THE AUTHOR'S RIGHT TO DECIDE WHETHER, HOW AND WHEN THE WORK WILL BE MADE PUBLIC

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Abstract

Moral copyright is the legal expression of the link between the work and its creator; it precedes the patrimonial rights, outlives them and exerts a permanent influence on them. Moral rights are independent of patrimonial rights, and the author of a work retains these rights even after the assignment of his/her patrimonial rights.

Romanian law has a tradition of recognizing the moral rights of authors of scientific, literary or artistic works. In this respect, Law no. 126/1923 on literary and artistic property was the first Romanian law and one of the first international laws to contain provisions ensuring the protection of moral copyright. At the Rome Conference in 1928, when the second conference to revise the Bern Convention was held, introducing art. 6 bis, it was noted that the Romanian law of 1923 contained very clear provisions on moral rights and was appreciated by the participants for the liberalism of its provisions.

This study presents an analysis of the right of disclosure, referred to in the literature as the right of first publication, which is the author's right to decide whether, how and when the work will be made known to the public. As the author of the study also considers, the right of disclosure is a discretionary and absolute right, recognized by all national laws as one of the most personal rights.

Keywords: *author, copyright, moral rights, right of disclosure, right of first publication, public knowledge.*

1. Introductory concepts on moral rights

Man's creative activity is embodied in his work in any of the scientific, literary or artistic fields. By creating a literary, artistic or scientific work, the author of the work acquires both *patrimonial rights,* which allow the author to derive profit from the use of his/her creation, and *moral rights (non-patrimonial),* rights that link the work to its creator, while also being an effective means of protecting the creator's rights. It must be stressed that the moral rights of the author of a work "precede the patrimonial rights, outlive them and exert a permanent influence on them. *Moral rights are independent of patrimonial rights*, and the author of a work retains these rights even after the assignment of his/her patrimonial rights"[1].

Moral rights, said Professor Viorel Roș, on the occasion of the International Conference "*The challenges of copyright 160 years after the first regulation of copyright in Romania and 150 years of moral rights in the world*", organized on 24 June 2022 by the ALAI Romania Association, a member of the International Literary and Artistic Association (founded in 1978 on the initiative of Victor Hugo), "*represents a 19th century gain in copyright law, on ground prepared by philosophers, creators and artists, but its affirmation, its recognition in favor of authors as a means of protecting their personality, its affirmation in legal life is due to the jurisprudence (lawyers and judges) and doctrine that preceded the introduction of this category into positive law, which only happened in the 21st century*" [2].

Although the Romanian legislator recognizes the pre-eminence of moral rights, placing them, in the text of the law[3], before patrimonial rights, it did not define them but only briefly listed the attributes conferred on the owner. The task of defining these moral rights, which are regulated in the national laws of most of the world's countries, has fallen to doctrine and specialists in the field, who have defined them as "*the legal expression of the link between the work and its creator*"[4] or "*the rights enjoyed by the author of an intellectual creation as a*

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[1] C.R. Romițan, *Drepturile morale de autor,* Universul Juridic Publishing House, Bucharest, 2007, pp. 47-48.

[2] V. Roș, A. Livădariu, *Provocările dreptului de autor la 160 de ani de la prima reglementare a acestora în România și la 150 de ani de drepturi morale în lume,* Hamangiu Publishing House, Bucharest, 2022, p. 28.

[3] In Chapter IV, with the margin "*Copyright Content*" of Law no. 8/1996 on copyright and related rights (republished in Offizial Gazette no. 268 of 27 March 2018, with subsequent amendments and supplements), the moral copyright is regulated before the patrimonial copyright.

[4] V. Roș, *Dreptul proprietăţii intelectuale. vol. I. Dreptul de autor, drepturile conexe și drepturile sui-generis,* C.H. Beck Publishing House, Bucharest, 2016, p. 286.

consequence of the fact that his/her personality is expressed and reflected in the work"[5].

In other opinions, moral rights "*are those non-patrimonial prerogatives which give the owner the possibility of controlling the exploitation of the creation and its respect by others*"[6] or "*those non-patrimonial prerogatives recognized to the author of a work or, in cases expressly provided for by law, to other natural or legal persons, by virtue of which they can have a certain conduct towards the work and can claim a conduct corresponding to the other subjects of law, and if necessary can appeal to the coercive force of the state for their protection*"[7].

