

Switzerland

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Reference

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**UNIVERSITÉ  
DE GENÈVE**

## CHAPTER 22

### SWITZERLAND

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#### I. Introduction and Historical Background

Moral rights were formally introduced into Swiss law by the Swiss Copyright Act of 9 October 1992 (“SCA”) which entered into force on 1 July 1993.<sup>1</sup> Before that time, moral rights were protected as an element of the rights of personality safeguarded in the Swiss Civil Code (“SCC” art.28).<sup>2</sup> Article 28 SCC indeed protects individuals against violations of their personality, and particularly against violations of their honour or reputation, something which can be of relevance in the context of violations of moral rights (particularly the right of integrity). The Swiss Supreme Court therefore held in various decisions that moral rights were to be viewed as an element or a specific aspect of the general right of personality under art.28 SCC.<sup>3</sup> The protection of moral rights under the general right of personality was not restricted to a right analogous to the moral right of integrity, but extended also to a right analogous to the paternity right.<sup>4</sup>

22–001

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<sup>1</sup> SC 231.1 (SC = Systematic Collection of Swiss laws or Classified Compilation of Federal Legislation, available in all Swiss national languages (but not in English)) at: <http://www.admin.ch/ch/l/rs/rs.html>. An unofficial English version of the Swiss Copyright Act (status as of January 2011) is available at: <https://www.admin.ch/lopc/en/classified-compilation/19920251/index.html>; all links to websites were last accessed on 13 May 2016; for a synthesis of the law protecting moral rights in Switzerland, see J. de Werra, “Le droit moral en Suisse”, in *Les cahiers de propriété intellectuelle* (2013) 1, 527–547, available at: <http://archive-ouverte.unige.ch/unige:28955>.

<sup>2</sup> art.28 para.1 SCC provides that “[a]nyone whose personality is illegally violated may, in protection thereof, take court action against any person participating in the violation”.

<sup>3</sup> “ein Teil oder eine besondere Seite des allgemeinen Persönlichkeitsrechts”, ATF 69 II 57 (ATF official collection of the published decisions of the Swiss Supreme Court, which can be accessed online in their original language at: <http://www.bger.ch> [Accessed August 2016]; ATF 96 II 420; ATF 110 II 418; ATF 113 II 311; ATF 117 II 470).

<sup>4</sup> See ATF 96 II 420 and ATF 84 II 570.

On this basis, the system of protection which existed before the adoption of the SCA could be viewed as dualist, given that the economic rights of the authors were protected in the previous Swiss Copyright Act (of 7 December 1922), with respect to copyrights relating to literary and artistic works, while the non-economic rights (i.e. the moral rights) were protected under the SCC. This approach was confirmed on several occasions by the Swiss Supreme Court, including in the landmark 1970 case which confirmed that the unauthorised addition of music to the film *Gold Rush* violated Charlie Chaplin's right of personality because such addition was detrimental to his honour and reputation.<sup>5</sup> One major drawback of this form of moral rights protection resulting from the rights of personality was that it did not continue beyond the death of the author, given that the rights of personality—logically—expire with the death of their beneficiary.<sup>6</sup> Although this had been criticised in the academic literature, the law was not amended until the adoption of the SCA in 1992, it being noted that the absence of protection of moral rights post mortem auctoris was in compliance with the minimal standard of protection under the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”, art.6*bis* para.2, second sentence).

**22–002 Current position**—Moral rights protection is now formally implemented in various provisions of the SCA, namely, as regards the right of paternity: art.9 para.1 SCA; the right of integrity: art.11 SCA; the right of disclosure: art.9 para.2 SCA; the right of access to the work: art.14 SCA; and the right to prevent the destruction of the unique physical copy of the work: art.15 SCA. These moral rights are now protected for the same term as the economic rights of the beneficiaries of the protection, i.e. 70 years after the death of the author (under art.16 para.1 in combination with art.29 SCA).

The adoption of these provisions means that the moral rights which are now formally protected in the SCA are independent from the general right of personality which remains protected by the SCC. This distinction raises the issue of the relationship between the two different sources of protection, i.e. is it possible for an author to claim a violation of the right of personality independently of a violation of a moral right or even to claim cumulative protection in a suitable case? This issue is not purely academic, given that the respective conditions of protection are different (particularly as regards the term of protection).

**22–003 Nature of protection**—The view is generally held that moral rights protect the specific relationship existing between authors and their work,<sup>7</sup> such as the right to protect the integrity of a given work (i.e. the right of integrity) or the

<sup>5</sup> See ATF 96 II 420; this was confirmed in subsequent decisions ATF 113 II 311; ATF 117 II 470.

<sup>6</sup> ATF 104 II 225.

<sup>7</sup> Note that in the German copyright literature, a work is considered to be the “intellectual child” (“*geistiges Kind*”) of the author.

## II. MEMBERSHIP OF CONVENTIONS

right to be named as the author of a specific work (i.e. the right of paternity), while the protection of the right of personality does not have such a narrow focus, but rather protects the personal rights of individuals against any violations of their personality (for instance in case of defamation, etc.). From this perspective, it is generally accepted that moral rights constitute a *lex specialis* of the general right of personality to the extent that the right of personality based on Swiss civil law cannot be used in order to grant rights to the authors which would not be granted under the SCA.<sup>8</sup> In spite of this, authors, just like any other individuals, can naturally not be prevented from invoking their rights of personality, for instance with respect to their honour, privacy or professional reputation, where such rights have been violated. From this standpoint, the protection of moral rights and the protection of the rights of personality can be invoked cumulatively.<sup>9</sup>

### II. Membership of Conventions

Switzerland has been a party to the Berne Convention as revised in Paris on 24 July 1971 since 25 June 1993 (SC 0.231.15). It has further been a party to the UCC since 30 December 1955 (SC 0.231.0) and the WPPT since 31 March 2008 (SC 0.231.171.1). Switzerland has also adopted specific provisions for the protection of the moral rights of performers (arts 33a and 39a SCA), which entered into force on 1 July 2008.<sup>10</sup>

### III. Present National Legislation on Moral Rights

#### A. Beneficiaries of protection of moral rights

**Authors**—The authors of protected works are the primary beneficiaries of moral rights. Under art.6 SCA, the author is defined to be the physical person who created the copyright work. This means that moral rights protection is conferred only on physical persons to the exclusion of corporate entities, which can never become legal beneficiaries of moral rights (even if they may benefit from waivers of moral rights obtained from the relevant authors). Moral rights protection is however only conferred on authors in respect of works in which copyright subsists under Swiss law.

**Performing artists**—Since 1 July 2008, performing artists also enjoy the benefit of certain moral rights (i.e. the right of paternity and the right of

<sup>8</sup> J. de Werra, *Le droit à l'intégrité de l'oeuvre* (Lausanne: thesis, 1997), p.39.

<sup>9</sup> See M. Seemann, *Übertragbarkeit von Urheberpersönlichkeitsrechten* (Berne: Stämpfli Verlag, 2008), p.222.

<sup>10</sup> See the message of Federal Council of Switzerland, FF 2006 3263.

integrity) as a result of the introduction of these rights in the SCA following Switzerland's ratification of the WPPT.

**22–007 Foreign authors and works**—Switzerland, as a party to the Berne Convention and the WPPT, essentially grants the same protection to the relevant qualified non-nationals and foreign works as that granted to Swiss citizens and Swiss works under these conventions. The protection of moral rights granted under the SCA applies to all works even if these works have been created, first published and/or commercialised abroad by foreign authors, and/or are imported from countries with a different or even non-existing moral rights protection.<sup>11</sup>

## *B. The individual moral rights*

### **1. Right of paternity**

#### *(a) Authors*

**22–008** Pursuant to art.9 para.1 SCA, “the author has an exclusive right in his own work and the right to the recognition of his authorship”. Article 9 para.2 SCA further provides that “the author shall have the exclusive right to decide whether, when, how and *under what name* his own work may be published” (emphasis added). This provision thus confirms that the author has the exclusive right to be recognised as the author of his work,<sup>12</sup> as well as the right to choose the name under which his work shall be published. This in particular means that the author can validly decide to publish his work anonymously or under a pseudonym. In a decision delivered prior to the enactment of the SCA, the Swiss Supreme Court enforced the right of paternity on the basis of the protection of the civil right of personality by holding that two architects who had designed the concept for the extension of a building (a church), which was later executed by another architect on the basis of the former architects' work, had the right to be named as the co-authors of the extension.<sup>13</sup> Interestingly, the Swiss Supreme Court made a connection between the right of paternity and the right of integrity by holding that the absence of reference to the names of the co-authors violated their honour and reputation.<sup>14</sup> The Swiss Supreme Court also held that the architects were entitled to financial compensation for the damage suffered as a result of the absence of their names on their work and any reference to them in the media which had reported the official inauguration of the building.

