Can We Give it Away? Transferability of Author's Personal Rights via Contractual Agreement

Liana JAPARIDZE*

Abstract

Author's personal right – a right streaming from the vision that the work is the author's "spiritual child", declaring that the former should be the one who always decides the non-economic fate of the latter, was a significant acquirement of last centuries' legislation. However, international acknowledgement of this right in the Berne Convention and its incorporation in national laws created diversity in its application on a country to country basis. One of the most important issues about this right, debatable until today, is the question of its transferability. Civil and common law approaches disagree about the fact whether third persons should be able to acquire an author's personal right via contractual agreement. The paper will address this issue, discuss the right from historical and comparative perspective, and try to come up with the answer whether it is transferable by nature, and whether transferability via contractual arrangement should be allowed.

Keywords: author's personal right, right of disclosure, right of attribution, right of integrity, right of retraction, transferability of the right

Introduction

Freedom to create is one of basic human rights (Roeder, 1940, p.558) enabling the author to express one's inner self through a particular work (Swack, 1998, p.371). One of the main reasons behind creating any work is the author's desire to share his/her ideas with the audience (Swack, 1998, p.371). Thus, it is logical to state that besides economic rights related to this work the author should also have a right to decide the fate of the work in terms of non-economic side of its usage (Hopping B. J. 2007-2008, chapter II B). This particular right has already been widely accepted[1] and is called the author's personal right.[2]

Universal acknowledgement has not eliminated the differences in the application of author's personal right, issue of its transferability being one of them. The question whether this right can belong to any other person besides an author, even in case of the author's express consent, is still under debate.

This work will discuss the above mentioned issue by using historical and comparative methods. From historical point of view, we shall see the rationale behind the creation of this right and its development throughout the years. From comparative point of view, the paper will show the differences between the two main modern approaches – civil law and common law ones. Finally, the problem will be analized by using both methods and the conclusion will be drawn regardin the transferability issue.

Brief History of Evolution of the Author's Personal Right

The prerequisites of an author's personal right can be first seen in the plagiarism-related laws of Ancient Rome[3]. Plagiarism was also negatively perceived by Christian Church due to the moral concept of ownership of intellectual property[4] (Swack, 1998, pp.365-370).

The situation changed in the Catholic Church during the Middle Ages, since the church was deemed to own all rights over the works created inside it or by its orders. Authors patronized by Catholic Church were, as a rule, working anonymously and were obliged to obey patrons' orders related to the content of their works (Swack, 1998, pp.365-370).

The first move towards the current situation was taken by acknowledgement of the artists' rights in Florence. The spectrum of rights grew over time and finally, a famous Italian artist Michelangelo Buonarotti[5] became the first artist to be named as author of his own works[6]. Beginning from this time, works of art were considered to be an "expression of artist's personality", but legal basis for protection still did not exist (Swack, 1998, pp.365-370).

Author's personal rights, as they are defined today, were first acknowledged in XIX century France (Dillinger, 2007, p.900). French lawmakers perceived a work as the author's "spiritual child" and established protection criteria according to this conception. French courts played an important role in enhancing this protection[7] (Hopping B. J. 2007-2008, chapter III A).

Acknowledgement of personal rights took a different pass in Great Britain (and consequently in all common

***Liana Japaridze** is M.A. student at the Ivane Javakhishvili Tbilisi State University and the Law Direction research-assistant at the Faculty of Social Sciences, International Black Sea University, Tbilisi, Georgia.
E-mail: ljaparidze@ibsu.edu.ge*

Journal of Social Sciences, 1(2):79-84,2012 ISSN:2233-3878

law countries), where Anne's Statute of 1709 first established copyright laws (Gallia, 2007, p.235). However, this right was closely connected to the economic interest for the creation of the work (Gallia, 2007, p.236). As a result, common law countries did not consider acknowledging an author's personal right for a long time.

The first international acknowledgement of an author's personal right was their incorporation in the article 6b of the Berne Convention (Dillinger, 2007, p.902). Nowadays, the author's personal right is acknowledged in many countries of the world at least at some extent.

Rationale behind Acknowledgement of the Author's Personal Right

At first, an author's personal right was recognized in order to protect the author's economic interests and to support the development of culture (Gallia, 2007, pp.234-235). Thanks to French law, these two interests were joined with the interest of protection of the author's personality (Dillinger, 2007, pp.900-901). As time passed a wide spectrum of economic rights were created in order to protect the author's commercial interests, while personal rights retained the function of protecting author's personality and the public.