Internationally, the first jurist to use the concept of "*moral right*" was André Morillot[8] in his work "*De la personnalite du droit de copie qui appartient a un auteur vivant*", published in 1872[9], and the jurist Alain Darras was the first to explain it in a precise and correct formula. The latter, in his work "*Du droit des auteurs et des artistes dans les rapports internationaux*", published in 1884, said that "*Every literary work, every artistic work, requires intellectual effort for its creation or its carrying out. Each of them is the product of an effort without which the work would not exist. Every author must be respected. All work must be rewarded. These are the sources of the double right recognized to authors and artists: the moral right and the pecuniary (patrimonial) right*"[10]. Also in older French doctrine, the moral right of the author was defined in 1897 by Jules Lermina[11]as "*the author's right to defend the integrity of his/her work in substance and form*"[12].

One of the first laws to contain provisions on the moral right of the author was the law adopted in France on 13.01.1791, which, in art. 3, regulated the rights of playwrights to object to the public performance of their works, thus conferring on them "*a right attached to the person (the right of authorization)*". Shortly afterwards, on 19.07.1793, another law was promulgated in France which, in art. 3, "*forbade any person to publish a work without the express permission of the author*". We can also recall the Prussian law of 11.06.1837, which, in art. 7, regulated the action of counterfeiting, stating that "*the true name of the author must be indicated either in the title or at the bottom of the dedication or preface*".

In Romania, the moral right of the author was enshrined with the adoption of Law no. 126/1923 on literary and artistic property[13], which, in art. 3, stipulated that, in the event of transmission of his/her work, the author or his/her heirs retain the moral right to prevent the work from being distorted. Moral rights could not be assigned, and were therefore *non-transferable* and could not be the subject of any transaction. Based on the provisions of this normative act, Professor Florin C. Tărăbuță gave one of the first definitions of this right, which he defined as "*the author's right to create, to control his/her work and to claim from anyone the respect due to his/her personality manifested through his/her work*"[14].

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[5] V. Roș, T. Bodoaşcă, P.G. Buta, C.R. Romițan, *Enciclopedia Juridică Română,* vol. II, letters D-E, Academiei Publishing House & Universul Juridic Publishing House, Bucharest, 2021, p. 409.

[6] E.G. Olteanu, *Drepturile morale și creația intelectuală,* Didactică și Pedagogică Publishing House, Bucharest, 2006, p. 72.

[7] T. Bodoaşcă, L.-I. Tarnu, *Dreptul proprietății intelectuale,* 5th ed., revised and added, Universul Juridic Publishing House, Bucharest, 2021, p. 49.

[8] André Morillot (1849-1922), French lawyer at the Council of State and the Court of Cassation of France.

[9] A. Morillot, *De la personnalite du droit de copie qui appartient a un auteur vivant*, in Revue Critique de Legislation, 1872, see RECHT, supra, note 23, at 110, *apud* Wojciech W. Kowalski*, A comparative law analysis of the retained rights of artists*, available online in *http://www.accessmylibrary.com/coms2/summary_0286-17461882_IT* and in *https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1547&context=vjtl* (accessed 04.02.2023).

[10] Toute œuvre littéraire, toute œuvre artistique, réclame pour sa conception, ou pour sa réalisation, un travail intellectuel. Chacune d'elle est le produit d'un travail sans lequel elle n'existerait pas. Toute personnalité doit être respectée. Tout travail libre mérite salaire. Telles sont les sources du double droit reconnu aux auteurs et aux artistes : droit moral droit pécuniaire (M. Beiller, *Dreptul moral al autorului*, in Pandectele române, Part 4, 1929, p. 25).

[11] Jules Lermina (1839-1913), French writer and journalist committed to the Socialists, which led to his imprisonment and support of Victor Hugo.

[12] J. Lermina, *Raport depus la Asociaţia literară şi artistică internaţională,* Congress of Monaco, 1897, *apud* Barbu I. Scondăcescu, Dumitru I. Devesel, Constantin N. Duma, *Legea asupra proprietăţii literare şi artistice* - commented and annotated, Cartea Românească Publishing House, Bucharest, 1934, p. 60.