<sup>11</sup> See I. Cherpillod, *Stämpfli's Handkommentar SHK Urheberrecht (URG)*, 2nd edn (Berne: Stämpfli Verlag, 2012), n.3, art.1, p.20.

<sup>12</sup> For a relatively recent case, see Swiss Supreme Court Decision 4A\_638/2009 of 1 April 2010, [33].

<sup>13</sup> ATF 84 II 570, 574; an older decision was rendered in comparable circumstances, see ATF 58 II 290.

<sup>14</sup> ATF 84 II 570, 574.

**Extent of the protection**—It is generally accepted that the extent of the protection granted by the paternity right depends on the circumstances of the case, even though this is not expressly stated in the statute itself, which appears to provide for an absolute right. The extent of the right thus particularly depends on the kind of copyright work at issue and on the type of industry in which such work was created and is to be used. As a result, an author does not have a right to be named in connection with the use of his work in all circumstances. The right to be named will consequently depend on the trade usages which apply in the relevant industry in which the work has been created and is to be used.

The extent of the protection will thus be different depending on the relevant trade usages. For computer software products and for works of applied art (such as textile or tapestry), for instance, it is generally considered that the authors do not have the right to be named.<sup>15</sup> By contrast, the right of paternity must generally be respected for architectural works and plans,<sup>16</sup> for graphical posters<sup>17</sup> and for journalistic works.

The right of paternity must however be fully respected when a work is used for quotation purposes (as expressly provided for in art.25 SCA<sup>18</sup>) or for news reporting (as expressly provided for in art.28 SCA).<sup>19</sup> By contrast, other exceptions (such as the exception for the purpose of creating a parody which is based on art.11 para.3 SCA) do not refer to the right of paternity and thus do not oblige the user of the work to cite the source of the work or to identify the author (even though, in the case of the parody, the source will normally be apparent).

*(b) Performers*

Since 1 July 2008, as a result of the amendment to the SCA (i.e. art.33a para.1 SCA) which was adopted in order to allow the ratification of the WPPT, performing artists also have the right to be recognised in respect of their performances.<sup>20</sup> For this purpose, performing artists are defined as the physical persons who present a work or an expression of folklore or who participate

<sup>15</sup> See G. Hug, *Stämpfli's Handkommentar SHK Urheberrecht (URG)*, 2nd edn (Berne: Stämpfli Verlag AG, 2012), n.18, art.9, p.85.

<sup>16</sup> KGer Basel-Landschaft, 2004 sic! 298 [sic! is the abbreviation of the Swiss review of intellectual property, information and competition law, see <http://www.sic-online.ch> [Accessed August 2016]].

<sup>17</sup> See “Tribunale d’appello del Ticino”, 2002 sic! 509.

<sup>18</sup> art.25 SCA provides: “1. Published works may be quoted if the quotation serves as an explanation, a reference or illustration and the extent of the quotation is justified for such purpose. 2. The quotation must be designated as such and the source given. Where the source gives the name of the author, that name must also be given”.

<sup>19</sup> art.28 SCA provides: “1. Where necessary for reporting on current events, works perceived in so doing may be recorded, reproduced, presented, broadcast, distributed or otherwise made perceivable. 2. For the purposes of information on current affairs, short extracts from press articles or from radio and television reports may be reproduced, distributed and broadcast or rebroadcast; the extract and the source must be designated. Where the name of the author is given in the source, that name must also be given”.

<sup>20</sup> For an in-depth study regarding the protection of performing artists’ moral rights under

artistically in such a presentation (art.33 para.1 SCA). As such, performing artists have a right of paternity over their performances which corresponds to that of authors (art.9 para.1 SCA). It should be noted, however, that art.33a SCA does not provide each performing artist with the absolute right to see his name mentioned.<sup>21</sup> As such, there may be circumstances (which may depend in particular on practice and trade usages<sup>22</sup>) in which the indication of a performer's name may be omitted.<sup>23</sup> Article 33a SCA does not provide any guidance on this specific issue.<sup>24</sup> It thus remains unclear how the right of paternity of performing artists should be applied and exercised in the (frequent) cases where the performance is given by numerous performers (such as a choir or an orchestra). It appears reasonable that in such cases, with the exception of the main performers (such as the soloists and the conductor), performers will not necessarily be afforded the right to be named individually.<sup>25</sup>

## 2. Right of integrity

### (a) Authors

**22–011** The right of integrity of the author is protected by art.11 paras 1 and 2 SCA. While art.11 para.1 SCA provides for a general protection of the right of integrity against all unauthorised changes, art.11 para.2 SCA provides for a more specific protection of the integrity of the work in the case where a third party has been authorised by the law or by contract to make changes to the work. Owing to their differences, these two different levels of protection of the right of integrity must be analysed separately.

**22–012** **First level of protection**—The first level of protection of the right of integrity of the author results from art.11 para.1 SCA, which provides that the author shall have the exclusive right to decide: (a) “whether, when and how the work may be altered”, and (b) “whether, when and how the work may be used to create a derived work or may be included in a collection”. On this basis, the author has, as a matter of principle, a discretionary right to decide how his work can be amended by a third party and, more generally, how his work can be used in order to create a derivative work or how it can be integrated in a collective

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Swiss law, see the doctoral thesis of M. Braun, *Le droit moral des artistes interprètes*, Lausanne (Berne: Stämpfli Verlag AG, 2010).

<sup>21</sup> See message of Federal Council of Switzerland, FF 2008 3295.

<sup>22</sup> D. Barrelet and W. Egloff, *Le nouveau droit d'auteur*, 3rd edn (Berne: Stämpfli Verlag, 2008), art.33a N4; C. Rigamonti, *Urheberpersönlichkeitsrechte Globalisierung und Dogmatik einer Rechtsfigur zwischen Urheber- und Persönlichkeitsrecht* (Berne: Stämpfli Verlag, 2013), p.278.

<sup>23</sup> See message of Federal Council of Switzerland, FF 2008 3295.

<sup>24</sup> C. Rigamonti, *Urheberpersönlichkeitsrechte* (Berne: Stämpfli Verlag, 2013), p.277.

<sup>25</sup> Even though there is no case law yet on this issue, the view that not all performers have the right to be named in respect of performances by a choir or an orchestra could be supported by reference (by analogy) to art.34 para.3 SCA, which provides that the commercial use of the collective performance only requires the consent of the main performers.

work (for instance, a collection of poems). The statute thus confers a protection for the integrity of the work which is rather extensive and much wider than that conferred under that provided by art.6(1)bis Berne Convention.

However, as with the right of paternity, although the right granted by art.11 para.1 SCA may appear very wide and absolute in its terms, the application of this right in practice is more restrictive. The extent of the protection indeed greatly depends on the circumstances of the case and, specifically, on the type of work that is at stake. As a result, protection is less extensive for a functional work (such as a travel guide<sup>26</sup> or a school book<sup>27</sup>) than for more artistically oriented works (such as a sculpture, a painting or a poem). This approach was characterised by the Swiss Supreme Court in the *Gold Rush* case (see above, Section I) as follows: “the more a work is the expression of the author’s personality, the more it is based on his individuality, and the closer the ties between the work and the author’s personality are, the sooner a modification by a third party can be found to constitute a violation of [the author’s right of integrity]”.<sup>28</sup> Even though the *Gold Rush* case was decided before the implementation of the SCA, this principle remains applicable under the SCA.<sup>29</sup>

Even though the right of integrity has been applied by Swiss cantonal courts in relation to various types of works (such as audiovisual works<sup>30</sup> or biographical works<sup>31</sup>), its application has been significantly more restrictive in relation to architectural works even before the adoption of the SCA in 1992. For architectural works, the balance has indeed so far largely tipped in favour of the owners of the buildings incorporating the architectural works. As a result, claims of violations of the right of integrity made by architects based on allegedly unacceptable changes made to the buildings by third parties have generally been rejected by the courts.<sup>32</sup>

**Second level of protection**—Article 11 para.2 SCA offers what could be viewed as a second level of protection for the right of integrity by providing that: “Even where another person is authorised by contract or by statute to alter a work or to use it to create a derived work, the author may oppose any distortion of the work that is damaging to his personality”. This provision ensures

22–013

<sup>26</sup> See for instance the decision of the Cantonal Court of Justice of Geneva, *Semaine Judiciaire* 1977, p.433.

