentence of paragraph 2 allowed for deviations by member states. It provided that those countries whose laws contained, at the time of ratification or accession of this version of the Convention, no provisions protecting all moral rights granted by paragraph 1 after death of the author, were entitled to provide that “some of these rights may, after his death, cease to be maintained”. The use of the plural might lead to confusion since paragraph 1 only enumerates two rights. This is most likely due to the compromise reached during the Stockholm Conference; the text suggests that initially more than two rights were mentioned in paragraph 1. The provision is therefore unclear and has to be interpreted accordingly. “Some” and “all” have to be read as “one” and “both”.⁷⁰ Thus, at least one of the two rights mentioned in paragraph 1 must be protected after the author’s death.⁷¹ This text has not changed during further revisions in Paris 1971 and an amendment to the RBC in 1979.

Since the current version of the RBC dates back to 1979, the European Union is now dominating the development of copyright regulations and standards in Europe. However, there are no requirements for the *post-mortem* protection of moral rights in European Union Law.⁷² Only the copyright term was extended to 70 years by an EU directive issued in 1993.⁷³ For those countries that are both a member of the EU and the RBC, the term of protection for moral rights was extended, because Article 6^{bis}(2) RBC provides that moral rights shall be maintained at least until the expiry of economic rights. Other international copyright treaties are silent on the issue of

⁶⁸ Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights, vol. I* (Oxford & New York: Oxford University Press, 2nd edn. 2006) para 3.28.

⁶⁹ Ricketson & Ginsburg, *International Copyright and Neighbouring Rights, vol. I* (2nd edn. 2006) para 10.12.

⁷⁰ Ricketson & Ginsburg, *International Copyright and Neighbouring Rights, vol. I* (2nd edn. 2006) para 10.34 with reference to the Stockholm Conference records.

⁷¹ Ricketson & Ginsburg, *International Copyright and Neighbouring Rights, vol. I* (2nd edn. 2006) para 10.34.

⁷² Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights), Brussels, 19 July 2004, SEC (2004) 995; Andreas Dustmann, ‘Vor § 12 UrhG’, in Axel Nordemann & Jan Bernd Nordemann (eds.), *Urheberrecht* (Stuttgart: Kohlhammer, 12th edn. 2018) para 4; Rehlinger & Peukert, *Urheberrecht* (18th edn. 2018) para 433.

⁷³ Article 9 of the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, O.J. L 290, 24/11/1993 p. 9 expressly excluded provisions of the Member States governing moral rights.

protecting authors' moral rights. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides that TRIPS members must comply with Articles 1 to 21 of the RBC and its Annex, but expressly excludes Article 6^{bis}. Article 6^{bis}(2) RBC is therefore still the relevant provision applicable for the *post-mortem* protection of moral rights.

e) Relevance of the Author's Interests According to the RBC

Article 6^{bis}(2) RBC also addresses the question of whether successors are bound to the interests and intentions of the deceased author. It reads as follows: "The rights granted to the author in accordance with the preceding paragraph⁷⁴ shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed." According to the RBC, the rights of the author are those, which, even after his death, are to be protected and are necessarily exercised by third parties who are called to do so. Since they are still the rights of the author, successors are bound by them.

The RBC does not necessarily require that persons authorized to exercise the rights of the deceased author are his or her legal successors, or that they have to assume these rights. National implementation is left to the respective legislation of its member countries. However, Article 6^{bis}(2), first sentence, of the RBC suggests a fiduciary and preserving role for legal successors because it states that moral rights may be exercised by the persons or institutions appointed to it by the legislation of the respective country of the association. Legal implementation may encounter dogmatic discrepancies in national legal systems, but must not lead to a reduction in protection or even to a displacement of the protected person.

7. Interim Results

A good argument can be made that the author's legal successors are bound by the interests of the deceased in the exercise or disposition of the moral rights:

It cannot be concluded from the lack of orders by the author that she gives up her interests or gives free rein to her legal successors. In addition, dispositions regarding moral rights are possible without observing any formal requirements. An essential

⁷⁴ 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 of the work and 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.

argument is the special, strictly personal nature of moral rights: the successors are neither author, nor do they have other interests that would connect them with the work the deceased author created. They do not inherit authorship but copyright. In addition, section 42 (1) sentence 2 German Copyright Act expresses a basic idea of moral rights. Accordingly, the interests of the author are “frozen” at the moment of her death. Thus, the legal successors are mere interest-based trustees. Judgments of the German Bundesgerichtshof also confirm that the interests of the author are decisive when the legal successors take legal action against interference by third parties. The same is true for the wording of article 6^{bis} (2) Revised Berne Convention, according to which the rights of the author are those which, even after his death, are to be protected.

Similarly, section 19 (1), second sentence, of the Austrian Copyright Act differentiates. In the context of commercial copyright and the right of use, the text of the statute speaks of a “transition” to the heirs. However, with regard to moral rights of the author, the wording is that they would be “assigned” to the heirs so that they can exercise them.