[13] Published in the Official Gazette of Romania no. 68/28.06.1923. In the explanatory memorandum to the law, Constantin Banu, Minister of Culture and Arts, pointed out that, although "the recognition of literary and artistic property rights meant that writers and artists could derive not only moral but also material benefits from their works, there are so many writers and artists who barely make a living from their works, and there are so many publishers who get rich by publishing and distributing these works. At the Rome Conference in 1928, when the second conference to revise the Bern Convention was held, introducing Article 6 bis, it was noted that the Romanian law of 1923 contained very clear provisions on moral rights and was appreciated by the participants for the liberalism of its provisions. It was also noted on this occasion that when drafting new laws on the subject, most participating states were inspired by the Romanian Law no. 126/1923 on literary and artistic property" (C.R. Romițan, *Nașterea și evoluția dreptului de autor,* Universul Juridic Publishing House, Bucharest, 2018, p. 107).

[14] F.C. Tărăbuță*, Dreptul moral al autorului asupra operii sale intelectuale*, Tipografia şi Legătoria de Cărţi Penitenciarul „Văcărești", Bucharest, 1939, p. 45.

2. First court rulings on moral rights

The first international ruling on moral rights was given by the Court of Cassation of France in April 1804, which, in a dispute, decided, with reference to a dictionary, that "*an edition added to and altered without the consent of the authors constituted reprehensible counterfeiting*"[15]. We can also cite a decision of 1814 of the Seine Civil County Court, which stated that "*a work sold by an author to a printer or bookseller, and which must bear his/her name, must be printed in the state in which it was sold and delivered*"[16], as well as a decision of 1826 of the Paris Court of Appeal, which ruled that "*the misuse of another's name by falsely attributing a work constitutes a violation of property*"[17].

Also from the first half of the 19th century, also in France, we can mention the decision of 30 March 1835 of the Seine Civil County Court in which the court ruled that "*the right to modify a work is the sovereign attribute of its author*"[18].

Romanian courts have also ruled on moral copyright, even before this right was regulated in national law. For example, a 1906 decision of the Ilfov County Court, Commercial Section, spoke of the *infringement of the moral right to respect for the integrity of the work* on the occasion of the authorized reproduction of a painting and of the author's right to compensations[19].

3. Moral copyright in Romanian law

Although moral rights have been the subject of numerous scientific disputes in Romania over the years, with the adoption of Law no. 8/1996 on copyright and related rights[20], any controversy has ceased since, as mentioned above, the Romanian legislator has recognized the pre-eminence of moral rights, and the legislation in force in our country is now very generous and recognizes a wide range of moral rights. Thus, according to the provisions of art. 10 of Law no. 8/1996 on copyright and related rights, republished[21], five categories of moral rights of authors of literary, artistic or scientific works are recognized and protected in Romania:

a) the right to decide whether, how and when the work is to be brought to public knowledge (right to disclose the work);

b) the right to claim the acknowledgment of the capacity of author of the work (right to paternity);

c) the right to decide under which name the work will be brought to public knowledge (right to name);

d) the right to claim respect for the integrity of the work and to oppose any alterations or any damage to the work if it prejudices his/her honor or reputation (right to respect for the work integrity or work inviolability);

e) the right to withdraw the work, compensating, where appropriate, the right holders of the rights of use who are prejudiced by the exercise of the withdrawal (right to withdrawal).

4. The right to make the work available to the public (disclosure right)

The right of the author of a literary, artistic or scientific work to decide whether, how and when the work will be made known to the public is also referred to in the doctrine[22] as "*the right of first publication*" or "*the right of disclosure of the work*"[23].

The right of disclosure, enshrined in Romanian law by art. 10 para. (1) of Law no. 8/1996 on copyright and related rights, republished, is the *author's right to decide whether, how and when the work will be made known*

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[15] A.R. Bertrand, *Droit d'auteur*, Dalloz, Paris, 2010, p. 10, *apud* V. Roș, A. Livădariu, *op. cit.*, p. 36.

[16] A.R. Bertrand, *Le droit d'auteur et les droit voisins*, 2nd ed., Dalloz Publishing House, Paris, 1999, p. 36.

[17] *Ibidem*.

[18] F.C. Tărăbuță, *op. cit.*, p. 87.