In order to protect author's personality, a creator of a particular artistic work has a right to decide the fate of its own creation despite its economic value or usefulness to society (Swack, 1998, p.366). Since the work is considered to be the external expression of the author's inner self (Swack, 1998, p.361) it should be protected from the impact which substantively changes its appearance or contents (Dillinger, 2007, p.900). Often the public knows the author only through his/her works. Thus, by protecting the work, the author's personality and vision also gets protected. This concept is relevant not only during author's lifetime, but also after death (Dillinger, 2007, p.900).

As for the defence of public interest, an author's personal right makes it possible to preserve any work for future generations in an authentic way without changes (Swack, 1998, pp.361-362 and Hopping B. J. 2007-2008, Chapter II A). Since works protected by the author's personal right are directed towards a specific audience, protecting this right means protecting the audience. After the first interaction with the work and creation of a certain impression regarding it, the expectation is that work stays unchanged by others in the future (Palmer, 1990, pp.844-848). This reasoning is also related to the idea of preserving cultural heritage and supporting its development (Swack, 1998, pp.363-364).

Author's Personal Right[8] – Breaking Down the Details

The ontent of an author's personal right differs from country to country. Most broadly, it comprises four rights (Hopping B. J., 2007-2008, chapter II B):

a) Right of Disclosure[9]. The author's right to decide without outside pressure when, where and by using which form of communication will he/she declare authorship of a particular work (Damich, 1988, p.7).

b) Right of Attribution[10]. According to it an author can demand to be named as an author of a particular work[11], to publish the work anonymously or with a pseudonym (Damich, 1988, p.24). "The moral right protects the identity of the creator as he has chosen it." (Roeder, 1940, p.562)

c) Right of Integrity.[12] This enables the author to ban third persons from amending or distorting the work without the contest of the former (Hopping B. J., 2007-2008, chapter II B).

d) Right of Retraction.[13] An author is empowered to amend already publicized work (Hopping B. J., 2007-2008, chapter II B).

The author is the only one who by the sheer fact of being a creator of a particular work has a right to declear himself as an author, to amend (or give contest for amendments), and to take the work out of circulation once and forever. In case these rights are transferable through a contractual agreement, the new owner of these rights will be able to realize them without the author's contest (and maybe even against the author's will). Coming from this the transferability issue is directly connected to the question whether a person other than the author should have a right to exersize the above listed rights. In case of a negative answer, the issue of transferability needs to be decided negatively as well.

Author's Personal Right in the Modern World

Since an author's personal right has no economic character regulating it has been avoided most of the time.[14] Article 6b of the Berne convention acknowledges two components of this right: Right of Attribution and Right of Integrity. At the same time this convention does not mandate acknowledgement of this right from its signatory parties (Dillinger, 2007, p.902). Thus, the content of this right significantly differs from one country to another. However, two main approaches can be still identified: civil law and common law ones.[15]

Civil Law Approach

This approach was developed on the basis of Kant's[16] and Heggel's[17] attitude towards intellectual property. Ac-

Journal of Social Sciences, 1(2):79-84,2012 ISSN:2233-3878

cording to them the final product of intellectual property unites two aspects in itself. It is a thing and an external expression of author's ideas (Swack, 1998, p.370). As a result this product should have some non-material value that should be protected by a right different from economic ones. Since this right stems from an author's personality it is automatically considered untransferrable (Swack, 1998, p.381).

In European law working on a particular work is not enough for the establishment of a copyright on it. The criterium of originality is decisive here.[18] Introducing a criterium of originality is a further indication that relationship between the author and its work is more than a relationship of an owner and a thing.

On the basis of this approach Europe has developed a two fold scheme for copyright protection. An author's economic and personal rights are separated.[19] The former one is transferable and limited in time. The latter is not (Hopping B. J., 2007-2008, chapter III A). An author might not have economic rights any more but still retains personal rights (Pattarozzi, 2007, p.460).

This approach has been criticized for several reasons. First reason deals with Kant's approach to the author-and-work relationship. Critics note that after the creation of a work it exists independent of its creator and does not "die" together with the author. Therefore, considering the two as single union is wrong (Palmer, 1990, p.844). Second, the ban on transferability is against the principle of free will. If the author wishes to transfer personal rights to another person, he/she should be entitled to do so (Pattarozzi, 2007, p.460).

Common Law Approach

This approach is based on a utilitarian theory that focuses on the possessor of economic rights of a work rather than on an author (Pattarozzi, 2007, p.432). The Common Law Approach is more interested in society's demands on a particular work than in a relationship between author and his/her work (Pattarozzi, 2007, p.431). Here economic interests related to a particular work dominate an author's personal interests. Transferability of personal rights is allowed if society benefits from it (Pattarozzi, 2007, p.433).