<sup>27</sup> ATF 69 II 53.

<sup>28</sup> See ATF 96 II 421, 422, cited here from its (unofficial) English translation in IIC 1971 315, at 323–324 (1971); see also ATF 117 II 466, 476.

<sup>29</sup> J. de Werra, *Le droit à l’intégrité de l’oeuvre* (thesis Lausanne, 1997), p.97; see also the decision of the Swiss Supreme Court 4A\_675/2015 of 19 April 2016 (to be published in ATF), para.4.6.

<sup>30</sup> Appellate Court of Zurich, RSPIDA 1981, p.109.

<sup>31</sup> Justice Commission Lucerne, RSPI 1994, p.292.

<sup>32</sup> See the leading cases rendered by the Swiss Supreme Court (under the previous regulation), ATF 117 II 433 ; ATF 120 II 65 ; Swiss Supreme Court, RSPI 1991, p.389. This was confirmed under the SCA, see Swiss Supreme Court, 1997 sic! 381; for a discussion, see para.22–016 see also the Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF).

a minimal protection of the right of integrity in cases where a third party has obtained the right to alter the work either by contract or on the basis of the law itself, such as for the purpose of creating a derivative work.

A contractual right to alter the work can particularly result from the grant by the author of an authorisation to create a derivative work. As a result, where a literary work is to be adapted into a film the author can invoke the right of integrity against such adaptation where it would constitute a “distortion of the work that is damaging to his personality”. The protection of art.11 para.2 SCA particularly applies in cases in which the author has transferred all of his copyrights and has fully waived all his moral rights in his work. From this perspective, an author cannot waive the protection of his right of integrity by granting a blanket waiver to a third party. The protection of the right of integrity under art.11 para.2 SCA is mandatory and cannot be waived by contract in the form of a blanket waiver (a specific waiver by which the author would accept specific changes to be made to his work could still be valid).<sup>33</sup> This is the reason why art.11 para.2 SCA is deemed to protect the unwaivable hard core (“*harte Kern*”) of the right of integrity.<sup>34</sup>

An example of this might be the case of an author who has contractually authorised a producer to adapt a love story into a movie by transferring to the producer any and all rights in his story (including his moral rights). In such case, art.11 para.2 SCA would protect the author if the adaptation of his love story was turned into a pornographic movie. However, art.11 para.2 SCA is subject to a restrictive interpretation and authors may only object to alterations in this context to a limited extent.<sup>35</sup> As such, the Swiss Supreme Court held that the concept of distortion of the work that is damaging to the author’s personality under art.11 para.2 SCA requires a certain level of seriousness of the alterations inflicted to the work (i.e. a minor change would not be sufficient) and that such alteration should have a negative impact on the author and should severely affect the creative work of the author.<sup>36</sup> In this respect, the Swiss Supreme Court also held that, contrary to what is the case for instance in Germany, the assessment as to whether or not there is a distortion of the work that is damaging to the author’s personality does not require a balancing of the interests at stake (i.e. the interest of the author vs.

<sup>33</sup> As to the waivability of moral rights generally, see paras 22–034 and 22–036 (with respect to the right of integrity).

<sup>34</sup> See D. Barrelet and W. Egloff, *Le nouveau droit d’auteur*, 3rd edn (Berne: Stämpfli Verlag, 2008), art.11 N 13; H. Pförtmüller, *Stämpfli Handkommentar SHK Urheberrecht (URG)*, 2nd edn (Berne: Stämpfli Verlag AG, 2012), n.8 art.11, p.108; 1997 sic! 381; ATF 120 II 65, p.70; Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF), 2016 sic! 446, paras 4.1. and 4.2.

<sup>35</sup> Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF), 2016 sic! 446, para.4.2, citing N. Schneider, *Urheberrechtlicher Schutz von planmässig festgehaltenen sowie ausgeführten Werken der Baukunst*, 1996, p.407.

<sup>36</sup> ATF 120 II 65, 70; as confirmed by subsequent case law of the Swiss Supreme Court, see the decision of the Swiss Supreme Court, 1997 sic! 381; see also Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF), 2016 sic! 446, paras 4.5. and 4.6.1.

the interest of the “other person” authorised to make the alterations).<sup>37</sup> In addition, the mere fact that an author may have previously consented to such distortion does not dispense the court from examining the existence of an infringement to art.11 para.2 SCA.<sup>38</sup>

**Objective standard**—The standard to be applied for assessing the existence of a “distortion of the work that is damaging to his personality” is an objective one in that it does not depend on the subjective perception of the author at issue (who will generally feel that any changes made to his work are damaging to his personality).<sup>39</sup> 22–014

**Use of work in a different context (indirect violation of the right of integrity)**—The protection of the right of integrity under art.11 para.2 SCA covers both direct and indirect violations of the integrity of the work. Direct violations occur when the work itself is distorted (i.e. a poem is abridged) while indirect violations occur when the substance of the work remains unaffected but when the circumstances of use of the work are detrimental to the author’s personality (i.e. a religious song is used for advertising purposes).<sup>40</sup> Case law confirms that a violation of the right of integrity under art.11 para.2 SCA can occur indirectly, that is, where the work itself remains unchanged, but where the surroundings of the work are altered. Thus, when one of the campuses of the Swiss Federal Institute of Technology in Zurich was extended by the addition of new buildings, the architect who had initially created the campus claimed unsuccessfully that the extension negatively affected his architectural concept. The Swiss Supreme Court held in 1994 that for such claims of indirect violation of the right of integrity raised by an architect to succeed, it must be shown that the owner of the building has acted in a morally reprehensible manner in order to negatively affect the author’s interests.<sup>41</sup> It follows from this decision that the burden of showing an infringement of the right of integrity as resulting from indirect violation is higher than for direct violation where the substance of the work itself is altered. 22–015

Article 11 para.2 SCA also applies in cases where a third party has the

<sup>37</sup> Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF), 2016 sic! 446, para.4.2 (references omitted).

<sup>38</sup> Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF), 2016 sic! 446, see also C. Rigamonti, *Urheberpersönlichkeitsrechte*, 2013, p.300. Against this interpretation and in favour of a balancing of interests: J. de Werra, *Le droit à l’intégrité de l’oeuvre*, 1997, n.135 p.162.

<sup>39</sup> ATF 131 III 480, 493 (citing J. de Werra, *Le droit à l’intégrité de l’œuvre* (Lausanne, 1997), p.35, who suggests that a violation of the right of integrity be assessed from the perspective of a reasonable author).

<sup>40</sup> ATF 120 II 65, 67; see also J. de Werra, *Le droit à l’intégrité de l’oeuvre* (Lausanne, 1997), p.68, et seq.

<sup>41</sup> ATF 120 II 65, 70; the court referred in this context to art.41 para.2 of the Swiss Code of Obligations under which there is civil liability in tort law where someone causes a damage to a third party by acting in a morally reprehensible manner (even without having breached any specific law).

legal right to use a work without the authorisation of the author or of the copyright owner, for instance for quotation purposes. Thus a quotation from a work which meets the conditions for the permitted act of quotation (as provided for in art.25 SCA)<sup>42</sup> may nevertheless violate the right of integrity of the author if such quotation distorts the work and image of the author in a manner that is detrimental to his personality (indirect violation). However, the application of art.11 para.2 SCA in this context, specifically the condition that a use must be “detrimental” to the personality of the author<sup>43</sup>, remains quite delicate. This was demonstrated in a Swiss Supreme Court decision concerning an article which had been published in an important Zurich daily newspaper and which had been written in reaction to a previous article by a right-wing politician about the criminality of foreigners. A quotation from the former article was subsequently made without the authorisation of its author in a conservative right wing newspaper in which the author himself was also violently criticised.<sup>44</sup> The author alleged in this respect that he suffered an indirect violation of his right of integrity because his work had been presented in a context which distorted it, given that it was published in a political media which was totally opposed to his own political opinions. The court rejected the claim and held that the author had entered the public sphere by voluntarily submitting his article to the Zurich newspaper which itself criticised the previous article written by the right wing politician. He had thus agreed to enter into a political debate and so could not claim to be damaged in his personality as a result of the quotes made from his article in the right-wing publication.<sup>45</sup>

**22–016 Works of architecture**—The restrictive approach adopted with respect to the protection of the integrity of architectural works is now anchored in art.12 para.3 SCA, which provides that “works of architecture that have been built may be altered by the owner subject to art.11 para.2”. The effect of this provision is that architects can only assert their right of integrity over a completed architectural work if they are able to show that the altered building constitutes a “severe” alteration of the work—a reading by the courts based on the use of the term “distortion” in art.11 para.2 SCA<sup>46</sup>—which would be damaging to their personality under art.11 para.2 SCA. This provision, which can be viewed as a codification of the case law rendered before the enactment of

<sup>42</sup> art.25 para.1 SCA provides that “published works may be quoted if the quotation serves as an explanation, a reference or illustration and the extent of the quotation is justified for such purpose”

<sup>43</sup> C. Rigamonti, *Urheberpersönlichkeitsrechte* (Berne: Stämpfli Verlag, 2013), p. 297.