[19] In the case cited, the court ruled that "the execution in autotype of an original painting was made in the most rudimentary manner and without any aesthetic character, for it is actually seen on examination that it possesses none of the qualities of the original work of art of which the faithful copy was intended to be. In truth, it totally lacks the lines, the colors, the perspective, in a word the tonality that is found in the model painting. Moreover, the paper used for its execution has neither the fineness nor the gloss of the paper on which the painting used as a model is printed. Therefore, under such conditions, the plaintiff's artistic work has been completely distorted and its artistic value completely lost. Thus, on the one hand, there will be the depreciation of the work, and on the other hand, the minimization of the sale of the copied counterparts in public, in other words, a moral and material damage that the artist will have to suffer" (Ilfov County Court, Commercial Section, hearing of 30.08.1906, in Dreptul no. 76/1906, p. 606).

[20] Published in the Official Gazette of Romania no. 60/26.03.1996.

[21] Republished in the Official Gazette of Romania no. 489/14.06.2018.

[22] V. Roș, *Dreptul proprietății intelectuale. Curs universitar,* Global Lex Publishing House, Bucharest, 2001, p. 107; V. Roș, D. Bogdan, O. Spineanu-Matei, *Dreptul de autor și drepturile conexe. Tratat,* All Beck Publishing House, Bucharest, 2005, p. 198; V. Roș, T. Bodoașcă, P.G. Buta, C.R. Romițan, *op. cit.,* pp. 348-349; I. Macovei, *Tratat de drept al proprietății intelectuale,* C.H. Beck Publishing House, Bucharest, 2010, p. 445; E. Ulmer, *Urheber und Verlagsrecht*, 3rd ed., Berlin, Heidelberg, New York, Springer Verlag, 1980, *apud* Y. Eminescu, *Opera de creație și dreptul. O privire comparativă*, Academiei Publishing House, Bucharest, 1987, p. 92.

[23] Throughout this paper we will use the term "the right to disclosure of work".

to the public. In other words, it is the author's right to decide *whether, under what conditions and when to make his/her work available to the public*. From the above we can say that the right of disclosure *is a discretionary*, *absolute right* and, in our opinion, *is one of the most personal rights*.

In our country's legal literature, Professor Stanciu D. Cărpenaru, stressing the absolute and discretionary character of this right, linked to the author's person, stated that "*only the author, aware of the moral and sometimes even legal responsibility he/she assumes, can assess, in a discretionary manner, whether the work has reached an adequate level to be made known to the public. As one of the most personal rights, the right to make the work known to the public belongs exclusively to the author*"[24]. In the same sense, Professor Octavian Căpăţână pointed out that "*the most authorized censor of his/her creation being the author, he/she alone has the capacity to assess whether a new work he/she is working on has reached the degree of perfection that makes it worthy of being published*"[25]. Other authors[26] have also spoken of the author's "discretionary right" to make the work known to the public and have stated that the exercise of this right "*depends on the very existence of his/her patrimonial right to derive material benefit from the publication or other dissemination of the work*".

Disclosure is "*an act of will by the author of a work whereby the work is revealed, brought to the public's knowledge*"[27]. As we have already indicated[28], *the action of disclosing* a work can be done by any means of *public communication*[29], including publication. In French doctrine, Henri Desbois pointed out that the author exercises his/her right of disclosure from the moment he/she "*takes the decision to communicate his/her work to the public*"[30].

Publishing is *an act of editing* the work. ”Publication", according to art. 3(3) of the Bern Convention for the Protection of Literary and Artistic Works of 9 September 1886[31], means "works edited with the consent of their authors, irrespective of the manner in which the copies are made, provided that the availability of the copies is such as to meet the normal needs of the public, having regard to the nature of the work. The performance of a dramatic or dramatic-musical work, the recitation in public of a literary work, the transmission or broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture do not constitute publication"[32].

As one can notice from the interpretation of this text, the essential condition for a work to be published is that it should *satisfy the normal needs of the public,* without, however, specifying the number of copies (print run) that would satisfy these needs.

