Author's contract in the Albanian copyright law

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Abstract

The relation between the author and his/her artistic creation is very specific and at the same time a strong one. Such relation defies any property and affective connection that an individual may have with an object (Caron, 2011, 25). Copyright constitutes precisely the legal embodiment of the author's intimate relationship with his/her work. Copyright is a plurality of legal provisions that belongs to the author of the work, in order to protect his/her ownership and eventually the commercial exploitation of such work. In this context, the author, through legal provisions and international conventions duly ratified by Albania, enjoys a relevant legal arsenal in order to defend his/her artistic works so that such works may have a live of its own (Vivant & Bruguière 2009, 23). One of these legal measures is the contract, which in legal doctrine is well known as the author's contract. By means of such contract, the author has the right to distribute, reproduce, license or certify rights related to his/her artistic work. In this regard, the contract is an irreplaceable tool in the hands of the author to distribute the work and to give it an undeniable value, turning it into one of the most valuable intangible assets in civil circulation. The contract of the author, as the name indicates it, is a contract that obeys to the rules of civil law with respect to the quality of the parties, the characteristics of the object of the contract, its conclusion, the determination of remuneration and the term of duration. On the other hand, it is undeniable that the contract of the author contains rules which are not specifically contemplated by the Civil Code, such as rules relating to the form, interpretation and existence of some *sui generis* contracts provided in Law 9380 / 2005 "On copyright and related rights" (hereinafter referred to as "Law 9380/2005" or "Law on Copyright") as well as in the Draft Law On Authors Rights (hereinafter referred to "Draft Law"). From this point of view, this paper will analyze two key moments: the fact that the author's contract originates from the civil law principles and on the other hand the fact that such contract has its own autonomy from such principles.

Keywords: Author, Copyright Law, Contract, Law, Civil Code.

Introduction

The author's contract constitutes such legal mechanism that allows the author to put into civil circulation his/her artistic work. Artistic works are defined by Law 9280/ 2005 as any original intellectual of a natural person, materialized, regardless of the form or mode of expression, which aims to touch human feelings". From a practical point of view, it involves the literary, visual, visual art and choreographic works (Bainbridge, 1996, 25). The contracts are the main legal mechanism allowing the circulation of a tangible or intangible object in the market; therefore they will have a place of particular significance in the copyright field. The role of author's contracts is strongly related with the generation of huge profits from the circulation of artistic works. In this regard, the contract provides the legal tools for protecting the works for illegal use and at the same time, enabling the spread of such artistic work into the

legal market, in order to generate profits for the author and for the legal entity or person who distributes or reproduces such work. The contract enables the author to live using his/her work as it is difficult for a single author to deal with commercial aspects of the exploitation of an artistic works, as well enables the distribution, as much as it is contractually provided, of the artistic work (Vivant & Bruguière, 2009, 455).

The author's contract as a civil law contract

Author's contract obeys to the general principles of contract law as provided in the Civil Code. Such principles will apply in those fields where the civil law principles cannot be evicted, as the implementation of such principle is of a public order importance. We can mention the principle regarding the legal capacity to act, cause and object of the contract, identity of the parties. Rules of civil law will apply to the cases of breach of contract as well. Civil Code provides the necessary legal remedies for the parties with respect to indemnification and compensation. However, the author's contract is unequal by nature: we cannot pretend that both parties have the same contractual power at the moment they decide to enter into an agreement. Such contractual inequality is an actual issue that both contract and law tend to soften its consequences, by providing the potential remedies in assisting the weakest party to assess properly the amount and the number of rights he/she should transfer: we are talking here about the author. It is quite clear that in a contractual relationship between the author and the user of the author's rights, both parties are looking for capacities that are offered by the other party, for example the author may require financial support, technical opportunities and distribution of its work and on the other hand the user of the work, such as for example the producer is looking for a talented tangible idea to be transformed into a movie or music. Ideas materialized are commodities worth trying to protect (Bainbridge, 2012, 123) and the producers take the bet, at their own expense. From this perspective, the producers are interested in integrating such clauses into the contract that give them enough guarantees to ensure that the work shall be fully exploited, in order to have a fair return to investment. Hence, the producer may not need the intervention of the law in the contract, as much as the author does.