<sup>44</sup> ATF 131 III 480, 493.

<sup>45</sup> ATF 131 III 480, 493. The court accepted as a matter of principle that indirect violations of the right of integrity can occur but rejected the claim in this case because the author had willingly entered into this political debate and thus had to accept that excerpts of his article could be reused in a right wing publication.

<sup>46</sup> ATF 120 II 65, 70; see also Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF), 2016 sic! 446, para.4.5.

### III. PRESENT NATIONAL LEGISLATION ON MORAL RIGHTS

the SCA,<sup>47</sup> confirms that the threshold for upholding the integrity right for architects in Switzerland is very high and that the interests of the owners of a building generally prevail over those of the architects.<sup>48</sup> Owners are indeed “fundamentally entitled to alter architectural works”<sup>49</sup> in order to maintain the value and purpose of buildings and to adapt them to changed technical or environmental circumstances, among other things.<sup>50</sup> Architects are deemed to have considered the possibility that such alterations may be made (at some point in the future) and, in the absence of any explicit reservations or agreement on the issue, they are deemed to have accepted such potential alterations upon the delivery of the building, thereby waiving their moral right to such extent.<sup>51</sup> Such a restrictive approach contrasts with the relatively generous position that was adopted by the Swiss Supreme Court in an older case (which, however, did not relate to the protection of an architectural work), in which the court had held that the right of integrity could be relied on by the author, irrespective of whether the changes that were made to his work without his approval improved the work or negatively affected it.<sup>52</sup> By contrast, in a cantonal decision regarding the violation of the right of integrity of an architect concerning a work of religious architecture (a church), the court decided in favour of the architect, on grounds that the architectural concept had in the case at hand been severely distorted.<sup>53</sup>

<sup>47</sup> ATF 120 II 65.

<sup>48</sup> For a discussion on this issue in legal literature, see C. Thies and P. Spauschus, “Quo vadis Baukultur?—Der Schutz der Urheberpersönlichkeit von Architekten in Deutschland und der Schweiz”, 2007 sic! 881; see also S. Wenger, “Quo vadis Baukultur?—Eine Präzisierung”, 2008 sic! 320; see also M.J. Lutz, “Der Erhaltungsanspruch des Architekten am Bauwerk ist dem Nutzungsinteresse des Eigentümers grundsätzlich unterzuordnen” in *Binsenwahrheiten des Immaterialgüterrechts, Festschrift für Lucas David zum 60. Geburtstag* (Zurich: Schulthess Verlag, 1996), p.235. See the Swiss Supreme Court decisions (which were delivered under the SCA): ATF 117 II 433; and ATF 120 II 65, Swiss Supreme Court, 1991 RSPi 389; this was confirmed under the new regulation: see Swiss Supreme Court, 1997 sic! 381 and Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF), 2016 sic! 446.

<sup>49</sup> Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF), 2016 sic! 446, para.4.2, citing I. Cherpillod, *Le droit d'auteur des architectes*, plaidoyer 6/1994, p.52.

<sup>50</sup> Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF), 2016 sic! 446, para.4.2; ATF 117 II 466, 475.

<sup>51</sup> Swiss Supreme Court Decision 4A\_675/2015 of 19 April 2016 (to be published in ATF), 2016 sic! 446, para.4.2; ATF 117 II 466, 475.

<sup>52</sup> ATF 114 II 368, 370 (holding that the right of integrity provides protection against anyone who changes the work, irrespective of whether the change made to the work negatively affects it or improves it (“*Sein Schutz bezieht sich auch auf das Urheberpersönlichkeitsrecht, das unabhängig von vermögensrechtlichen Ansprüchen einen absoluten Anspruch auf Unterlassung gegenüber dem gewährt, der das Werk ohne Erlaubnis in irgendeiner Weise abändert, gleichviel ob das Werk dadurch entsteht oder verstümmelt, verbessert oder gar wertvoll ergänzt wird* [ref. omitted]. *Es kommt deshalb nicht darauf an, ob das Ansehen des Künstlers durch die Herausgabe der streitigen Gedenkmünze gehoben wird, wie das Obergericht annimmt, und ob der Beschwerdegegner gutgläubig gehandelt hat und eher an eine Ehrung des Künstlers als an einen Gewinn gedacht haben will*”).

<sup>53</sup> Decision of the Cantonal court of Grisons of 4 September 2007, 2009 sic! 590 (confirmed by the Swiss Supreme Court decision of 29 January 2009, 2009 sic! 345); the church is located in the village of Cazis, see [https://de.wikipedia.org/wiki/Steinkirche\\_Cazis](https://de.wikipedia.org/wiki/Steinkirche_Cazis) [Accessed August 2016].

In any event, the moral right of the architect must yield where the alteration of a building is warranted by public law (i.e. by construction law). If altering the building is required in order to comply with the requirements of construction law, the architect may not assert the violation of his moral rights. This was confirmed in a cantonal court decision in which the court held that, in cases where alterations are *imposed* by public law, art.11 para.2 SCA does not apply as this provision only relates to *voluntary* alterations (which the court determined on the basis of the statute's wording ("may be altered by the owner"), arguing that in such case, the owner is not "authorised", but rather *required* to alter the work.<sup>54</sup>

**22–017 Relationship between the right of integrity and the right of personality**—The question arises as to whether the protection of the author's right of integrity under art.11 para.2 SCA is essentially identical to the one granted under the SCC in the sense that it is limited to the author's professional honour or reputation as an individual (and not as an author). It appears however that the right of integrity under art.11 para.2 SCA should not be limited to the protection of the author's professional honour or reputation. A violation of the right is thus possible even in cases in which the professional honour or reputation of the artist is not injured (for instance in cases in which a work is used for an artistic or political purpose that is completely foreign or even opposed to the author's opinions).<sup>55</sup>

**22–018 Destruction of work**—Swiss copyright law provides for a further aspect of the author's integrity right, which is the protection against the destruction of the original embodiment of an artistic work (for instance, a unique sculpture or a painting).

Thus art.15 para.1 SCA provides that, where the owner of an original work, of which no other copies exist, has reason to believe that the author of the work has a justified interest in its preservation, the owner may not destroy such work without first offering to return it to the author. The author therefore has the ability to prevent the destruction of his original work by re-acquiring it from an owner who is envisaging destroying the work. In order to avoid the author having to pay the market price for the work, art.15 para.1

<sup>54</sup> Decision of the Cantonal Court of St. Gall of 18 May 2011, ref. DZ.2009.3, St. Gallische Gerichts-und Verwaltungspraxis (GVP), 2011, N° 50: "*Der vom Architekten C angerufene Art.11 Abs.2 URG ist auf den vorliegenden Fall indessen nicht anwendbar. A und B waren nicht im Sinne dieser Bestimmung 'vertraglich oder gesetzlich befugt' den Rückbau auf das in der Baubewilligung festgelegte Mass vorzunehmen, sie waren vielmehr gerichtlich dazu gezwungen. . . . Der Rückbau durch A und B erfolgte nicht, weil sie sich dazu aus freiem Willen entschlossen hätten und dazu 'befugt' gewesen wären. Nur unter dieser Bedingung der Möglichkeit freier Willensbetätigung aber kann einem entstellenden Eingriff in die Werkintegrität überhaupt gestützt auf Art.11 Abs.2 URG entgegengetreten werden.*"; confirmed by the Swiss Supreme Court Decision 4A\_423/2011 of 26 September 2011, para.5.3.

<sup>55</sup> See by contrast ATF 58 II 290, 308 (holding that no violation of the right of integrity should be admitted because the changes which were made to the work improved it).