In view of the above, it should be stressed that a work is only considered disclosed when it *is accessible to the general public* for the first time and *not only to the normal circle of a family and its relations*. Although, Law no.8/1996, republished, does not define the concept of "*normal circle of members of a family and its acquaintances*", foreign case law has established that it is constituted by meetings of relatives, partners or persons between whom relations are habitually established[33] or by members of the same family, united by blood and cohabitation[34]. In this regard, for example, a decision of 9 September 1931 of the Court of Appeal of Venice[35] admitted that the concept of "*ordinary family circle*" cannot be limited to the environment of persons united by blood ties or living in the same family, but must be extended to those persons who, because of intimacy or other relationships, participate in family life[36].

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[24] St.D. Cărpenaru*, Drept civil. Drepturile de creaţie intelectuală. Succesiunile*, Didactică şi Pedagogică Publishing House, Bucharest, 1971, p. 43.

[25] O. Căpăţână, *Alcătuirea masei succesorale în cazul transmiterii prin moştenire a dreptului de autor*, in Legalitatea Populară no. 10/1957, p. 1179.

[26] A. Ionașcu, N. Comșa, M. Mureșan, *Dreptul de autor în R.S.R.*, Editura Academiei R.S.R., Bucharest, 1969, p. 29.

[27] For developments, see V. Roș, T. Bodoașcă, P.G. Buta, C.R. Romițan, *op. cit.,* vol. II, pp. 252-253.

[28] C.R. Romițan, *Drepturile morale de autor, op. cit.,* (2007), p. 97.

[29] According to art. 20 para. (1) of the Law no. 8/1996, republished, „1) Any communication of a work, made directly or by any technical means, made in a place open to the-public or in any place where a number of persons exceeding the normal circle of members of a family and its acquaintances are assembled, including a stage performance, recitation or any other public performance or direct presentation of the work, the public exhibition of works of visual, applied, photographic and architectural art, the public screening of cinematographic and other audiovisual works, including works of digital art, the presentation in-a public place by means of sound or audiovisual recordings, and the presentation in a public place by any means of a broadcast work is considered public communication. Any communication of a work by wire or wireless means, by making it available to the public, including via the Internet or other computer networks, shall also be considered to be public, such that any member of the public may have access from any place or at any time individually chosen is also considered public communication”

[30] H. Desbois, *Le droit d'auteur en France,* 3rd ed., Dalloz, Paris, 1978*,* p. 388.

[31] Romania acceded to the Bern Convention by Law no. 77/1998, published in the Official Gazette no. 156 of 17 April 1998.

[32] C.R. Romițan, *Drepturile morale de autor, op. cit.,* (2007), p. 97.

[33] Grenoble CA, dec. of 28.02.1968, in RIDA no. 57/1968, p. 166.

[34] „Il dirito di autore”, 1931, p. 86, *apud* B.I. Scondăcescu, D.I. Devesel, C.N. Duma, *op. cit.*, p. 141.

[35] Venice CA, dec. of 09.09.1931, in "Il dirito di autori", 1931, p. 491, Ibidem.

[36] The condition of the existence of a normal family circle is not met in the case of employees of a company (Douala CA, dec. of 03.03.1967, in RIDA no. 57/1968, p. 164), concerts, artistic evenings and other meetings organized by circles, casinos (Hungarian Superior

As mentioned above, *the author is free to judge* if and when to publish the work he/she has created. At the same time, *the author may object to* a prose work, for example, being rendered in verse, to a novel being dramatized, or to a dramatic work intended exclusively for theatrical performance being published, or to the subject matter being only briefly reported in newspapers, thus going beyond a strict press account that would accompany promotional actions or criticism of that work. The author of a song can also object to the partial reproduction of the song in an advertisement. Thus, in a 2001 decision of the French Court of Cassation, the court held that the partial reproduction, without the authors' authorization, of Jaques Detronc and Jaques Lanzmann's song "*Et moi, et moi, et moi*" in an audio-visual advertisement which did not have as its sole purpose the exploitation of this work, infringes both the moral right of disclosure and the patrimonial right of the assignee of the right to exploit the work[37].

4.1. Effects of the right of disclosure of a work

Being inextricably linked to the author's personality, *the right of disclosure* belongs exclusively to the author. With the publication of the work, *the author assumes both a moral* and *a legal* responsibility, which is only incumbent on him/her if he/she himself has decided to publish his/her work.

