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ORIGINAL ELEMENTS IN THE DOCTRINAL ANALYSIS OF THE AUTHOR'S MORAL RIGHTS

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Abstract: *The present scientific endeavour proposes a rigorous analysis of authors' moral rights, with an emphasis on original elements in terms of doctrine. At the same time, with the present study we put forward a series of lex ferenda proposals for a better legal regulation of social relationships that relate to the exertion of moral rights by creators of legally protected works. Thus, the proposed study brings along both original elements that regard a logic and legal doctrinal analysis on authors' moral rights, as well as proposals for laws meant to optimize the legal framework regulated by Law no. 8/1996.*

Keywords: doctrinal analysis, author's moral rights, intellectual property.

1. Introduction

Moral rights are recognized in art. 1, par. (1) in Law no. 8/1996, which expressly sets forth the classification of rights that stem from the existence of intellectual creation rights into moral attributes and economic attributes. Art. 1 par. (2) does not make a distinction between making aware or not that a creation might be subjected to legal protection, which is, in this respect, an option of the author, and it underlines its creation by the author as a sole and sufficient condition. In this respect, in terms of doctrine, it is generally accepted that by using the construction "the mere fact of its creation" the law giver has envisaged the condition of a work's originality. This thesis is also argued by the law giver's enunciation in art. 7 of Law no. 8/1996, which expressly sets forth that "*original works of intellectual creation in the literary, artistic or scientific field are subject to authors' rights"*. Besides the issues related to originality, as shown [1], the law giver's enunciation pertaining to the fields that enter the scope of safeguarding authors' rights is limited. At the same time, in order to fall under the scope of legal protection, the regulation does not set conditions for the form of a work, as it is completed or not. Obviously, with a contrary provision on the form of a work in the context of legal protection, creation would be deprived of protection. Concurrently, the regulation does not set forth compulsory conditions in terms of the material form of expressing a creative activity either. Still, even if certain fields do set out rules in terms of the creative activity itself, they rather belong to technical requirements in a field and the condition of originality is defining for a work to be legally protected.

2. Original doctrinal analysis of the author's moral rights

A debated issue, whose rigorous analysis has gone beyond the boundary of law, is defining the concept of a work's originality. One definition provided by the law giver would have eased, in part, the

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activity of doctrine theorists. Even if there were regulations to stipulate the condition of originality in detail, according to objective criteria, we are of the opinion that it is impossible to give a delimitation of originality that would be rigid or based on a quantified assessment. And still, there will be an agreement on a work's lack of originality to the extent in which such a work will lack the most rudimentary elements of originality. Thus, we advocate the thesis that a work meeting the condition of originality in the context of its legal protection must be viewed from an angle of novelty elements (objective elements) that it brings in a field and from an angle of work authenticity (subjective elements). Thus, objective elements conjoin with the contribution brought along by an involvement of personality. The Explanatory Dictionary of the Romanian language defines originality mainly as "a particular way of being". Therefore, we acquiesce to the view that the originality of a work is given by the novelty and authenticity of intellectual creation [2], since distinctiveness entails, *ab initio*, an element of novelty that is related not only to the form of expression, but also to the work as a unitary whole. We appreciate that the variety of fields and a work being related to the person of its author make it difficult to have a general valid standardization for the appraisal of a work's meeting the requirement of originality in order to benefit from legal protection, as it is sometimes of a nature relatively determined, in principle, by traits that are peculiar to each work and to each author.