8. Possible Obstacles to the Trust Model

a) Determining the Interests and Intentions of the Deceased Author

This section deals with a follow-up question: what should apply when the interests and intentions of the deceased author are unknown? Proponents of the “succession model” argue that the “trust model” is hardly practicable because identifying the alleged interests and intentions of the author can be extremely difficult.⁷⁵ This argument is overstated. First, it describes a problem that applies to determining the probable intent more generally, not just *post-mortem* protection of moral rights. Second, problems associated with determining the deceased author’s interests and intentions are not as serious as one might think. Critics themselves provide a possible answer when they deal with section 42(1) sentence 2 of the German Copyright Act. According to this provision, the author’s legal successors can only declare the recall of a right of use if they prove that the author would have been entitled to exercise this right prior to her death and that she was prevented from exercising or provided for its exercise by testamentary disposition. The proof required by section 42 can easily be provided by a will, but is also possible in another ways, e.g. by presenting

⁷⁵ Wolfgang Spautz & Horst-Peter Götting, ‘Section 30’, in Hartwig Ahlberg & Horst-Peter Götting (eds.), *Urheberrecht* (München: C.H. Beck, 4th edn. 2018) para 1.

corresponding letters from the author.⁷⁶ Previous remarks, statements or actions may provide clues for determining the interests and intentions of the deceased author.⁷⁷ For instance, an artist may have disapproved of any interference, alteration, or adaptation, and had already taken legal steps to prevent them during her lifetime. Other artists may have thought that changes in their artwork or reactions by the audience are part of their creative work. If the interests and intentions of the author can already be determined in this way, the successors already know how to best proceed.

This is not a question of directly or analogously applying section 42 of the German Copyright Act, rather one of generalizing the possibilities of how to prove the interests and intent of the deceased author. Since mere silence in itself has no explanatory value,⁷⁸ it is necessary in this case, too, to prove the interests of the author. However, the proof that the deceased author was hindered in the exercise of her rights or intentions is not required when it is generally a question of determining the interests of the deceased themselves. It is precisely the question of how the author would have decided if she had been confronted with this act.

When the determination of the author's interests and intentions is unsuccessful, the probable intent has to be looked for. This can be done using proven general principles of private law.⁷⁹ Ultimately, if there is no clarity on how the author would have handled the issue, the law – the Copyright Act – provides the legal framework for determining the author's interests and sets the framework within which the legal successors can move. Anything that violates the Copyright Act also violates the deceased author's interests.

Due to their function as trustees of the deceased authors' moral rights, the heirs or legal successors have to see their role and powers from two different perspectives: In relation to third parties, the legal successors have all the rights that the author had. They could do whatever they want to do with "their" moral rights. However, when it comes to their role as trustee, i.e. the interests and intentions of the deceased author, the successors themselves have to take the perspective of a third party. Thus, the limits of the law, especially the provisions of the Copyright Acts regarding moral rights, apply to their actions since the entrusted moral rights are not "their" rights, but the deceased author's moral rights. The legal successors by no means always have to

⁷⁶ Wolfgang Spautz & Horst-Peter Götting, 'Section 42', in Hartwig Ahlberg & Horst-Peter Götting (eds.), *Urheberrecht* (München: C.H. Beck, 4th edn. 2018) para 10.

⁷⁷ Clément, *Urheberrecht und Erbrecht* p. 73.

⁷⁸ *Infra* 5.b).

⁷⁹ Clément, *Urheberrecht und Erbrecht* p. 73.

play a passive role due to the “freezing” of the authors interests and intentions;⁸⁰ they also can actively exercise the legal powers they have if they themselves act uninfluenced by personal convictions, thus take the perspective of a third party and observe the limitations set by law, respectively by the Copyright Act.

In summary, the author's legal successors have a duty to investigate the interests and intentions or the probable intent of the deceased author. If they are unable to do so, the Copyright Act itself and especially its provisions regarding moral rights provide guidance. If no probable intent can be determined, the intended disposition of moral rights has to comply with the provisions on moral rights laid down in the Copyright Act.

b) Sanctions and Enforcement

Another point of criticism for the “trust model” is that control and sanctions are missing.⁸¹ *Adolf Dietz & Alexander Peukert* argue that practical problems of enforcement are no reason to hastily object to this model.⁸² One remedy, for example, is the possibility that even critics of this view allow: close relatives⁸³ are able to take legal action against gross disfigurement of the deceased's life image by legal successors in the context of general *post-mortem* protection of personality rights.⁸⁴ Even if the legal successors themselves are close relatives of the deceased, eliminating recourse to the general *post-mortem* protection of personality rights, one of several co-heirs could initiate a judicial check on the decision of the others. In any case, the control of the actions of the legal successors seems to presuppose the existence of a third party that has legal standing. *Christoph Clément*, for instance, has proposed the

⁸⁰ *Supra* 5.d).

⁸¹ Spautz & Götting, ‘Section 30’, in Ahlberg & Götting (eds.), *Urheberrecht* (4th edn. 2018) para 1.

⁸² Dietz & Peukert, ‘Vor §§ 12 ff’, in Loewenheim & Leistner & Ohly (eds.), *Urheberrecht* (5th edn. 2017) para 22.

