SOME CONSIDERATIONS AND CONTROVERSIES OVER THE ASSIGNATION OF THE AUTHOR`S PATRIMONIAL RIGHTS

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Abstract:This article is intended to present a study on the assignation contract of patrimonial rights of the author, insisting on some legislative rambling in the examinated matter. Starting with the characteristically items of this contract, continuimg with some critical references on provisions which refers to legal characters, the study will end up pointing some legal problems related to revision and nullity of assignation contract.

Keywords:author`s patrimonial rights, assignee, assignor, exclusive assignation, the author`s remuneration.

The legal regulation on the copyright`s assignation contract is found in Law no.8/1996 on copyright and neighboring rights, as subsequently amended and supplemented. The content of copyright on intellectual creation enters both moral rights and patrimonial rights. Of the two categories, the only ones that may be subject to alienation or renunciation through living acts are the patrimonial rights. A way of transferring patrimonial property rights is the contract of assignment, governed as a general rule by the art.40-48, and some species of this contract are found at art.49-64 of Law no. 8/1996.

The assignment contract of patrimonial copyrights consists of the agreement between the assignor (the author of the creation or the copyright holder) and the assignee, under which the former delivers to the latter, in return for remuneration, the use of one or more rights patrimonial author, for a determined period of time. What constitutes the object of the assignment contract is the transfer of the use of patrimonial rights, not the rights as such. These remain in the patrimony of the author, returning to him after the expiration of the contract for which the assignment was completed.

Patrimonial property rights recognized by law are: exclusive patrimonial right to decide whether, how and when to use its work, including consent to the use of the work by others (art.12); suite right (art.24); as well as distinct rights to whose use by third parties only the author can consent (such as reproduction/copying of the work; distribution of the work; import for the purpose of commercialization on the domestic market of the work`s copies, with the author's consent; renting the work; the loan of the work; the direct or indirect public communication of the work by any means, including making the work available to the public so that it can be accessed at any place and at any time individually chosen by the public; the broadcasting of the work; cable retransmission of the work; making derivative works).

In the specialized literature1 it was argued that it can not be the object of the assignment contract the author's right to decide whether, how and when its work will be used, including the right to consent to the use of the work by others. Regarding the patrimonial right of the suite, article 24 paragraph 7 of Law 8/1996 expressly provides that it may not be subject to any alienation or renunciation. Only the privileged rights resulting from the right of

[1] To be seen T.Bodoasca, The intellectual property law, second edition, revised, Ed.Universul juridic, Bucharest, 2012, p.100

use may be subject to the assignment contract 2, listed in article 13 and defined in articles 14-23.

As mentioned above, the parties to the contract under review are the assignor (transferor) and the assignee (transferee). On the basis of those mentioned in art. 40, paragraph 1 of Law no. 8/1996, the author or the copyright owner can assign to other persons only the patrimonial rights of the author. It is necessary to distinguish between the two notions: Ţauthorţ and Ţcopyright ownerţ . The author of intellectual creation is also the owner of the copyright, but the owner of the patrimonial rights of the author is not always the author of the work. The author is the physical person who created the work, while the titular of the patrimonial rights of author is the physical or juridical person who, prior to the assignment, has acquired - under the conditions of Law no.8 / 1996 or the common law - the patrimonial rights that he assignes.

According to Law no. 8/1996, the following persons may become holders of the patrimonial rights of the author: the physical or legal person who, with the consent of the author, has made public the anonymous or under a pseudonym that does not allow the identification of the author (as long as he has not revealed his identity) work (art.4 paragraph 2); the natural or legal person on the initiative, under the responsibility and under whose name the collective work was created, unless otherwise agreed (art.6 paragraph 2); the legal or testamentary heirs of the author; the collective management body mandated during the life of the author if they are not legal or testamentary heirs etc.3

In the absence of a contrary contractual clause, for works created in the performance of the service duties specified in the individual labor contract, patrimonial rights belong to the author of the created work. In this case, the author may authorize the use of the work by third parties only with the consent of the employer and rewarding it for contributing to the costs of creation. The use of the work by the employer within the scope of the activity does not require authorization of the author's employee.

The assignee of the assignment contract for the patrimonial rights of the author may be any natural or legal person who has the capacity to conclude contracts according to the rules of common law.

The Romanian law requires the written form to prove the existence and content of the contract for the assing of patrimonial rights. The written form provided by the law for the conclusion of this contract is an ad probationem requirement, not an ad validitatem one.

Considering the presumption of assignment of patrimonial rights to computer programs, it was argued that in this case the author can prove the existence of the contract by any means of proof4, motivated by the fact that the written form of the contract was established to protect the authors. Other authors also support this idea by considering the wording of the text („unless otherwise agreedţ), which does not require a written agreement proving the existence of the assignment. In addition to this exception, the law also allows proof of assignment by any means of proof also in the case of a contract dealing with works used in the press.5

The assignment contract must contain, under threat of termination:6

patrimonial rights assigned;

how to use them;

the duration of the assignment;

extent of assignment;

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[2] T.Bodoasca, quoted opera, p.102

[3] B.Florea, The intellectual property law, Ed. Universul Juridic, Bucharest, 2011, p.107

[4] V. Ros, The intellectual property law, Ed.Global lex, Bucharest, 2001, p.172

[5] G.Olteanu, The intellectual property law, Ed. C.h.Beck, Bucharest, 2007, p.104

[6] D.I.Scarlat, The intellectual property law. Seminar booklet, Ed.Sitech, Craiova, 2019, p.21

the remuneration of the copyright holder.

The assignment of all the author's future works, whether nominated or not, is sanctioned with absolute nullity.

