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Practical problems occurring against the background of the author's personal rights

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Abstract: In the article, the author points out the basic issues related to the personal component of authorship in copyright (personal rights). The issues raised include problems with the assessment when personal rights are infringed, views about the commonality of rights, the legal structure related to the disposition of personal rights and the analysis of the protection of rights after the author's death. The article ends with a summary aimed at organizing all the issues analyzed in this work.

Praktyczne problemy występujące na tle autorskich praw osobistych

Abstrakt: W niniejszym artykule autor wskazuje na podstawowe problemy związane z autorskimi prawami osobistymi. W tym zakresie zostaną poruszone takie kwestie, jak: ocena, kiedy mamy do czynienia z naruszeniem autorskich praw osobistych, poglądy na temat wspólności praw, dysponowanie autorskimi prawami osobistymi oraz analiza ochrony tych praw po śmierci twórcy. Pracę kończy podsumowanie mające na celu uporządkowanie wszystkich zagadnień poruszanych w przedmiotowym artykule.

1. General thoughts

Polish copyright law recognizes the separation of two independent copyrights — proprietary copyrights and personal copyrights. It should be noted that in real-

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ity it is hard to classify personal rights because they really are material-personal in nature.¹ In connection with the duality mentioned, there are many problems in the field of personal rights. These include assessing a violation of an author's personal rights, protection of rights after death, joint copyright of personal rights and the possibility of concluding agreements regarding personal copyrights. All the above aspects have not only theoretical considerations but also create effects in practice. The correct assessment of individual issues requires a thorough analysis and a holistic approach, taking into account the entirety of the provisions of the Act on Copyright and Related Rights (hereafter: pr. aut.),² as well as the entire private law system. Many statements have been made by the legal doctrine, in particular expressed in subject the matter of academic literature. The purpose of this work is to systematize and discuss the views that seem to be the most rational, as well as to present additional arguments supporting such a judgment.

The completely different character of the author's personal rights is determined by such features as: unlimitedness and a permanent bond with the creator. This remark alone makes the analyzed subject matter very problematic. For example, the inability to transfer personal copyrights may lead to a violation of the legitimate interests of third parties.³ One can imagine the situation of necessary interference in a construction project, the modification of which obviously violates the link between the creator and the work. The impossibility of transfer or surrender of the author's personal rights requires a different solution to this problem. All the practical problems that occur on the basis of the author's personal rights will be discussed in this article.

2. Violation of an author's personal rights

Personal rights of the author are defined in article 16 pr. aut. "Unless otherwise provided by law, personal rights protect the inseparable and inalienable bond between the author and the work [...]". The key issue here is the fact that the legislator protects the bond of the creator with the work, which means that the personal rights listed below are only examples. The legislator mentions the right to: authorship of the work, designation of the work with his name or pseudonym or to make it available anonymously, inviolability of the content and for the work and

¹ J. Barta, R. Markiewicz, *Prawo autorskie*, Warszawa 2016, p. 121.

² The Act of February 4, 1994 on Copyright and Related Rights (consolidated text: Journal of Laws of 2017 item 880, as amended).

³ See European copyright code (hereinafter: e.c.c.) (the Wittem Project, April 2010, <https://www.jipitec.eu/issues/jipitec-1-2-2010/2622/wittem-group-european-copyright-code.pdf>, accessed: 14.04.2019). Article 3.6 e.c.c. — Interests of third parties (1) The moral rights recognized in article 3.1 will not be enforced in situations where to do so would harm the legitimate interests of third parties to an extent which is manifestly disproportionate to the interests of the author.

its reliable use, deciding on the first access to the work of the public, supervision over how to use the work.

This is also confirmed by the literal legal text, which uses the words: “in particular the right to”, which necessarily implies “not limited to”. Attention should also be paid to another aspect of this provision. The question arises whether we are dealing with one proprietary personal right or with many rights? The position regarding the pluralism of proprietary personal rights is quite clearly established.⁴ At the same time, however, it must be stressed that the aforementioned “bond of the creator and the work” is the superior copyright of the personal law.⁵