⁸³ The deceased's close relatives have standing to exercise *post-mortem* protection of personality rights, unless the deceased has called anyone else to do so, see BGH 20 Mar. 1968, I ZR 44/66, GRUR 1968, p. 552; Hager, ‘Section 823’, in Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch – § 823 A-D* (revised edition 2017) para C 40 with further references.

⁸⁴ Spautz & Götting, ‘Section 30’, in Ahlberg & Götting (eds.), *Urheberrecht* (4th edn. 2018) para 4; Schulze, ‘Section 30’, in Dreier & Schulze (eds.), *Urheberrechtsgesetz* (6th edn. 2018) para 6; Ohly, ‘Section 30’, in Loewenheim & Leistner & Ohly (eds.), *Urheberrecht* (5th edn. 2017) para 12; J.B. Nordemann, ‘Section 30’, in Nordemann & Nordemann (eds.), *Urheberrecht* (12th edn. 2018) para 10; Angelika Hoche ‘Section 30’, in Arthur-Axel Wandtke & Winfried Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (München: C.H. Beck, 4th edn. 2014) para 13.

creation of a supervisory body.⁸⁵ This does not seem realistic⁸⁶ and there are already institutions that guard the interests of authors. For instance, one could think of copyright collecting societies also guarding authors' moral rights.⁸⁷ Finally, it is important to note that a lack of, or subpar, enforceability is not a question of law, but one of policy.⁸⁸

9. Term of Protection

a) Possible Viewpoints

Dispute exists over the term of protection for *post mortem* moral rights. Some scholars argue that the term of protection is based on the general *post mortem* right of personality; the interests of the author fade over the course of time, so that they slowly become weaker until they vanish completely.⁸⁹ Others argue that the interests

⁸⁵ Clément, *Urheberrecht und Erbrecht* pp. 127 *et seq.*

⁸⁶ Spautz & Götting, 'Section 30', in Ahlberg & Götting (eds.), *Urheberrecht* (4th edn. 2018) para 1.

⁸⁷ See OGH 19 Nov. 2002, 4 Ob 229/02h, ÖBl (Österreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht) 2003, p. 142; 1 July 1986, 4 Ob 353/86, ÖBl 1986, p. 162; Guggenbichler, 'Vorbem zu §§ 19-21 UrhG', in Ciresa (ed.), *Österreichisches Urheberrecht* (version 16, 2013) para 7; Toms, 'Section 19', in Kucsko & Handig (eds.), *urheber.recht* (2nd edn. 2017) para 13; Reh binder & Peukert, *Urheberrecht* (18th edn. 2018) para 840.

⁸⁸ Clément, *Urheberrecht und Erbrecht* pp. 72 *et seq.*; von Welser, *Die Wahrnehmung urheberpersönlichkeitsrechtlicher Befugnisse durch Dritte* p. 150; Dietz & Peukert, 'Section 15', in Ulrich Loewenheim (ed.), *Handbuch des Urheberrechts* (2nd edn. 2010) para 16; Reh binder & Peukert, *Urheberrecht* (18th edn. 2018) para 989.

⁸⁹ Bullinger, 'Vor §§ 12 ff', in Wandtke & Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (4th edn. 2014) para 10; Clément, *Urheberrecht und Erbrecht* p. 55; Dietz & Peukert, 'Section 15', in Ulrich Loewenheim (ed.), *Handbuch des Urheberrechts* (2nd edn. 2010) para 15; Dietz & Peukert, 'Vor §§ 12 ff', in Loewenheim & Leistner & Ohly (eds.), *Urheberrecht* (5th edn. 2017) para 23 and section 14 para 34; Markus Alexander Federle, *Der Schutz der Werkintegrität gegenüber dem vertraglich Nutzungsberechtigten im deutschen und US-amerikanischen Recht* (Baden-Baden: Nomos, 1998) p. 56; von Gamm, *Urheberrechtsgesetz* section 30 para 4; Grunert 'Urhebererben und Regietheater', in Bullinger & Grunert & Ohst & Wöhm (eds.), *Festschrift für Artur-Axel Wandtke der Bühnenregie* pp. 122 *et seq.*; Haberstumpf, *Handbuch des Urheberrechts* (2nd edn. 2000) para 381; Jänecke, *Das urheberrechtliche Zerstörungsverbot gegenüber dem Sacheigentümer* p. 181; Kroitzsch & Götting, 'Section 14', in Ahlberg & Götting (eds.), *Urheberrecht* (4th edn. 2018) para 21; Ohly, 'Section 30', in Loewenheim & Leistner & Ohly (eds.), *Urheberrecht* (5th edn. 2017) para 7; Manfred Reh binder, 'Die Mitbestimmung des Urhebers bei der Vermarktung seiner Werke' (1996) ZUM 613 p. 616; Sattler, *Das Urheberrecht nach dem Tode des Urhebers in Deutschland und Frankreich* pp. 61 *et seq.*; Hans-Heinrich Schmieder, 'Werkintegrität und Freiheit der Interpretation' (1990) NJW 1945, p. 1950; Thiele & Waß, 'Urheberrecht post mortem - Rechtsnachfolge bei Werkschöpfern', (2002) NZ 97, p. 99. The BGH ruled that the interests of the deceased author do "not necessary" have the same weight compared to times when the author is still alive: BGH 13 Oct. 1988, I ZR 15/87, GRUR 1989, p. 106; 19 Mar. 2008, I ZR 166/05, GRUR 2008, p. 984; 9 Nov. 2011, I ZR 216/10, GRUR 2012, p. 172.

