Moral Rights to a judge's opinion

Why a judge's opinion is (almost) a work of art

by

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A. The judge as an author

Judicial ethics and professional conduct imply that behind the judiciary system – ultimately behind the court – is an addressee who is accountable for certain standards. The judge is subject to numerous rules when it comes to her work such as to maintain independence, impartiality and avoid impropriety.[1] The claim to judicial ethics correlates with the transparency of the institution and the public's right to information.[2] There is consensus in Europe that a society is entitled to a competent judge with a broad professional ability, who ensures transparency by giving reasons for her decisions.[3] But as soon as the decisions are published and reprinted, the judge herself eschews

[1] Cornell University Law School, Legal Encyclopaedia: Judicial Ethics, https://www.law.cornell.edu/wex/judicial_ethics – retrieved on 05/29/2016.
[2] European Network of Councils for the Judiciary (ENCJ), Working group Judicial Ethics 2009-2010: Judicial Ethics – Principles, Values and Qualities, http://encj.eu/index.php?option=com_content&view=article&id=55%3Aethics&catid=14%3Ajudicial-ethics&Itemid=233&lang=en – retrieved on 05/29/2016.
[3] ENCJ Working Group, Judicial Ethics Report 2009-2010, 10, http://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf – retrieved on 05/30/2016.

the spotlight: At least in Germany it is common practice that the judge's name does not appear in the published documents.[4] The practice to refrain from naming the judge as the actual author of a ruling implies that the ruling is not the judge's work but the work of the court as an institution. Hearing the voice of a judge or hearing the voice of an institution is not a mere formalistic difference, as illustrated by recent press releases: When the office of the advocate general acted, it said that *"Advocate General Kokott considers the new EU tobacco directive of 2014 to be valid"*[5], but when the actual decision by the European Court of Justice was handed down it said that *"[...] the Court [...] confirms the validity of the provisions of the directive"*[6]. Both the advocate general and the court fulfill a role in the judicial system, both are institutions, crucial to the European judicial system. And both the advocate general and the court have a significant amount of clerks, researchers and advisers. However, the advocate general is displayed as an individual arguing a certain interpretation of the law while the court seemingly is a lifeless institution, stating a fact, merely acknowledging what is true and just.

The latter creates an air of objectivity, impartiality and neutrality, while the former reveals that there is an individual behind a statement. It lets the recipient of the statement connect to this individual as a person. The difference is simple: A lifeless, machine-like institution is potentially flawless or at least emotionally detached, not driven by interests, a formal manifestation of the impartiality integral to a modern judicial system. An individual who acts on behalf of the institution may be an ambassador, a messenger, but at the end of the day that messenger states an opinion. To question an opinion stated or delivered by an individual is a natural thing, almost a reflex, whereas a statement made by an institution is less likely to be perceived as an opinion and thus less likely to be questioned as such. While an institution declares what is right, true and valid, an individual merely gives her opinion on what she thinks is right.

However, a court's opinion is written, drafted and revised by an appointed judge, i.e. by an individual who is appointed to rule on a matter of law. At the end of the day, the term "court" is nothing but a summary, a concise way of referring to multiple individuals who sit on the bench

[4] Arnold, Ist § 5 UrhG verfassungskonform?, ZUM 1999, 283, 285.
[5] Press Release ECJ, No. 154/15 on 12/23/2015, http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-12/cp150154en.pdf – retrieved on 05/07/2016.
[6] Press Release ECJ, No. 48/16 on 05/04/2016, http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-05/cp160048en.pdf – retrieved on 05/07/2016.

and rule on the case before them. Using the term "the court" for public information rather than the judges' names, i.e. the respective names of those who make the decision and are ultimately responsible for it, makes it a challenge to attribute the decision itself to the decision makers. One could argue the benefits of stressing the impartiality of institutions by refraining of depicting them as a collection of individuals with potentially diverting opinions. But one cannot help but wonder if it is fair and just that a judge's work, the opinion she writes, which often times has a huge impact on the parties before the court and on the society as whole, is not at all attributed to the judge as a person, since a lot of effort, a lot of creativity flow into these legal creations, into these modern testaments of democracy and the separation of powers that have emerged as a result of the enlightenment.

Therefore, two questions arise: Does a judge have moral rights as far as her opinions are concerned and to what extent may these rights be infringed upon?

To answer these questions, we will firstly describe the concept of moral rights [B I.]. We will demonstrate that a judge's opinion is subject to moral rights and that the judge is beneficiary of these moral rights [B II.]. Secondly we will show that there is insufficient justification to plainly exclude a judge from all moral rights to the opinion she wrote [C]. Thirdly, we will outline the desirable effects that will come forth from acknowledging a judge's moral rights to her work [D].