Violation of proprietary personal rights has many consequences. There are many views on how to determine whether it has occurred. It is possible to choose two positions. On the one hand, one can defend the view that a formal violation of article 16 pr. aut. leads to liability on the basis of article 78 pr. aut. This would mean that any interference with the work from third parties leads to the responsibility of the infringer. It seems that the creator has the right to expect respect for his personal rights, even considering a categorical approach. On the other hand, jurisprudence and doctrine support the interpretation of the fact that copyright infringement of personal rights may be infringed only through breaking or weakening the creator's relationship with the work.⁶ As it is raised, it is a change that “breaks or weakens the bond of the artist with the work, removes or violates the bond between the work and the traits that individualize its creator. Such marked features of violation of the right to the integrity of the work do not meet minor changes in the elements of its contents and forms that do not evade the attribution of the creation”.⁷

In my opinion, the latter view is correct. The understanding of the rationality of this position first requires the concept of what constitutes a work. According to article 1 pr. aut. “the subject of copyright is any manifestation of creative activity of an individual nature, determined in any form, regardless of value, purpose and expression (work)”. We can only talk about the work if the creator somehow “reflects” his personality in the work.

This does not mean that a work must necessarily reflect the creator's individuality, but that it must by itself stand out from other identical manifestations of creative activity in a way that shows its

⁴ See M. Jankowska, “Commentary to article 16 pr. aut.”, [in:] *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, ed. P. Ślęzak, Warszawa 2017, Legalis, nb. 2.

⁵ See J. Barta, R. Markiewicz, op. cit., p. 127.

⁶ See *ibidem*; Judgment of the Court of Appeal (hereinafter: SA) in Cracow of October 29, 1997, I Aca 477/97, LEX No. 533708; Judgment of the SA in Warsaw of June 25, 2004, VI Aca 27/04, Case Law of Appellate Courts (hereinafter: OSA) 2005, No. 11, item 41; Judgment of the Supreme Court of Poland of September 16, 1986, II CR 241/86, Case Law of the Supreme Court (hereinafter: OSN) 1987, No. 12, item 205.

⁷ See Judgment of the SA in Cracow of October 29, 1997.

peculiarity, originality and all the properties that make it bigger to a lesser extent, it is unique and without its faithful counterpart in the past.⁸

In this case, the bond can exist only because of its unique choices,⁹ due to which a specific metaphysical relation of the artist and the work is created. If such a relationship can only arise in the case of “individual” choices, it is difficult to accept the view that banal and obvious elements could influence the formation of the necessary ties with the work. They are completely irrelevant when it comes to expressing the personality of the author. And if they are irrelevant, then interference with them should not be indifferent from the point of view of infringing on personal rights.

3. The problem of commonality of personal rights

Copyright property rights are covered by commonly applicable law. This is clear and directly from article 9 paragraph 1 pr. aut. In the case of the author’s personal rights, such an assessment is not self-evident. It is generally accepted that proprietary personal rights are not covered by common law,¹⁰ however, different interpretations also appear in the doctrine.¹¹ Assuming that personal rights are independent rights, related problems arise. Some of the creator’s rights can be exercised by the creators themselves, but for others, all co-creators need one another’s consent. As A. Nowicka points out:

In the light of the wording of article 9 pr. aut., it would be difficult to question the admissibility of applying these provisions also to the author’s personal rights, both in the exercise of these powers and in pursuing claims for breach.¹²

On the other hand, M. Jankowska claims that the commonality of rights with respect to proprietary personal rights requires:

a triple modification of the way it is carried out, to apply general principles to it, three such regimes as: commonality, co-ownership in fractional parts (exceptionally) or the execution of it like the rights to authorship of an independent work.¹³

In my opinion, one should share the view of J. Barta and R. Markiewicz, who rationally explain the problem of the shared copyright of personal rights. According to these authors, “personal rights, similar to personal rights of general law,

⁸ J. Barta et al., [in:] *System Prawa Prywatnego*, vol. 13. *Prawo autorskie*, ed. J. Barta, Warszawa 2017, p. 8.

⁹ See E. Ferenc-Szydełko, “Commentary to article 11 pr. aut.”, [in:] *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, ed. E. Ferenc-Szydełko, Warszawa 2011, Legalis, nb. 17–23.

¹⁰ J. Barta, R. Markiewicz, op. cit., p. 129.

¹¹ A. Nowicka, [in:] *System Prawa Prywatnego*, vol. 13, p. 80.

¹² Ibidem, p. 100.

