Moral Rights in Switzerland.pdf

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Switzerland

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CHAPTER 20

SWITZERLAND

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I. Introduction and Historical Background

Moral rights were formally introduced into Swiss law by the Swiss Copyright Act of October 9, 1992 (“SCA”) which entered into force on July 1, 1993. Before that time, moral rights were protected as an element of the rights of personality safeguarded in the Swiss Civil Code (“SCC”, art.28). 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. 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.

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 December 7, 1922), with respect to copyrights relating to literary and artistic works, while

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1 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/f/rs/rs.html (accessed June 2010)); an unofficial English version of the Swiss Copyright Act (which is however not fully updated) is available at: http://www.wipo.int/clea/en/text_html.jsp?lang=EN&id=648 (accessed June 2010).
2 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”.
3 “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 on line in their original language at: http://www.bger.ch (accessed June 2010)); ATF 96 II 420; ATF 110 II 418; ATF 113 II 311; ATF 117 II 470.
4 See ATF 96 II 420 and ATF 84 II 570.
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 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 this was detrimental to his honour and reputation.\(^5\) One major drawback of this form of moral rights protection resulting from the rights of personality was that it did not extend after the death of the author, given that the rights of personality—logically—expire with the death of their beneficiary.\(^6\) 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 (art.6bis para.2, second sentence).

20–002 **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 of the general right of personality which remains protected by the SCC. This distinction however 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).

20–003 **Nature of protection**—The view is generally held that moral rights protect the specific relationship existing between authors and their work,\(^7\) such as the right to protect the integrity of a given work (i.e. the right of integrity) or the 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 against defamation, etc.). From this perspective, it is generally accepted that moral rights constitute a *lex specialis*

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\(^5\) See ATF 96 II 420; this was confirmed in subsequent decisions ATF 113 II 311; ATF 117 II 470.

\(^6\) ATF 104 II 225.

\(^7\) Note that in the German copyright literature, a work is considered as the “intellectual child” ("geistiges kind") of the author.
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 Swiss Copyright Act. In spite of this, authors, just like any other individuals, naturally cannot be prevented from invoking their rights of personality, for instance relating to their honour, privacy or professional reputation, where these rights have been violated. From this standpoint, the protection of moral rights and of the rights of personality can be applied cumulatively.

II. Membership of Conventions

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

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 the 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 July 1, 2008, performing artists also enjoy the benefit of certain moral rights (i.e. the right of paternity and the right of integrity) as a result of the introduction of these rights in the SCA following Switzerland’s ratification of the WPPT.

Foreign authors and works—Switzerland, as a party to the Berne Convention and to the WPPT, grants essentially the same protection to the relevant

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10 See the message of Federal Council of Switzerland, FF 2006 3263.
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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 no moral rights protection.11

B. The individual moral rights

1. Right of paternity

(a) Authors

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 as well as the right to choose the name under which his work shall be published. This means that the author can validly decide to publish his work anonymously or under a pseudonym.

In a decision dating from before the enactment of the SCA, the 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.12 Interestingly, the 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 honor and reputation.13 The 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.

Extent of the protection—It is generally accepted, however, that the extent of the protection given by the paternity right depends on the circumstances of the case, even though this is not expressly stated in the statute itself, which

11 See I. Cherpillod, Stämpflis Handkommentar SHK Urheberrecht (URG) (Berne: Stämpfl Verlag, 2006), n.3, art.1, p.18.
12 ATF 84 II 570, 574; an older decision was rendered in comparable circumstances, see ATF 58 II 290.
13 ATF 84 II 570, 574.
appears to provide for an absolute right. The extent of the right thus particularly depends on the kind of copyright work which is 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 right of paternity will thus be applied differently depending on such trade usages. For computer software products and for works of applied art (such as textile or tapestry), it is generally considered that the authors do not have the right to be named. By contrast, the right of paternity must generally be respected for architectural works and plans, for graphical posters and for journalistic works.

