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Who has Created the Work? Albanian Legal Framework and Cases on False Attribution of Authorship

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Abstract: The act of creating a work is often described like the birth of a child, which naturally establishes a unique affiliation relationship between the author and his work, legally known as the right of attribution. The paper aims to clarify if the Albanian right of attribution “contains” the sub right to disclaim authorship through analyzing the right of attribution provided by the new Albanian Law on Author’s Rights and how it is claimed in court. The paper will also explain the ways false attribution can infringe two most distinguished author’s rights: the right of attribution and the right of integrity and will highlight the difficulties to protect them through long and high-cost litigation process.

Key words: author; the right of attribution; disclaim; right of integrity

1. Introduction

There are known two main categories of author’s rights: (1) *economic rights*, which protect his economic interests and (2) *moral rights*, which ensure respect for his intellectual and personal qualities; both sides of the same medal. The aim of law, providing for two kinds of rights, expresses the utmost guarantee of author's assessment as a person and as a creator.

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The Albanian Law 35/2016 “On Author’s Rights and Other Neighboring Rights” (LAR) specifically states the typical approach of a *Civil Law* country, disposed in recognizing a collection of concrete rules that are designed to protect author’s personal interests in their works (Rigamonti, 2007). The rationale behind moral rights consists to the fact that the author is a natural person with his personality, characteristics, talents, experiences, senses, bias and inspiration and his work is the result of a combination of the abovementioned elements (and others), which creates the unique connection between the creator and his creation. This relation makes the author unable to remain indifferent if his work risks to be compromised and his reaction in protecting it, is as just legitimate, as in protecting a dear person.

France is the state where moral rights were born, and they are distinctively protected from economic rights and have further developed their own doctrine of a worldwide influence (Ikonomi & Zyberaj, 2017). Moral rights of author have French roots. The philosophical source for them seems to have been the writings of Kant and Hegel, which sensitized the society about the author’s individuality, personality and reputation exhibited through his works and before that moral rights were fixed into law they were part of judicial opinions of French courts in nineteenth century (Peeler, 1999). As part of human rights, moral rights go beyond the economic exploitative rights and protect the person and not what he owns (Schéré, 2018).

Economic rights and moral rights are utterly different, thus is not smart to compare them to find which are the most essential and necessary for the author. It is quite clear that economic rights, as incentives to produce and disseminate creative wealth (Zemer, 2011) provide a living for the author and the results from the exploitation of these rights are measurable. On the other hand, it is not right to underestimate moral rights because through them the author can protect his inner side embodied in his work. Providing for moral rights also helps the proper exploitation of economic rights and guarantees the authenticity and the quality of works for the public.

Berne Convention was adopted at the sixth conference, after five important conferences were held from 1858-1885 aiming to create a uniform scheme of international protection (Hatch, 1989). The original text of 1886 did not contain any provision about moral rights. Through the revision of Rome in 1928, “moral rights” were introduced to Berne Convention. It was included article *6bis* that recognized some other rights for the authors, which were new, different, perpetual, and independent from what was known form Berne Convention till then as

“*author’s copyright*”. The article 6bis did not refer to them as moral rights, but (1) the right to claim authorship of the work and (2) the right to object to any distortion, mutilation or other modification of the work which would be prejudicial to his honor or reputation, were both well known from French doctrine of moral rights. Berne Convention transfers the determination of the way the rights shall be exercised and of the means of safeguarding them to national legislations. Introducing so the right of attribution and the right of integrity is discussed to be one of the major factors for the one century delay of signature of Berne Convention from U.S., but the approach of U.S. towards Berne Convention was uncertain from the beginning: U.S. law did not grant aliens any jurisdiction to protect their copyrights in domestic courts and U.S. chose to attend the 1886 Conference only as an observer (Hatch, 1989).

The right of attribution is one of the most recognized moral rights of the author. From Rome Act of 1928 which paved the way of further regulating the most essential right of the author, there is a lot in discussing how this right is exercised and protected.