of the author are fully upheld during the entire term of protection, which is seventy years after the author's death, i.e. that they cannot fade during the upright term of protection set by the Copyright Act.⁹⁰

b) The Standard Set by Article 6^{bis}(2) Sentence 1 Berne Convention

Article 6^{bis}(2), first sentence, of the RBC is clearly worded with regard to the duration of *post-mortem* protection of moral rights: the rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights. Moral rights and (commercial) copyrights are treated identically with regard to the term of protection, meaning that the term of protection for moral rights should result from the respective provisions on the length of the copyright.

⁹⁰ Winfried Bullinger, 'Vor §§ 12 ff', in Arthur-Axel Wandtke & Winfried Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (München: C.H. Beck, 3rd edn. 2009) para 10 (*but see contra Id.*, 'Vor §§ 12 ff', in Wandtke & Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (4th edn. 2014) para 10, *supra* footnote 89); *Id.*, *Kunstwerkfälschung und Urheberpersönlichkeitsrecht* pp. 206 *et seq.*; Dreyer, 'Vor §§ 12 ff', in Dreyer & Kotthoff & Meckel & Hentsch (eds.), *Urheberrecht* (4th edn. 2018) para 39; Gloser, *Die Rechtsnachfolge in das Urheberrecht* pp. 184 *et seq.*; Götting, '§ 15. Das Urheberpersönlichkeitsrecht', in Horst-Peter Götting & Christian Schertz & Walter Seitz (eds.), *Handbuch des Persönlichkeitsrechts* (2nd edn. 2019) para 10 ("[...] ceases to exist 70 years after the author's death pursuant to section 64 Copyright Act"); Eva Inés Oberfell, 'Entstellungsschutz post mortem? - Der Urheberrechtsfall "Stuttgart 21"' (2010) *GRUR-Prax* 233 p. 236; Rehbinder, 'Die Familie im Urheberrecht' (1986) *ZUM* 365 p. 369 ("The moral rights therefore pass to the successor in title for the full duration of the copyright's term of protection; this protection expires pursuant to section § 64 I Copyright Act seventy years after the death of the author") *but see contra Id.*, 'Die Mitbestimmung des Urhebers bei der Vermarktung seiner Werke' (1996) *ZUM* 613 p. 616; Schack, 'Das Persönlichkeitsrecht der Urheber und ausübenden Künstler nach dem Tode' (1985) *GRUR* 352, p. 354; *Id.*, *Urheber- und Urhebervertragsrecht* (8th edn. 2017) para 358; Schulze, 'Vorbemerkung zu §§ 12 ff', in Dreier & Schulze (eds.), *Urheberrechtsgesetz* (6th edn. 2018) para 8 and section 28 para 2; *Id.*, 'Vernichtung von Bauwerken', in Peter Ganea & Christopher Heath & Gerhard Schrickler (eds.), *Urheberrecht Gestern - Heute - Morgen. Festschrift für Adolf Dietz* (München: C.H. Beck, 2001) 177 pp. 200 *et seq.*; Artur-Axel Wandtke & Ilja Czernik, 'Der urheberrechtliche Integritätsschutz von Bau(kunst)-werken und dessen Probleme in der Rechtsanwendung' (2014) *GRUR* 835 p. 839; Artur-Axel Wandtke, *Urheberrecht* (Berlin: De Gruyter, 6th edn. 2017) p. 71 para 14 ("However, there is no reference in the law to such an interpretation [the 'succession model']"). Lucas Elmenhorst & Friederike Gräfin von Brühl, 'Wie es Euch gefällt? Zum Antagonismus zwischen Urheberrecht und Eigentümerinteressen' (2012) *GRUR* 126, pp. 129 *et seq.*, favor a case-by-case analysis but do remark that a fading of interests is neither compulsory, nor happens by mere passage of time. For Austrian law: Toms, 'Section 19', in Kucsko & Handig (eds.), *urheber.recht* (2nd edn. 2017) para 12; Guggenbichler, 'Vorbem zu §§ 19-21 UrhG', in Ciresa (ed.), *Österreichisches Urheberrecht* (version 16, 2013) para 8; Wallentin, '§ 16: Gewerblicher Rechtsschutz, Urheberrecht und Erbrecht', in Gruber & Kalss & Müller & Schauer (eds.), *Erbrecht und Vermögensnachfolge* (2nd edn 2018) para 50. Likewise Walter, *Österreichisches Urheberrecht* (2008) remarks that moral rights exist during the entire term of copyright protection (para 886) and - due to the lack of differentiation - cease to exist at the same time as exploitation rights do (para 465).

c) The Monistic Discrepancy

Courts in Germany and Austria take a different approach. Since the general right of personality is protected after death, but no explicit terms of protection are set in the law, the case law has had to develop appropriate principles. Following doctrine and jurisprudence regarding the general right of personality,⁹¹ some scholars argue that the moral rights of the deceased author fade out.⁹² This means that the longer the death of the author dates back, the less weight his or her moral rights have in the case of an infringement. In its judgment on the Oberammergau Passion Plays, the Bundesgerichtshof held that “the essential interests of the author do not necessarily have the same weight years or decades after the author’s compared to the situation during his lifetime”.⁹³ In other words, there is the possibility that an act that would be considered unlawful one year after the author’s death, but not 50 years later, even when the act is exactly the same.

