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*Property which cannot be disposed of or the sphere of privacy or
freedom of expression? Authorship of a work in the light of the
protection of human rights*

ABSTRACT

Unlike the author's economic rights, the authorship of a work as well as other moral rights should not necessarily be classified as a kind of intellectual property. If literature presents the problems of copyright as an element of intellectual property, this is done in reference to economic rights. The issues connected with moral rights appear then as the background condition for economic rights to arise. However, according to the will of the legislator, the nature of these rights was formed in a different way. While economic rights are a kind of intellectual property, the authorship of a work should rather be viewed as a phenomenon at the intersection of the right to privacy (particularly at the stage of an already established but not yet completed work) and the right to freedom of expression (from the moment of the exercise of other moral rights and the moment of taking a decision to make a work public under the author's own name). The right to withhold authorship cannot be interpreted as the right to change the author by agreement of the interested parties.

Key words: freedom of expression, privacy, author's moral and economic rights

INTRODUCTION: OWNERSHIP AND INTELLECTUAL PROPERTY

The author's moral and economic rights are usually classified, along with industrial property, as intellectual property. The purpose of this article is to open discussion on the authorship of the work in the context of human rights protection. Hypotheses can be formulated as follows:

1. authorship of a work is a kind of property which cannot be disposed;
2. authorship of a work is a part of the sphere of privacy;
3. authorship of a work is a part of the sphere of freedom of expression.

The article is based on the comparative analysis of literature, analysis of case law and methods of law interpretation.

The concept of intellectual property does not include homogeneous rights, which is why it is sometimes criticized [Stallman: *Did You Say "Intellectual Property"?*]: "The term 'intellectual property' is at best a catch-all to lump together disparate laws. For instance, copyright law was designed to promote authorship and art, and covers the details of expression of a work (...). In practice, nearly all general statements you encounter that are formulated using "intellectual property" will be false. For instance, you'll see claims that 'its' purpose is to 'promote innovation' (...). Copyright law is not concerned with innovation; a pop song or novel is copyrighted even if there is nothing innovative about it". However, the European Court of Human Rights (ECHR) extended upon intellectual property the protection covering the exercise of ownership rights and undisturbed use of property. "In judicial decisions, the concept of property is interpreted broadly enough to apply to explainable material profits of specific owners of rights. That is why, apart from material objects, it (the concept) comprises debts, claims, assistance measures one is entitled to, intellectual property, copyrights, patents and intellectual property in the broad sense" [Duda, Kociubiński: *Realizacja ochrony własności*]. Although the conclusions arising from the ECHR judicial decisions are correct, a very free use of terms shows interpretation difficulties connected with the conceptual network. In the cases adjudicated by the Court the subject matter was copyright. It should be emphasized that although contentious issues usually concern the author's economic rights, they are only derivative of the existence of the author's moral rights, in particular, the authorship itself of a work. In this context, it is essential to stress the autonomous understanding of the content of concepts under the Convention for the Protection of Human Rights and Fundamental Freedoms. The rule is based on two assumptions. The first one assumes that the objectives and the subject matter of the Convention can be better implemented if it is recognized as being an independent entity and having the autonomous content. The second assumption is based on the conviction of coherence and harmony in the process of application of this Convention. The rules of domestic law, from which the international agency draws information, have to be shared by the signatories of the treaty [Machowicz 2014: 189 and literature cited therein]. Consequently, the issues of possible classification of the author's moral rights as a kind of intellectual property under the Convention is of marginal importance for establishing the concept content of intellectual property.

THE ESSENCE OF AUTHORSHIP OF A WORK AS THE AUTHOR'S MORAL RIGHT

Nevertheless, there are no sufficient grounds to exclude the author's moral rights from the protection of the European Convention of Human Rights. However, it remains to be established which national and conventional guarantees apply to these moral rights.

A feature of the creative process is that it should be subjectively new to the author him/herself. In other words, the process should be the result of an independent creative effort, it should originate in the author's mind, and the result of the author's creative activity should be previously unknown to him/her [V CSK 202/13]. Under Art. 16 of copyright law both the authorship of a work and the signing a work with one's name or pseudonym, or making it available anonymously is the author's temporally unlimited bond with the work, which (the bond) cannot be renounced or transferred. At the same time, as long as the author has not revealed his/her authorship, s/he is represented by the producer or publisher in the exercise of his/her copyright, and, in the absence of such representatives, by an appropriate organization of collective management of copyright. Crucial to the implementation of copyright protection is therefore the disclosure of a work and readiness to disseminate it (unlike the establishment of a work, i.e. when a work becomes the subject matter of copyright).

