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- ABSTRACT -

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COMPEDIUM

In our attempt to provide new perspectives and horizons to the doctrine, we have come up with various solutions and approaches regarding copyright-related institutions.

The thesis was structured following a thorough consultation with my coordinator, Mr. prof. univ. Ph. D. Teodor Bodoașcă, in 5 chapters, and, finally, a distinct chapter, where we draw several conclusions and *de lege ferenda* proposals regarding the researched topic.

The thesis contains some concluding aspects, elements of jurisprudence, doctrinal claims, as well as elements of comparative law, in order to clarify the raised issues.

In the first chapter we presented a series of general aspects about intellectual creation, work of art, author and copyright. Because of the fact that the related rights arise and develop, in general, from copyright, there is a very close link between the two categories, almost indissoluble, so we appreciated that we can not make an in-depth analysis of these rights without taking a general look at their "source".

In this chapter, we focused on evolutionary landmarks, went back in time and analyzed the context, the economic and social situation in which they arose, this aspect being of particular importance given the immeasurable influence that these rights they have on the progress of society.

In the second chapter, we made an analysis of intellectual creations that generate related rights. These are the musical performances of performers, the sound and audiovisual recordings of the producers of sound and audiovisual recordings, and, last but not least, the television and broadcasting programs of the television and broadcasting organizations.

Basically, it is about the creations that generate beauty and pleasure in our lives. Without them, obviously, we could not talk about the existence of any right. They generate everything that is the object for the legislator, doctrine, jurisprudence's work. In other words, threw this chapter, I started analysing the subject of this doctoral thesis. We appreciate as being extremely important, representing a significant contribution to the knowledge and doctrinal development, the analysis of the aspects related to the meaning of these notions, expressions and finally legal institutions, to know the conditions in which these creations can be protected, and finally the proposals for developing their protection measures.

We have allowed ourselves to bring criticism to the difficult bureaucratic procedure for ensuring their protection.

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Last but not least, we have highlighted a number of important issues regarding the main actors in the related rights scene, highlighting the differences between those who give birth to these creations and, of course, enjoy protection, and those who have a less important role, but who, however, have some benefits.

I dedicated the third chapter to the analysis of the legal regime of related rights. We appreciate that it is the most complex chapter, our doctrinal contribution here being the most important. In the first sections, we have highlighted the issues that we consider important regarding the relationship between copyright and the related rights. Subsequently, I analyzed in detail, clarifying where I considered necessary, each moral and patrimonial prerogative that belongs to any holder of these related rights. The doctrinal analyzes are accompanied by a series of *de lege ferenda* proposals where we considered it appropriate.

The fourth chapter is dedicated to the common regulations regarding authors, performers, producers of sound and audiovisual recordings.

In this chapter we analysed a series of issues concerning the limits of the exercise of the related rights, clarifying and analyzing issues related to the patrimonial side of the exert of these rights, especially the remuneration due to rights holders.

Finally, we enunciated new theses that will contribute to the development of the specialized doctrine.

The last chapter is dedicated to the analysis of the aspects related to the capitalization and contractual transmission of some related rights.

We have chosen to dedicate an entire chapter to these issues, especially because of the specificity of these rights, the special mandate, derogating from the common law that is used to capitalize these rights through collective management bodies and, more recently, independent management entities. Of course, we analysed in detail the way of organization and operation of these specific entities of collective management.

The institutions analyzed in this chapter are important because they refer to the regulations regarding the exercise of these rights, and, in particular, the novelty elements introduced after the amendment of the law regarding the regulation of the independent management entities.

Contents

KEY WORDS: related rights, moral rights, patrimonial rights, collective management organizations, indepdendent management entities, performing artists, sound and audiovisual recording producers, radio and television entities, private copy, equitable unique remuneration,

compensatory remuneration for private copy, public satellite communication, cable retransmission.