In order to offer a definition for the concept of authors' moral rights, one must have in view the definition of authors' rights, in conjunction with the theory for which the law giver opted pertaining to the content of authors' rights and its nature. Thus, we shall retain the definition of authors' rights as postulated by Prof. Bodoaşcă, as being those *moral or economic prerogatives recognized in law for the author of a work or for other natural persons or legal entities to have, within limits of public order and good morals, a certain conduct and to claim an adequate conduct from other subjects of law and, whenever needed, to resort to the state's coercive power.* Pursuant to the monist theory, due to the connection between an author's personality and a created work, a division between moral rights and economic rights is not desirable. [3] Still, the monist theory recognizes the complex nature of authors' rights but it remains ignorant to the fact that protecting moral interests is distinct from gratifying economic interests. For that matter, Germany is the only country at present that prefers the monist system for authors' rights and related rights. The dualist theory dedicates distinct legal systems for moral rights and economic rights. Pursuant to this theory, the two groups of rights are subjected to a classification, with moral rights ranked higher. [4] Differences between moral rights and economic rights are found in terms of their duration, as well as in their impact. Thus, moral rights take precedence over economic rights, they have a larger span and have a constant influence on the latter. Although the solution of the dualist theory is a creation of the French doctrine, the classification of authors' rights as a complex right is not a novelty in Romanian legislation, as it dates here ever since 1862, recognized in the Press Law. At present, from a logical and legal interpretation of Law no. 8/1996 there results a series of inconsistencies related to the concurrent use of two terms: "authors' right" and "authors' rights". As shown [5], this confusion is not missing in consequences since only the use of one single form will cement the Romanian law giver's option in relation to the legal nature of authors' rights (or right) as related to monist and dualist theories. Still, a convenient way would be to replace "authors' right" with "authors' rights". This change would harmonize laws, recognizing the two, moral and economic, attributes of

authors' rights, in an acquiescence to the dualist theory. The law giver has not completely acquired either of the theories that form the foundation of authors' right. In spite of a wanting enunciation, that can bring into question the stand of the Romanian law giver on the matter, we consider that authors' rights have a complex nature in Romania, composed both by moral rights and economic rights.

Thus, the authors' moral right is the legal expression of the connection between an author and his/her work.

Law no. 8/1996 recognizes the growing importance of moral rights and it acknowledges five moral rights in art. 10: the right to disclose a work, the right to claim authorship of a work, the right to the name, the right to claim the integrity of a work and the right to withdraw a work.

In art. 11, par. (1) in Law no. 8/1996, the law giver establishes the principle that "moral rights cannot be subjected to any alienation or waiver". Thus, rights provided in art. 10 are inalienable and not seizable. Still, by exception, art. 11, par. (2) in Law no. 8/1996 allows that rights provided in art. 10, lett. a), b) and d) may be subjected to a *mortis causa* transmission for an unlimited period. As shown [6], the exception from the principle that moral rights are inalienable is an apparent one, since the transfer operates only as regards the exertion of rights provided under art. 11, par. (2). The possibility of transmitting the three rights is not meant to gratify or ease the gain of benefits for successors, as such a purpose exceeds the scope of the moral rights transmission institution, but to ensure a perpetual nature of authors' moral rights and to create the premises for innovative activity to surpass time limits. At the same time, the current regulation ensures legal protection of moral rights in order to facilitate the protection of authorship and integrity of a work after its author's death. How the capacity of an active subject in moral rights ceases is of a lesser importance either in practice or in doctrine. Law no. 8/1996 does not make a distinction between natural death and a legally presumed death and a reinstatement of rights after an invalidated legal presumption of death is done following the same procedure as for all civil rights. From the analysis of art. 11, par. (2) in Law no. 8/1996 "*After an author's death, the exertion of rights provided in art. 10, lett. a), b) and d) shall be transmitted by inheritance, pursuant to civil laws, for an unlimited period. If there are no heirs, the exertion of these rights shall fall with the collective management body that has administered the author's rights or to the body holding the largest number of members in that field of creation, as applicable.*" There result the following remarks:

First of all, the law giver makes no distinction among means through which the exertion of authors' moral rights can be inherited. There results, as applicable, that these rights can be acquired by legal inheritance or bequest. Secondly, how the institution of moral rights transmission operates is related to other institutions in inheritance law (disinheritance, reduction of excessive gifts, reserved portion of an inheritance, quota for the surviving spouse) and, in principle, only general civil law is applied and special law provides a derogation in a single situation, which is when the *de cuius* inheritance remains vacant. Here, special law produces a deviation, and the exertion of rights falls with the collective management body that has administered the author's rights or to the body holding the largest number of members in that field of creation, as applicable. This derogation has the same purpose with the apparent exception to the inalienability of rights and the transmission of exercise for authors' moral rights provided in art. 11, par. (2), in Law no. 8/1996, *id est* to ensure the legal framework that would facilitate the survival of a work beyond the death of its author. In this respect, the transfer of moral rights exertion

over to collective management bodies is entitled to the prejudice of a transmission provided in civil law on the matter of inheritance. Still, the concrete vocation in a case of transmitting the exertion of rights provided in art. 11 par. (2) in Law no. 8/1996 does entail a ranking, that is fully grounded, so that if there is one, the collective management body that has administered an author's rights is preferred over other subjects of law. This regulation is predicated, in principle, on an author's subjective connection who preferred a certain collective management body and it is brought forth in the spirit of the author's choice. Taking into account its nature, it does not limit in any way the number of transmissions, which ensures the perpetual nature of authors' moral rights, since a work has a vocation of perpetuity and moral rights have a perpetual nature and protect authors' personality as manifested in their works.

Secondly, even if the duration of these rights is not unvarying, it does match an author's life time for rights contemplated under lett. a), c) and e) and it is unlimited for authorship and integrity rights, transmitted by inheritance and, in the absence of heirs, they go to O.R.D.A., the regulation does not set a time limit for the transmission of rights exertion. Thus, the exertion of rights can be transmitted to subsequent heirs, as well, not only to direct heirs. The unlimited nature of exercise transmission ensures its perpetual nature.

In conclusion, moral rights benefit from legal protection starting with the creation of a work until the death of its author. An exception to this is the exercise of rights provided in art. 11 par. (2) in Law no. 8/1996, which are transmitted only via *mortis causa* legal acts.

As shown [7], [8], an exertion of rights transmission by inheritance cannot take place when an author has expressed, during his/her life time, the wish for his/her work not to be disclosed. Thus, in the event an author makes use of a decision not to disclose a work to the public, we consider that a transmission by inheritance of authors' moral rights exertion does not take place. Indeed, the human right to share knowledge with their fellowmen is one of the personality rights. It is a discretionary and absolute right, in a close connection to authors' personality [9], and the highest authority in the matter of its censorship must be the author himself/herself. This last assertion must be, of course, harmonized with provisions in art. 14 of the Civil Code and with social and legal references related to the exertion of civil rights within boundaries of good morals and good faith. Although we appreciate as essential an author's capacity for self-censorship and to decide on his/her own, by free will, on the disclosure or nondisclosure of a work, as applicable, we think that a complete analysis on the right of disclosure also includes the situation (which is often enough) where an author has given no dispositions as regards the disclosure of a work. By interpreting the prerogatives listed in the analysis of art. 10 let. a) in Law no. 8/1996, there results the fact that an author's right to decide whether to disclose or not to disclose a work to the public is not equivalent with a lack of expression in this respect. In other words, the right not to disclose a work to the public must be exerted in a persuasive manner so that the transmission of authors' moral rights exertion should not be made by inheritance. This thesis is based first on the pseudo-symmetric relationship between the two prerogatives of an author holding the moral right to disclose a work. The relationship between the two prerogatives, that is the right to decide to make a work known to the public and the right to decide not to make a work known to the public is not symmetric. This is due to the lack of equivalence materialized in the temporal nature (an author's life time) of the situation which is pending from the moment when a work benefits from legal protection until the moment when the author takes a decision as