¹³ M. Jankowska, *Autor i prawo do autorstwa*, Warszawa 2011, p. 493.

cannot be covered by common law, so also in the case of co-authorship they are independent (separate) rights of each co-author".¹⁴ If we were to accept a shared copyright of personal rights, then we would have to know that every co-creator is entitled to an indivisible right to proprietary personal rights. As a consequence, everyone would really be entitled to the right that is indivisibly associated with a particular co-creator. Such would be the consequence of the above position. This is unacceptable due to the nature of these rights. The author's personal rights is a set of individual rights of each co-author, which connects with this person a characteristic, specific and unique relationship, which means that they cannot be judged from the same perspective as proprietary copyrights.

4. The problem of the impossibility to transfer personal copyrights

In article 16 pr. aut. The legislator expressly mentions the inability to renounce or sell personal rights. In connection with such a normative approach, many practical problems arise from the legislator. As mentioned in the general remarks at the beginning of this article, the proprietary copyrights of the creator are subject to transfer and sale. The impossibility of sale of personal rights, in turn, is problematic and may lead to the liability of the infringer in the absence of legal regulation of this issue. Therefore, it is essential to solve this problem. Of course, it should be remembered that: "The right to integrity does not provide the creator with boundless control over [the work's] fate".¹⁵ The provision establishing a certain author's restrictions as to exercising control over the work is article 49 paragraph 2 pr. aut., which clearly articulates the possibility of making changes to the work under full conditions.¹⁶

The proposals submitted in the literature create a whole range of possible legal forms that allow for sanctioning interference with personal rights. So both are said on the exclusion of unlawfulness or consent of the author to exercise his rights, as well as the act of renouncement pursuing claims for breach of them.¹⁷

In the Polish doctrine, we can distinguish both a very liberal approach to the subject of agreements regarding personal copyrights and more restrictive beliefs. The representative of the former approach is E. Traple, who claims that there are no "obstacles for the author to allow the buyer to make any changes that he considers necessary in terms of the intended use of the work".¹⁸ The more restrictive approach is presented by M. Kępiński, who maintains that: "The creator can agree

¹⁴ J. Barta, R. Markiewicz, op. cit., p. 129.

¹⁵ B. Giesen, E. Wojnicka, [in:] *System Prawa Prywatnego*, vol. 13, p. 442.

¹⁶ The act allows making changes to a work, provided they are caused by an obvious necessity, and the creator would not be justified in opposing them (article 49 paragraph 2 pr. aut.).

¹⁷ B. Giesen, E. Wojnicka, op. cit., pp. 443–444.

¹⁸ *Prawo reklamy i promocji*, eds. E. Traple et al., Warszawa 2007, p. 856.

only on specific changes proposed by the purchaser of rights. However, it cannot effectively allow the buyer to make any changes in the future”.¹⁹ I believe that a statutory ban on waiving or selling proprietary personal rights is justified. This is due to the nature of these rights. I also share the position of the Court of Appeal in Warsaw, which said: “It would be unacceptable to convey an emotional bond concerning the sphere of individual mental experiences”.²⁰ Therefore, the construction of the transfer of personal copyrights would be flawed. However, it is trivial to claim that the constantly evolving economic cycle poses new challenges for the legislator. In connection with the above, there is no doubt that the possibility of making a legal transaction, the content of which will be the author’s personal right, is desirable from the point of view of the market’s needs. The most important issue for a potential infringer is to answer the question of how one can legally dispose of the creator’s personal rights.

If we recognize that some legal structure could be appropriate for the disposition of an author’s personal rights, I remain convinced that not all goods may be traded. Indeed, the content and form of the work sometimes require changes, and in this respect I find the notion of transferring personal rights as an acceptable alternative. However, in the case of proprietary rights that are extremely strongly associated with the creator, it seems absolutely unacceptable. An example is the right to authorship. In my opinion, it is such a direct relationship that disposing of it would violate the ratio legis of the *pr. aut.*²¹ Therefore, I am of the opinion that first of all, it should be decided whether the personal rights may be subject to the author’s disposal at all, and only then should the potential legal structure be analyzed.

Under current law, the possibility of applying legal acts that exclude unlawfulness through consent or authorization of the author, to exercise his rights, as well as the author’s renouncement of claims arising from breaches or infringements, is a subject of discussion.²² In addition to the aforementioned, there are also suggestions that personal copyright should be the subject of the license agreement. The prevailing view is that it is not possible to dispose of personal proprietary rights under a license agreement under the current legal system.²³

5. Protection of personal rights of the creator

On the basis of the author’s personal rights protection, after his death many doubts and difficult problems appear. According to the representatives of the doctrine, the basic problem is to determine if the personal rights continue after the cre-

¹⁹ B. Giesen, E. Wojnicka, *op. cit.*, pp. 443–444.

