ASSIGNMENT OF THE AUTHORS' RIGHTS OF JOURNALISTS – COMPARATIVE LAW ISSUES

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Abstract

The opportunity and the possibility of reusing or secondary exploitation (reprography, databases, online distribution, etc.) of journalistic works have apparently generated new uncertainties or difficulties regarding the recognition and protection of the author's rights of the journalists. While the latter, claiming full respect for the author's right, especially for patrimonial rights, want the payment of additional remuneration for these reuses, publishers or employers, in order not to have to pay these amounts, tend not to recognize any of the author's rights. It is true that they succeeded in taking advantage of the various legislative ambiguities and inconsistencies existent and they sometimes found the support of the jurisprudence and of the doctrine. However, the principles, if not the legislative texts, seem quite clear and indisputable, even if the exercise or management of these rights may still present some practical difficulties. To evoke this theme of the author's right of the journalists, we will refer in this study to France and Romania regarding the issue of the author's right ownership and the exploitation of journalistic works.

Keywords: *assignment of the author's right, journalistic works, author-employee, press institution, publisher/editor.*

1. AUTHORSHIP OR OWNERSHIP OF THE WORK - INTRODUCTORY ASPECTS

Both in France and in Romania, the protection of the creator as an individual represents the basic principle. The author's right is perceived as a natural right. The author's right is attributed, in principle, to the creator of the work, and not to a moral person, based on the personalist conception. Therefore, only an individual can produce a creative effort that results in an intellectual good. We find this conception in the classic definition of originality, as a mark of the author's personality, which excludes the possibility that a moral person can express his personality in a work.

It is important to distinguish between the authorship and the title of subject/holder of the author's right: the former originates from a legal fact, whereas the latter originates from the law or from a legal act (ROŞ, 2016).

Both legislators clearly grant protection to the individual creator, the authorship of a work arising from "the simple fact of its creation." Consequently, according to Romanian and French law, only an individual can award himself the title of "author." The same principle is also found in the case of audiovisual[i] or radio works[ii].

Instead, the title of subject/holder of the author's right may belong to other people, than the actual creators of the works[iii]. Thereby, the creator of a work can assign his rights, in some cases the assignment being presumed. *Exempli gratia*, the audiovisual production contract regulated by the French legislature implies, in the absence of a contrary stipulation, an assignment of the exclusive exploitation rights in favour of the producer[iv]. Another exception is provided for the press: according to article L.121-8, the journalists retain the use of their rights of reproduction and exploitation, under the condition that the reproduction and exploitation do not compete with those of the magazine/ newspaper. It results from the interpretation of this provision that the assignment of the patrimonial rights by the employer, in the case of an employment contract, is possible, in the absence of a contrary stipulation. However, the right is born from the creation of the individual: the general principle of the exclusion of legal people from the original authorship, formulated in 1982 by the French Court of Cassation, in the "Dupont" decision, therefore remains relevant, even if the moral person can claim an original author's right on computer programs made by employees or in the case of collective works for

which he had the initiative. In any case, a legal entity can anytime have patrimonial rights over a work as an assignee, with the provision that it establishes with the author of the creation the methods of use, the duration and extent of the assignment.

2. THE REGIME OF CREATIONS MADE BY EMPLOYEES IN FRANCE AND ROMANIA

Regarding the regime of employees' creations, both legislators establish the fact that the author-employee is the owner of the author's right on the creations made within the framework of an individual employment contract[v]. Therefore, both the non-patrimonial and the patrimonial prerogatives are recognised to the author, as employee. The situation, which we shall further analyse, in which the author, as employee, transfers the pecuniary rights to the employer is not excluded.

As author, the employee preserves his moral rights during the individual employment contract, as well as after its termination, which is absolutely normal. The moral rights of the employee-author consist, in essence, of his right of paternity, that is, to be recognized as the author and to have his name applied to the work (*exempli gratia*, the photos published with the name of the employee-reporter). This right being imprescriptible, it can be enforced by the author-employee even after the termination of his employment contract (GAUTIER, 2019). Consequently, the author-employee is entitled to sue for the violation of his moral rights, including for the works created in collaboration (FITZGERALD & GILCHRIST, 2015). The employee's right to integrity over his work must be applied very strictly, so as not to allow the anyone to violate the right of exploitation of the mentioned work belonging to the employer. In other words, under the pretext of the right to integrity, the employee should not be able to ask for additional remuneration in case of adapting the work according to its original destination. According to the law, the extra-patrimonial rights are inalienable and cannot, in principle, be assigned on the basis of an employment or enterprise contract. The salaried author owns the paternity right over the work and can claim his authorship at any time. However, partial disclaimers of some attributes of moral law are not excluded. We refer to the situation in which the author prefers to leave his work anonymous or when the jurisprudence admits the giving up by an employee on the moral right of paternity, with the condition that this is explicit and limited.