As mentioned above, one of the most important effects of the disclosure of a work is *the creation of patrimonial rights*. In other words, *patrimonial rights are contingent rights*, they become effective only when the author has published his/her intellectual creation[38]. However, according to the provisions of art. 1(1) of Law 8/1996 on copyright and related rights, republished "a work of intellectual creation is recognized and protected, independently of its being made known to the public, by the mere fact of its realization, even in unfinished form". From the interpretation of this text, it follows that prior to the disclosure of the work, the patrimonial rights are, as mentioned, *virtual, possible,* they *become actual*, effective, *only after the author exercises the moral right of disclosure*[39].

Patrimonial rights are rights that allow the author *to derive material benefit* from the use of his/her creation, *they link the work to its creator* and are also *an effective means of protecting his/her rights*. Copyright has the following legal characteristics: it is linked to the person of the author (personal), it is exclusive and limited in time (temporary).

In the same sense, the French professor Andre Françon pointed out that "*the author's decision to publish his/her work is all the more important because it depends on the birth of patrimonial rights that arise from the moment the work is published*"[40] and Claude Colombet said that "*before disclosure the work is part of his/her personality and once it is disclosed, the work becomes a patrimonial asset; it is at this moment that the author's patrimonial rights are born*"[41].

4.2. Disclosure of posthumous, joint and collective works

The issue of publishing *posthumous works* has generated numerous disputes both in the literature and in civil society in our country and abroad[42]. Both doctrine and case law agree that posthumous works must be made known to the public, regardless of whether or not the author expressed this wish during his/her lifetime. For these reasons, the amendments made by the Romanian legislator by Law no. 285/2004 amending and supplementing Law no. 8/1996 are to be appreciated, whereby the right of disclosure may be transmitted by inheritance, according to civil law for an unlimited period.

An issue which is likely to give arise to disputes is possible to appear in the case of disclosure of *joint* and

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Court, dec. of 02.02.1930, in "Le droit d'auteur", 1930, p. 21, *apud* B.I. Scondăcescu, D.I. Devesel, C.N. Duma, *op. cit.*, p. 141), of an evening organized by a sports association in honor of an opposing foreign team, in the case of people in old people's homes or children's homes who meet in games halls without parental or alliance ties (C. Colombet*, Propriété litteraire et artistique et droits voisins*, 7th ed., Dalloz, 1997, pp. 180-181) nor an association to which any person may freely adhere (French Court of Cassation, dec. of 14.06.1972, Dalloz, in Revue Trimestrielle de Droit Commercial, 1973, p. 262, *apud* Y. Marcellin, *Protection pénale de la propriété intellectuelle*, Cedat, Paris, 1996, p. 129). In order to meet the condition of the existence of the family circle, it is necessary that this communication is free of charge, which means that the persons forming the normal circle of family members do not pay any money to watch the performance. French case law has ruled in one case that any "private" and free performance made exclusively in a family circle is exempt from the consent of the right holders of the work broadcast (French Court of Cassation, Civil Chamber, dec. of 14.06.1972, Dalloz, 1972, p. 659, *apud* Y. Marcellin, *op. cit.*, p. 137).

[37] French Court of Cassation, 1st civ. s., dec. of 12.07.2001, in Pandectele române no. 2/2002, p. 239.

[38] C.R. Romițan, *Protecția penală a proprietăţii intelectuale*, C.H. Beck Publishing House, Bucharest, 2006, p. 94.

[39] V. Roș, *op. cit.,* (2016), p. 289. See also V. Roș, *Dreptul proprietăţii intelectuale*, Global Lex Publishing House, Bucharest, 2001, p. 108.

[40] A. Françon, *Cours de propriété litteraire, artistique et industrielle*, Litec, Paris, 1996, p. 214.

[41] C. Colombet, *Propriété litteraire et artistique et droits voisins*, 7th ed., Dalloz, 1997, p. 117.

[42] *Posthumous work* is "a work that was not published during the author's lifetime" (C.R. Romițan, J. Drăgan, *Mic dicționar de proprietate intelectuală. Dreptul de autor și drepturile conexe*, Lumina Lex Publishing House, Bucharest, 2004, p. 87).

collective works. In this situation, the solution is given to us by the law itself, which, in art. 5 para. (2) provides that the *copyright in the joint work belongs to the co-authors*, one of whom may be the principal author. In other words, the main author has the moral right to decide whether, how and when the work is to be brought to public knowledge; The status of main author of a work must be *acknowledged by the other authors in a written agreement*. In the absence of a written agreement, the work can only be made available to the public by mutual agreement.