regards disclosing it to the public. The relationship is not one of equivalence since the lack of a manifestation produces legal effects in the direction of one of the prerogatives. Another argument which is based on the legal text consists in the formulation chosen by the law giver and unanimously approved in legal doctrine. In this respect, pursuant to art. 10, let. a) in Law no. 8/1996, an author has the right to decide if, how and when a work is to be disclosed to the public. Thus, the law giver's formulation using the verb "to decide" suggests a clear, unequivocal and active attitude on behalf of the author. By placing provisions in art. 10, let. a) in Law no. 8/1996 in conjunction with provisions in art. 11, par. (2) in Law no. 8/1996 which set forth the transmission of authors' moral rights exertion, we can state that based on the principle of transmission of the exertion of moral rights expressly provided by the law giver, the exertion of the right to decide whether a work is to be disclosed to the public is transmitted by inheritance as of right if the author does not expressly manifest his/her intention of not having a work made known to the public. Evidently, this conclusion illustrates once again the unbalanced relation between the two prerogatives, as presented above. Finally, another cornerstone of this thesis is the idea that the end of an act of intellectual creation is an author's sharing knowledge with other fellowmen, which idea could lead to establishing a relative presumption of expressing a wish to disclose a work to the public, argued by the lack of a manifestation of the author's will to the contrary during his/her lifetime.

An interesting hypothesis in the transmission of moral right exercise by inheritance is that where heirs exert an inherited right in bad faith. As regards penalties, we identify two possible penalties that can be simultaneously applied to the extent that they are applicable. First of all, the possibility to annul a legal deed drawn up without the observance of provisions is mentioned in art. 14 of the Civil Code. This penalty is fully justified and the action can be brought by any person that has a justified interest (for example the Romanian Copyright Office) which is legitimate and personal. In scientific terms, the hypothesis should not raise special problems. A second possible punishment consists in losing the moral right exercise, which is a solution proposed in doctrine [10]. In this case, our opinion is that although the solution would be fair in moral terms, followed by a retribution of the rights exercise to collective management bodies, the measure has no legal grounds for implementation, since bad faith in the exertion of a civil right acquired by inheritance is not enough to deprive heirs of such a right. Therefore, we support the thesis pursuant to which the only remedy in this situation would be a relative nullification of a legal deed drawn up without the exertion of civil rights in the spirit of the principle of good faith.

Making a work known to the public involves, according to art. 15, par. (1) "any communication of a work, directly or by technical means, made in a place open to the public or in any other location where there is a number of individuals gathered that exceeds the normal circle of family members and their acquaintances, including stage performance, recitation or any other means of public performance or direct presentation of a work, public display of plastic art works, applied art works, photographic art works and architecture, public protection of cinematographic works and other audio-visual works, including digital art works, presentation in a public venue, by any means, of a broadcast work. Moreover, it shall be deemed as public any communication of a work, by wired or wireless means, achieved by making available to the public, including via Internet or other computer networks, so that each member in the public would have access to it in any location or at any time individually chosen". The law giver's enunciation in art. 15 par. (1) of Law no.

8/1996 is a list of examples. The law giver lists, depending on the field, some concrete means to manifest an author's decision to disclose a work to the public. Obviously, due to the vast area of fields falling under the scope and the ever developing technical possibilities, an attempt to an exhaustive regulation would be doomed to failure. We therefore retain the idea that public disclosure is left at authors' discretion or the discretion of persons who have acquired the right exertion by inheritance.

3. Conclusions

We acquiesce to the critical remarks presented by Professor Bodoaşcă on the ambiguity of provisions in art. 15, par. (1), 2nd thesis, and we appreciate that the law giver should have oriented towards a more rigorous formulation of criteria that the author of a work should meet so that the process to disclose a work to the public would be deemed as valid and achieved, eventually with a reference to the institution of criminal law on deeds committed on public grounds. Although the two notions are not identical, their association is desirable to the requirement of a criterion based *ab initio* on random elements (the broad or narrow meaning of family or the scale of a circle of friends) and we appreciate that the activity of disclosing a work to the public is to be determined case by case. In order to consider the disclosing of a work to the public as achieved, we think that the intention to disclose a work to the public should ensue from expressions of will coming from the author or from the prerogative holder, thus completing the creative activity, and article 15 in Law no. 8/1996 must be viewed as a list of examples that can be improved, meant to be a reference in ascertaining, case by case, when a work is deemed as having been disclosed to the public.

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