Regarding the transmission of patrimonial rights, French jurisprudence distinguishes two situations: tacit assignment and express and anticipated assignment.

In the first situation, by signing an employment contract, it is considered that the pecuniary rights of the author-employee have been tacitly assigned to the employer. At first, this rule was reflected in French jurisprudence and in the revolutionary decrees (1791 and 1793) in France. Later, since the entry into force of the 1957 law, this rule has been strengthened by the solutions of the French courts[vi]. However, the French legislator provides, in art. L.131-3 paragraph 1, the fact that the assignment of rights must be express and carefully delimited. In other words, the global assignment of future works is null. The assignment of the author's right is subordinated to the condition that each assigned right represents the subject of a distinct mention in the act of assignment and the field of exploitation of the assigned rights is delimited in terms of destination, place and duration, especially for the creations of the employees (LUCAS et al., 2017).

At the same time, the French jurisprudence considers that a written proof is necessary in employment relationships in case of the assignment of the patrimonial attributes of the author's right. On the other hand, if it is accepted that the legal employment relationship involves *de facto* a transfer of patrimonial rights to the employer, this must meet two conditions: the employee must create the work within his activity and the assignment must be limited to the activity object of the employing company. Taking into account these aspects, the French position aligns with the realistic solutions adopted in most national legislations.

In the second situation, it is foreseen to be introduced, in the employment contract, of an express clause specifying that the works created

by the author will belong to the employer. In this case, the provisions of article L.131-3 would not be respected, which prohibits the general, undefined assignment of future creations made during the employment contract.

Although the specialized literature supports the prohibition of the anticipated assignment of rights by the employer on all future works, in reality, the approach is different. In principle, all pecuniary prerogatives of the salaried-author are fully transferred to his employer, based on the simple execution of the contract, for which the employee-creator is paid.

From another perspective, we wonder if, in the absence of special provisions, the employee can exploit the work created under an employment contract upon its expiration. The answer differs depending on two situations. The employee can exploit a work if it is produced outside the normal framework of the company's activities (*exempli gratia*, a professor can republish his lectures, even if he teaches in another institution) or if it represents an element of a collaborative work that can be exploited without prejudice to the exploitation of the joint work[vii]. In return, if the work was created within the normal activities of the company, its exploitation could still constitute an act of unfair competition or could engage the civil liability of their author, following the fault resulting from the disclosure of confidential information received within the employment contract.

The last situation involves certain clarifications. If the assignment of the rights of which the employer benefits results from a general clause inserted into the employment contract (or even implicit in it), this must be limited to the employee's field of activity. However, this field necessarily derives from the business object of the company at the time of signing the employment contract. In other words, the phrase "normal activity" applies not only to the employee, but also to the employer (BERTRAND, 2010).

Let's take as example a company whose object of activity is the production and sale of wind turbines. Taking into account that the respective company does not sell software, the programmer did not transfer the employer the right to use the computer program for external purposes, but only for internal work. If the company decides to market also that specific software, it cannot do so without specific authorization from the author or the author's right holder of this software. In this connection, another relevant example is the case in which the photographer, employed by a publisher, necessarily cedes the right to use and reproduce his photos in the context of the company's normal business. The transfer by the publisher of the photos to third parties for the production of a TV generic or of an advertising print cannot be done without the consent of the author or the author's right holder of the respective photos.

The debate regarding the author's right of employees is being done around the principles of labour law and author's right. Thus, the employee-author finds himself in a position of imbalance between an author's right granted to independent creators and a labour right that involves everything related to intellectual activity. If we look from the perspective of the labour law, which stipulates that for the service performed a salary is offered, the result of the author's service must, without doubt, be transmitted in full to the employer. If the rules of the author's right are respected, the salary cannot be supplemented, at least in France and Romania, with the proportional remuneration derived from the sale or exploitation of the work.

3. THE REGIME OF JOURNALISTS' WORKS IN FRANCE

Before the adoption of the law promoting the dissemination and protection of work created on the Internet ("HADOPI"[viii]), journalists were presumed to have assigned to their employer, the publisher of the newspaper or magazine, their copyright for the works that were created for a first publication, with the condition that they remain holders of the rights over their works in the event of a separate and non-competitive exploitation with that of the respective newspaper/ magazine. The journalist, like the photojournalist, had the right to authorize the publication of his work in another magazine, as long as such reuse did not directly compete with the original publication, and to reunite his articles into a collection and publish them in this form. The provisions were applicable to both print and

audio-visual media, and covered articles, illustrations and also photos. Therefore, any secondary exploitation and on a different medium than the original one - especially multimedia - by the employer had to be subject to an express authorization from the journalist, subject to the payment of additional remuneration for the benefit of the latter (BRUGUIERE, 2018). However, in the absence of a written authorization from the author specifying the limits of reproduction, the editor could not republish the journalist's article in another newspaper, including in a publication from the same editorial group (BERTRAND, 2010).