This paper is focused in analyzing “the right of attribution” under the Albanian legal framework. In the *first part* of the paper, I will try to make understandable what is meant by the right of attribution and how many “sub-rights” are included in it, according to LAR. The *second part* of the paper will explain what is considered false attribution and if it possible to prevent and claim it under the right of attribution. The *third part* of the paper will focus the legal measures to false attribution.

2. The Right of Attribution

The right of attribution, also known as *droit à la paternité* is used to express the importance of the connection of the author and his work. This connection, comparable to the strong relation of a father and his child, is a corner stone of LAR, specifically recognized as “*the right of acknowledgement and the mention of authorship*”.

The author has the right to be acknowledged and to be mentioned as the author of the work. Claiming authorship brings the need to clarify how to determine “the author” of a work as a process of a crucial importance because it identifies the affiliation of the work thus enabling the birth of the whole set of moral and economic rights (Ikonomi & Zyberaj, 2017).

As the right of attribution is a moral right, based on the French concept that the work contains the personality and character of its creator, it follows that only humans can claim it (Standler, 2012). LAR, art. 13 states that the author can be any natural person or a group of natural persons which creates a literary, artistic, or scientific work: an original intellectual product materialized, regardless of the form and manner of expression. What has been sure so far, has already been called into question as artificial intelligence has begun to create works. As pointed out by Directive (EU) 2019/790 there are rapid technological developments which continue to transform the way works and other subject matter are created, produced, distributed, and exploited. New business models and new actors continue to emerge (Directive (EU) 2019/790, para. (3)).

Also, the acknowledgement of authorship only to individuals, creating alone or co-creating, does not contain any limitation regarding the age or the mental condition of the author(s). This only implicates the way the rights are legally exercised. The right of acknowledgement and mention of the author as part of moral rights, exists if the author transfers his property rights, because it is independent from economic rights. The way this right is provided by LAR is expressed divided in two parts: the right to be known as the author of the work and the right to be mentioned as the author of the work.

2.1. The Right to be known as Author

The right of acknowledgement is probably the *alpha* of all other rights. If someone creates a work, he automatically has created the necessary conditions for the existence of copyrights and simultaneously he is the primary right holder. The creation of the work constitutes the original title (Caruso, 2011) of having the author's rights. The work can be created by an author or it can be created as the result of significant contributions of multiple authors, in co authorship. The previous LAR required the identification of leading author. The right to be known as the author or as the co-authors is of the same importance, and equally protected.

In 2007 the Albanian singer Mrs. M. claimed the right to be known as co-author together with the photographer of a picture which appeared on the cover page of a review. In fact, the claim was made after the picture derived in a postcard that was distributed to send New Year wishes by a bank. Mrs. M. claimed to be co-author, especially to further claim economic rights. She pretended that the work was a direct product of the creative commitment accomplished through her posing for the

camera and the picture contained the minimum of intellectual, artistic, or physical abilities conceived with the plaintiff's appearance. In its analysis the Court stated that the realization of a photographic work requires the special knowledge and skills of the person who manages to fix reality. These capabilities of the photographer give the same reality different performances and values and lead to the realization of different photographic works. Despite the plaintiff's contribution through her poses, it cannot be other than the material (reality) of the picture taken by its author (Tirana District Court, Decision No. 1711, 2007).

The case of P. family contained the claim over the right of attribution, precisely to be known as co-authors. In 2015, after the divorce of the P. couple, the ex-wife and their two sons claimed co-authorship on some engravings of ancient city of Butrint in wood and stone. The Albanian Copyright Office (aka ZSHDA) had issued the certificate only for Mr. P., but the plaintiffs argued that the engravings were realized from all of them. ZSHDA defended the process of issuing the certificate for Mr. P., based on the facts that the plaintiffs never requested to be known as co-authors or to deposit a co-authorship agreement (Albanian High Court, Decision No. 371, 2015).