B. Moral rights to a judge's opinion

I. Moral rights

The term "moral right" is a translation of the French term "droit moral". It describes the right of an author to control the usage of the work the author created. As opposed to copyrights that ensure that the author will benefit economically from the use of her work, the author's moral right is vested in the personal connection between an author and her work.[7] The author has an inalienable right to prevent others from, to only name few examples, modifying, distorting or otherwise interfering with the integrity of that work.[8]

[7] Betsy Rosenblatt, Moral Rights Basics, Mar. 1998, available at http://cyber.law.harvard.edu/property/library/moralprimer.html (offering basic review of moral rights in U.S. context) – retrieved on 05/06/2016.
[8] Thomas F. Cotter, „Pragmatism, Economics and the Droit Moral", 76 N.C.L.Rev.1 (1997) – retrieved on 05/07/2016.

1. Historic perspective

European intellectual property law is founded on the assumption that the author is connected to her work on a very basic level, i.e. that the author has an inalienable right, a tie to her work that cannot be severed. This assumption derives from the philosophical concept that one acquires and disposes of property not only by labor, by creating an object, but also by one's joining of one's individual will to some object external to oneself.[9] Namely Kant and Hegel assumed that one was incapable of alienating rights that were not (completely) external to oneself, e.g. right to freedom of will, to religion, to only name two. According to them, a right can be disposed of only if the right is not of a kind that embodies the disposing party's personality. Put differently, the rights to an object can only be disposed of if these rights are not of such nature that they are to be considered inalienable, i.e. only then these rights can be disposed of if these rights are completely external to oneself. As far as works of literature are concerned, both Kant and Hegel agreed that through creating a piece of literature the piece of literature embodied something internal rather external with regard to the author.[10] Kant even went so far as to argue that copying a book without proper licensing were to constitute an infringement on the right to freedom of speech, since it was up to the author to determine if, when and to whom she chooses to speak to through her work.[11]

This continental approach to the personal connection between an individual and her work, based on the basic works by Kant and Hegel, is best described with the following phrase coined by Margaret Radin: "Only objects separate from the self are suitable for alienation."[12] If a creator has a personal right to her work, a *droit moral*, it cannot be taken away, cannot be infringed upon. It is linked to the creator in a way that severing the personal tie between the creator and her work is virtually impossible. Put simply, the concept of moral rights as it is understood on the continent of Europe comes from the notion that the work incorporates the personality of the author.[13]

[9] Thomas F. Cotter, „Pragmatism, Economics and the Droit Moral", 76 N.C.L.Rev.1 (1997) – retrieved on 05/07/2016.
[10] Immanuel Kant, Von der Unrechtmäßigkeit des Büchernachdrucks [erstmals erschienen in Berlinische Monatsschrift 5 (1785), Seiten 403 bis 417] http://www.flechsig.biz/V04Kant.pdf – retrieved on 05/07/2016.
[11]Immanuel Kant, Von der Unrechtmäßigkeit des Büchernachdrucks, [erstmals erschienen in Berlinische Monatsschrift 5 (1785), Seiten 403 bis 417] http://www.flechsig.biz/V04Kant.pdf – retrieved on 05/07/2016.
[12] Margaret Jane Radin, Contested Commodities 34 (1996).
[13] Rocherieux, The Future of moral rights (2002), University of Kent.

Over time, the civil law jurisdictions came up with different approaches to solving the conflict of interests between the creator of a work and those who seek to use the work for any given purpose, both on a national and international level.

2. Codification of moral rights

We will present the European Convention of Human Rights (ECHR), the Charter of Fundamental Rights of the European Union, the Berne Convention and the German Copyright Act and outline to what extent moral rights are acknowledged and protected under each regime respectively.

a) Berne Convention

The most relevant international treaty that concerns itself with moral rights is the Berne Convention. The need for a copyright regime on an international level had arisen as soon as it was technically possible to multiply books. It was not until Victor Hugo of the Association Littéraire et Artistique Internationale initiated the process of drafting a convention that several states started working on an international copyright regime that also protects the personal relationship between a creator and her work. The fundamental international treaty is the "Berne Convention for the Protection of Literary and Artistic Works" that dates back to September 9, 1886 and has been revised several times. Originally, the Berne Convention was signed by 10 states, namely by Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia, and the United Kingdom. Today the Berne Convention has 170 parties, 169 states and the Holy See. The United States did not join the Berne Convention until March 1st, 1989.

As set forth in Article 1 of the convention, the major purpose of the convention was and is to procure that the "countries to which this convention applies" protect the "rights of authors in their literary and artistic works". Therefore, the convention also does contain a provision regarding moral rights. For the purpose of this paper two articles are most relevant, Art. 2 par. 1,4 and Art. 6bis par. 1.

Art. 2 – Protected works

(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; […]

(4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts. […]

Art. 6bis – Moral Rights

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

Article 2 defines which works are subject to the Berne Convention. Par. 1 stipulates that a production in the literary and scientific domain is considered a "literary and artistic work" in the sense of Art. 1 and is therefore subject to the Berne Convention. Art. 2, however, allows for the signatory states of the Berne Convention to determine whether and to what extent official texts of legal nature are protected.