The concept of fading interests is a viable solution for the general right of personality, since it leads to a proper result in each individual case. Concerning the *post-mortem* protection of the general right of personality, it is convincing that the BGH ruled that a generally applicable determination of the term of protection is not possible; rather it depends on the individual case and on a variety of criteria to be weighed (e.g. intensity of infringement, renownedness and importance of the person).⁹⁴

The situation is different for moral rights because the Copyright Act contains an explicit term of protection. Pursuant to the principle of *lex specialis derogat legi generali*,⁹⁵ the special provisions of the Copyright Act on the term of protection of

⁹¹ Hubmann, *Das Persönlichkeitsrecht* (2nd edn. 1967) p.346; Rixecker, ‘Anhang zu § 12’, in Säcker & Rixecker & Oetker & Limperg (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 1* (7th edn. 2015) para 54; Hager, ‘Section 823’, in Staudinger (ed.), *Kommentar zum Bürgerlichen Gesetzbuch – § 823 A-D* (revised edition 2017) para C 45; Kerstin Schmitt, ‘§ 29. Das Persönlichkeitsrecht des Verstorbenen’, in Horst-Peter Götting & Christian Schertz & Walter Seitz (eds.), *Handbuch des Persönlichkeitsrechts* (München: C.H. Beck, 2nd edn. 2019) paras 68 *et seq.*; BGH 20 Mar. 1968, I ZR 44/66, GRUR 1968, p. 552; 8 June 1989, I ZR 135/87, NJW 1990, p. 1986. Meissel, ‘Section 16 ABGB’, in Fenyves & Kerschner & Vonkilch (eds.), *Großkommentar zum ABGB – §§ 1 bis 43* (3rd edn. 2014) para 187.

⁹² Supra footnote 89.

⁹³ BGH 13 Oct. 1988, I ZR 15/87, GRUR 1989, p. 106; 19 Mar. 2008, I ZR 166/05, GRUR 2008, p. 984; 9 Nov. 2011, I ZR 216/10, GRUR 2012, p. 172.

⁹⁴ BGH 20 Mar. 1968, I ZR 44/66, GRUR 1968, p. 552; 8 June 1989, I ZR 135/87, NJW 1990, p. 1986.

⁹⁵ Reinhold Zippelius, *Juristische Methodenlehre* (München: C.H. Beck, 11th edn. 2012) pp. 31 *et seq.*; Franz Bydliński, *Juristische Methodenlehre und Rechtsbegriff* (Wien & New York: Springer, 2nd edn. 1991) p. 465. Strictly speaking, in this case, a legal norm collides with a general principle

moral rights preempt the general principle of fading created by case law. Copyright and, according to the monistic model of copyright, moral rights cease to exist seventy years after the death of the author.⁹⁶ There is no mention of a fading or a gradual decrease in protection. In the course of time, the (commercial) copyright will not become “cheaper” – why would the personal interests, which are protected by moral rights become less worthy of protection? No one has ever tried arguing that the copyright has faded out since the author died sixty years ago. The reasoning that the interests of the deceased fade out over time is convincing, but only applies to situations where no clear term of protection is set. Within a specified period of time, there can be no consideration as to how much time has passed since death. This consideration was anticipated by the setting of a specific period.

When the term of protection is given by an act or statute, further consideration is unnecessary. Just like the commercial copyright ends at a certain date and does not slowly fade out,⁹⁷ so, too, do moral rights end at a certain date.⁹⁸ A different view would be contrary to the monistic model of copyright as well as to Article 6^{bis}(2) RBC, which provides that the moral rights shall be maintained “at least until the expiry of the economic rights”. It is inconsistent to base the inheritability of moral rights on the monistic model, but ignore the same model with regard to the term of protection. This view has been accused of being inflexible and preventing just results in some cases.⁹⁹ However, arguing that the Copyright Act only sets the term of protection but is silent on the intensity, which allows for the author’s interests to fade out during the upright term,¹⁰⁰ one could easily sweep aside every term or period laid down by law and declare it irrelevant. One could, for instance, circumvent the statute of limitations, since these provisions, too, do not mention of a fading or a gradual decrease in protection. Thus, one should not establish additional requirements not laid down in the Copyright Act.

created by case law. This speaks even more in favor of the primacy of the Copyright Act, which regulates a subversion of the general principle.

⁹⁶ Section 64 German Copyright Act, section 60(1) Austrian Copyright Act.