²⁰ Judgment of the SA in Warsaw of May 14, 2007, I ACa 668/06, OSA 2008, No. 12, item 39.

²¹ See J. Barta, R. Markiewicz, *op. cit.*, p. 218.

²² B. Giesen, E. Wojnicka, *op. cit.*, pp. 443–444.

²³ See *ibidem*, pp. 449–454. The authors give a lot of arguments against the permissibility of licensing the right to use proprietary personal rights.

ator's death and are constructed as the subjective right of the deceased entity, or are the subjective rights of the persons mentioned²⁴ in article 78 paragraph 2 pr. aut.

If we accept, according to the overwhelming view, that proprietary personal goods are not separate goods²⁵ in relation to the personal rights of general law, we should, in accordance with the general rule, recognize that the personal rights of the deceased creator are extinguished at death as well as rights²⁶ from article 23 of the Polish Civil Code (hereinafter: k.c.).²⁷ J. Barta and R. Markiewicz, however, claim that: "the creator's death does not lead to the expiration of his personal rights; with this moment, it also does not 'transform' the creator's personal rights into the personal interests of relatives".²⁸ It is necessary to agree with the authors of this study, but it is difficult to resist the impression that the views of these commentators regarding the qualification of personal rights and the moment of their expiration are not coherent. It seems that if we classify the relation of universal personal rights in relation to copyright as the conclusion, it should also be recognized that the creator's personal rights expire upon his death. In this case, the authors cited create a legal fiction consisting of the adoption of the duration of the author's personal rights.

The problem of the deceased artist's lack of a legal personality seems to cross the possibility of constructing a personal one after his death, because the author's existence is considered a condition sine qua non.²⁹ This universally accepted principle of Polish civil law has been overcome through the regulations contained in article 78 paragraph 2, 3 and 4 pr. aut., which indicate the possibility of the existence of rights without their subject.³⁰ The author may appoint entities listed in article 78 paragraph 2 pr. aut. to posthumously protect his personal copyrights. J. Mazurkiewicz argues that this means that even after death these are the rights of the creator, because the author only designates persons to protect their rights.³¹ The most reasonable solution would be to accept that personal rights continue after the creator's death,³² as separate independent legal rights created in favor of the entities listed in the above-mentioned provision.

²⁴ See J. Barta, R. Markiewicz, op. cit., p. 128.

²⁵ J. Barta and R. Markiewicz both as to the fact that proprietary personal goods are not separate goods in relation to general law goods; see *ibidem*.

²⁶ J. Panowicz-Lipska, "Commentary to article 23 k.c.", [in:] *Kodeks cywilny*, vol. 1. *Komentarz. Art. 1–449¹¹*, ed. M. Gutowski, Warszawa 2016, Legalis, nb. 27.

²⁷ The Act of 23 April 1964 Civil Code (consolidated text: Journal of Laws of 2017 item 459, as amended) (hereinafter: kc).

²⁸ J. Barta, R. Markiewicz, op. cit., p. 129.

²⁹ J. Mazurkiewicz, *Non omnis moriar: ochrona dóbr osobistych zmarłego w prawie polskim*, Wrocław 2010, p. 84.

³⁰ *Ibidem*, p. 85.

³¹ *Ibidem*, p. 110.

³² The entities listed in article 78 paragraph 2 pr. aut.

The argument that the authors of their personal rights does not extinguish is a literal interpretation of article 16 pr. aut. phrasing including the “bond” of the creator and their work. “This provision is used by many representatives of the doctrine to support the notion of ‘eternity’ and of personal rights which remain unchanged, although the entity that created them no longer exists”.³³ I agree that, according to the literal interpretation, one should accept the view of “eternity of the author’s personal rights”, but I do not think that this provision negates the possibility of creating subjective rights on the part of the entities mentioned in article 78 paragraph 2 pr. aut. After all, it does not nullify the meaning of the content of article 16 pr. aut. The author’s personal rights can further protect, indefinitely, the bond between the creator and the work, and on the other hand, individual rights may be created for other entities. It would be rational to assume that after the death of the creator, separate subjective rights of the spouse, parents, siblings, descendants of the siblings or another person indicated by the creator.³⁴ In that regard, the plea put forward by J. Barta and R. Markiewicz regarding the difficulty of explaining the situation when the author designates a “foreign” person to defend those rights³⁵ is completely wrong in my opinion. It should be noted that “the creator’s bond with the work should be seen as an objective non-peculiar relationship”.³⁶ The relationship of the entities is listed in article 78 paragraph 2 pr. aut. This is a relationship in relation to their emotional bond with the creator this time,³⁷ and through him with the work. It should not be limited only to “close relatives”, because there is no reason to claim that a person appointed by a creator outside the circle of “close relatives” may not possess an emotional bond with the creator. If the author designates a person it is obvious that it is also a “close person” for him, even if it is not confirmed by the generally applicable laws.³⁸