FOREWORD

The doctoral thesis offers a comprehensive picture of the theoretical and practical issues regarding the analysis of the legal regime of the related rights, being a possible working tool useful to all theorists and practitioners in the field of intellectual property law.

Threw the thesis we aimed, on one hand, to identify the similarities and differences between historical and current conceptions, and on the other hand, to highlight the current data of knowledge in the chosen field and highlight both certainties, dilemmas and questions that need answers. Regarding this, we tried to identify any inaccuracies or gaps in the legislation and to formulate relevant *de lege ferenda* proposals in order to remedy them.

Futhemore, following an extensive and rigorous documentation, under the competent guidance, and control of my doctoral supervisor, I managed to gather relevant information for the subject approached after researching local and foreign bibliographic sources.

ABSTRACT

Through this scientific research we aimed to analyze in our own way the legal regime of the related rights resulting from the intellectual creation. We also aimed to identify a series of normative solutions that give new visions and expand the horizons of scientific orientation.

The proposed topic aims, what I am passionate about, the in-depth analysis of the interpretation and exercise of the related rights regulated by Law no. 8/1996 regarding copyright and related rights.

We appreciate that *"the intellectual property"* is more comprehensive than common law property because it offers more prerogatives and at the same time, different from those under common law. This is where moral rights arise, the rights regarding the honor, the reputation of a creator and whose presence is not so strongly outlined in the field of common law.

Ensuring the protection of intellectual property is an essential aspect of human development, being a condition of progress in society. At the same time, as we can see in other countries more developed, a direct relationship has emerged between the protection of the creators rights and the level of development of countries. The more evolved the country is, the better is the protection of the creators, which encourages, supports the act of creation.

At present time, the field of intellectual property law is appreciated as one of the most dynamic, one of the most spectacular evolution during the last century. For example, the technical methods used to bring to public's attention certain famous musical works enjoy an unprecedented expansion, while the idea of the *"talent"* of listening to live music in the concert hall is lagging behind. That’s why special importance is given to the legal instruments that allow us to keep up with the violation of the rights of those who are "performing artists", "sound and

audiovisual recording producers" or *"radio and television entities"*. The doctrinal challenges are special and stimulate the creativity.

However, in the field of intellectual property, take place most infringements (eg. websites that allow free song downloads, movies, DJs that broadcast songs at parties without having legally obtained such rights). The proposed topic is very actually in the current context in which many situations can be identified, and especially in the online digital world where happen many violations of these rights that can be easily done and most remain unsanctioned or even encouraged. As such, it is the current socio-economic environment with its evolution - we live in the era of computer games, commercials, mobile phone applications, festivals that all together involve the use of works of intellectual creation within the meaning of Law no. 8/1991 – that requires paying more attention to the exercise, protection of these rights and, of course, a detailed knowledge of them.

In Romania, due to the high costs and the complicated procedures, the persons and institutions concerned do not always take the necessary measures to protect the copyright and, implicitly, the related ones. The causes of this situation are, without question, much more numerous, but we will not detail them here.

The reasons why I choose this topic revolved around the specific of related rights, which, as I mentioned above, represent a special and distinct category of intellectual property rights and which, in the context of technical, economic and social development, and indeed the whole progress of society, require permanent adjustment. Last but not least, the need to reform, adapt, update the legal regulations regarding the rights of the performing artists, of the sound and audiovisual recording producers, of the radio and television entities determined my option. I believe that this scientific research will contribute, hoping significantly, to the extension of new horizons in the analysis, protection of related rights, both for doctrine and for the legislator.

Thus, the main objective that we had in mind in the construction of the thesis refers to the development of the specialized doctrine, especially because most authors focused more on

copyright, leaving behind the related rights. We could say that, at present time, there is too little specialized literature to deal in depth and to make an analysis of these rights, being presented, in most cases, succinctly and mainly, only as enunciative texts of law. This, of course, follows the principle that in the field of research there is no room for the notions of *"too much"* or *"enough"*.

As a second objective, we considered the identification of possible inaccuracies in the national legislation or even gaps that we tried to clarify and improve, formulating a series of *de lege ferenda* proposals.