Firstly, in the author's contract, the parties should always respect the provisions of Article 663 of the Civil Code, according to which: "the necessary conditions for the existence of the contract are: mutual agreement of both parties, cause of the obligation, the object that form the core of the contract and the form as required by law." General conditions as contemplated in the above provisions are mandatory for the rightful conclusion of any contract. As regarding the mutual agreement, it is important to underline the application of the mandatory provisions of Article 6 of the Civil Code as regards the capacity to act: one cannot enter into an agreement without the capacity to act. According to this Article, the capacity to act belongs to any individual who is more than 18 years of age and the married woman who is more than 16 years of age. Adults who are deprived from the capacity to act or have limited capacity to act, according to a court decision, cannot be part in a contract, and as a consequence, cannot be part of an author's contract. This does not mean that the individual with no capacity to act cannot be considered as an author: such quality is related to the human

being and not to the contractor (Caron, 2013, 23). In this case, the custodian of the individual (the assignments of a custodian is mandatory by law) are entitled to conclude such contract and are in charge of collecting and managing the profits from the art work on behalf of the author.

As far as the consent of both parties is concerned, it is important to underline the fact that both parties should have the capacity to act, as explained above. Such consent must be complete and unequivocal (Delebecque & Colart-Dutilleul, 2010, 125). In addition to the above mentioned principles, it is important to assess the level of necessary information that the author should receive from the user of its rights, since the author is the party that consents to cede its rights in favor of the producer. The principle is this: the author should deliver an enlightened consent, and this cannot be done without the proper information delivered to him by the user or the producer of the work. Such principle is written in Article 664 of Civil Code, with respect to negotiation between parties before the conclusion of the contract. In order to have an enlightened consent, the author may rely on such Article to push the user or the producer to give as much as possible the information with respect to the offer that shall be part of the final contract. Negotiations, according to Albanian law and other continental laws, are not part of the contractual area: the fact that one of the party interrupts negotiations without prior notice or when it is obvious to both parties that such negotiations are leading to a concrete offer or to the conclusion of a contract, the harmed party may introduce to the court a compensation request based on tort law (Vivant & Bruguière, 2009, 455). On the other hand, the provisions of Article 671 may be fulfilled, in case when, as this Article says, "the offer is as worth as a proposal, when it contains substantial elements of the contract, which the parties intend to conclude, unless it results otherwise from the circumstances." The consent given for an offer shall be deemed as a proposal if it contains the substantial elements of the contract (Murphy, Spiedel, 1977, 131). Such provision clearly prescribes the idea that in case of refusal of conclusion of contract, when parties have agreed on the offer, one party may engage the contractual responsibility, according to Article 698 of the Civil Code, against the party that refuses to conclude the contract.

As regards the legality of the consent, it is important that such consent has not been agreed by a person being defrauded, under duress, in error of because of the great need, as provided in Articles 92 and 94 of the Civil Code. We have an example from the French civil law. An artist, working in a publishing house claimed to be under duress and in great need in respect to the employment contract with the publisher. Based on the contract, she agreed that her patrimonial rights should be granted to the publisher. But the contract omitted to provide any clause related to extra hours she actually performed, as such extra hours and therefore works performed during such periods, were not related whatsoever with the object of the contract. The object of the contract resided in the preparation of a children's encyclopedia. The artist argued that the performance or not of works was not related to the object of the contract and thus, cannot lead to termination of her employment contract as an artist. She feared that the resistance against the wish of her employer to transfer her rights related to works other than children's encyclopedia, which were not included in the contract, might have led to the termination of contract by her employer. She claimed that she was under duress. French High Court (*Cour de Cassation*) denied the arguments of

the plaintiff. Duress should result from irrefutable proof and that the causal relation between the refusal to cede the rights not contemplated in the contract and the termination of contract should be of a direct nature. This means that the court will scrutinize the fact and evidence before reaching to any conclusion (Decision dated April 3rd, 2002). Such analysis of the fact and evidence is of a great importance since the consequence of declaring duress in legal transactions is that the contract shall be declared as void, according to the Civil Code.