⁹⁷ J.B. Nordemann, ‘Section 30’, in Nordemann & Nordemann (eds.), *Urheberrecht* (12th edn. 2018) para 1: “Over the entire term of protection of 70 years after the death of the author (§ 64), the copyright remains the same and does not fade, but then expires completely from one day to the next”.

⁹⁸ *Supra* footnote 90.

⁹⁹ Bullinger, ‘Vor §§ 12 ff’, in Wandtke & Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (4th edn. 2014) para 10.

¹⁰⁰ *E.g.* Elmenhorst & von Brühl, ‘Wie es Euch gefällt? Zum Antagonismus zwischen Urheberrecht und Eigentümerinteressen’ (2012) GRUR 126, p. 129; Bullinger, ‘Vor §§ 12 ff’, in Wandtke & Bullinger (eds.), *Praxiskommentar zum Urheberrecht* (4th edn. 2014) para 10.

Questions on the term of protection are separate from the merits of the case. Successors have standing to bring an action before a court of law to protect a deceased author's moral rights within the term of protection (i.e., 70 years). The main question then is: was the defendant's act (or alleged infringement of the author's moral rights) unlawful? The period of time that has elapsed since the author's death has – as a rule – no influence on the merits.¹⁰¹ There is no reason to disregard an unlawful act within the upright term of protection merely because the author died twenty years ago.

d) Inconsistencies in the “Succession Model”

According to the “succession model”, successors may, after the author's death, exercise the inherited moral rights as they wish without being bound by any previous interests and intentions of the deceased author. However, when arguing – like the BGH claimed – that the protection fades out, a contradiction arises: why do the interests of the successors fade out, when, at the same time, the interests of the deceased author are not of any importance to the successors? Why is the time elapsed since the author's death of importance if the author has no influence at all in the “succession model”? In order to resolve that contradiction, a term of protection independent of the deceased's would be required.¹⁰² Thus, the “succession model” is inconsistent when it relies on the concept of fading interests of the deceased author.

10. Other Jurisdictions

In addition to this detailed description of the legal situation in Germany and Austria, the remainder of this article provides a brief look at the French and American legal systems. In France, the birthplace of moral rights, the Copyright Act favours the deceased's interests. By contrast, the brief glimpse into the US shows that the retrospective implementation of moral rights into a common law jurisdiction is in some cases only possible to a lesser extent. A comparative view must come to a swift end because the relevant act at the federal level (“VARA”) does not provide for *post-mortem* protection of moral rights. However, the genesis of VARA shows that there were attempts to include *post-mortem* protection, but ultimately fell victim to the legislative process. An April 2019 report of the U.S. Copyright Office analyses the

¹⁰¹ Pierer, *Postmortaler Schutz von Persönlichkeitsrechten* pp. 158 *et seq.* However, it might have some influence if the judgment is based on a balance of interests.

¹⁰² Jänecke, *Das urheberrechtliche Zerstörungsverbot gegenüber dem Sacheigentümer* p. 181 footnote 668 and Gloser, *Die Rechtsnachfolge in das Urheberrecht* p. 185 point to this contradiction; see also Pierer, *Postmortaler Schutz von Persönlichkeitsrechten* p. 159.

“moral rights patchwork” and concludes that it would work well,¹⁰³ but takes up again the issue of duration.¹⁰⁴

a) The French View

France was one of the creators of the Berne Convention and influenced the design and subsequent revisions of the agreement with respect to moral rights. French law covers moral rights in the 1992 Code de la propriété intellectuelle (CPI).¹⁰⁵ Pursuant to article L121-1 sentence 1 of the CPI, the author enjoys the right to respect to both his name (“nom”), his authorship (“qualité”) and his work (“oeuvre”).¹⁰⁶ Pursuant to sentence 2, these rights are exempt from the statute of limitations (“droit moral perpetual”), inalienable and non-transferrable during the author’s lifetime. While non-transference and inalienability is a characteristic feature of many legal systems as far as moral rights (or personality rights) are concerned, the lack of a time limit is a peculiarity.

The French view is one of a “transformation du droit moral post mortem auctoris”, according to which the interests and intentions of the deceased author are to be safeguarded by her heirs, as the “trust model” suggests. Accordingly, the personal interests of the people exercising the moral rights of the deceased are irrelevant. The above-mentioned transformation is that the deceased author’s moral rights turn into an obligation of the legal successors to protect these rights and interests and thus be a guardian of the author’s memory and moral rights after death: “[L]’ayant droit ne se présente plus comme le continuateur de la personne du défunt, mais bien comme le gardien naturel de sa mémoire”.¹⁰⁷

b) Moral Rights and the Implementation of the Berne Convention in the USA

Unlike the previous examples of Germany, Austria, and France, the United States has a common law system. Historically, the U.S. argued that moral rights would not exist at common law, or they could not be harmoniously integrated into the legal

¹⁰³ United States Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* (2019) p. 24 *et seq.*

¹⁰⁴ *See infra* p. 31.

¹⁰⁵ Title II, Chapter I, Article L121-1 to L121-9 of the Act no. 92-597, 1 July 1992, Journal Officiel de la République Française p. 8801, last amended 1 Jan. 2014.