Among the scientific research methods, we used the historical analysis method, the logical method and, last but not least, the comparative method.

We used the historical analysis method in the analysis of certain terms and expressions, whose meaning has changed over time, and in order to build a thorough and complex analysis of the subject, it was imperative to provide an image of the social context in which certain institutions were born, and then developed.

We used the logical method of scientific research especially when formulating the *de lege ferenda* proposals, as well as in the construction of new doctrinal theses in the field of related rights.

I used the comparative method of scientific research when comparing the relevant legal provisions between different legal systems, mainly the French, Anglo-Saxon and American legal systems. We also used this method to analyze differend doctrinal approaches in various countries in order to understand the way and vision on this subject in other cultures and nations.

According to a study made by BSA Software, an organization created to promote the global software industry to governments and in the international marketplace, based on 110 countries and more than 23,000 responses from consumers, employees and information technology executives, has shown that in Romania, 59% of computer users use pirated programs, the commercial value of pirated programs reaching 151 million dollars. Globally, although there is a downward trend, 37% of the software installed on computers is pirated that value 151 million

dollars. Globally, although there is a downward trend, 37% of software installed on computers is pirated. In Western countries, piracy is minimal, the United States (15%), Austria (19%), the United Kingdom (215), while China causes the most damage, 66% of the Chinese people use pirated software, the commercial value being about 6, 8 billion dollars.

Globally, internet users visited pirated websites almost 300 billion times in 2017. It represents an increase of 1.6% compared to 2016, according to the consulting company Muso. Although the popularity of Netflix and other similar services is growing, illegal TV series downloads have increased by a third compared to illegal downloads in 2017.

Another study made by the European Commission shows that illegal consumption of video games leads to increasing the legal consumption. Researchers estimate that for every 100 illegally downloaded games, video game enthusiasts legally get another 24 games (even those offered for free). These estimates are valid only for video games, as piracy has a negative effect on the sale of movies and books and a neutral effect on the sale of music.

At present time, due to the high costs and complicated procedures, the holders of these rights do not always take the necessary steps to protect their rights.

The Romanian legislation does not provide sufficiently strong mechanisms to protect the copyright and the related rights and that’s why there are frequent situations of infringement (eg websites that allow free download of songs, movies, DJs who play songs at parties without having legally obtained such rights). Although the legislation provides sanctioning measures, they are often not applied.

There should also be a deeper focus on these rights and a more intense media coverage so that artists, performers, televisions know their rights and, consequently, take the necessary steps to protect them. For example, due to the rather complex management of the collective management bodies, the access of actors, composers or performers directly covered by copyright law is quite limited, which indirectly encourages slippage.

Considering the essential role in the development of a people's culture, special attention must be paid to these rights. Regarding this, greater involvement of the state institutions, especially the Romanian copyright office, would be welcomed in order to support the holders of these rights and encourage them to take measures to protect their creations, and even an involvement of the Police, the Prosecutor's Office to fight against violations in this area, especially in the online environment. Last but not least, putting a greater emphasis in the

university, postgraduate environment (organization of specialization courses, master programs) on the field of intellectual property, would help our nation.

The importance and need to adapt to the evolution of digital technologies is also supported by the proposal for a directive of the European Parliament and of the Council regarding copyright on the digital single market (Directive 2016/0280), a controversial and up to date document, also called the copyright reform on the digital market, which specifically targets works published in any form of media for information and entertainment, as a regular basis. Even though it is not adopted yet in its final form, the proposal concerns the exercise of copyright and related rights in case of online broadcasts of the radio an television entities and certain broadcasts of television and radio programs, as well as permitted uses of works and other objects protected by copyright and related rights for the benefit of the blind, visually impaired or difficult to read printed matter and the harmonization of certain aspects of copyright and related rights in the information society.