The right of paternity must however be fully respected when a work is used for quotation purposes (which is provided for in art.25 SCA) or for news reporting (which is provided for in art.28 SCA). 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

As from July 1, 2008, as a result of the amendment to the Swiss Copyright Act (i.e. art.33 bis 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. For this purpose performing artists are defined as the physical persons who present a work or an expression of folklore or who participate artistically in such a presentation (art.33 para.1 SCA). Such

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14 See G. Hug, Stämpfli Handkommentar SHK Urheberrecht (URG) (Berne: Stämpfli Verlag AG, 2006), n.18, art.9, p.77.
15 “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 June 2010)).
17 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”.
18 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”.

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artists have a right of paternity over their performances corresponding to that of authors. At present, it remains unclear how such right 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 in such cases that, with the exception of the principle performers (such as the soloists and the conductor), performers will not necessarily have the right to be named individually.19

2. Right of integrity

(a) Authors

20–011 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.

20–012 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 work (for instance in a collection of poems). The statute thus confers a quite extensive protection on the integrity of the work which is much wider than the Berne art.6(1)bis right.

However, as with the right of paternity, although the right granted by art.11 para.1 SCA appears to be very wide and absolute in its terms, the application of this right in practice is more restrictive. The extent of protection indeed depends greatly on the circumstances of the case, and specifically on the type of work which is at stake. As a result, protection is less extensive for a functional work (such as a travel guide20 or a school book21) than for more artistically oriented works (such as a sculpture, a painting or a poem). This approach was

19 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 can 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.
21 ATF 69 II 53.
characterised by the Supreme Court in the *Gold Rush* case (above) 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].” Even though the *Gold Rush* case was decided before the implementation of the SCA, this principle is considered as applicable under the SCA.

Even though the right of integrity has been applied by Swiss cantonal courts in relation to various types of works (such as audiovisual works or biographical works), its application has been significantly more restrictive in relation to architectural works even before the adoption of the Swiss Copyright Act 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.

**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 authorized 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 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 the cases in which the author has transferred all of his copyrights and has fully waived all of his moral rights in his work. From this perspective, an author cannot fully 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

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26 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 new law, see Swiss Supreme Court, 1997 sic! 381; for a discussion, see para.20–016.
waiver by which the author would accept specific changes to be made to his work would still be valid). This is the reason why art.11 para.2 SCA is considered in the legal literature as protecting the unwaivable hard core ("harte Kern") of the right of integrity.

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. The Swiss Supreme Court under art.11 para.2 SCA held that the concept of distortion of the work that is damaging to the author's personality 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.

20–014 **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).

20–015 **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. use of a religious song for advertising purposes). The 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 where 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 Supreme Court held in 1994 that for such claims of indirect

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27 As to the waivability of moral rights generally, see paras 20–039 and 20–036 (with respect to the right of integrity).
29 *ATF 120 II* 65, 70; as confirmed by a subsequent decision of the Swiss Supreme Court, 1997 sic! 381.
30 *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).
31 *ATF 120 II* 65, 67; see also J. de Werra, *Le droit à l'intégrité de l'œuvre* (Lausanne, 1997), pp.68 et seq.
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.\textsuperscript{32} It follows from
this decision that the burden of showing an infringement of the right of integ-
rity as resulting from indirect violation is higher than for direct violation
where the substance of the work itself is altered.

Article 11 para.2 SCA also applies in cases where a third party has the
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)\textsuperscript{33} may nevertheless violate the right of integrity
of the author if such quotation distorts the work and image of the author
in a manner which is detrimental to their personality (indirect violation).
However, the application of art.11 para.2 SCA in this context remains quite
delicate. This is demonstrated by a recent Supreme Court case 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 politi-
cian about the criminality of foreigners. A quotation from the former article
was subsequently made without the authorisation of its author in a conserva-
tive right wing newspaper in which the author himself was also violently criti-
cised.\textsuperscript{34} 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 submit-
ting 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.\textsuperscript{35}