SCA provides that the owner may not request from the author a higher compensation than the value of the materials composing the work. Even though this solution appears to protect the author's interests adequately, its application may still remain difficult where the work is composed of valuable materials (such as gems or gold). In other cases, the owner of the work may not be in a position to return it, for example, where the work has been integrated into a building that is to be destroyed (such as a fresco or mural paintings). In such a case, art.15 para.2 SCA provides that, where it is not possible to return the work, the owner must make it possible for the author to reproduce the original copy in an appropriate manner. Article 15 para.3 SCA further provides that such right does not apply to architectural works; in this situation the author only has the right to photograph the work and require that copies of the plans be handed to him, at his own cost.

It follows that architectural works are treated differently from other types of works as regards the integrity right. This is to take into account the legitimate interests of the owners of a building that incorporates a copyright work. Similarly, in cases of violation of the author's exclusive, economic rights and even in cases of violation of the author's moral rights, the author is not entitled to request the destruction of architectural works that infringe his rights, pursuant to art.63 para.2 SCA.<sup>56</sup>

*(b) Performers*

Since 1 July 2008, performing artists have also enjoyed a limited integrity right in respect of their performances. Thus art.33a para.2 SCA provides that the protection of the performing artists against mutilations of their performances is governed by arts 28a to 28l SCC. Based on this provision, which grounds the protection in general civil law, performing artists do not enjoy a specific protection as regards the integrity of their performance. This consequently means that the integrity of the performances is protected only to the extent that the performers' honour or reputation is threatened. From this perspective, the protection granted to performing artists is more limited than that granted to authors, which, as has been seen, essentially grants the authors the right to object to any changes which are made to their works (as provided for under art.11 para.1 SCA).

22-019

**3. Right of disclosure**

*(a) Authors*

Article 9 para.2 SCA confers a right of disclosure to authors by providing that they have the right to decide whether, when and how their own work is published (and also under what name). This right gives authors the power to

22-020

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<sup>56</sup> Swiss Supreme Court, 2009 sic! 345.

decide if and when their work can be shown to the public for the first time. Article 9 para.3 SCA further provides that “a work shall be considered published when it has been made available for the first time, by the author or with his consent, to a large number of persons not constituting a private circle within the meaning of art.19 para.1(a) SCA”. Article 19 para.1(a) SCA states, in turn, that the private use of a work shall mean any use of a work in the personal sphere or within a circle of persons closely connected to each other, such as relatives or friends. The sale of a tangible embodiment of the work, such as the sale of a painting or sculpture to a third party, may be taken as a decision to disclose the work to the public.

The practical importance of the right of disclosure should not be exaggerated, as a violation of such right frequently occurs simultaneously with a violation of other exclusive, economic rights of the author, such as the right of reproduction (which is protected by art.10 para.2(a) SCA).<sup>57</sup> From this perspective, a violation of the right of disclosure is only infrequently invoked on a stand-alone basis before Swiss courts. This may also be due to the fact that sanctions for violations of the right of disclosure are of no practical use, since once the work has been published, the author cannot have it removed from the public eye, and damages are unlikely to be granted by courts for a violation of the right, having regard to the restrictive approach adopted so far by Swiss courts.

*(b) Performers*

- 22–021** The SCA does not provide performers with a specific right of disclosure. However, based on case law pre-dating the adoption of the SCA, performing artists may be able to claim that the unauthorised disclosure of their performance violates their right of personality as protected under the SCC.<sup>58</sup> In addition, and independently from this, the commercial exploitation of such performances would violate the exclusive economic rights granted to performing artists (art.33 SCA).

#### **4. Right of retraction**

- 22–022** Swiss copyright law does not provide for a right of retraction for either authors or performing artists. However, it is fairly easy to imagine situations in which overly onerous contractual obligations of authors would be deemed unlawful on grounds of undue restraint of trade. This could be the case, for instance, if, pursuant to an agreement between an artist and an art gallery, the artist had undertaken to create and supply art works to the gallery in an excessively onerous way (in terms of volume of works and/or term of

<sup>57</sup> See ATF 120 IV 208, 212.

<sup>58</sup> ATF 110 II 411.

the obligation). In such cases, it is conceivable that the agreement would be struck down as unlawful.<sup>59</sup> This would then mean that the author would have the right to retain the ownership of his artworks and even to keep them undisclosed (thus exercising negatively his right of disclosure), in spite of a previous contractual commitment to transfer such art works to the art gallery.

## 5. Right of access

Article 14 para.1 SCA provides for a right of access for authors by holding that “any person who holds or possesses the original or a copy of a work as his property shall be required to provide access thereto to the author to the extent necessary for the latter to exercise his author’s rights and insofar as no justified interest on the part of the proprietor opposes such access”. The *ratio legis* of the right of access (as well as of the right to reacquire a work in danger of being destroyed) is to prevent the transfer of the copyright work ultimately equating the (de facto) transfer of all rights relating to the work.<sup>60</sup> As such, the right of access is not an end in itself but serves the purpose of enabling an author to exercise his rights.<sup>61</sup> The works of visual artists are the most relevant in this context.

22–023

The right to gain physical access to the original of an author’s work or a copy thereof is subject to two conditions.

The first condition imposed by art.14 para.1 SCA is that access should be necessary for the author to be able to exercise his author’s rights. A typical situation where an author would have a legitimate interest in accessing the original version of one of his works would be one in which he feared that the work was about to be damaged or destroyed by its owner. In such case, the author should be entitled to have access given that such access would be necessary for him to exercise his moral right of integrity (as protected by art.11 SCA) as required under the first condition of art.14 para.1 SCA.

The second condition requires that the owner of the relevant work should not have any legitimate and justified interest for opposing such access. It is possible that an owner might try to justify his refusal to give access by claiming that such access would violate his privacy (although such a scenario appears rather hypothetical).

<sup>59</sup> See by analogy ATF 104 II 108, 117 (in which a talent management agreement entered into between an agency and a young “would-be actress” was struck down under art.27 para.2 SCC because it was excessively restrictive of that person’s personal freedom).

<sup>60</sup> Decision of the Zurich High Court of 26 February 2013, sic! 2013 523: “*Mit dem Zutrittsrecht (sowie dem Ausstellungsrecht und dem Schutz vor Zerstörung) wollte der Gesetzgeber verhindern, dass die Veräußerung des Werkexemplars faktisch doch einer Veräußerung des Rechts gleichkomme. . . . Ohne Zugang können aber die dem Künstler verbliebenen Verwendungsrechte (Vervielfältigung—also insbesondere Fotografien—von Gemälden, Abdruck bei Plastiken etc.) nicht ausgeübt werden*” [references omitted].

<sup>61</sup> C. Rigamonti, *Urheberpersönlichkeitsrechte* (Berne: Stämpfli Verlag, 2013), p.277.

## 6. Right to obtain temporary possession

**22–024** Article 14 SCA also provides for a right of an author to obtain temporary possession of an art work owned by a third party for the purpose of exposing the work in an exhibition in Switzerland. This right is provided for in art.14 para.2 SCA as follows: “The author may require that a copy of the work be lent to him for exhibition within the country if he is able to prove an overriding interest”. An example of such an overriding interest would be the case of a major art exhibition (either of different artists or the individual artist). In order to protect the interests of the owner of the art work, art.14 para.3 SCA provides that the “loan may be made dependent on provision of security for the return of the copy of the work in good condition. Where the copy cannot be returned in good condition, the author shall be liable even without fault on his part”. Similarly to the right of access and to the right to reacquire a work in danger of being destroyed, this right (which has not so far led to any published court decision) aims at striking a fair balance between the respective interests of the author and of the owner of the art work at issue.<sup>62</sup>

### *C. Protection of moral rights by other causes of action*

**22–025** The protection of moral rights by other causes of action requires a separate analysis for each moral right.

**22–026** **Paternity right**—With respect to the paternity right, it is clear that such a right can only exist if the work at issue is protected by copyright law. Should this not be the case (for instance, because the term of protection has lapsed), the right of paternity cannot apply.<sup>63</sup> In such case, it could be claimed that a third party who uses the work without giving credit to the author violates the law against unfair competition (i.e. the Swiss Act against Unfair Competition of 19 December 1986, “SAUC”<sup>64</sup>), which prohibits, among other things, commercially relevant acts such as the marketing and sale of products which create confusion with products or works created by third parties (art.3 para.d SAUC). However, an important principle of Swiss intellectual property law is that the limits of the protection resulting from the various specific intellectual property regulations (such as the SCA) shall not be circumvented by the grant of a similar protection which would be based on other legal instruments such as unfair competition regulations (i.e. the SAUC) or the protection of

<sup>62</sup> On the respective relationships between the author and the owner of the author’s art work, see the doctoral thesis of P. Hafner, *Das Verhältnis zwischen Urheberrecht und Eigentum am Werkexemplar* (Berne: Stämpfli Verlag, 1994). By application of the principle of territoriality, the right does not apply to works situated outside Switzerland.