In practice, there may be a possibility that one of the co-authors may not agree to the work being made public or may object to the way in which the work is to be made public. In this situation, according to art. 5 para. (3) of Law no. 8/1996 on copyright and related rights, republished, the co-author's refusal must be duly justified and we consider that this refusal can be challenged in court by the other co-authors.

In the case of *a collective work* in which the personal contributions of the co-authors form a whole, in the absence of an agreement to the contrary, the copyright in the work, including the right of disclosure of the work, belongs to the natural person or legal entity on whose initiative, under whose responsibility and under whose name the work was created (art. 6 of Law no. 8/1996, republished).

5. Disclosure right after conclusion of a publishing contract for the work

If the author can exercise his/her right of disclosure without any impediment until the conclusion of a publishing contract[43], by which he/she gives his/her consent for the work to be made available to the public, the question arises *whether an author can still exercise this right after signing such a contract*, or does his/her discretionary right to decide whether to make the work available to the public ceases once the contract is concluded?

We believe that the author's right to decide whether to make the work available to the public is maintained, but within certain limits, even after the conclusion of the contract. The author may *temporarily* or *permanently* withdraw his/her work in order to make changes or additions, but the reasons given must be duly justified.

If the person who assumes responsibility for bringing the work to the public's attention does not agree to the withdrawal of the work, the task of determining whether the reasons given by the author are justified and whether they justify the cessation or termination of the contract lies with the court, which will also decide on the compensation for non-performance of the contract concluded. In this respect, for example, the Paris Court of Appeal ruled in a case concerning a photographer who refused to have his photographs published in a magazine, even though a set of photographs from that series had been published in a previous issue. The Court ruled that the exercise of the right of disclosure in the present case is abusive and the refusal to disclose the work jeopardizes the achievement of the contractual causes over the assigned patrimonial rights[44]. In another case, decided by the Paris County Court, it was accepted that a painter's moral right to his work is subject to limitation period. This right allows him to modify or destroy the work as long as it has not been made public. Consequently, the action of a decoration house to refuse, a few months after taking possession of some sketches, to return them to the artist, is abusive and also represents an infringement of the artist's rights[45].

According to art. 54 of the Law no. 8/1996, republished the publisher is bound to allow the author to make improvements or other changes to the work in the case of a new edition, provided that the same do not essentially increase the publisher's costs and that they do not change the nature of the work, unless otherwise stipulated in the contract.

Also, according to art. 56 of the law mentioned herein above, the publisher is bound to return the original of the work to the author, the originals of the works of art, the pictures, and any and all other documents received for publication, unless agreed otherwise.

Also, according to the provisions in art. 57 para. (3) of the same enactment, if the publisher does not publish the work within the agreed term, the author may request the termination of the contract and non-performance damages. In this case, the author maintains the remuneration received, or, as the case may be, can request the payment of the full remuneration stipulated in the contract.

6. Transfer of the right of disclosure

The right of disclosure being a non-patrimonial right cannot be transferred by *inter vivos* acts. In this regard,

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[43] For developments on the publishing contract, as well as other contracts for the exploitation of copyright and case law, see V. Roș, Dragoș Bogdan, Octavia Spineanu Matei, *Dreptul de autor și drepturile conexe. Tratat*, All Beck Publishing House, Bucharest, 2005, pp. 371-404.

[44] Paris CA, dec. of 17.03.1989, *apud* A. Bertrand, *op. cit*.

[45] Paris County court, dec. of 11 February 1953, *apud* Pierre Greffe, Francois Greffe, *Traité des dessins et des modeles*, 7e ed., Litec, 2003, p. 341.

art. 11 of Law no. 8/1996, republished, provides that the right to decide whether, how and when the work will be made available to the public cannot be subject to any renunciation or alienation. However, after the death of the author, the exercise of this right is transmitted by inheritance, according to civil law, for an unlimited period and if there are no heirs, the exercise of the right of disclosure is vested in the collective management organization which administered the author's rights or, as the case may be, the organization with the largest number of members in the field of creation concerned.