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

\textsuperscript{32} 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).
\textsuperscript{33} 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”
\textsuperscript{34} ATF 131 III 480, 493.
\textsuperscript{35} 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 will-
ingly entered into this political debate and thus had to accept that excerpts of his article could
be reused in a right wing publication.
provision is that architects can assert their right of integrity over a completed architectural work only if they can show that the altered building constitutes a “severe” alteration of the work—a reading by the courts from the use of the term “distortion” in Art.11 para.2—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 the Swiss Copyright Act,37 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 architect.38

This restrictive approach is in contrast with the relatively generous position which 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 it held that the right of integrity can be relied on by the author, irrespective of whether the changes which are made to his work without his approval improve the work or negatively affect it.39

20–017 Relationship between the right of integrity and the right of personality—The issue arises 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 Swiss Civil Code in the sense that it only protects the author’s professional honour or reputation as an individual (and not as an author). It appears that the right of integrity under art.11 para.2 SCA is not in fact 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 which would be completely foreign to or even opposed to the author’s opinions).40

36 ATF 120 II 65, 70.
ATF 120 II 65.
39 ATF 114 II 368, 370 (holding that the right of integrity provides protection against anyone who changes the work, no matter 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 entstellt 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”).
40 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).
Destruction of work—Swiss copyright law further provides for another 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 proprietor of an original work, of which no further copies exist, has reason to assume that the author of the work has a justified interest in its preservation, he 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 acquiring it back from an owner who is proposing to destroy it. In order to avoid the author having to pay the market price for the work, article 15 para.1 SCA provides that the proprietor may not request from the author more 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 has been made using 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 proprietor 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 a right does not apply to architectural works; in this situation the author simply has the right to photograph the work and to require that copies of the plans be handed to them, at his own cost.

It follows that architectural works are treated differently from other types of works as regards the integrity right in order to take into account the legitimate interests of the owners of a building incorporating a copyright work. Similarly, in cases of violation of the author’s exclusive, economic rights and even in cases of violation of the moral rights of an author, the author is not entitled to request the destruction of the architectural work which infringes his rights pursuant to art.63 para.2 SCA.41

(b) Performers

Since July 1, 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 of the Swiss Civil Code. As a result of this provision, performing artists do not enjoy a specific protection as regards the integrity of their performance, given that such protection shall be based on the general civil law. This consequently means that the integrity of the performances is protected only to the extent that the performer’s honour or reputation is threatened. From this perspective, the protection granted to performing artists is more limited than that of authors, which, as has been

41 Swiss Supreme Court, 2009 sic! 345.
seen, essentially grants to the authors the right to object to any changes which are made to their works (as provided for under art.11 para.1 SCA).

3. Right of disclosure

(a) Authors

Article 9 para.2 SCA confers a right of disclosure on 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 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, in that 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). From this perspective, a violation of the right of disclosure is only infrequently invoked in an independent manner 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

The Swiss copyright law does not provide performers with a specific right of disclosure. However, based on case law pre-dating the adoption of the Swiss Copyright Act, it is possible that performing artists can claim that the unauthorised disclosure of their performance violates their right of personality as protected under the Swiss Civil Code. 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).

42 See ATF 120 IV 208, 212.
43 ATF 110 II 411.
III. PRESENT NATIONAL LEGISLATION ON MORAL RIGHTS

4. Right of retraction

Swiss copyright law does not provide for a right of retraction for either authors or performing artists. However, it is possible to imagine situations in which overly-onerous contractual obligations entered into by an author would be held unlawful on the ground that they were in undue restraint of trade. This could particularly be so in the case of an agreement entered into between an artist and an art gallery under which the artist had agreed to create and deliver art works to the gallery in an excessive way (in terms of volume of works and or duration of the obligation). In such cases, it is conceivable that such an agreement would be struck down as unlawful. This would then mean that the author would have the right to retain the ownership of his art-works 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 his gallery.

5. Right of access

Article 14 para.1 SCA provides for a right of access for the benefit of an author 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”. This provision consequently gives the author the right to gain physical access to the original of his work or a copy thereof under two conditions. The works of visual artists are the most relevant in this context.