Article 6bis describes the concept of moral rights. This section was not implemented until the conference of Rome in 1928 and it was strongly opposed by the member states that followed a strict copyright regime without the concept of moral rights.[14] This goes especially for the US that continued to oppose the inclusion of moral rights in other international treaties, e.g. during the negotiation of the "Agreement on Trade-Related Aspects of Intellectual Property Rights" that came into effect on January 1st 1995.[15]

The Berne Convention seeks to protect the personal connection between an author and her work, meaning that the author has two basic rights:[16] First, the author may claim authorship, i.e. require that whenever the work is displayed, used in public, she is named as the author of the work. Second, the author may object to any alteration of the work that would be prejudicial to the author's reputation. Art. 6bis is an attempt to concisely describe the author's remedies while it does not define moral rights.

Similar to what Hegel and Kant had outlined, the concept of moral rights to be found in Art. 6bis of the Berne Convention is one that protects the relationship between the author and her work. The rights described by Art. 6bis are explicitly different from economic rights. Neither the authenticity of the work nor the author herself is in the focus of Art. 6bis. It is the integrity of the personal connection between the author and her work that this section protects.[17]

[14] Doutrelepont, Das droit moral in der Europäischen Union, GRUR Int. 1997, 293, 295.
[15] Mike Holderness, Moral Rights and Authors' Rights: The Keys to The Information Age, JILT 1998.
[16] Mike Holderness, Moral Rights and Authors' Rights: The Keys to The Information Age, JILT 1998.
[17] Lucas-Schloetter, Die Rechtsnatur des Droit Moral, GRUR Int. 2002, 809, 810; pointing out that the translation of droit moral or moral rights into the German legal language were disadvantageous because it was easily

b) Moral rights under the European Convention on Human Rights

The ECHR was established in 1950 to protect human rights and fundamental freedoms in Europe. All states that are member to the Council of Europe have ratified this treaty. The European Court of Human Rights ("ECtHR") oversees and enforces the Convention. Member states are obliged to execute the judgements handed down by the supra-national court. The EU itself as a supra-national organization is not a member of the Council of Europe. Nevertheless, the ECJ recognizes the special significance of the ECHR as a guiding principle in EU-case law. In the Lisbon Treaty it is confirmed that the ECHR shall be respected by The Union as general principles of Community law because they result from the constitutional traditions common to the Member States, Art. 6 sec. 3 of the Lisbon Treaty. Therefore, the ECHR has great significance for the general understanding of human rights in the EU. While the Convention does not explicitly safeguard moral rights, they might lie within the scope of codified fundamental rights. Since moral rights seek to guard creativity and innovation as well as its output, they might be classified under the right of property or in the broader context of the right to freedom of expression (Art. 10 ECHR). Albeit as a means to restrict a person's freedom of expression, the work of the judiciary is also reflected in Art. 10 ECHR.

aa) The right to property

Seeking to protect the personal connection between the author and her work of which only the author can dispose, moral rights are covered by the right to property. The right to property was not included in the ECHR itself but in Art. 1 of Protocol No. 1, signed on March 1952. It states that "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of International law".* Property does not only capture personal and real property, but also rights *in rem* and intellectual property,[18] as it was held in several decisions by the ECtHR. According to the ECtHR Art. 1 of Protocol No.1 applies to Patents[19], Marks[20], and to Application

misunderstood. The German term "Urheberpersönlichkeitsrecht" were to incorrectly imply that it is in fact the author herself who is protected and beneficiary to moral rights.

[18] Council of Europe, Human right files, No. 11 rev.: The European Convention on Human Rights and property rights, 11 (1998).

[19] Smiths Kline and French Laboratories Ltd. v. the Netherlands, App. No. 12633/87, 1990; Lenzing AG v. the United Kingdom, App. No. 38817/97, 1998.

[20] Anheuser-Busch Inc. v. Portugal, App. No. 73049/01, 2007.

for registration of a trade mark[21], for a license for Internet access provisions[22] and for the exclusive right to use and dispose of registered Internet domain names[23].

Authors of literary and artistic works, scientific discoveries, commercial names etc. have an economic right that enables them to profit from their work, e.g. by reproduction.[24] This economic right as it is embodied in patents, marks or licenses lies within the scope of Art. 1 of Protocol No. 1. As stated before, the author's moral right differs from her economic right. While the former seeks to protect the personal connection, the latter protects any economic interests. Of course, if the financial value of a work is protected, the moral right of an author must be protected *a fortiori*: Being linked to one's personality and freedom of speech, a moral right has a stronger claim to be protected than mere economic privileges. It is not only a "neighboring" right to copyright, but inaugurates the deep implication of creators in their work.[25] There is an intrinsic value in the acknowledgement of authors as an expression of human dignity and creativity.[26]

bb) The freedom of expression

Moral rights stress the link of a work to the author's personality. The expression of one's personality is sought to be protected by Art. 10 ECHR that establishes the freedom of expression: *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. […] The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary […] for maintaining the authority and impartiality of the judiciary."* Art. 10 ECHR guarantees the freedom to hold opinions as well as impart and receive information and ideas. Academic freedom is part of the freedom of expression, as held in Sorguc v. Turkey[27]: *"[T]he academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction*". Therefore, authors of literary and academic works are protected by Art. 10 ECHR. When law establishes rules for the handling of literary or academic work, those rules must be measured