¹⁰⁶ Article L121-1 sentence 1: L’auteur jouit du droit au respect de son nom, de sa qualité et de son oeuvre.

¹⁰⁷ Cour de Paris, 9 June 1964, J.C.P. 1965.14172 - cited in Adolf Dietz, *Das Droit Moral des Urheber im neuen französischen und deutschen Urheberrecht* (München: C.H. Beck, 1968) p. 175.

structure.¹⁰⁸ In fact, federal copyright law in the U.S. (i.e., the Copyright Act 1976) did not contain any provisions on moral rights.¹⁰⁹ This changed when the U.S. joined the Revised Berne Convention in March 1989.¹¹⁰ Although the U.S. first held the view that existing laws were sufficient to fulfill the requirements set by the RBC,¹¹¹ Congress eventually agreed on a reform and passed the Visual Artists Rights Act (VARA)¹¹² in 1990, which codified the protection of moral rights¹¹³ at the federal level.¹¹⁴ VARA entered into force in June 1991. The essential new provision was 17 U.S.C § 106A, which was incorporated in the Copyright Act.¹¹⁵ VARA grants protection according to § 106A(a) only to a small group of persons who create works of visual art such as paintings, drawings, a print or a sculpture, which exist either as a single copy, or in a limited and signed edition of 200 copies or less. Posters, maps, globes, technical drawings, diagrams, models, applied arts, motion pictures or other audiovisual works, books, magazines, newspapers, periodicals, and databases are expressly excluded. Pursuant to § 106A(a)(1), the author of a work of visual art shall have the right to claim authorship or to prevent its false attribution.

§ 106A(a)(2) grants the author the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to her honor or reputation. In accordance with § 106A(a)(3)(A), the author has the right to prevent any intentional distortion, mutilation, or other modification of one of his or her works which would be prejudicial to his or her honour or reputation. Furthermore, § 106A(a)(3)(B)

¹⁰⁸ Melville B. Nimmer & David Nimmer, *Nimmer on Copyright, vol. 3* (New York: Matthew Bender, looseleaf, edition 2018) § 8D.02[A] and [D][1]; Elizabeth Adeney, *The Moral Rights of Authors and Performers* (Oxford & New York: Oxford University Press, 2006) paras 15.42 *et seq.* with further references; *see also Eldred v. Ashcroft*, 537 U.S. 186, 259, 123 S. Ct. 769, 810, 154 L. Ed. 2d 683 (2003); *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 296–97 (7th Cir. 2011).

¹⁰⁹ Nimmer & Nimmer, *Nimmer on Copyright, vol. 3* (looseleaf, edition 2018) § 8D.02[C].

¹¹⁰ Even in 1989, the United States' accession to the RBC was not the result of a major change in the legal culture, but of a mere economic and competitive need. The US could no longer afford not to be a member of the RBC. *See* Robert J. Sherman, 'The Visual Artists Rights Act of 1990: American Artists Burned Again', 17 *Cardozo L. Rev.* 373, pp. 398 *et seq.*

¹¹¹ Paul Geller, 'Comments on Possible U.S. Compliance With Article 6bis of the Berne Convention', 10 *Colum.-VLA J.L. & Arts* 665, p. 665; William F. Patry, 'The United States and International Copyright Law: From Berne to Eldred', 40 *Hous. L. Rev.* 749, p. 751.

¹¹² Pub. L. 101-650, title VI, Dec. 1, 1990, 104 Stat. 5128.

¹¹³ *See Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir.2003).

¹¹⁴ *See infra* footnote 123 for the Californian provision dating back to 1979.

¹¹⁵ 17 U.S.C § 106A.

allows the author to prevent any destruction of a work of recognised stature.¹¹⁶ Although all these rights are not transferable pursuant to § 106A(e)(1), the author may expressly waive them in writing.

Copyright endures for a term consisting of the life of the author and 70 years¹¹⁷ after the author's death pursuant to 17 U.S.C. § 302(a). The term of protection for moral rights is regulated by 17 U.S.C. § 106A(d). The author may assert it in accordance with § 106A(d)(1) throughout his or her life. The death of the author or the time afterwards are not mentioned there. A reference to the possible inheritability of moral rights is also missing. § 106A(d)(4) provides that all terms with respect to moral rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire.¹¹⁸ An understanding of § 106A(d)(4) which states that moral rights only continue to exist in the year of death and thus – if at all – could be asserted by the author's heirs,¹¹⁹ seems questionable. Differences between artists who died on January 1st or December 31st cannot be justified. Nevertheless, this is the current legal situation.

Other drafts of VARA included a 50-year *post-mortem* term of protection¹²⁰ and recognized the inheritable nature¹²¹ of moral rights.¹²² These two aspects were cut by the Senate. However, a new provision expressly stated that VARA does not annul or limit any rights or remedies under the common law or statutes of any State¹²³ with respect to activities violating legal or equitable (moral) rights that extend beyond the

¹¹⁶ See Christopher J. Robinson, 'The "Recognized Stature" Standard in the Visual Artists Rights Act', 68 Fordham L. Rev. 1935.