Concerning the object of the contract, Law on Copyright as well as the Draft Law on Copyright provide that such object should reflect the transfer of rights from the author to the user. However, the above mentioned laws refer expressly to the rules of Civil Code with respect to the conclusion of such contracts, including the principles pertaining to the object. Article 678 of the Civil Code provides that the object should be "possible, legal, determinable, or that may be determined". The author's contract is the embodiment of such contract where the object is of a great importance. The principles stated above induces that the contract must be clear, unambiguous and comprehensive and must be honored in both letter and spirit (Murphy, Spiedel, 1977, 131). The nature and the amount of the rights the author's accepts to transfer should be provided exactly in the contract. In any case, the object shall be a matter of interpretation from the court therefore, for example, if a contract stipulates that the author accepts to transfer right of communication to the public of a work, it is most likely that the term "communication to the public" needs further definition elements, in order for the author to understand the amount and nature of such right to be transferred. The need to provide exhaustively the nature of the object is a matter of protection for the author and from this principle derives the obligation of information of both parties (especially the author) that we mentioned above.

Same principles must guide the parties when it comes to payment, royalties or other advances in favor of the author. Such payments are the principle counterpart of the transfer or rights of the author. Without the provision of such payments, including the moment when they are due and the amount, expressly mentioned in the contract, we can positively state that such contract shall be declared as void. This does not mean that the author is not allowed to donate its work: however, we are not talking about such eventuality. The author may, if he/she decides freely without the intrusion of any exterior will, donate the work. But in general, in copyright matters, such thing will happen far too rarely. The payment of the author shall be considered as part of the object and cannot be omitted from the contract. The object of the obligation must have an economic assessment, according to Article 421 of Civil Code. From this point of view, it is the law on copyright and the draft law that provide that "the payment for transfer of the patrimonial rights is provided in the contract and is assigned proportionally with the revenues deriving from the exploitation of the work" (Article 49 of the Law on Copyright). The payment of the author is of a major importance, and shows exactly the point of view that the Law has towards the author. The Copyright Law provides that, if there is an obvious non proportionality between the payment of the author and the general revenues the producer receives from the exploitation of the work, the author may request the competent authority to review the contract in order to provide a fair compensation for the author (Article 49 point 3

of the Copyright Law). If we look carefully to the civil law, such principle derives from the provisions of Article 686 of the Civil Code with respect to the general conditions of the contract. Although the author's contract may not contain general conditions in it, the principle set out in this Article with respect to incurring from any substantial element of the contract, of disproportionate loss or damage of the interest of one of the party; have influenced without any doubt the provisions of the Law on Copyright.

Finally, as much as the payment of the author is concerned, the Copyright Law as well as the Draft Law provides that the author may request to the competent authorities to provide the payment in case such payment is not stipulated in the contract (Article 49 point 2 of Draft Law). Such provision is aiming to protect the interest of the author, as such principle is inspired from the general philosophy of law that the author is in the central of the mechanism of copyright. However, we may raise some objections with respect to such provision, as the Civil Code is unequivocal in cases when there is a lack of object in the contract: such contract may be declared as void by the Court. However, such eventuality is reserved to the author and may be demanded in Court as e last resort. The author and the other contractual party may find a resolution to a possible conflict with the assistance of a competent authority, in charge of implementing the provisions of Copyright Law.