With the development of technology and of the Internet, the new economic media model has directed the media sector around the distribution of the same content on multiple media, simultaneously or sequentially. This is the reason why the journalist-employees considered that this new exploitation means a reuse of their works and therefore their prior authorization is required under the provisions of article L. 121-8. On the other hand, for the publishers, this meant an increase of the assignment contracts and implicitly the granting of additional remunerations.

Precisely for these reasons, the "HADOPI" law, adopted in 2009, tried to simplify things and ease the constraints imposed to the newspaper publishers.

Thereby, article L. 132-37 stipulates that the exploitation rights of the work created within a media entity/press institution ("titre de presse"), regardless of the medium and the dissemination method (with the exception of audio-visual communication services), are assigned exclusively to the employer, unless there is a contrary clause in the individual employment contract. Therefore, the legislator abandoned the distinction between the first and secondary publications in order to speak of "the press institution." Consequently, once an article has been written on behalf of a publisher (for example, *Le Figaro*), he or she can use it on any medium (excepting audio-visual support) belonging to the same entity (for example, the online version of *Le Figaro* magazine), without having to pay any additional remuneration to the journalist-author, other than his salary.

However, this global transfer is not unlimited as Article L.132-37 provides that the stipulates that the duration of this transfer must be established by a contract. No minimum or maximum is set, which can cause difficulties in the absence of such agreements. In case that the employer exceeds the period stipulated in the contract, he must offer the journalist, in order to continue the publication of the respective work, a remuneration, either in the form of salary or in the form of royalties.

The same article is also applied when the work is published not by the publisher under which it was created, but within the same press trust – "famille coherente de la presse" - (group comprising several newspapers of a different nature, but which can be linked, for example, by a company contract).

Finally, for all other publications that are not part of the respective press trust, it is a return to common law and, therefore, to the difficult-imposed formalism by article L.131-3 of the Code of intellectual property. Thereby, for this type of publication, the journalist's consent will always be required and he will therefore be paid an additional remuneration.

4. CONCLUSIONS

Facing the claims of their employers, willing to own the author's right of the journalistic works, in order to exploit and re-exploit them when and in any form they want, journalists, even if in principle the law is on their side, face real difficulties in obtaining the recognition and protection of their rights. Inaccuracies and apparent legislative contradictions have generated in France an uncertain jurisprudence, therefore generating completely opposing viewpoints. The same way as for other authors, in the case of journalists, the solution must be in correspondence with the personalist conception of author's right. Therefore, taking into account the conditions and nature of their creations, journalists are and should be considered authors themselves.

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Endnotes

i Art. L113-7, French Intellectual Property Code (CPI): „Ont la qualité d'auteur d'une oeuvre audiovisuelle la ou les personnes physiques qui réalisent la création intellectuelle de cette oeuvre."

ii Art. L113-8, CPI: „Ont la qualité d'auteur d'une oeuvre radiophonique la ou les personnes physiques qui assurent la création intellectuelle de cette oeuvre."

iii Art. 3, from the Romanian law on author's right and related rights: "(2) In the cases expressly provided by law, may benefit from the protection granted to the author legal entities and individuals, other than the author. (3) The quality of the subject of author's right can be transferred under the provisions of the law.", Art. L.113-5, CPI: "L'oeuvre collective est, sauf preuve contraire, la propriété de la personne physique ou morale sous le nom de laquelle elle est divulguée. Cette personne est investie des droits de l'auteur."

iv Art. L132-24, CPI: „Le contrat qui lie le producteur aux auteurs d'une oeuvre audiovisuelle (…), emporte, sauf clause contraire (…) cession au profit du producteur des droits exclusifs d'exploitation de l'oeuvre audiovisuelle."

v The legal regime of employees' creations is presented as a key element to distinguish the copyright regime from that of the author's right. According to art. 201 *(US Copyright Act)*, all rights in this kind of works belong to the employer or to the one that ordered, unless otherwise is provided in writing.

vi *Exempli gratia*, the decision of the Court of Appeal of Aix-en-Provence, of October 21, 1965, in the case of Meffre v. Funel, admitted that, by the effect of an employment contract signed between an advertising specialist and his employer, the latter had a use right over the works created by his employee.

vii Art. 5 of the Romanian law: "(4) If the contribution of each co-author is distinct, it can be used separately, with the condition that the use of the joint work or the rights of the other co-authors are not prejudiced."

viii „Haute Autorité pour la Diffusion des Œuvres et la Protection des droits d'auteur sur Internet".