¹¹⁷ The term of protection granted by Article 7 RBC shall be the life of the author and 50 years after his death. However, the RBC allowed for a longer term of protection. Today's standard is 70 years *post mortem auctoris*. The purpose is that the author's descendants benefit economically from her works throughout their lifetime.

¹¹⁸ 17 U.S.C. § 106A(d)(4): "All terms of the rights conferred by subsection (a) run to the end of the calendar year in which they would otherwise expire".

¹¹⁹ Cambra E. Stern, 'A Matter of Life or Death: The Visual Artists Rights Act and the Problem of Postmortem Moral Rights', 51 UCLA L. Rev. 849, p. 867.

¹²⁰ § 106A(d)(1): "the rights conferred by subsection (a) shall endure for a term consisting of the life of the author and fifty years after the author's death". The legal situation at that time provided for a term of protection of 50 years for copyright, *supra* footnote 117.

¹²¹ § 106A(e)(2): "[...] to whom such rights pass by bequest of the author or by the applicable laws of intestate succession".

¹²² H.R.2690, 101st Cong. (1989) (H.Rept 101-514).

¹²³ *E.g.* Californian Civil Code § 987(g)(1): The rights and duties created under this section shall, with respect to the artist, or if any artist is deceased, his or her heir, beneficiary, devisee, or personal representative, exist until the 50th anniversary of the death of the artist.

life of the author.¹²⁴ As a result of the changes to the draft, 17 U.S.C. § 106A(d)(2) provides with respect to works of visual art created before VARA entered into force, but title to which has not been transferred from the author, that the (moral) rights conferred by VARA shall be coextensive with, and shall expire at the same time as the copyright. § 106A(d)(1) states that moral rights to works of fine art created after VARA entered into force are protected only during the lifetime of the author. This creates a questionable¹²⁵ result: an author's moral rights which were codified by VARA are protected after the author's death only if the work of visual art had been created before VARA entered into force. And moral rights to works of visual art created after the entry into force of VARA enjoy protection only during the author's lifetime. This condition prevails since VARA entered into force in 1991 and has not been corrected since. Therefore, in the US, authors who wish to make sure that their moral rights are respected and protected after death, are dependent on State law, since VARA does not grant *post-mortem* protection. Only some States¹²⁶ have enacted laws providing for *post-mortem* protection of moral rights, their scope varies significantly.

In April 2019 the U.S. Copyright Office published a report analyzing the personal (moral) rights of authors. Despite concluding that the "moral rights patchwork" works well,¹²⁷ the Copyright Office expressly suggests with regard to *post-mortem* protection of moral rights that the legislator address "this apparent inconsistency" if Congress decides to revise VARA.¹²⁸

11. Summary

With regard to the monistic model of German and Austrian copyright law, one can conclude that the author's interests are still of relevance after her death. The protection of authors' moral rights *post mortem* is - necessarily - exercised by third parties; usually the author's legal successors. They are bound to the deceased's

¹²⁴ 17 U.S.C. §301(f)(2)(C).

¹²⁵ William F. Patry, *Patry on Copyright, vol. 5* (St. Paul: Thomson/West, looseleaf, March 2018 Update) § 16:38: "very unfortunate concession", "ironic".

¹²⁶ *E.g.* the Californian Civil Code, § 987(g)(1) ("...with respect to the artist, or if any artist is deceased, his or her heir, beneficiary, devisee, or personal representative, exist until the 50th anniversary of the death of the artist...") *see also* Massachusetts General Laws Part III, Title II, Chapter 231, § 85S(g). For further references, *see* Adeney, *The Moral Rights of Authors and Performers* para 15.63 footnote 104.

¹²⁷ United States Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* (2019) p. 24 *et seq.*

¹²⁸ United States Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* (2019) p. 81 *et seq.*

interests, which are “frozen” at death. Thus, the ones protecting the deceased author act as interest-based trustees (the “trust model”). The mere absence of the author’s express instructions does not allow for the conclusion that she has given up her interests or given her legal successors free choice on how to handle her moral rights.

The essential argument is the special, strictly personal nature of moral rights. The legal successors are neither author, nor do they have other interests that would connect them with the work the deceased author created. They do not inherit authorship but copyright. Judgments of the German Bundesgerichtshof also confirm that the interests of the author are decisive when the legal successors take legal action against interference by third parties. The same is true for the wording of article 6^{bis} (2) Revised Berne Convention, according to which the rights of the author are those which, even after death, are to be protected.

The deceased author’s interests and intentions may be determined by the author’s will or – if there is none – by reviewing previous remarks, statements or actions. If not successful, the probable intent has to be looked for. Ultimately, if there is no clarity on how the author would have handled the issue, the law – the Copyright Act – provides the legal framework for determining the author’s interests. Anything that violates the Copyright Act also violates the deceased author’s interests.

The term of protection for moral rights is identical to that of commercial copyright and lasts for seventy years after the author’s death. Moral rights cannot “fade” or vanish during the term of protection. Thus, in general, the time elapsed after the author’s death is of no relevance when assessing the merits of a case.

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