<sup>63</sup> This was noted by the Swiss Supreme Court in ATF 113 II 312, para.4b.

<sup>64</sup> SC 241.

the right of personality under the SCC.<sup>65</sup> This was particularly emphasised by the Swiss Supreme Court in a case decided before the rights of performing artists were expressly protected in Switzerland (i.e. under the SCA since 1992), where the court stated that the right of personality cannot be used to create economic rights which have not been adopted (yet) under the specific intellectual property regulations.<sup>66</sup>

The rationale is that the limits of the exclusive rights set forth in the respective intellectual property regulations should not be circumvented by the grant of other similar legal protection. This would, in essence, lead to an undue extension of the rights granted to intellectual property owners and thus affect the balance of rights and interests between such owners and the public, which, in turn, would threaten the public domain.

**False attribution of authorship**—The SCA does not protect authors against cases of false attribution of authorship. This situation can occur when a third party falsely associates and uses the author's name in connection with a work which has not been created by such author. This situation can particularly arise when a work of art falsely bears the signature or the name of an artist who in reality has not created such work. In these circumstances, given that no work of the author is at issue, no copyright protection and thus no violation of the right of paternity can be claimed. In such cases, despite the above, the protection could be based on the protection of the right of personality resulting from the SCC (with the important consequence that the protection would lapse upon the death of the author).<sup>67</sup> 22–027

**Right of integrity**—As far as the right of integrity is concerned, it is generally accepted that the specific protection of such right as results from the SCA (art.11 SCA) pre-empts any protection of the interests of the author which might arise under the SCC. From this perspective, an author could not successfully claim to be the victim of a violation of his right of personality (i.e. of his honour or reputation) in order to elude the narrow scope of legal protection of the right of integrity granted under the SCA. 22–028

**Performing artists**—The situation is entirely different for performing artists since the relevant provision (art.33a para.2 SCA) expressly provides that the protection of their integrity right is based on the SCC. Here, the protection remains defined by Swiss civil law and is thus not specifically tailored to the situation of the performing artists, even if the formal legal basis for such protection is grounded in the SCA. As a result, the substantive integrity right is based on the SCC. 22–029

<sup>65</sup> See ATF 113 II 306, 311.

<sup>66</sup> ATF 110 II 411.

<sup>67</sup> See J. de Werra, *Le droit à l'intégrité de l'œuvre* (Lausanne, 1997), p.44 et seq.

**22–030 Right of disclosure**—With respect to alternative sources of protection of the right of disclosure, cases can be envisaged where the author, his heirs or other relatives could claim that the unauthorised disclosure of the author’s work violated their right of privacy or other rights of personality (such as their honour or their reputation).<sup>68</sup> Even though there is no recent case law on this issue, reference can be made to an old case in which the Swiss Supreme Court held that the public showing of a painting depicting the famous Swiss painter Ferdinand Hodler on his deathbed violated the personality rights of his widow because such a painting invaded her privacy and her personal feelings towards her late spouse.<sup>69</sup> On this basis, it is possible that authors (or qualified third parties standing in close connection to them) may claim violation of their right of personality should they fail to invoke the violation of the right of disclosure.

**22–031 Right of access**—No alternative protection mechanism exists under Swiss law with respect to the right of access or the right of retraction (which in any case, as noted above, does not exist as such under Swiss copyright law).

#### *D. Duration of moral rights of the various beneficiaries*

**22–032 Authors**—One of the major and most welcome innovations which was brought about by the enactment of the SCA in 1992 was that moral rights became expressly protected and were consequently no longer based on the general protection of the rights of personality under the SCC. The most significant consequence was that the duration of the protection of moral rights became identical to that of the economic rights of the authors. Article 29 para.1 SCA provides in this respect that the protection of the rights shall expire 70 years after the death of the author (or 50 years with respect to rights in a computer program). Article 16 para.1 SCA also provides that copyright shall be transferable by inheritance, and this provision also applies to moral rights. On the basis of this new system, authors have been put in a position to decide by whom and how their moral rights shall be exercised after their death by deciding to entrust them to an executor or to a third party entity should they not have confidence in their statutory heirs.<sup>70</sup>

Under the previous regime (i.e. before the adoption of the SCA 1992), an

<sup>68</sup> See M. Seemann, *Übertragbarkeit von Urheberpersönlichkeitsrechten* (Berne: 2008), p.219.

<sup>69</sup> ATF 70 II 13.

<sup>70</sup> See P. Breitschmid, et al., “Persönlichkeitsschutz Verstorbener—Urheberpersönlichkeitsschutz im Besonderen” (2011) 5 *Successio* 19 et seq.; P. Breitschmid, *Einsatz des Willensvollstreckers bei persönlichkeitsrechtlichen Belangen*; K. Siehr, “Der Künstlernachlass—Rechtsfragen nach eines Künstlers Tod”, in G. Reichelt (ed.), *Ludwig Boltzmann Institut für Europarecht, Vorlesungen und Vorträge*, H. 13 (Vienna: Schulthess, 2002), p.1, et seq.; on this issue, see J. de Werra, “*Droit d’auteur et successions*”, 2000 sic! 685, see also C. Baumgartner, *Nachlassplanung des Urhebers* (Berne: Stämpfli Verlag, 2005); for an analysis of the protection of intellectual property rights after the death of the creator under the previous copyright

author's moral rights expired upon his death, although in certain circumstances (as mentioned above in relation to the *Hodler* case), his heirs had the ability under certain (restrictive) conditions to invoke a violation of their right of personality (privacy, honour or reputation).

**Performers**—The simple and uniform term of protection which applies to all of the authors' moral rights (that is to the rights of paternity, integrity, disclosure and access) stands in sharp contrast to the different and more complex regime which applies to the term of protection of the moral rights of performing artists. 22-033

Article 39 para.1*bis* SCA (which entered into force on 1 July 2008) provides in this respect that the right to be recognised as a performing artist pursuant to art.33a para.1 SCA (i.e. the right of paternity of the performing artist) expires at the death of the performing artist or, if later, the expiry of the term of protection as defined in art.39 para.1 SCA. Article 39 para.1 SCA provides in turn that the protection for performing artists begins with the performance and ends after a period of 50 years starting from this moment (or more precisely on 31 December of the relevant previous year as specified in art.39 para.2 SCA). As a result, the performers' paternity right continues until the occurrence of the last of the two following events: the death of the performing artist or the expiration of the 50-year term after the performance.

By contrast, the performers' integrity right is governed by the SCC (art.28 SCC), as provided for under art.33a para.2 SCA. It therefore expires upon the death of the performing artist. On this basis, the duration of protection of the moral rights of performing artists varies depending on the type of moral right at issue.

### *E. Alienability/waivability of moral rights*

Article 16 para.1 SCA provides that copyrights shall be transferable by assignment. This provision does not distinguish between the *economic* and *moral* rights of the authors. In addition, the SCA does not contain any other provision addressing in general terms the issue of the alienability or waivability of moral rights. However, the Swiss Supreme Court confirmed that “the moral right cannot be assigned; this is to say that such right is intrinsically linked to the physical person of the author”.<sup>71</sup> As to legal scholars, views diverge on the question of whether moral rights are assignable in full or in 22-034

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regulation, see M. Hunziker, *Immaterialgüterrechte nach dem Tode des Schöpfers* (Berne: Stämpfli Verlag, 1983).