After a controversy related to one of Pablo Picasso's[20] works common law countries more or less acknowledged the existence of an author's personal right (Hopping B. J., 2007-2008, chapter IV B). However, the content of this right significantly differs from its civil law understanding. A good example of this difference is a "works made for hire" doctrine which still works effectively in these countries. According to this doctrine if a copyrighted work is performed by order the orderer aquires copyright (both economic and personal rights) for this particular work (Pattarozzi, 2007, p.460).

This approach too, has been mainly criticized for two reasons. First, an author's personal right cannot be limited by applying a society interest argument since the society itself is mostly interested in its protection. This way originality and the contents of the work will be better preserved and society will get an unmutilated version of it (Pattarozzi 2007, p. 433). Second, this approach makes the personal right of an author seem "secondary" and dependent on economic rights. However, personal and economic rights are separate rights with different natures. As a result transferability of the latter does not automatically grant the former the same character.

Transferability – an Analysis

It is obvious from a historical point of view that the author's personal right was not perceived as transferable upon the moment of its creation. But does this mean that the right does not have transferable character at all?

In order to answer this question we should look at the content and purpose of the right. Despite the different levels of protection, all countries acknowledging the author's personal right agree that the right was designed as an acknowledgement of the author's personal link to the created work. The concept of the work being the author's "spiritual child" served as a stimulus for declaring the author as "the parent" and making him/her the sole authority in the issues related to "child's upbringing". Keeping this concept in mind the issue of transferability raises two main questions; can a person be an author of a work when he/she did not create the work but rather acquired the right to be called author from the creator? Should any person except of the author be allowed to amend or make substantial[21] changes to the work without the consent of the latter?

Coming from the content and purpose of the creation of the author's personal right, the answer to the first question should be negative. Authorship is acquired in the moment of expression of author's original approach through a particular work. The author is an author only because of the fact of creation. The right to be named as an author (Right of Attribution) is established from the moment of creation and by the sole fact of it. It cannot be acquired by any other means.

The fact that a work has its own "life" after creation and that it does not "die" together with the author is true. However the death of the author does not (and should not) revoke authorship. As long as the work exists identity of its creator should not be disregarded and only this person has a right to be named as the "parent" of it.

What if the author desires otherwise? The will of an author should definitely be respected if the content of the right allows it. In case of the right of attribution though, it is not possible. The nature of the right itself indicates that once it is given to a certain person it should stay with that

Journal of Social Sciences, 1(2):79-84,2012 ISSN:2233-3878

person forever. Protection of society's interests plays an important role as well; the public has a right to know who exactly created a particular piece of work.

The negative answer on the first question naturally generates the negative answer for the second one. Amending a particular work without the author's consent means amending the author's personality in the eye of public, showing the author's point of view (his/her inner self) from a different perspective, when the latter does not desire to do so. Giving this right to a third person means intrusion not only into the author's interests but disregarding society's interest as well. Society has a legitimate interest in knowing the work as the creator intended to show it.

Having answered both questions negatively the issue of transferability should be decided this way as well.

Conclusion

An author's personal right enables him/her to be known as an author as well as protect the work from further undesirable changes. It protects the author even when the former does not have economic rights any more. This right also protects society, since it enables the work to be preserved in its original form as a part of a cultural heritage.

Protection of this right was reasoned by interests of both author and society. Because of this fact, personal right was deemed to be untransferable from the very beginning. Differences between the two types of approaches described above are based on the fact that common law countries recognized only the author's economic rights. The concept of the author's personal right was relatively new to them. Thus considering this right in a framework similar to economic rights could not be avoided.

The fact that common law countries try to enact norms based on two opposing theories in single legal system certainly creates problems. However, the implementation of author's personal rights in the laws of these countries does not create a prerequisite for it becoming transferable. The transferability issue should be decided according to the content and purpose of this right, and this right can belong only to the author. Therefore giving the author's personal right to others via contractual agreements should not be allowed.

[1] Since its incorporation in Berne Convention, this right has been acknowledged by the majority of signatory countries in one or another form.

[2] At first introduced in French Law, this right is known as "droit moral". Majority of authors translate it as "moral right". However, some think that the right, according to its contents, is described better by English term "Personal Right". For further information see Palmer, 1990 and Roeder, 1940.

[3] The author notes that the term "plagiarism" streams from the word "plagium" - the crime of stealing a human being – and underlines negative attitude of authors and society regarding it in Ancient Rome.

[5] Plagiarism was deemed to be theft and was punished likewise. 1475-1564.