Specific elements of the author's contract

The most distinguishable element that reflects the specificity of the author's contract is formalism. Article 48 of Law on Copyright provides that the contract shall be valid only in writing and if it stipulates the following: description of the work, rights and obligations of the transferee, excusive or non exclusive use of the rights, amount and ways under which the work shall be used, duration and territory." Such principle may be found in the Copyright Act of USA, stating that the transfer of copyright ownership is enforceable only if it is evidenced by a writing signed by the grantor or the grantor's authorized agent, the grantor being the author (§ 204, Copyright Act 1976). The Albanian Copyright Law requires a written document regarding the transfer of ownership, regardless of the exclusive of non exclusive transfer of rights, whereas the US Copyright Act does not require such document for non exclusive transfer of right (LaFrance, 2008, 137). For the sake of exhaustion, Copyright law provides transfer of copyright through non exclusive transfer, which means that the author may exploit the work along with the transferee, and exclusive transfer, under which the author may not concur the transferee with respect to the exploitation of the work. However, in both cases, the Albanian Copyright law provides the need of a written document for the transfer of copyright rights.

The main question that arises from such provision is whether the written document (i.e. contract) is mandatory by law or if it is prescribed for evidentiary matters, in order to give always to the parties evidence or sufficient proof where they can rely on, in case of a potential dispute. If such transfers are enforceable only in writing, what about agreement reached orally and for contracts concluded online, or in electronic methods? As far as the Copyright law provides, we think that the lawmaker has decided on purpose to eliminate agreements reached orally as they are too

uncertain for authors, since the law mentions explicitly the term "valid" with respect to the conclusion of contract (Point 2 of Article 48). The importance of the validity of the written document is related to the substance of the rights the author transfers and is mandatory by law to be expressly contained in this document or contract. Such elements are: the description of the work, rights to be transferred, whether the transfer is non exclusive or exclusive, period of use, territory and payment to the author (Point 2 of Article 48). On the other hand, as much as the electronic form of contract is concerned, we are of the opinion that the term "written" for the agreement between the author and the user of the copyright should include this kind of contract as well. Albanian legislation has been improved in relation to the security of electronic agreements. For example, Albania has approved the law on electronic signature, in accordance with the European directive, thus making possible the conclusion of electronic agreement. However, it is a matter of judicial appreciation and as up to now, we are not aware of a court decision has rendered a decision with respect to the validity of such agreements in the copyright area.

The second element is related to the interpretation of the contract. It is true that such element can be found in the Civil Code, as the judge should not refer to the contract only literally, but should interpret it, in accordance with the parties' will. We previously had the opportunity to speak about such principle provided in the Civil Code, specifically in Article 681 of it. However, the difference in the author's contract is that the interpretation of the contract should be done only in favor of the author. The power of interpretation that the judge has related to the contract is somehow limited: he should always bear in mind who is who, who profits the more and who is the weakest party in such contract (Linant de Bellefonds, 2004, 153). The author may not be deprived from his/her right unless agreed and "within the boundaries of his/her consent". In this respect, the words "within the boundaries of his/her consent shall be construed in the strictest way possible (Linant de Bellefonds, 2004, 269). Once again, it is quite understandable that the author's contract should be written.

It is undeniable that the influence of the commercial interests of the artistic industry has shaped new forms of contract that go beyond the limits of contract as provided above. Such contracts are contemplated in the Albanian Copyright Law, both new and former law. It is worth mentioning two of them of greater importance: edition contract and audiovisual contract. In this paper we will mention only the audiovisual contract as more representative of such specific contracts. In the essence of those contract is the investment made by a producer to make an audiovisual product based on the work of one or different authors, such as the author of the script, music, cinematography, as provided in the Law. It is obvious that the amount of investment may be impressive, therefore the producer requires from the author warranties that lie in the transfer of the rights as a whole in favor of the producer (Caron, 2011, 451). In most cases, the producer is a legal entity. However, we may have some cases when the producers are individuals who are backed up by producing companies.