We consider extremely relevant to create an integrated copyright system, to protect press publications in case of digital uses (it is about the practice of distribution, "sharing" of articles belonging to other authors that is intensively made threw the online communication networks like Facebook, Whatsapp, Skype, Twitter, etc.), applying filters on the online media platforms such as YouTube, Google, Wikipedia or those that store large amounts of works for analyzing and monitoring uploaded media content on the platforms that store such works, in order to diminish or even stop the phenomenon of violation of the rights over the works. Although some entities in the field believe that this will make difficult the process of disseminating information in the online environment, we believe that the work of those who created their content must be fairly remunerated and it is necessary to find a balance between the interests of all actors in the field.

In the first chapter I made an analysis of the general aspects of intellectual creation, work, author and copyright. In our scientific approach we have looked as deep as possible in history after some aspects regarding the arising of the protection of these rights that were born from the intellectual creation, their importance, the evolution of legal regulations and specialized doctrine. We analyzed the evolution of the protection of intellectual creations from Antiquity to the Modern era, finally pointing out a number of issues regarding the role and impact of the Internet on intellectual creations.

Through the historical analysis we found that the legislator's perception of the phenomenon of creators' rights has changed over time, being closely linked to the social and cultural changes specific to each era.

The invention of printing, which led to simplify the process of copying manuscripts, was the moment that generated the need for legal protection of the intellectual creation. Thus, after inventing the modern printing, the need of the states to regulate the protection of the intellectual creation behaved more intensely. We have pointed out the differences between European, Anglo-Saxon and US law systems regarding these aspects and tried to highlight the reasons why there are differences between these legal systems in terms of copyright protection.

After the simplification of the process of copying manuscripts, this activity became more and more popular, becoming a real profitable industry. In this context, the competition arose between those who carried out this bookstore activity and also, the need to take better protection measures. According to some authors, as a result of the discovery of printing, human genius becomes more fruitful: the work of authors, the bookstore industry becomes more profitable and, at the same time, the shameful profession of plagiarists and counterfeiters becomes more active[1].

A significant impact on the evolution of creators' rights has been determined by the emergence of the system of privileges that we have extensively analyzed in this chapter. Next, we pointed out a number of issues regarding the first international and national regulations regarding copyright, which also represents the source, the basis of the regulations in this field.

We also emphasized the impact of the Internet on intellectual creations. Because there is a direct connection between information technology and the protection of intellectual property, intellectual property being considered both an exponent and a catalyst for technological development[2], it is necessary to take specific measures to protect intellectual creations.

We appreciate that the current level of adjustment of the legislation to technological developments is exceeded, so we support the need to adjust the legislation and pay more attention to new creations that represent the exclusive product of the Internet, such as: social networks, Internet transmissions, text extraction and data, graphic files (GIFs) and blogs.[3]

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[1] This subject was studied by I. Macovei in his book, *Tratat de drept al proprietății intelectuale*, C.H. Beck publishing house, 2010, p. 420, and also Y. Eminescu, sited work, p.12 who quotes Adolphe B. Breulier in her work.
[2] This subject was analyzed by Al. C. Ștrenc, *Tehnologia informației: protejarea și respectarea dreptului proprietății intelectuale*, Universul Juridic publishing house, București, 2010, p. 26-27.
[3] A study regarding this subject was published by S.G. Totelecan, „Autor" (fără operă) și „operă" (fără autor). „Arta" în era digitală, in RRDPI no. 4/2016, p. 95.

We also analyzed the legal regime of the work in our country, considering that it is essential to provide clarifications on certain issues such as the conditions that a work has to fulfill in order to enjoy legal protection, as well as on the distinction between different categories of works that enjoy legal protection and the intellectual creations that are not protected by copyright. We have also shown the approach of other legal systems regarding the categories of works included in the category of protected ones, such as the French or Dutch legal systems that provide legal protection to the scent of a perfume, for example, which is not found in our legislation. We also analyzed the subject of protection of the ideas, where there are arguemnts pro and against, and we draw some observations regarding this.