[21] Anheuser-Busch Inc. v. Portugal, App. No. 73049/01, 2007.
[22] Megadat.com SRL v. Moldova, App. No. 21151/04, 2008.
[23] Paeffgen GmbH v. Germany, App. No. 25379/04, 21688/05, 21722/05 and 21770/05, 2007.
[24] Council of Europe, Research Division: Internet: case-law of the European Court of Human Rights, 35 (2011).
[25] Mira T. Sundara Rajan: Center Stage: Performers and their moral rights in the WPPT, Case Western Reserve Law Review, Vol. 57 Issue 4, 767, 771.
[26] Paul Torremans: The EU Charter of Fundamental Rights, 509 (2014).
[27] Sorguc v. Turkey, App. No. 17089/03, 2009.

against the freedom of expression. Art. 10 ECHR allows for restricting the freedom of expression to maintain the authority and impartiality of the judiciary. This does not mean, however, that the judge's work itself is not safeguarded under Art. 10 ECHR.

cc) Conclusion

Moral rights as the author's right to control his or her own creation fall both within the scope of one's property rights as well as of one's right to freedom of expression. A right for authors of attribution and of integrity lies within the scope of Art. 10 ECHR and Art. 1 of Protocol No. 1. It combines aspects of ownership with those of creative output, since moral rights exist once a work is created.

c) Moral rights under the Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union safeguards property and academic freedom no less than the ECHR. The Charter was proclaimed in December 2000 at Nice. It is a legally binding document under the Treaty of Lisbon. It only applies to member states by the implementation of EU law and does not codify additional rights that do not exist in Union law. The Charter guarantees the freedom of expression and information (Art. 11), the freedom of the arts and sciences (Art. 13) as well as the right to property (Art. 17), specifically intellectual property (Art. 17 sec. 2). The author's moral right has not yet been part of EU-law. However, the European Court of Justice has recognized moral rights as a specific of copyright law.[28] The European Union has implemented numerous directives regarding copyright law, e.g. Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right on a certain rights related to copyright in the field of intellectual property[29] or Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.[30] Since copyrights as part of intellectual rights have been established by EU law, the restrictive character of the Charter does not forbid to regard moral rights as a specific of intellectual rights to be guaranteed by the provisions of the Charter.

[28] Carine Doutrelepont: Das droit moral in der Europäischen Union, GRUR Int. 1997, 293, 304 with further details.
[29] Official Journal L 346, 27/11/1992 p. 0061 – 0066.
[30] Official Journal L 290, 24/11/1993 p. 0009 – 0013.

Moral rights are also part of the creator's non-economic property interest and therefore are safeguarded under Art. 17 Sec. 2. They are moreover part of the "free market of ideas"[31] and fall within the scope of Art. 13 of the Charter. Since the national judiciary is traditionally a field of national sovereignty the Charter of Fundamental Rights of the European Union is not applicable on matters regarding the rulings of national judges. Nevertheless, the idea of moral rights is strong in European law.

d) Moral Rights under German Law

Germany explicitly recognizes the author's moral rights, they are codified in the Copyright Act of 1965 (UrhG)[32], specifically in section IV, subsection 2 "moral rights of authors", Art. 12-14 UrhG. In these articles, the Copyright Act lays out the scope of the author's moral rights. The rationale behind these sections is in line with Kant's and Hegel's philosophical approach to moral rights that have governed the European continent. They resemble the aforementioned rights stipulated in the Berne Convention, i.e. the author has the right of publication, recognition of her authorship and a right to prevent any distortion of her work:

Article 12 - Right of publication

(1) The author has the right to determine whether and how his work shall be published. […]

Article 13 - Recognition of authorship

The author has the right to be identified as the author of the work. […]

Article 14 - Distortion of the work

The author has the right to prohibit the distortion or any other derogatory treatment of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work.

The right of publication roots in the belief that the author reveals her personal views and beliefs on religious, social, political, cultural or any other matters by publishing her work and therefore exposing it to the general public.[33] Art. 12 follows the same rationale as art. 14, which enables the author to protect her work against all forms of derogatory treatment, which potentially prejudices

[31] Debbie Sayers: The EU Charter of Fundamental Rights – A Commentary, edited by Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, 389 (2014).
[32] Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Article 8 of the Act of October 1st, 2013 (Federal Law Gazette Part I, p. 3714).
[33] Schulze, Dreier/Schulze, Urheberrechtsgesetz, 5th ed. 2015, § 12 UrhG Rn. 1; Wiebe, Spindler/Schuster, Recht der elektronischen Medien, 3rd ed. 2015, § 12 UrhG Rn. 1.

her personal interests in her work. Art. 14 demonstrates quite clearly how determined the German legislature is to protect the author's work from all kinds of alterations, that may misrepresent the author's intention and reflect badly on her personally.[34] The integrity of the work is protected not for its own sake but for the sake of the author's personal rights.[35] This is not limited to protecting the author's reputation and honor; the provision seeks to comprehensively protect the intellectual and personal bond between the author and her work.[36]

Art. 13 plainly stipulates the authors right to determine whether and how the work is attributed to her name and identity. This provision is identical with art. 6bis of the Berne Convention.