Legal nature of the audiovisual contract. In such contracts, all the economic rights shall be transferred exclusively and without limit to the producer, or the commissioner of the work. In the American legal system such contract shall be considered as "Work made for hire". In such contract, the authorship of the work is vested *ab initio* in the

employer, producer or commissioning party (LaFrance, 2008, 75). The character of the transfer is so general that it includes all the rights, including the moral rights of the author, which under principles of the European copyright law, such thing is forbidden. From this perspective, in the context of the Albanian Copyright Law, the transfer is general but however is limited only to economical rights of the author. According to the law, the author is prevented from adapting his/her work for the next 20 years from the moment of the conclusion of the contract. This means that the author may have the right to adapt the work after this duration, but he/she cannot prevent the producer to exploit the first adaptation in its name even after the expiry of this duration of time. The main difference between the two systems can be explained through two ways of work creation in presence of several authors: collaborative work and collective work, both provided in the Albanian Copyright Law. The collaborative work is a work that involves several authors, but even if they are deprived through a contract with a producer from their economical right, they still remains the authors, with certain privileges given by the law, such as the moral rights, whereas the collective work is identical to the "work made for hire" system that deprive the authors even from moral rights. There are however some exemption, but they are due more to the tolerance of the producer than to the provisions of the law. For the sake of example we can mention the case of Pamela Travers, the creator of Mary Poppins, illustrated in the movie "Saving Mr. Banks", directed by John Lee Hancock, produced and distributed by Walt Disney Pictures, with Tom Hanks and Emma Thompson. Audiovisual contract, as far as it is provided in the Draft Law deals with collaborative work (Article 99 of the Draft Law), since all the authors are not deprived from their quality as author, even if they are no longer in possess of their economical right, passing them in favor of the producer. For such transfer, the author benefit royalties or payment, which shall be stipulated in the contract. Such contract should be of course, in writing (Article 96, point 2).

Presumption of transfer of economical rights of the authors. This is the principal element of these contracts. While entering into such contract, the author is well aware of the consequences: the author does not assign or transfer partially his/her rights. The author must transfer all his/her rights and generally there is not much room for discussion, event the Draft law provides that the contract may stipulate otherwise. The Draft Law provides that the producer is the individual or legal entity which is responsible for the production of the work and ensures the necessary resources both technical and financial, for the realization of such work, according to the contract (Article 96, point 3). Therefore the presumption of transfer of rights is the exact and necessary counterpart to the large amount of obligations that the producer engages himself/herself to fulfill.

First comment related to such contract is that the author never completely loses moral rights. Such moral rights are connected to the mentioning of the authorship, as well as with the protection of the integrity of the work. Moral rights, according to our Law and from e general point of view, to the European legislation, give the right to the author to retract the work from the market. But practically such revocation is considered as illusive, since the author should indemnify the producer. It is clear that the author may not have the financial capacity to indemnify the producer. The second comment is related with the position of the producer. The producer is not only the project manager; its rights are not limited to the benefit from the exploitation of its

investment. The producer is obliged to cover, either personally or through its representatives, initiative and realization of the work (Vivant & Bruguière 2009, 537). Its presence is strongly required during the implementation of the project. Such presence may derive also from the principle of responsibility of the owner which are connected to the effective control over the work (Jourdain, 2007, 127). And from this very important status that the producer enjoys, it often happens that artistic clichés may "kill" the originality and creativity for the sake of ensuring breakthrough releases in box offices.

Conclusions

The author's contract represents a key mechanism that allows the existence of the artistic work, realization of the property rights of the author as well as the development of a sector of much importance that is, the artistic industry. We explained above that the contract may resemble to license of general character that the author transfers in favor of the producer of the work. There is a risk, from a legal point of view, that the author enters into negotiations with a limited bargaining power: generally, the options may be two, either everything or nothing. Under these conditions, we can hardly speak of equilibrated contractual relations. It is more important to stress the duty to inform the author on the quantum of rights to be transferred, as well as on the guarantees the producer should give to the author that the rights shall be respected and implemented according to the agreement reached between the parties. The author may find a concrete interest in transferring the totality of its right to an entity that has the power and means to protect the work either in real and digital world. Let's face the truth, the author may not defend and promote his/her work alone, without strong support of the producer or other legal entity using the work. From this point of view, the author should be clearly informed on the rights to be transferred, the right that are inherent to its personality (moral rights) and the payment he should receive from the use and distribution of the work.

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