<sup>71</sup> Decision of the Swiss Supreme Court Decision 4A\_638/2009 of 1 April 2010, para.3.3; see also the decision of the Cantonal Court of St. Gall of 18 May 2011, ref. DZ.2009.3, St. Gallische Gerichts- und Verwaltungspraxis, GVP 2011 N. 50.

part and whether, and to what extent, such rights are waivable.<sup>72</sup> Despite the existence of diverging views, it is generally acknowledged that no one-size-fits all answer can be given for all types of moral rights, so that the issue must be analysed separately for each of them, and must distinguish an assignment from a waiver of the rights, something which is not always clearly set forth by courts.<sup>73</sup> In a recent report relating to the on-going revision of the SCA (which will however not cover moral rights),<sup>74</sup> the Swiss Federal Council has indicated that, even though the moral rights cannot be assigned in their core elements, legitimate interests can justify that the rights holders shall be in a position to manage this issue by contract and thus shall have the right to assign part of their moral rights to third parties.<sup>75</sup>

**22–035 Paternity right**—With respect to the paternity right, given that such right is considered to be intrinsically bound to the author, it is generally deemed inalienable by the courts.<sup>76</sup> However, it is not disputed that an author can contractually waive his right of paternity in the framework of a “ghostwriter” agreement, according to which the author agrees that his work shall be published under the name of a third party.<sup>77</sup> However, contractual obligations such as these remain subject to the general limits of validity resulting from Swiss Civil law. In this respect, art.27 SCC provides that nobody can contractually limit his own freedom in an excessive manner. From this perspective, an agreement pursuant to which an author would agree that all of his future works should be published in the name of a third party would not be held valid.

**22–036 Right of integrity**—The right of integrity, as protected by art.11 para.2 SCA, is inalienable, even though the author can validly transfer his right to modify his work to a third party under art.11 para.1 SCA. Rules of interpretation

<sup>72</sup> For an in-depth analysis of this issue and of the various doctrinal views, see the doctoral thesis of M. Seemann, *Übertragbarkeit von Urheberpersönlichkeitsrechten* (Berne: Stämpfli Verlag, 2008); see also C. Rigamonti, *Urheberpersönlichkeitsrechte* (Berne: Stämpfli Verlag, 2013), pp.29 and 239 et seq. and B. Bieler, *Die Übertragung des Urheberrechts in Konstellationen des Arbeits-, Auftrags-, Werkvertrags- und Produzentenverhältnisses sowie in ausgewählten Bereichen des Umstrukturierungsrechts* (Basel: Helbing & Lichtenhahn, 2014), p.89.

<sup>73</sup> See for instance the Decision of the Swiss Supreme Court 4A\_638/2009 of 1 April 2010, para.3.3 (which appears to assimilate an assignment to a waiver).

<sup>74</sup> See Section V below.

<sup>75</sup> See the report of the Federal Council of 11 December 2015, [https://www.ige.ch/fileadmin/user\\_upload/Urheberrecht/modernisierung\\_urheberrecht\\_2015\\_fjErlaetender\\_Bericht\\_FR.pdf](https://www.ige.ch/fileadmin/user_upload/Urheberrecht/modernisierung_urheberrecht_2015_fjErlaetender_Bericht_FR.pdf), pp.28–29; the report refers to the opinion/book of R. Hilty, *Urheberrecht* (Berne: Stämpfli Verlag 2011), para.187.

<sup>76</sup> See the decisions of the District court of Unterrheintal, 2002 sic! 589, 597 and of the Cantonal Court of Basel-Land 2004 sic! 298, 299.

<sup>77</sup> On this type of agreement, see the doctoral thesis of A. von Planta, *Ghostwriter* (Berne: Stämpfli Verlag, 1998) and the article of M. Rehbinder, “*Verbraucherschützende Bemerkungen zum Urheberrecht des Ghostwriters*”, in: E. Brem, J.N. Druey, E.A. Kramer and J. Schwander (eds), *Festschrift zum 65. Geburtstag von Mario M. Pedrazzini* (Berne: 1990), p.651.

governing copyright contracts can apply in this context. One of the relevant rules provides that, unless otherwise agreed, a third party to whom the author has assigned the right to publish his work has no right to modify such work.<sup>78</sup> Default rules governing publishing contracts adopted in the Swiss Code of Obligations (“SCO”) further provide that the publisher must publish the work without any abbreviations, additions or modifications (art.384 para.1 SCO).

In cases in which the author has contractually granted a third party a broad or even unlimited right to modify and change his work,<sup>79</sup> the author remains entitled to claim a violation of his integrity right under art.11 para.2 SCA, provided that the conditions in this provision are met (in particular, that the distortion is sufficiently severe to affect the author’s personality). However, the author can waive the integrity right and validly accept that specific changes, adaptations or even distortions be made to his work. From this perspective, the right of integrity is waivable under Swiss copyright law, provided that the waiver is sufficiently specific in identifying the nature and extent of the changes which are approved by the author. By contrast, a blanket waiver would not be valid and binding upon the author, who would remain in a position to claim that changes made to his work without his specific approval constituted a distortion which adversely affected his personality and thus violated art.11 para.2 SCA.

**Right of disclosure**—The right of disclosure cannot be assigned as such to a third party. However, the first disclosure of the work can be made by a third party (for instance, a publishing house) with the approval of the author. Such exercise of the right of disclosure of the work can take place in connection with the assignment of the economic rights of the author (such as publishing rights).<sup>80</sup> For the author to entrust a third party with the first disclosure of a work to the public presupposes a relationship of mutual trust between them.<sup>81</sup> In spite of a contractual obligation allowing a third party to disclose his work for the first time, the author can nevertheless prevent such disclosure, relying on his right of disclosure, even if the author may then be liable for damages to the other party. This means that the author cannot be forced to have his work disclosed to the public if he does not so wish, irrespective of the existence of a contract providing for such obligation. This aspect may be viewed as closely

22–037

<sup>78</sup> ATF 69 II 56.

<sup>79</sup> See the decision of the cantonal civil Court of Geneva, *Semaine Judiciaire* 1977, 433, 435, in which the publisher had contractually obtained the right to do whatever it wished with the author’s contribution: “*Les Editions Nagel seront propriétaires du texte écrit par Monsieur Landry et pourront l’utiliser comme bon leur semblera*”.

<sup>80</sup> See Swiss Supreme Court, RSPI 1994, 64, 67.

<sup>81</sup> See the decision of the Swiss Supreme Court, RSPI, 1994, 64, 65, in which the author had entrusted a third party who had interviewed her to finalise at her discretion the transcripts of the conversations that they had had together and to complete them with excerpts taken from biographical notes and documents, thus showing the high level of trust placed in that person by the author/interviewed person.

connected to the right of retraction, in the sense that it offers the author the ability to keep a work secret in spite of any contrary contractual obligation and subject to the payment of damages. In other words, the author should not be forced to disclose a work against his will, and an order for specific performance cannot be imposed upon the author in such circumstances.

- 22–038 Right to obtain temporary possession**—According to a cantonal court, the right to obtain temporary possession can be assigned since the purpose of such right is not so much to uphold the moral connection between the author and his work as it is to safeguard the author’s copyrights.<sup>82</sup>

### *F. Remedies and penalties for infringement of moral rights*

- 22–039** Subject to certain exceptions, the remedies and penalties for the infringement of moral rights do not significantly differ from those available for the infringement of the economic rights of authors and performing artists.

- 22–040 Criminal sanctions**—With respect to criminal sanctions in respect of authors’ moral rights, art.67 para.1 SCA provides that, at the request of the person whose rights have been infringed, any person who, intentionally and unlawfully: (a) uses a work under a false designation or a designation that differs from that decided by the author, (b) publishes a work, or (c) alters a work, shall be liable to imprisonment for a term not exceeding one year or to a fine. This provision consequently punishes with criminal sanctions wilful violations of the rights of paternity, disclosure and integrity of authors.

However, a person who simply omits to mention the name of the author when using a work would not fall foul of art.67 para.1(a) SCA and would not be subject to criminal sanctions unless such omission is made in the context of a quotation or for news reporting.<sup>83</sup> Article 68 SCA indeed provides that any person who intentionally omits to state the source that has been used where this is required by statute (i.e. art.25 for quotation and art.28 for news reporting) and, where they are named in the source, to give the name of the author, shall be punishable by a fine, at the request of the person whose rights have been infringed.

- 22–041 Civil remedies**—The civil remedies which are available for violations of the moral rights of authors enable them to obtain protective injunctive orders in cases of imminent or existing violations of their rights (art.62 para.1 SCA). The authors may also obtain the confiscation and the destruction of the physical objects which infringe their rights, with the exception of works of architecture which have already been built (art.63 SCA). With respect to

<sup>82</sup> Decision of the Cantonal Court of Zurich of 26 February 2013, LK10007-O/U.

<sup>83</sup> See District Court of Unterrheintal 2002 sic! 589, 597.