The right of acknowledgement is strongly supported by two important principles. According to the presumption of authorship principle, provided by the LAR, art. 16, para (1), if there is no evidence of the contrary "*any individual or group of individuals whose name appears on a work, whatever the mode of appearance, is presumed the author of the work*" thus meaning by "name" even a sign, a pseudonym or signature of the author. The second principle, the principle of automatic protection only requires the realization of the work without further need for registration or any other formality. These two principles offer the possibility that from the moment of creation the work, the first and only owner of it is the person(s) who has "marked" his creation by putting his name.

The author has the right to decide in whose name his work will be presented to the public, as well as the right to remain anonymous or with the pseudonym chosen by him. Only the author can choose if he wants to disclose his identity while presenting the work to the public or to hide it behind anonymity or a pseudonym. Choosing not to disclose the identity is a usual artistic trend, but it can also be "imposed" when the author or his publisher fear probable bias or persecution towards the author. The characteristic of this right is that it can be a temporary, or it can be used during the author's life, while specifically implicates the way the set of author's rights are exercised and protected, usually identifying the publisher as the

legitimate right holder. This rule does not apply if the author reveals his identity and proves to the judicial authorities the authorship of his work.

2.2. The Right to be Mentioned as Author

The author has the right to be mentioned as the author of his work. This right lies in a dependent position from the right to be recognized. First, the author “chooses” in whose “name” to present the work to the public, and then in every use of the work, the legitimate user must write and cite the author's name in any copy or use of the work. This means that even if the author has decided to stay anonymous, the user must mention it. The right to be mentioned may be limited by the author’s own written will in accordance with the nature of the work and its use. The previous LAR of 2005, art. 10 (b) provided also that the author had the right to request the mentioning of his name when his work was publicly mentioned, if allowed by practice and tradition.

Actually, there are some provisions of LAR which clearly express the right to be mentioned as the author or the right holder of author’s rights, like: (1) the name of natural or legal person who creates or in whose name is published a collection (LAR, art. 15/1); (2) the name of the authors in collections realized for teaching or scientific research purposes (LAR, art. 76/1); (3) the name of the author on the use of works intended for persons with disabilities (LAR, art. 77/1); (4) the name of the author when the work is used for teaching purposes or in school activities (LAR, art. 79/ 2); (5) the name of the author in partial reproduction of the work (LAR, 81/2); (6) the name of the author in reproduction of works located permanently in public spaces (LAR, art. 82/4); (7) the name of authors of promotes works on posters and catalogues (LAR, art. 83/2); (8) the name of the author when the work is transformed for didactic purposes (LAR, art. 84/ç). In these situations, LAR reserves the right that mentioning the author’s name will depend on the possibility to be mentioned according to the type of the work and only if the author did not request in writing not to be mentioned.

In 2014 Mr. Ç., a photographer, had filed an application and a certificate had been issued from ZSHDA for seven pictures of a well-known Albanian singer, taken in 1983. One of these pictures was used by a newspaper as its front page in 2014, the day the singer has died. Mr. Ç. claimed the infringement of his right to be mentioned by the newspaper as the author of the picture. The defendant argued that they did not know who the author of the picture was, and they had found the

picture while searching in Google. The Court ruled in favor of Mr. Ç (Tirana Court of Appeal, Decision No. 1391, 2016).

3. False Attribution

The right of attribution is closely related to the concept of “being or belonging to someone”, or to correctly identify who has the right to take all credits for the work. LAR contains no explicit provision that the author has the right to object false attribution of authorship. Although, there is recognized the possibility to object co-authorship if it is arbitrarily set by others. The right to object is provided for the co-author himself and for his legitimate heirs.

3.1. False Attribution to Others

The right to prevent or to object false attribution to others takes place when the only person who does not take credit for the work is its author! The detachment of the strong and unique link between the author and its work may be caused with or without the malicious intent to infringe the right of attribution and to unjustly profit from other’s creations. Orphan works carry high chances that the author of the work is deprived from taking the credits from his work. The increase of the number of orphan works, without any doubt leads into using a copyrighted work without properly mention its author due to the objective impossibility to know or find him. The lack of mentioning the author can be considered by him an infringement of the right of attribution. That is why researchers, producers and other users often deterred from using or reusing orphan work. Even when the lack of mentioning the author is not a *mala fide* act, it is a form of infringement of the right of attribution.