II. Moral rights to a court's opinion

A ruling is an intellectual work of a judge.

Just like any other author, the judge produces an intellectual work. She cannot simply be replaced by a machine with the expectation of the same result. The judge's work is to find *lawful* solutions for questions unanswered by statutes or former court rulings – which necessarily requires creativity. In a prominent case, the German Federal Constitutional Court had to rule on the questions whether a diary entry may be used in criminal proceedings.[37] A diary might be classified as a per se truly personal document, whose disclosure infringes on the accused private rights. The communication with oneself is a highly important personal right. However, the level of protection of communication with oneself decreases as soon as the thoughts are put into written words. The Court found that the accused relinquished control of his words when writing them into diary, which inherits the risk of another person taking notice. Above all, when the content of the diary touches public interests, like it does in criminal cases, it is not "private" anymore. Not only did the Court determine whether the evidence was admissible or not, which is what a law-machine would have been limited to. Additionally, the Court allowed the reader of the opinion to participate in the Court's thought process when the Court found that the decisive factor is whether a thought has been written down or not.

[34] The same rationale is behind art. 39, 62, 75, 93 UrhG.
[35] Wiebe, Spindler/Schuster, Recht der elektronischen Medien, 3rd ed. 2015, § 14 UrhG Rn. 1; BGH, GRUR 2008, 981, 984.
[36] Schulze, Dreier/Schulze, Urheberrechtsgesetz, 5th ed. 2015, § 14 UrhG Rn. 3.
[37] BVerfGE 80, 367.

As the author of an intellectual work, judges, just like any other author, have moral rights. These connect the judge to the ruling in the same way the artist is connected to her sculpture or painting or the way the musician is connected to her piece. Accordingly, the work of a judge falls within the scope of the ECHM and the Charter of Fundamental Rights of the EU just as literature and academic works in general do. Neither the ECHM nor the Charter know a right that explicitly protects the personality. They do, however know freedom of speech, expression, of the arts as well as the right to property. The concept of moral rights includes aspects of all of those rights, and for this reason derives from them.

C. No sufficient justification to infringe on a judge's moral rights

We will show that and to what extent the judge's moral rights as the author of a court ruling are infringed upon on an international and on German level (I.) and that there is no sufficient justification for an overall exclusion of a judge's moral rights when it comes to the opinions she wrote (II.).

I. Infringement on moral rights

The judge's moral rights are infringed upon by international treaties as well as national legislation.

Art. 2 Berne Convention – Protected works

[…] (4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts. […]

Article 5 Copyright Act- Official works

(1) Acts, ordinances, [...] as well as decisions and official head notes of decisions do not enjoy copyright protection. [...]

Art. 2 par. 4 of the Berne Convention allows for signatory states to exclude official documents such as court rulings from copyright protection. Art. 5 of the German Copyright Act is the German counterpart to Art. 2 par. 4 of the Berne Convention. The rights generally granted to authors by Art. 12-14 UrhG do not apply to authors of court rulings.[38] That means that one may use the work

[38] There is some debate whether Art. 5 in fact excludes the author of an opinion from being subject to Art. 12-14 UrhG in the first place or merely prevents the author of an opinion to use the rights granted by them; Dreier, Dreier/Schulze, Urheberrechtsgesetz, 5th ed. 2015, § 5 UrhG Rn. 1.

without quoting the author, one may misstate the content of the ruling and one may alter the work while the judge herself has no remedy against one doing so.

In Germany the court rules "in the name of the people". The judge as the decision maker also appears in the legal document. After all it is she who signs the ruling. The parties involved know who their respective judge is, they know the author of the ruling. In the process of publication, however, the judge's name disappears, it will not be reprinted. For the reader of the published opinion it is not possible to identify the actual author of the text. The reader will only know that a specific bench of a specific court handed down the decision (e.g. "District Court of Hamburg, 5th Chamber"). Even though the grounds for a decision derive from the judge's pen, they will not be attributed to her personally but to the institution instead. Not naming the author when publishing the work is quite the essence of an infringement of moral rights, not quoting the author when using the work is an inevitable extension of that infringement.

Also, in most German courts judges do not have the right to a dissenting opinion. When a court decides, it does so as one entity, it speaks with one voice. Taking the moral right of a judge on her ruling as a basis, this, again, infringes on this right: Just like not naming the author, obligating the judge to go along with an opinion that she did not write, disregards the tie between the author and her work.