[6] "By sheer force of reputation, Michelangelo enjoyed then most of the rights French artists now legally enjoy under the doctrine of droit moral." Swack gives examples from the biography of Michelangelo to clarify that he, unlike other artists, did not obey the orders of patronizing noblemen, refused to show his unfinished works even to the Pope himself, created the pieces of arts without being ordered and set prices for them. This type of behavior was unusual for most of the artists of Renaissance period, since during this time legal basis for protection of author's personal rights did not exist, and artists willing to be named as the author of his own work would only do so by sheer strengths of own reputation.

[7] Three out of four components of an author's personal rights was established by French court.

[8] Most of the legal literature puts the term in plural (personal rights). However, analysis shows that this is in fact a single right with subdivisions. This view is further supported by Article 17.1 of Georgian Law on Copyright and Related Rights which names the right in singular and then discusses its different forms (author's comment).

[9] Le Droit de Divulgation – This right is often discussed with the fellow right of withdrawal. This encompasses the author's right at a certain point to not only ban a further distribution of his/her work but extract already distributed works from public. According to some authors this very right is a part of the "basic four" personal rights of the author instead of right of retraction.

[10] Le Droit à la Paternité de L'oeuvre, in legal literature a right known as "right of paternity".

[11] This right is expressed in the 1999/08/07 Law of Georgian on Copyright and Related Rights, Article 17.1 "a" and "b" and is named respectively "right of authorship" and "right to name". This right also encompasses the author's power to disclaim any work which is not his/her work.

[12] Le Droit au Respect de L'oeuvre.

[13] Le Droit de Repentir ou de Retrait.

[14] EU's approach to the issue is a good example of this. Aspects of copyright are protected by several directives at the EU level but every directive indicates that its sole aim is to regulate economic rights only.

[15] This type of division is provisional, since the desire to harmonize legislation pushed many countries to adopt more similar approaches. For example, Australia, a common law country, has been internsively adopting legislation protecting the author's personal rights (Pattarozzi, 2007).

[16] Immanuel Kant (1724-1804).

[17] Freidrich Hegel (1770-1831).

[18] This moment is especially evident in EU's "Database Directive" (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases). The Directive distinguishes between two types of databases, one of which possess characteristics of originality enough to be protected by copyright, and the other which does not satisfy originality criteria, but is still protected by so called sui generis right because the author has put a significant amount of work in creating this database.

[19] Alternatively, in common law, personal rights have never been part of copyright. Some authors suggest that copyright perceived only economic set of rights from the very beginning, and use phrase "copyright and moral (personal) rights" in order to clarify their position. For example, Martin Roeder discusses different standards of copyright (author's economic rights) and moral right (personal right) protection.

[20] In 1986 one of the Australian Papers published announcement, where the owner of "Trois Femmes" (A famous 1959 work of Picasso) offered readers to buy parts of this work. The owner, which bought the work on an auction for 10000 dollars, intended to cut the work into 500 square pieces and sell each piece for 135 dollar. In case of success, other works would be sold the same way. The overall negative response over this issue played a significant role in acknowledgement of an author's personal right in several common law countries, including the USA. (Dillinger, 2007).

Journal of Social Sciences, 1(2):79-84,2012 ISSN:2233-3878

[21] *Substantial changes modify the style, content or purpose of a particular work. That way they differ from technical changes, changes that any editor is allowed to perform. The difference between substantial and technical changes is that the former counts as secure. This is an act perceived as an intrusion into author's right of expression and is banned by most legislative acts around the world (See Georgian Constitution, Art 23.2).*

References:

Berne Convention for the Protection of Literary and Artistic Works. Retreived on November 2012, from: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

Damich, E. J. (1988). The Right of Personality: A Common Law Basis for the Protection of the Moral Rights of Authors. Georgia Law Review

Dillinger, E. (2007). Mutilating Picasso: the Case for Amending the Visual Artists Rights Act to Provide Protection of Moral Rights after Death. UMKC Law Review

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. Database Directive. Retreived on May 2011, from: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML

Gallia, C. R. (2007). To Fix or not to Fix: Copyright's Fixation Requirements and the Rights of Theatrical Collaborations. Minnesota Law Review

Hopping, B. J. (2007-2008). A Proposal for the WTO to Enhance Moral Rights Protections. Gonzaga Journal of International Law.

Palmer, T. G. (1990). Are patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects. Harvard Journal of Law and Public Policy

Pattarozzi. (2007). Can the Australian Model be Applied to U.S. Moral Rights Legislation. Cardozo Journal of International and Comparative Law

Rigamonti, C. P. (2006). Deconstructing Moral Rights. Harvard International Law Journal

Roeder, M. A. (1940). The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators. Harvard Law Review

Swack, C. (1998). Safeguarding Artistic Creation and the Cultural Heritage: A Compassion of Droit Moral Between France and United States. Columbia-VLA Journal of Law and the Arts