A conception/creative idea that are the foundations of a work are intangible property. They are protected under Art. 23 of the Civil Code: "The personal interests of a human being, in particular, health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive or improvement achievements are protected by civil law, independently of protection under other regulations". Personal interests interpreted under civil law pertain to different constitutional rights and freedoms. What is especially involved is the right to privacy and freedom of expression. The right to privacy is the object of interests of several disciplines. Even despite combining research results, a uniform and widespread definition of this concept has not been established: "(...) there is also no universal and invariable 'space of privacy' that could be constructed in the same way in relation to every person. It is the human individual him/herself who defines the limits of his/her privacy, and autonomously decides to disclose specific events, facts or situations. What is universal, however, is the method itself or perhaps the applied criteria that enable separation between the public and private sphere of the individual's activity, and, within the latter, enable setting of the area of protection by referring to the will and decision of the subject him/herself" [Safjan 1998: 72]. Attempts to combine the results of studies conducted in different fields or different disciplines can even turn out to be fairly troublesome. "Attempts to interdisciplinarily examine the investigated phenomenon may in this case entail achieving not entirely satisfying results for representatives of particular disciplines. Although a political scientist or legal scholar may agree with the psychological conception of distinguishing closer (stricter) privacy and more remote

(open) privacy, and include into the former the intimacy and such states, features and processes that are known only to an individual, the same political scientist and legal scholar will have problems accepting the semantic range of more remote privacy. The scope determined by a psychologist contains everything that exists at the point of contact with other people, i.e. one's private space, opinions publicly voiced, etc. In contrast, a political scientist or legal scholar perceive the views publicly expressed as a manifestation of a human right, distinct from the right to privacy" [Machowicz 21012: 180 and literature cited therein] and in this case they speak of the freedom of expression.

Since authorship is the author's bond with a work, then the moment such a bond arises is not without significance. Pursuant to Art. 1, § 3 of the copyright law it can be assumed that the bond arises when a work is established, even if its form was incomplete. The moment the work is established, it is the subject matter of copyright. The process of forming a work is highly difficult (if at all possible) to analyse exclusively in the area of law or political science. These sciences are interested in the result of activity, i.e. in a work. A work is a proof that something significant took place regarding the issues of copyright, right to privacy, and freedom of expression. However, the embedding of the creative process in privacy is the domain of psychology: "This is the area, which can be called, after Scheler, an intimate person, the area of a person's experiences impossible to verbalize, and thereby entirely incommunicable in a direct way. To a person, what is located in this area is his/her most profound, intimate truth about him/herself. The content contained in this area impacts his/her manner, but only the person him/herself knows to what degree and in what way. This is also the content that, because it is entirely inaccessible to others, defines the area of human loneliness. The second circle consists of the content that can be communicated to others through verbalization or non-verbal communication; it is in relation to it that a human being determines (...) a barrier of cognitive accessibility. And finally, there is the third circle: its content is social; it is accessible and subject to social exchange" [Galdowa 1995: 248]. In this context, the bond that begins to connect the author with his/her work can be classified to the second circle because we are certainly dealing here with the verbalization of thoughts, conceptions, or convictions. In contrast, the moment a work is disseminated it passes into the third circle. The work is not only available but it also influences its audience and can stimulate an exchange of views.

THE EFFICACY OF RELINQUISHING THE AUTHORSHIP OF A WORK

Anonymous publication of a work is the author's right, but in no way does it create a presumption that the author who publishes a work authorizes other persons to take over his/her creative productions. If it is impossible to identify the author, then the condition specified in Art 34 of Copyright Law can be satisfied by giving information that a quotation comes from an anonymous author [I CK 232/04]. The

first sentence of the provision in question says that works can be utilized within permitted use on condition that the author's forename and surname as well as the source are mentioned. However, pursuant to the reading of the second sentence, the provision of the author's name and the source should take the existing possibilities into consideration. Anonymity is not tantamount to the wish to relinquish moral rights. Two other issues should be raised instead: the willingness to make one's creative achievements public and the simultaneous unwillingness to disclose own authorship. The reasons for such unwillingness can be different and require studies combining psychology and sociology. It can be intuitively assumed that underlying the author's decision to remain anonymous is the uncertainty or even fear of reactions by different social groups or part of society: from one's close family and friends to the public opinion.