The first condition which is imposed by art.14 para.1 SCA is that such access should be necessary for the author to exercise his author’s rights. Even though there is no case law on this provision, a situation can be conceived where an author would have a legitimate interest in accessing the original version of one of his works where 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. Again, in the absence of relevant case law, 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).

44 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).
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6. Right to obtain temporary possession

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 showing it 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 the owner of the art work at issue.45

C. Protection of moral rights by other causes of action

The protection of moral rights by other causes of action requires separate analysis for each moral right.

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.46 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 December 19, 1986, “SAUC”47), 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 Swiss Copyright Act) cannot 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

45 On the respective relationships between the author and the owner of an art work created by such author, 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.
46 This was noted by the Swiss Supreme court in ATF 113 II 312, para.4b.
47 SC 241.
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the protection of the right of personality under the Swiss Civil Code. This was particularly emphasised by the Supreme Court in a case decided before the rights of performing artists were expressly protected in Switzerland (i.e. under the Swiss Copyright Act in 1992), where the court stated that the right of personality cannot be used to create economic rights which had not been adopted (yet) under the specific intellectual property regulations.

The rationale for this is that the limits of the grant of exclusive rights as defined under the intellectual property regulations should be respected and should not be circumvented by the grant of some other similar legal protection which in essence would lead to an undue extension of the rights granted to intellectual property owners and thus affect the balance of rights and interests between them and the public, and which would in turn threaten the public domain.

False attribution of authorship—Irrespective of this, the Swiss Copyright Act 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, the protection could, however, be based on the protection of the right of personality resulting from the Swiss Civil Code (with the consequence that the protection would lapse on the death of the author).

Right of integrity—As far as the right of integrity is concerned, it is generally accepted that the specific protection of such right resulting from the Swiss Copyright Act (art.11 SCA) pre-empts any protection of the interests of the author which might arise under the Swiss Civil Code. 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 try to elude the narrow scope of legal protection of the right of integrity granted under the Swiss Copyright Act.

Performing artists—The situation is different with respect to the performing artists for whom the relevant provision (art.33a para.2 SCA) expressly provides that the protection of their integrity right is based on the Swiss Civil Code. 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

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48 See ATF 113 II 306, 311.
49 ATF 110 II 411.
50 See J. de Werra, Le droit à l’intégrité de l’œuvre (Lausanne, 1997), pp.44, et seq.
legal basis for such protection is to be found in the Swiss Copyright Act. As a result, the substantive integrity right is based in the Swiss Civil Code.

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). Even though there is no case law on this issue, reference can be made to an old case in which the 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 deceased spouse. 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 be in a position to invoke the violation of the right of disclosure.

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, has not been implemented as such under Swiss copyright law).

D. Duration of moral rights of the various beneficiaries

Authors—One of the major and most welcome innovations which was brought about by the enactment of the Swiss Copyright Act 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 Swiss Civil Code. 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 his death by deciding to entrust them to an executor or to a third party entity should they not have confidence in their statutory heirs.

52 ATF 70 II 13.
53 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 regulation, see M. Hunziker, Immaterialgüterrechte nach dem Tode des Schöpfers (Berne: Stämpfli Verlag, 1983).
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Under the previous regime (i.e. before the adoption of the Swiss Copyright Act 1992), an 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.

Article 39 para.1bis SCA (which entered into force on July 1, 2008) provides in this respect that the right to be recognised as a performing artist pursuant to art.33a para.1 (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 December 31 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 Swiss Civil Code (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 make any distinction between the economic and moral rights of the authors and the Swiss Copyright Act does not contain any other provision addressing in general terms the issue of the alienability or waivability of moral rights. In these circumstances and in the absence of any relevant decisions by the Swiss Supreme Court, it has been debated in the legal literature whether moral rights are assignable either fully or in part and whether and to what extent they are waivable. In spite of the existence of diverging views, it is generally acknowledged that no unique

54 Because of the Swiss federalist and decentralised court system, the decisions of the various Cantonal or District courts which have not been confirmed on appeal by the Swiss Supreme Court are generally not considered as fully binding precedents.