II. No sufficient justification

There is no sufficient justification for completely excluding a judge from the rights granted by the German Copyright Act through Art. 5 UrhG, which stipulates that decisions and official headnotes of decisions do not enjoy copyright protection. While Art. 6bis of the Berne Convention allows for an exception as created by the German legislature the specific provision in the German Copyright Act still has to pass some sort of scrutiny test.[39] We will demonstrate that, while the rationale behind the provision is reasonable (1), and while the provision furthers the goal of the rationale (2), the complete exclusion of the judge's moral rights by the means of Art. 5 UrhG is overly broad and therefore not necessary to achieve the goal of Art. 5 UrhG (3). We will show that Art. 5 UrhG therefore is an unjustified infringement on the judge's moral rights by excluding her from having the court ruling published with her being recognized as the author. More specifically,

[39] Since it is a German provision we shall apply the German constitutional test for infringements on personal rights by self-executing law rather than the tests used in common law.

we will show, that while the judge may be excluded from the rights granted by Art. 12 and 14 UrhG, it is too harsh an infringement on her moral rights to also exclude her from the rights granted by Art. 13 UrhG.

Article 12 - Right of publication

(1) The author has the right to determine whether and how his work shall be published. […]

Article 13 - Recognition of authorship

The author has the right to be identified as the author of the work. […]

Article 14 - Distortion of the work

The author has the right to prohibit the distortion or any other derogatory treatment of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work.

1. Legitimate state interest

With Art. 5 UrhG the legislature seeks to ensure that no author of an official document obtains or retains any moral rights to the work. The legislature reasoned: "It has to be up to the office that induces the creation of the work to dispose of the work without regard of any moral rights, especially without naming the author's name. Should an official work be reproduced incorrectly or should it be distorted by a third party, then the office may publish a correction if the office deems it necessary or inform the public of the incorrect reproduction in any other manner that the office sees fit."[40] Excluding the right to recognition of authorship seeks to ensure that the author's name is released to the public only then if and when it suits the office.[41] Another objective for not naming the judge but solely the court as the institution responsible for the work is to create an air of objectivity and impartiality. While this might be a goal that the legislator deems desirable to pursue, creating an air does not constitute a legitimate state interest. Being objective and impartial as a court is a legitimate state interest. Having the court pretend to be so, is not.

Most important, however, was the motive to benefit the public by excluding moral rights, i.e. to allow for a widespread dissemination of the work without having to concern oneself with the

[40] Official legislative motives, p. 240, 253, UFITA 45 (1996).
[41] Rojahn, in: Schricker, Urheberrecht, 1987, § 43 Rn. 78.

author's moral rights.[42] To ensure a functioning legal system, rulings just as court proceedings must be public.

Summing up, the legislature's intent was to do three things: Firstly, the legislature sought to exclude the author from any moral rights claims in the relationship between office and author.[43] Secondly, the goal was to prevent the author from pursuing any moral rights-related claims against third parties by herself and have the office pursue any claims related to the authors moral rights instead if the office sees it fit to do so.[44] Thirdly and lastly the legislature was concerned with problems with widespread dissemination of works created by government officials if the latter would enjoy moral rights.

2. Furtherance of the goal of Art. 5 UrhG

Art. 5 UrhG furthers the goals laid out above. It is easier to publish a court document if there are no judge's moral rights attached to the opinion. This allows for easy reproduction and thus furthers the accessibility of legal proceedings for the public. This in turn helps safeguard and improve the transparency of the legal system.

Art. 12 UrhG grants the author the right to determine whether and how her work shall be published; this goes directly against the legitimate state interest to make court rulings as accessible to the public as possible. The same goes for Art. 14 UrhG. This provision stipulates the author's right to prohibit any derogatory treatment of the work, Art. 5 UrhG excludes the judge from this right. Thereby the state ensures that arguing in public whether a ruling is correct is not going to be thwarted by any claims of the author that quotes of the ruling constitute a distortion of the work. Just like excluding Art. 12 UrhG, excluding Art. 14 UrhG helps with improving the easy dissemination of legal decisions. While Art. 13 UrhG also seeks to ensure that no claims by the author stand in the way of working with a legal decision it seems questionable that not requiring to quote the author's name when reproducing the decision and/or working with it, would actually facilitate the publication of decisions. Naming the author when quoting an opinion does not seem to create a significant burden when it comes to working with academic texts, so one could argue that it would not do so either when it comes to working with legal decisions. However, in the end,

[42] Dreier, Dreier/Schulze, Urheberrechtsgesetz, 5th ed. 2015, § 5 UrhG Rn. 3; Marquardt, Wandtke/Bullinger, Praxiskommentar zum Urheberrecht, 4th ed. 2014, § 5 UrhG Rn. 2; BVerfG GRUR 1999, 226, 228.
[43] Arnold, Ist § 5 UrhG verfassungskonform?, ZUM 1999, 283, 288.
[44] Arnold, Ist § 5 UrhG verfassungskonform?, ZUM 1999, 283, 288.

one cannot help but note that not having quoting the author of a legal decision poses less of a burden than having to do so. While the burden of having to name the author's name may be small, having none at all does further publishing, reprinting and working with the legal decision.