Scientific research contains elaborated rules, specific guides, or style citations formats to formalize the way citations and references are being made, to use responsibly other’s work. Sometime references suffer misattribution and that part of work erroneously is attributed to another author. For example, citing by mistake the wrong author or the editor of the book. Misattribution also can occur when someone wrongly believes he has the right information about the author of the work which he is using and based on this wrong belief he makes false attribution instead of the real author. Another common, but wrong practice in academic research is the “honorary authorship”. This kind of widespread attribution manipulation does not reflect the real contributors. It can lead to authorship

disputes in facing problems or criticism and for the most of cases is a direct result of the abuse of power and intimidation or of the need to be attached to big names. “*Authorship is not just a list of names. It is a mechanism to establish credit, integrity, accountability and responsibility in research.*” (Desai 2012, p. 434).

In 2009 there were claims of false attribution over three chapters of a book, used as basic literature for students. Mrs. B, Mrs. K and another were known as co-authors of a book published in 1997. After a few years Mrs. B published a new book as sole author, using three chapters from the book published in 1997. Mrs. K filed a complaint with ZSHDA and in its explanation ZSHDA gave Mrs. K. right by stating infringement of her copyright on three chapters of the book. Mrs. B. sued Mrs. K. The court ruled in favor of Mrs. B, by arguing that the mere fact that the defendant Mrs. K. is known as the author of the three chapters is insufficient for the Court to conclude that she is the real author of these chapters. The decision was based also in expert’s conclusions about the bibliography used and quoted for creating the chapters was the list of authors deposited by the plaintiff (Tirana District Court, Decision No. 6515, 2009).

The worst scenario of false attribution is undoubtedly plagiarism, mainly performed in *mala fede*, led by the sole purpose of presenting a work under another name, to take credits from it. *Plagio* is considered equal to stealing, focused on copying other’s words, style, or work’s structure. Plagiarism’s target may be the whole work, or part of it. This is the most serious and dangerous way of infringing the right of attribution.

In 2013 Mrs. Q. the heir of a well-known translator claimed false attribution over a dictionary. The dictionary was realized in co-authorship, but Mrs. Q. was convinced that best part of it was copied from a previous published dictionary of her father. As the legitimate heir of her father Mrs. Q. also claimed that her father was to be known as author. The Court dismissed the case arguing based on the expert’s conclusions that the microstructures and macrostructures of two dictionaries were different and there was no plagiarism, but some coincidences in words (Tirana District Court, Decision No. 6888, 2012).

3.2. False Attribution to the Author

The right of attribution offers the author the opportunity to be identified with his work. The author’s name comes with his way of expressing his ideas and talents and *vice versa*. The author benefits from this right to choose how he will be

introduced in public. He also enjoys the right to control his work's publication. It is illegal to publish a work or reveal the real identity of the author without his consent, but there is a worst scenario when someone abuses with an author's name by putting it on any creation.

False attribution to the author implies the wrong act of creating out of nothing a link between a work and an author, thus stating a false authorship over the work by pointing out someone as its author. *"Attaching a false name imputes to that "nonauthor" a creative process that never took place. Quite literally, false attribution puts thoughts into an author's head, and words into his or her mouth."* (Hicks 2015, p. 383).

This is the case, where in terms of fraud, someone put a name on a creation with bad intentions. The person who falsely introduce a creation under the name of a well-known author has the intention to unjustly profit from it. At the same time, it brings another negative consequence. It provides the public with unauthentic works, by creating a market of fake works, which are purchased as authentic. It is contradictory to the prospective of market and consumer protection policies.

Moreover, false attribution to the author can be caused by ineptitude or malice by attaching his name to a creation that does not match the ideas, style, or the quality set by the author as the normal standard of his creative activity, thus infringing his honor, dignity, or reputation. This situation overlaps infringement of the right of attribution with the infringement of the right of integrity. Furthermore, even putting the work to derogatory treatment constitute false attribution. In the case of the photographer, Mr. Ç. claimed exactly the combined infringement of the right of attribution and integrity, because the picture on the newspaper cover was not published in the proper professional quality by diminishing the value of the work, as well as his image (Tirana Court of Appeal, Decision No. 1391, 2016).