M. Jankowska stresses that J. Barta and R. Markiewicz warn against a too "scrupulous" linguistic interpretation of Art. 16 of Copyright Law, which, they believe, may result in the development of judicial interpretation allowing relinquishment or transfer of moral rights of the author. Although the interpretation would be inconsistent with the existing theory and practice, yet it would be in conformity with the literal reading of Art. 16, according to which, the only thing that cannot be the object of relinquishment or transfer is the author's bond itself with a work. This interpretation would allow the admissibility of relinquishment or transfer of moral rights [Jankowska 2011: 362] and would be an argument for sanctioning ghostwriting by law. Ghostwriting consists in creating a work commissioned by another person, on the understanding between the parties that the dissemination of the work will be conducted with the authorship or co-authorship being attributed directly or implicitly to the commissioner [Czub 2011: 124]. Another definition given in literature does not include the possibility of the ghostwriter participating in the authorship of a work "Ghostwriting is defined as an act which consists in the creation of a commissioned work, which will later be distributed under the commissioner's surname" [Jankowska 2014: 103].

The other circumstance (co-authorship) is, however, more often termed guest authorship. We are dealing with "guest authorship" ("honorary authorship") when the author's participation is negligible or none, and despite this fact s/he is the author/co-author of a publication [guest authorship, https://pbn.nauka.gov.pl/static/doc/wyjasnienie_dotyczace_ghostwriting.pdf]. Therefore, in the case of the attribution of authorship to a person other than the actual author, in practice we are dealing with a *contra legem* situation: the author's actual and voluntary breaking of the bond with his/her work. This phenomenon should be examined not only in the context of the freedom of contracts but also through the clause that restricts this freedom, including reference to criminal law. Pursuant to Art. 353¹ of the Civil Code the parties executing a contract may arrange their legal relationship at their discretion so long as the content or purpose of the contract is not contrary to the nature of the relationship, the law or the principles of community life. J. Guśc comments upon the norm as meaning

that the clause of the “nature of relationship” (and the principles of community life) provides the opportunity to recognize certain provisions of the contract as invalid, without the need to narrow down, through far-fetched interpretations, the scope of the freedom of contracts, arising from the provisions of the particular law [Guś 1997: 16]. M. Szczygieł [1997: 17], on the other hand, writes that the nature of contractual obligation relationship is the limit of contractual freedom, functioning as the system keystone and requiring that account be also taken of the fact that restrictions on this freedom may also arise from legal regimes other than contractual relationship and from other systems and branches of law (from public-law regulations). Thus, examining the issue of ghostwriting only at the level of civil law one could say that if both parties intend voluntarily and in full consciousness to shape a contract in a special way, they can act according to the principle that “what is not prohibited to a natural person is allowed”.

The problem is, however, that civil law is only a branch in the whole system. References to ghostwriting should be also sought in criminal law because “Anyone who appropriates the authorship or misinforms about the authorship of a whole or part of someone’s work or artistic performance, is liable to a fine, the restriction of liberty or imprisonment up to three years”.¹ The case becomes even more complicated insofar that the ghostwriter knows or should at least realize, basing on the accompanying circumstances, that his/her work with its authorship attributed to another person will be submitted as the grounds for certification of the obtention of higher professional qualifications than the current ones (e.g. a diploma of graduation from an institution of higher learning). The attribution to oneself of the result of the ghostwriter’s work is to mislead the receivers of a work. Furthermore, pursuant to Art. 272 of the Criminal Code, “Anyone who obtains a certification of an untruth by deceitfully misleading a public official or another person authorized to issue such a document is liable to imprisonment for up to three years”. Under such circumstances, account should be taken of the possibility of holding the ghostwriter responsible as an instigator (when s/he knows or especially induces another person into the offence) or at least as an aider and abettor (when behaving reasonably s/he has grounds to guess) in the offence of obtaining a diploma under false pretenses. Misleading about the authorship consists in actions intended to produce beliefs contrary to reality. It does not matter whether misleading concerns the whole work or selected fragments of it. “When speaking of misleading, we mean the production of a belief about the authorship, inconsistent with the objectively existing state of affairs (...). For an offence to occur (both the offence of appropriation of authorship and of misleading) it does not matter which part of someone else’s work (...) the perpetrator’s behaviour applies to, yet without doubt this must be an essential element of the protected work (rather than the idea itself or the research method applied)” [Mozgawa, Radoniewicz 1997: 10].