It follows from an interpretation of the specified provisions that, where the exercise of these rights is transferable, it may also be made to persons other than the legal or testamentary heirs of the authors, namely, collective management organizations of patrimonial copyright[46]. Given that collective management organizations are created directly by the holders of copyright or related rights, we believe that they can, through the means and possibilities at their disposal, ensure, on a permanent basis, the best conditions for protecting the moral rights of the deceased author. Also, in our opinion, as has been pointed out in the older specialized literature[47], the provisions of art. 11 of Law no. 8/1996, republished, concerning the transfer of rights, do not concern a transfer as such, but merely organize a system of protection of the moral rights of the author after his/her death. We believe that by entrusting collective management organizations with this task, the legislator aimed to prevent the author's intellectual creations from being damaged after his/her death (publication of the work under another title, deletion of texts, additions, supplements, abridgments or use of the work in conditions inappropriate to its nature). In this way, the author's personality does not disappear with his/her death but survives and the moral rights will be protected as belonging to the author.

Currently, following the amendment of Law no. 8/1996 by Law no. 285/2004, the deed of bringing the work to the public knowledge without the authorization or, where appropriate, the consent of the holder of the rights recognized by the law on copyright and related rights has been decriminalized and *is therefore no longer an offence*.

Infringement of the right of disclosure is sanctioned by civil law, through a legal action by the right holder, which may be aimed at *ordering the cessation of the infringement and awarding damages*[48].

7. Conclusions

At the end of our study on the right to make a work available to the public (disclosure right) we can present some conclusions, namely:

- the right of disclosure is the author's right to decide whether, under what conditions and when to make his/her work available to the public;
- the right of disclosure is a discretionary, absolute right and is one of the most personal rights of the author of an intellectual creation;
- a work is only considered disclosed when it is accessible to the general public for the first time and not only to the normal circle of a family and its relations;
- with the publication of the work, the author assumes both a moral and a legal responsibility, which is only incumbent on him/her if he/she himself/herself has decided to publish his/her work;
- one of the most important effects of the disclosure of a work is the creation of patrimonial rights, which are contingent rights and only become effective when the author has published his/her intellectual creation;
- the right of disclosure, like any non-patrimonial right, cannot be transferred by *inter vivos* acts and therefore cannot be subject to any waiver or alienation;
- after the death of the author, the exercise of the right of disclosure is transmitted by inheritance, according to civil law, for an unlimited period and if there are no heirs, the exercise of the right of disclosure is

[46] According to art. 150 para. (1) of Law no. 8/1996, republished, "collective management organizations are, for the purposes of this law, legal persons established by free association, having as their sole or principal object of activity the management of copyright or rights related to copyright, categories of rights, types of works or other protected objects, which is entrusted to them by several authors or holders of copyright, for their collective benefit". Collective management organizations are established under the law, with the approval of the Romanian Copyright Office, and operate according to the regulations on non-profit associations and according to the provisions of this law. Collective management organizations are set up directly by the holders of copyright or related rights, natural or legal persons, and act within the limits of the mandate entrusted to them and on the basis of statutes adopted following the procedure laid down by law. They may also be created separately for the management of distinct categories of rights, corresponding to different fields of creation, as well as for the management of rights belonging to distinct categories of right holders (art. 151 of Law no. 8/1996, republished).

[47] Y. Eminescu, *Opera de creație și dreptul, O privire comparativă*, Academiei Publishing House, Bucharest, 1987, p. 164.

[48] For example, in a dispute concerning the right of disclosure, the Spanish Supreme Court, in a 1992 decision, obliged a film producer to disclose the novel he had adapted as a film script, and in a decision of the Paris High Court of 17.02.1999, the court held that the moral right of disclosure had been infringed by the publication in the press, without the author's consent, of a screenplay and excerpts of dialogue from a film prior to its screening in cinemas (N. Perez de Castro, *Las obras audiovisuals, Panoramica juridical*, REUS, Madrid, 2001, p. 77, *apud* Gh.e Gheorghiu, L. Iacob, *Audiovisual works (II). Drepturile morale,* in RRDPI no. 4/2005, pp. 12-13).

vested in the collective management organization which administered the author's rights or, as the case may be, the organization with the largest number of members in the field of creation concerned. In other words, where the exercise of these rights is transferable, it may also be made to persons other than the legal or testamentary heirs of the authors, namely, collective management organizations of patrimonial copyright.

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