55 For an in-depth analysis of this issue, see the doctoral thesis (400 pages) of M. Seemann, Übertragbarkeit von Urheberpersönlichkeitsrechten (Berne: Stämpfli Verlag, 2008).
answer can be given for all of the different moral rights, so that the issue must be analysed separately for each of them.

20–035 **Paternity right**—With respect to the paternity right, given that such right is considered as being intrinsically bound up with the author, it is generally held as inalienable by the courts. However, it is not disputed that an author can contractually waive his right of paternity in the framework of a “ghostwriter” agreement under which the author agrees that his work shall be published under the name of a third party. 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 under which an author agreed that all of his future works should be published in the name of a third party would not be held valid.

20–036 **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 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. 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 an unlimited right to modify and change his work, 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 that it affects the author’s personality). However, the author can waive the integrity right and validly accept that specific changes, adaptations or even distortions may 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

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58 ATF 69 II 56.
59 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”.

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remain in a position to claim that changes made to his work without his specific approval constituted a distortion which detrimentally 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). 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. 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 want, irrespective of the existence of a contract providing for such obligation. This aspect may be viewed as being closely 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.

F. Remedies and penalties for infringement of moral rights

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.

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

60 See Swiss Supreme Court, RSPI 1994, 64, 67.
61 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.
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. 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.

20–040 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 monetary remedies, art.62 para.2 SCA provides that authors can recover damages under the general rules of the Swiss Code of Obligations. 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 Supreme Court is quite 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 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).

20–041 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 on the establishing of detrimental damage caused to the personality of the performing artist. Thus the 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

62 See District Court of Unterrheintal 2002 sic! 589, 597.
63 Swiss Supreme Court 2009 sic! 345; the older case law was more generous, see ATF 69 II 53, ATF 58 II 290.
IV. EXERCISE OF MORAL RIGHTS

not claim financial compensation as a result of such use because it would not affect his personality in a sufficiently harmful manner. 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. 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.

Performers: criminal sanctions—With respect to criminal sanctions, art.69 para.1 lit. ebis 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 decided by the performing artist, shall be liable to imprisonment for a term not exceeding one year or to a fine. This provision mirrors that 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 Swiss Civil code (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

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. However, even if copyright collecting societies in Switzerland are not entitled to exercise the 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 mention of the author’s name can trigger a 100 per cent increase of the remuneration which has to be paid for such use. This consequently means that the

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64 ATF 129 III 715, 726. The case was, however, decided before July 1, 2008, i.e. before the implementation of the moral rights of performing artists in the Swiss Copyright Act.
65 ATF 129 III 715, 726. (“Anderserseits 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”).
67 The regulation of the Swiss collecting society Pro Litteris (which applies to pictures, http://www.prolitteris.ch/iaf/pdf/bildf.pdf), s.18 provides that the author’s name and the title of
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 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 doubling of the payment imposed on infringers, which comes very close to punitive damages, which as such are not valid under Swiss law, is fully enforceable (the Supreme Court has left the issue open\textsuperscript{68}).

In a similar manner, collecting societies may be entrusted with the management of the synchronisation rights, i.e. the right to use a musical work in a film. As confirmed by the Supreme Court, the synchronisation right is based on the integrity right under art.11 para.1 (b) SCA, which grants to the author the right to decide exclusively whether, when and how a work may be used to create a derivative work.\textsuperscript{69} 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

There are no new developments expected in the near future with respect to moral rights in Switzerland.

\textsuperscript{68} ATF 122 III 464, 467.

\textsuperscript{69} Decision of the Swiss Supreme Court, 2A.288/2002, para.3.3; on this issue, see M. Seemann, \textit{Übertragbarkeit von Urheberpersönlichkeitsrechten} (Berne: Stämpfli Verlag 2008), p.364.