¹ Art. 115 of the Act on Copyright and Neighbouring Rights.

In M. Safjan's opinion [Safjan 1993: 19], the infringement on the freedom limits defined in Art. 353¹ is subject to the sanction of invalidity of a legal act (Art. 58 of the Civil Code). This means that also in civil law (and not only in criminal law) the contract of writing by a ghostwriter is not recognized by the legislator; in other words, this kind of contract is not allowed. Since such a contract is legally void, one cannot try to omit this finding, focusing selectively only on the principle of freedom of contract. In particular, this principle should not be unjustifiably construed in broad terms.

The question remains, however, about the reasons for this situation. One of the four values referred to in the Preamble to the Constitution, is truth. "[In the Preamble] it is not truth in the theological sense. Nor should it be construed as truth in the metaphysical sense or truth in the ontic sense (ontological truth). We should assume that the issue is the fundamental, classical understanding of truth, i.e. truth in cognitive terms (...). Thus, the point is the agreement of the content of cognition with its object: the agreement of a proposition with reality" [Dziedziak 2014: 203]. In literature, there is an ongoing discussion on the normative/non-normative nature of the provisions of the Preamble to the Constitution. This issue is also the subject of constitutional judicial decisions: "Legal norms in the strict sense cannot be derived from the text of the Constitution's Preamble. Nevertheless, it provides guidelines based on the genuine statement of the constitutional framer, as to the directions, consistent with his/her intentions, of interpretation of the provisions in the Constitution's normative part" [K 18/04] and, at the same time: "Law, good law, will never be axiologically neutral" [Zakrzewska 1993: 200]. Moreover, the Constitution is supreme in the hierarchy of sources of the universally binding law. Consequently, it is necessary to exclude an interpretation of the copyright law that would allow not only the concealment of the truth about the authorship but, at the same time, it would legally allow the introduction of false information into public reception, replacing true information.

CONCLUSIONS

Unlike the author's economic rights, the authorship of a work as well as other moral rights should not necessarily be classified as a kind of intellectual property. If literature, primarily the teaching texts, presents the problems of copyright as an element of intellectual property, this is done in reference to economic rights. The issues connected with moral rights appear then as the background condition for economic rights to arise. However, according to the will of the legislator, the nature of these rights was formed in a different way. While economic rights are, without doubt, a kind of intellectual property, the authorship of a work should rather be viewed as a phenomenon at the intersection of the right to privacy (particularly at the stage of an already established but not yet completed work) and the right to freedom of

expression (from the moment of the exercise of other moral rights and the moment of taking a decision to make a work public under the author's own name).

An obstacle to the assignment of authorship to the intellectual property right is also the fundamental feature of property: transferability and the possibility of abandoning it. This feature is inherent both in "traditional" property – ownership of tangible property and intangible property. However, authorship cannot be disposed of either by selling it to another person or by relinquishing it. The legislator's consistent stance on the issue of authorship is to defend truth. This value is the reason why the principle of the freedom of contract will be excluded with regard to the situation when the parties to a social relationship attempt to reach a ghostwriting agreement. Obviously, the adoption of this legal solution does not guarantee that there will be no facts inconsistent with the legislation in force. Such cases can, however, occur in all branches of law. These are the consequences of a ghostwriting agreement that are crucial. Although in the public reception of reality there will actually appear misrepresented information about the person of the author, this will not affect the authorship of a work. It will remain with the ghostwriter. Failure to reveal a person's name does not affect the person's identity. The right to withhold authorship cannot therefore be interpreted as the right to change the author by agreement of the interested parties.

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