The author is morally and ideologically connected to the authentic work, the work he gives permission to be published. He is responsible for his work, too, but the author has the right to disclaim authorship, or minimally to require that material distortion, mutilation, or alteration material to be highlighted as with no connection to him, as well. The most common case when both the right of attribution and integrity are considered infringed is when accidentally or because of an amateurish work, the derivative work does not reflect, reduce, or distort the values of the authentic work.

LAR art. 44/5 provides an interesting regulation dealing with changes of an

architectural work. The author of an architectural work cannot object: (1) to changes that are needed for important reasons, such as security or technical reasons and (2) to the use of other materials, in cases of reconstruction, if the materials used in its construction prove defective or if such materials cannot be disposed or can be obtained only with difficulty or expenses. The provision puts the owners of the architectural work in a privileged position, but the author reserves the right: *“to request that the owner of the building, in addition to the author's name, make a note of the changes to the work and the time when they were made”*.

4. Legal Measures on False Attribution

The right of attribution as part of author's rights has received the full attention to be promoted and protected by the Albanian legal framework. Despite other provisions, which can be categorized as: provisional measures, civil remedies, measures, remedies, and sanctions against abuses in respect of technical devices and border measures (WIPO, 2016) there are also criminal sanctions, which are intended to punish those who carry out grave infringements.

LAR specifically dedicates two provisions to the defined measures if the right of attribution or integrity are infringed: *“neutralizing or destroying the copy or production of this work”*, only if: (1) the damage cannot be repaired by the addition, marking or advertising of the authorship (LAR, art. 170), or (2) it is materially impossible for the copy or its reproduction to be restored to its original form at the expense of the party opposing the neutralization or destruction (LAR, art. 171).

The promotion and protection of Intellectual Property is an important part of Albanian National Strategies and in this respect, since 2001 the changes of Albanian Criminal Code (ACC) toughened the penalties for criminal offenses regarding author's rights. False attribution is a criminal offense, recognized by two provisions. False attribution to others, plagiarism, as a criminal offense is committed by use or publish with his own name, in whole or in part a literary, musical, artistic, or scientific work of another (ACC, art. 148). The other offense is related to false attribution to the author and the criminal makes profits through fraud, by presenting a work of art and culture as original or created by another author (ACC, art. 147).

7. Conclusions

The right of attribution answers the question: “*Who has created the work?*” The right of attribution establishes the unique link between the author and his work, from which derive all other rights and responsibilities. The right to be recognized and mentioned as the author of a work is of a crucial importance. False attribution to others is the most common infringement of the right of attribution. Plagiarism in any of its forms is present in the academic world, as in music, cinematographic and entertainment industry. The use of copyright registration system is the strongest and safest weapon to win any court battle.

Disclaiming authorship in case of false attribution of the author means denying or rejecting any possible connection to a work which is not created by him, or even if the work is created by him but it has been damaged after its creation, enough to infringe the right of integrity. LAR is silent over the right to disclaim. There is no doubt that the right to disclaim authorship exists as a sub-right of the right of attribution. Although explicit provisions, like those provided by VARA in U.S., would be of better use. It is easier to understand that the right to disclaim can be applied when the work is totally foreign to the author, but it is ambiguous regarding the right to disclaim when the work is authentic, but has been altered, defaced, mutilated, or modified from others and without the author’s consent. Is it possible to withdraw authorship at any rate? Nevertheless, authorship disclaim is not the easiest thing to do, especially when the pretended authentic work is highly estimated, because the author’s moral interest goes against legitimate interest and financial expectation of the owner of the work. The claim of false attribution imposes the burden of proof on the author himself or his heirs. During the author’s life, the process of authentication may be easy. But, taking in consideration that moral rights are perpetual, after 150 years from author’s death, the process may be harder than selling ice to Eskimos.

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