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monetary remedies, art.62 para.2 SCA provides that authors can recover damages under the general rules of the SCO. Article 49 para.1 SCO provides in this respect that a person who has suffered a violation of his personality can request the payment of financial compensation for the moral damage that he has suffered as a result of such violation, provided that the violation is sufficiently severe and that the resulting damage cannot be cured otherwise. Even though this provision normally applies in the cases of physical or mental damages caused to an individual, it can also apply to cases of violations of moral rights. However, the case law of the Swiss Supreme Court is rather restrictive in this context and it has been held that the psychological damage which has been suffered by an author whose right of integrity has been violated is better cured by the publication of the court decision than by the payment of financial compensation. On this basis, the Swiss Supreme Court rejected a claim for payment of financial compensation by an architect whose integrity right had been infringed (by the extension to a church executed by another architect without his approval).<sup>84</sup>

**Performers: civil remedies**—The protection of the moral rights of performing artists is based on the same civil remedies as the ones available to authors. It should be noted in this respect that it will be difficult for performing artists to claim financial compensation as a result of the violation of their moral rights on the basis of art.49 SCO. This is so because case law imposes perhaps overly-stringent conditions requiring it to be established that detrimental damage was caused to the personality of the performing artist. Thus, the Swiss Supreme Court held that an actor whose performance (which was taken from a film) was reused without his authorisation in an advertising campaign for meat products could not claim financial compensation as a result of such use because such use did not affect his personality in a sufficiently harmful manner.<sup>85</sup> The court noted that meat products are standard products so that the fact of being associated with the advertising for such products would not be negatively perceived by the public opinion. Consequently, the court held that the association of the actor's image with such products would not severely damage his personality and did not justify the award of financial compensation on the basis of art.49 SCO.<sup>86</sup> This decision confirms the reluctance of Swiss courts to grant financial compensation in cases of violations of moral rights of performing artists, as already noted for the case of authors' moral rights.

22–042

<sup>84</sup> Swiss Supreme Court, 2009 sic! 345; the older case law was more generous, see ATF 69 II 53, ATF 58 II 290.

<sup>85</sup> ATF 129 III 715, 726. The case was, however, decided before 1 July 2008, i.e. before the implementation of the moral rights of performing artists in the SCA.

<sup>86</sup> ATF 129 III 715, 726. (“*Anderseits ist nicht von der Hand zu weisen, dass Fleischprodukte als gängige Konsumgüter in der allgemeinen Anschauung der Verbraucher grundsätzlich keinerlei negative Assoziationen wecken und daher die Werbung für derartige Produkte nicht an sich negativ besetzt ist*”).

**22–043 Performers: criminal sanctions**—With respect to criminal sanctions, art.69 para.1 lit.e bis SCA provides that, at the request of the person whose rights have been infringed, any person who, intentionally and unlawfully, uses a performance under a false designation or a designation that differs from the one chosen by the performing artist, shall be liable to imprisonment for a term not exceeding one year or to a fine. This provision mirrors the one relating to the protection of the authors’ paternity right (art.67 para.1(a) SCA). By contrast, because the protection of the performers’ integrity right is governed by the SCC (as provided for in art.33a para.2 SCA), the violation of this right is only subject to civil sanctions and not to criminal sanctions.

#### IV. Exercise of Moral Rights

**22–044** As a matter of principle, and in view of the basically inalienable nature of moral rights under Swiss law, moral rights are only exercisable by the beneficiaries themselves (i.e by the authors, the performing artists or their heirs and successors) and cannot be exercised by third parties.<sup>87</sup>

However, even if copyright collecting societies in Switzerland are not entitled to exercise moral rights as such, they can still indirectly contribute to the effectiveness of their protection. This is especially the case with respect to the paternity right, for which some regulations adopted by the collecting right societies provide that the unauthorised use of copyrighted works (the management of which is entrusted to the collecting society at issue), without the mention of the author’s name can trigger a 100 per cent increase of the remuneration which has to be paid for such use.<sup>88</sup> This consequently means that the collecting societies have the ability to increase the amounts of remuneration that they collect from unauthorised users of the works in cases where the unauthorised use was made without the mention of the author’s name (i.e. in violation of the paternity right). It must however be noted that it is uncertain whether such increased payment, which basically doubles the payment imposed on infringers and thus comes very close to punitive damages (which are as such not valid under Swiss law), is fully enforceable (the Swiss Supreme Court has left the issue open<sup>89</sup>).

In a similar manner, collecting societies may be entrusted with the

<sup>87</sup> See Kantonsgericht Basel-Landschaft 2004 sic! 298.

<sup>88</sup> The regulation of the Swiss collecting society *Pro Litteris* (which applies to pictures, <http://www.prolitteris.ch/imaaj/pdf/bildf.pdf>), s.18 provides that the author’s name and the title of the work shall be mentioned on each use, independently of whether the author’s name is or is not cited on the original work. If the author’s name is not mentioned, a penalty amounting to 100% of the applicable remuneration is due. The original (French) version states: “*Le nom de l’auteure ainsi que le titre de l’œuvre doivent être mentionnés sur chaque utilisation, indépendamment du fait que le nom de l’auteur-e apparaisse ou non sur l’œuvre originale. . . . Si la mention du nom de l’auteure est omise, il est dû un supplément de 100% sur les indemnités tarifaires applicables*”.

<sup>89</sup> ATF 122 III 464, 467.

management of the synchronisation rights, i.e. the right to use a musical work in a film. As confirmed by the Swiss Supreme Court, the synchronisation right is based on the integrity right under art.11 para.1 (b) SCA, which grants the author the right to exclusively decide whether, when and how a work may be used to create a derivative work.<sup>90</sup> On this basis, the relevant regulations of the copyright collecting societies generally provide for the collecting societies to have the right to manage such synchronisation right, so that they can authorise third parties to use musical works in connection with films, unless the authors have expressed their intent to manage this right themselves so that they can individually decide in what circumstances their musical works can be associated with other works in a film. Thus, also from this perspective, collecting societies can play a role in the management of moral rights where these rights are closely connected to the commercial exploitation of the works (as in the case of the synchronisation right).

## V. New Developments

In December 2015, the Swiss government launched a consultation on a revision of the SCA for the purposes of fighting against copyright piracy over the Internet and implementing the WIPO Beijing Treaty on Audiovisual Performances and the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled.<sup>91</sup> This revision does not include any regulatory changes with respect to moral rights: in its report dated 11 December 2015, the Swiss Federal Council briefly discussed the issue of the transferability of moral rights but indicated that this issue was not covered by the on-going revision.<sup>92</sup> On this basis, no regulatory developments affecting moral rights are expected in the near future in Switzerland.

22–045

## VI. Conclusions

The protection of moral rights has not experienced any major development since their adoption in the SCA and will most likely not do so in the near future. This of course does not mean that moral rights should be immutable

22–046

<sup>90</sup> Decision of the Swiss Supreme Court 2A.288/2002 of 24 March 2003, para.3.3; on this issue, see M. Seemann, *Übertragbarkeit von Urheberpersönlichkeitsrechten* (Berne: Stämpfli Verlag 2008), p.364.

<sup>91</sup> See the webpage <https://www.ige.ch/en/copyright/modernisation-of-copyright.html> and the “media kit” of the Swiss Institute of Intellectual Property explaining the key elements of the revision ([https://www.ige.ch/fileadmin/user\\_upload/Urheberrecht/modernisierung\\_urheberrecht\\_2015\\_el\\_Medienrohstoff\\_URG\\_EN.pdf](https://www.ige.ch/fileadmin/user_upload/Urheberrecht/modernisierung_urheberrecht_2015_el_Medienrohstoff_URG_EN.pdf)).

<sup>92</sup> See the report of the Federal Council of 11 December 2015, [https://www.ige.ch/fileadmin/user\\_upload/Urheberrecht/modernisierung\\_urheberrecht\\_2015\\_fjErlaetender\\_Bericht\\_FR.pdf](https://www.ige.ch/fileadmin/user_upload/Urheberrecht/modernisierung_urheberrecht_2015_fjErlaetender_Bericht_FR.pdf), pp.28–29.

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and should not be influenced by the social and technological changes which affect society today and will continue to affect it in the future. It can therefore be expected that the protection of moral rights in Switzerland and abroad will have to adapt to the digital environment and to collective creation processes which characterise the present era of open innovation and collective creation processes.<sup>93</sup>

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<sup>93</sup> See J. de Werra, “Moral rights, a view from continental Europe”, in F. Brison, S. Dusollier, M.-C. Janssens and H. Vanhees (eds). *Moral Rights in the 21st Century: The changing role of the moral rights in an era of information overload* (Bruxelles: Larcier, 2015), pp.69-82, available at: <http://archive-ouverte.unige.ch/unige:48354>.