Assignment of the patrimonial rights of the author may be limited to certain rights from the foregoing, for a given territory and for a certain duration. These limitations will need to be mentioned in the contract. Considered as a form of rental, the contract of assignment is subject to the rules mentioned in art.1783 of the Civil Code, which stipulates for the renting a maximum duration of 49 years. If the parties stipulate a longer term in the contract, it is legally reduced to 49 years.

Regarding the extension of assignment, the law regulates two types of assignments: exclusive and non-exclusive.

Exclusive assignment implies that the author / copyright holder himself can no longer exploit the patrimonial rights that are the object of the assignment, in the ways, during and for the territory agreed upon in the contract. He also can no longer pass on the same rights under another assignment. Instead, the assignee of an exclusive assignment will be able to convey the acquired rights without the consent of the author.

If a non-exclusive assignment takes place through the contract, the assignor can use the work and even pass on the transferred property rights and other persons. Instead, the non-exclusive assignee will not be able to assign the rights acquired to a third party unless it has the express consent of the author or copyright holder.

Starting from the above, the court also decided in the case of a songwriter of a song widely known to the public, when the court has been called to judge by him about the use without a right of his musical composition within an advertising spot. His melody was embedded in another creation (the advertising spot produced by the defendant) without the consent of the copyright holder of the musical composition. Obviously, the applicant also invokes the non-existence of an assignment agreement with the defendant. Even if the applicant had previously stated that he intended to allow the use of the song composed and interpreted by him in the production of an audiovisual work (advertising spot) without remuneration in return, that fact did not justify the use without an assignment contract stipulating clear the terms of that assignment.

In reality, it is an assignment of the right to use the work, in the form of audiovisual adaptation, which, like any assignment, can be made for consideration, or free of charge7. This form of use of the pre-existing creationa is expressly regulated by Law no. 8/1996 and can only be done with the consent of the copyright holder and based on a written contract between the latter and the producer of the spot, contract which must expressly provide the terms of the assignment (duration, extent, rights passed, etc.).

On the basis of the above, the court admits such action by the plaintiff finding violation of the provisions of Law no. 8/1996 on the assignment matter.

The principle of contractual freedom operates in the matter of the remuneration of the author of the work, the Romanian law leaving it to the parties to determine how it is set, although it recommends two variants: proportionate to the proceeds of the exploitation of the work, in fixed amount or in any other way.8

Sometimes the assignment contract may also be free of charge. In doctrine 9, it was was asserted the idea that the assignment free of charge should be regarded as a liberality, by diminishing the assets of the assignor with the unpaid benefit from the assignee. As a

[7] O.Spineanu-Matei, Intellectual property (5). Judicial practice on 2010, Ed. Hamangiu, Bucharest, 2011, p.448

[8] G.Olteanu, quoted opera, p.105

[9] V.Ros, D.Bogdan, O.Spineanu-Matei, Copyright and related rights. Treaty, Ed.All Beck, Bucharest, 2005, p.364

consequence of this idea, the free-of-charge assignment contract should take the authentic form to validly display (ad validitatem).

Failure to establish remuneration in the assignment contract may result in the dissolution of the assignment. At the same time, in such circumstances, the author may ask the competent jurisdictional bodies to set the remuneration.

Also, in the case of an obvious disproportion between the remuneration of the author of the work and the benefits of the person who obtained the assignment of patrimonial rights, the author may ask the competent judicial bodies to revise the contract or to increase the remuneration. Similar to the action for rescission for civil liability, it is possible to request the court to review the contract or increase the remuneration in case of a "obvious" disproportion between the author's remuneration and the assignee's profits. The legislator thus offers the author an option: he can either choose to revise the contract by taking measures to lower the benefits by limiting the use of the divestiture by the assignee or to choose to increase the remuneration to the level corresponding to the benefits obtained by the assignee. Given that the considerable increase in pay is one of the possible consequences of the review, it was proposed in the doctrine 10 the modification of the provisions of art.44 paragraph 3 of the Law no.8 / 1996, so that it refers only to the revision of the assignment contract, being up to the jurisdictional authority (not the author's option) to decide which of the two modalities will apply for balancing the relationship between the parties.

At the same time, another controversial aspect is that according to the same article 44 this action is only at the expense of the author, and not of other natural or legal persons that may be holders of patrimonial rights of the author as we have previously stated, fact unfair if we have in view of the fact that they can also act as a assignor under an assignment contrac.

Starting from the above was also proposed by the doctrine 11 amending the provisions of Article 44 so that it refers to the contracting parties and not only the author.

On the other hand, the text of the law also seems unfair with regard to the assignee, since the revision of the assignment contract referred to in article 44 is based exclusively on unpredictability 12, which may affect both parties, not only the assignor, which is why, in compliance with the principle of equality provided by the Constitution, the assignee should also be given the right to act in the sense of revising the contract.13

Except for the action mentioned in art. 44, the author has at his disposal the action for the dissolution of the assignment contract regulated by art.48 of the Law no.8 / 1996. This time too, the text of the law makes it clear that the action belongs to the author, but what it was like was that this action was made available to the assignor. Thus, whenever the assignee does not use the ceded rights or uses them inadequately and if the author's justified interests are affected, the latter may request the termination of the assignment contract. In this action, the assignot will prove both the damage (which may be a patrimonial or moral one) and the bad faith of the assignee in the non-use or insufficient use of the rights he has been granted. An important aspect in the admissibility of this action is also the fact that the reasons for non-use or precarious use must not be due to the culprit of the assignor, the deed of a third party, a fortuitous case or force majeure, but only the act of the assignee.

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