It is clear and rational to me that the persons mentioned in article 78 paragraph 2 pr. aut., may make claims in the event of violation of their own subjective rights related to the “emotional bond with the creator” under article 23 and others k.c. A practical problem that arises on the basis of the author’s personal rights after the creator’s death, in recognizing that they are “eternal” is the guiding criterion for managing them. By sharing the view most strongly represented by J. Barta and R. Markiewicz on the author’s “enduring” personal rights after his death, it would be necessary to reconstruct the “emotional bond between the creator and the work” and, for example, to accept a violation of the integrity of the work. I believe

³³ B. Giesen, E. Wojnicka, op. cit., p. 426.

³⁴ See Judgment of SA in Warsaw of October 27, 2011, VI Aca 461/11, LEX No. 1102077; K. Czub, “Konstrukcja autorskich dóbr i praw osobistych po śmierci twórcy”, *PiP* 2011, no. 11, p. 32.

³⁵ J. Barta, R. Markiewicz, op. cit., p. 128.

³⁶ *Ibidem*, p. 127.

³⁷ See Judgment of SA in Warsaw of October 27, 2011; K. Czub, op. cit., p. 32.

³⁸ By this I mean the fact that it is not: a spouse, a parent, siblings or descendants of siblings.

that based on accepted customs in the given environment and earlier disposition of said rights by the creator, entities from article 78 paragraph 2 pr. aut. should be able to perform legal and procedural actions regarding the rights appearing in article 16 pr. aut.

Conclusion

The framework of this study does not allow for a thorough discussion of all views and to analyze each of them in a comprehensive way. However, the purpose of this article was to present the most important ones, and to engage in a discussion based on them. Starting from the very beginning it should be stated that the violation of the author's personal rights takes place only in the event of breaking or weakening "the creator's relationship with the work". It is the most rational, since a violation of the same essential elements not characterized by specific clarity and brilliance (individuality) can hardly be classified as those which constitute said bond. Regarding the co-existence of proprietary personal rights, one must definitely opt for the view expressed by J. Berta and R. Markiewicz, who claim that these rights cannot be included in the community. An issue of very significant practical importance is the possibility to provide proprietary personal rights. In this case, the view on the possibility of giving consent, which repeals the unlawfulness, authorizing the third party by the creator to exercise his rights, as well as the act of signing off by the author claim for breach, should be considered. Importantly, I believe that not every personal right will be subject to the above-mentioned legal act. Some of the rights seem so strongly connected with the creator that transferring them will be unacceptable. When reaching the conclusions, it was necessary to consider the protection of personal rights after the creator's death. I believe that the acceptance of a legal fiction in the form of their duration after the death of the creator is the correct solution. It is difficult to protect an existing unlimited bond in time, given that these rights will continue even after the author's death. It is also not disputed that persons mentioned in article 78 paragraph 2 pr. aut. have their own subjective rights that deserve protection. Certainly, it is possible to construct such goods for those people who, due to their strong relationship with the creator, will be protected under article 23 and others k.c.

In conclusion, it should be noted that the issue of personal moral rights is extremely complicated and important from a practical point of view. An analysis of when we are dealing with a violation of an author's personal rights is crucial in the context of further discussing other matters. Another fundamental matter is the possibility of having proprietary personal rights. In many cases, the mere transfer of proprietary rights or the granting of a license is not enough. The necessity to adapt the work to, for example, physical conditions, causes the need for "intrusion" into the integrity of the work. In connection with the above, a co-existence with an

exceptional personal and property character of proprietary personal rights arises. Moreover, the problem of protection of personal rights after the creator's death and the commonality of these rights is very common in everyday life. Therefore, all these queries required a discussion in the above work.

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