3. Necessity of Art. 5 UrhG

When weighing the private interests protected by Art. 12 through Art. 14 UrhG and the legitimate state interest behind Art. 5 UrhG, it is most challenging to justify excluding the judge from her rights proclaimed by Art. 13 UrhG. The crucial question is whether an infringement is in fact necessary in order to achieve the pursued goal. There might exist other viable options to ensure the widespread, easy dissemination of court rulings while infringing less on the author's moral rights.

Art. 5 UrhG excludes judges from moral rights to their opinion in general. More specifically it excludes the judge from the rights explicitly granted in the Copyright Act, i.e. from the right of publication (Art. 12 UrhG), from the right to recognition of authorship (Art. 13 UrhG) and from the right to prohibit any derogatory distortion of the work (Art. 14 UrhG) as well as from the rights provided for by the ECHR. The main purpose of Art. 5 UrhG is to ensure that rulings may be published, reprinted and disseminated without the burden of the author's moral rights attached to it. So the actual question is, whether it is truly necessary to exclude the judge from all rights stipulated in Art. 12-14 UrhG in order to achieve the goal of widespread dissemination.

If the administration seeks to publish the opinion, the right to publication cannot remain with the author. Accordingly, the right as provided for in Art. 12 UrhG is an obvious obstacle for widespread dissemination and there is no other way to ensure the goal than to exclude the judge from this right. Without a doubt a judge may not retain property to the ruling to such an extent that it cannot be disseminated as a legal document any more. The same goes for Art. 14. If the author were to retain the right to prohibit distortion of the work herself then the author would be in a position to file claims against publishing and republishing individuals and entities. The threat of claims made by the author would impair the process of dissemination, there is no viable alternative to excluding the judge from this right. However, being required to quote the author's name when using her work as provided for in Art. 13 UrhG, does not interfere with publishing the work. Having to add the name to the published text is an act that requires additional work. But this cannot begin to qualify as a substantial effort that thwarts the administrations objective to freely

disseminate the judge's opinion. The only difference between granting Art. 13 UrhG to a judge and excluding her from it, is that she can insist on having her name put on the piece of paper on which her work is used, published or quoted. This will not foil a single attempt to use and publish the author's work. Therefore, excluding the judge from moral rights in general may be the most thorough approach but this measure is unnecessary in order to achieve the goal pursued by the legislature. Restricting the author's rights to such an extent that the authorship is disowned is not a necessary measure.

The legislature's decision is more understandable if one takes a quick look at the context of the provision, in particular at the other official works that are subject to Art. 5 UrhG. As stated in Art. 5 par. 2 UrhG, Art. 5 par. 1 UrhG applies to all official works published in the official interest for general information purposes. It applies to ordinances, official decrees and official notices, as well as to decisions and official head notes of decisions, to administrative provisions, laws, regulations, public announcements and warnings, to only name the most prominent official works. Legal opinions are treated the same way as an administrative provision and alike: Art. 5 par. 2 UrhG paints all official works with the same brush with no regard for the different ways in which these works came into existence in the first place. While a legal opinion is a result of weighing arguments, facts and different legal concepts, other official works such as ordinances and warnings are less prone to be a fruit of creative work. The legislature decided to treat the different official works alike and thus chose an unnecessary measure in order to ensure widespread dissemination of legal opinions.

D. Effects of acknowledging moral rights to a judge's opinion

The general neglect of the moral rights to a judge's opinion infringes on the author's rights in an unjustifiable way. If one were to acknowledge moral rights to a judge's opinion instead, several desirable effects would ensue.

I. Naming the judge

The moral right safeguards the integrity of a work. The personal connection between the author and her creation becomes obvious by matter of recognizing the authorship. Naming the judge who is ultimately responsible for the legal opinion has several general positive effects besides merely protecting the judge's moral rights.

First, it will be easier to examine a judge's respective views and therefore allow insight into the judge's tendencies, preferences and bias. Attributing legal opinions to a certain individual rather than to an institution allows for greater transparency and increases the recipients understanding of how and why a judge may lean towards one or another side.

Second, the judge as the opinion-maker in court cases comes to the fore. Linking a legal opinion to a judge as an individual will highlight that opinions are in fact written by individuals rather than by institutions. Eliminating the awe attributed to the judiciary will make room for discourse. The connection between the ruling and the judge will be more likely to spark a debate on whether the respective decision is right and just. Instead of questioning the judiciary, the ruling remains what it is in the first place: The decision by appointed individuals. Judges, foregrounded by their authorship, will not fade behind the bench that rules in "the name of the people".

Therefore, the level of public control will increase. An increased level of transparency as well as the increased level of public scrutiny that comes along with it, will promote a more democratic process. Possibly, when not only ruling as a chamber but more as individuals, judges might feel the urge to publish dissenting opinions. Since it will be their name connected to a decision, judges might be more cautious in the way they decide. Allowing judges to communicate through their work may promote a judge's self-interest to be respected as an impartial and consistent judge.

Third, replacing a potential flawless institution by a natural person will allow the general public to gain a more realistic approach to law and the judicial system in general. It will not be "the court" or "the jurisprudence", but "Judge *Jane Doe*" who decides.

The criminal jurisprudence in Germany over abortions has gone through quite a change over the years. When at first, women who performed an abortion, were hold responsible and were punished, later a health risk was seen as a possible exculpation.[45] It was not "the jurisprudence" that once had a different opinion on the criminal liability and it was not even the legislature that made a change. Similar cases were heard by different judges and that made all the difference. Knowing who is responsible for a decision will bring out that there is not that one institution deciding, but individuals. Naming the judge will increase the understanding that different judges, young ones and old ones, have different political beliefs and that these beliefs inevitably influence their

[45] RGSt 61, 242, 254; Günther Kaiser, Kriminologie – Ein Lehrbuch, 3rd ed., 347, Heidelberg (1996).

decisions. Law has the potential to become more approachable more tangible and, in the end, more realistic, when it will not veil that there are people behind the court's decisions.

But it is also the judge who gains from being named when her opinion is published and quoted. Obviously, a judge who is subject to heightened public scrutiny may feel higher pressure when working on an opinion. But on the other hand, exceptional rulings will be attributed to her, too, as well as substantial changes in society. She will be able to enjoy the fruits of her work and she has the possibility to be recognized as what she really is: A responsible, important pillar of modern democracy.

II. Quoting the judge

Connecting a ruling to its author will also have quite an influence on how to work with rulings. While rulings in Germany are quoted by only naming the court, the date of the decision and its reference number, the moral right will require to quote the author as well. Quoting the author is in line with an altogether more academic approach to judicial work. In the academic context it is a great neglect to not name the source and, of course, the author. Quoting a judge by her name when quoting her ruling emphasizes the application of academic standards. It will be necessary to name the ruling in its context. Being obliged to actually quote a person rather than an institution may promote a more academic approach when it comes to working with rulings. It is simply easier to misquote an institution rather than an individual. The more prominent an author is the more eyebrows it will raise if the quote is inconsistent with what the reader is usually expects from the quoted author. This is an end in itself.

III. Conclusion

When accepting that a judge's opinion is subject to moral rights, several desirable effects will ensue. A judge will be recognized as the author of the ruling as an academic work. Hence the self-understanding of the judge will change and with it the legitimate expectations of a judge's work. Instead of the ruling as a work *sui generis* by an institution it will be the judge who is drawn into the spotlight. Along with it comes the possibility of a certain professional fame with good work and of course, infamy with bad work. To be able to trace a decision back to its author is likely to lead to better quality in rulings. The duty to quote the author as a characteristic of a moral right will lead to a higher predictability of legal decisions, after all, previous decisions by the very same judge shine a light on his views on certain legal issues and on society as a whole and allow to

assume how she may rule in the future. Many of those effects require that the judge will be named as the author of a ruling. Of course the moral right is a *right* and not a *duty*. It lies within the discretion of the author whether she wants to be named when she is quoted or published. She is free to waive the protection of her moral rights. In this case everything will stay as it is.

Taking it from here, considering the positive effects for the transparency and predictability of the judiciary work, it might be worth to consider that judge should be named mandatorily if the ruling is published or quoted. While this is likely to constitute an infringement on the author's rights, too, it is not at the core of this paper to argue whether this could be justified.

E. Naming the judge for the sake of transparency of judicial proceedings

Judicial opinions are one of the crucial cornerstones of democratic societies. They define and shape the law made by the legislature. While the text of the law, the actual words, do not evolve by themselves, the interpretation of the actual words by the courts does. But it is not the court as an institution that changes its opinion. It is the composition of the court that has changed prior to the court changing its opinion. With a different composition, the decision-making process changes, and so does the result of this process. To imply that "the court" has changed its opinion neglects the fact that a court consists of individuals with differing backgrounds, political beliefs and opinions.

The court is not the judge. The court is made up of judges and it is time that the role of the individuals behind the opinion is properly recognized. This will allow for the reader of an opinion to truly understand what she is reading. Interpreting a text is virtually impossible if one does not know who the actual author is. Recognizing the actual acting party is crucial to a modern society that does recognize the fact that at the end of the day most questions can be answered in more than one way and yet all of those answers may be correct or at least none of them are blatantly wrong. When it comes down to individuals merely having an opinion, following their true belief and conviction, there is no need for these individuals to hide behind the anonymity of an institution. For the sake of transparency of the judicial system it is necessary that judges take credit for what they think, write and decide. Recognizing a judge's moral right to her work is a necessary first step towards more transparency in the judicial system and towards better predictability of court rulings.