The last section of the first chapter was dedicated to the analysis of some particularities of the moral and patrimonial rights resulting from the creation of a work and I made a series of doctrinal contributions. We also analyzed the theories regarding the legal nature of copyright, pointing out the essential aspects.

In the second chapter we analyzed the intellectual creations generating related rights, especially the interpretations and performances of the performing artists, sound and audiovisual recordings of the producers of sound and audiovisual recordings and finally, radio and television programs of the radio and television entities. They often have a potentiating role of the value of the authors' creations, some of them even ensuring the economic connection between the intellectual goods and the business world.

Regarding the interpretations and performances of the performing artists, we analyzed the conditions that have to be fulfilled in order to benefit from protection and made a series of doctrinal contributions on the concept of folklore protection, showing the approach of other legal systems on this issue, such as those in Great Britain, Cyprus, Senegal, etc. I also made some contributions to the meaning of the concept of performing artists and argued in favor of ensuring the protection of extras and stuntmen, but only in certain circumstances. We also highlighted the way in which other legal systems, such as the Turkish one, approach the protection of the performing artists.

Regarding the sound and audiovisual recordings, we have dealt with their evolution since their appearance until now, we have clarified the meaning of the two concepts, as well as the conditions they must fulfill in order to benefit from protection, bringing arguments in favor of reducing bureaucracy in the field of holographic markings, presenting in this sense the

downward trend of recent years of these markings issued by Romanian copyright office with the mention that Romania remained the only country in the European Union where holograms are still applied, and internationally, only Kenya still applies holograms on audio / video media. We also presented some issues regrding the measures to be taken in order to fights against piracy in the field of sound and audio-visual recordings (enrollment in RNF and RNV).

Regarding the fact that law provisions also refers to the concept of *"phonograms published for commercial purposes"* (art. 112 para. (1) of the law), we consider that it is necessary, in order to remove any non-compliant interpretations of this concept, to define it by law, so we made some *de lege ferenda* proposals for introducing a new paragraph to art. 104 with the following content:

(2) For the purposes of this law, a phonogram is considered to be published for commercial purposes when copies of it are offered to the public in physical format, in sufficient quantity, or in digital format.

Regarding the radio and television programs, we have pointed out some issues related to their emergence and evolution, contributing to the definition of the concept of radio and television program, especially since our legislation does not address this issue. We also emphasized the particularly great influence that these programs have on the psychological characteristics of the listener or spectator, considering that more attention should be paid to their quality.

The third chapter was dedicated to the analysis of the legal regime of copyright-related rights, I formulated a series of theses and doctrinal contributions regarding each right. I structured this chapter in five sections, dealing with the issue of the legal nature of related rights, the relation between them and copyright, their individual analysis regarding each category, the term.

Regarding the right of performing artists to claim respect for the quality of their performance and to oppose any distortion, falsification or other substantial change of their interpretation or performance or any violation of their rights which would seriously harm their honor or reputation, I formulated some opinions regarding the content of the concept of serious prejudice that we consider important in the analysis of the violation of these rights.

Regarding the exclusive right of the holders to authorize or prohibit to make available to the public the fixed creation, so that it can be accessed, in any place and at any time,

individually, by the public, I analyzed the exercise of this right regarding all the four ways of public communication.

Regarding the rights of the producers of audiovisual recordings, especially because the law does not contain special provisions for the producer for each category of audiovisual work, we support the transposition of the provisions of the Beijing Treaty into national law as soon as possible, being extremely neccessary the definiton of the concept of audiovisual fixation, distinct regulation of the right of reproduction, distribution, rental, broadcasting, communication to the public and making available to the public the audiovisual performances, correlation of the moral rights of the performing artists also for audiovisual performances, etc., development of the exploitation ways of audiovisual works, imposing the need to regulate economic and social relations in the current reality.

Regarding the moral right to the name and paternity of the work for radio and television entities, we made a *de lege ferenda* proposal, the amendment of art. 129 with the following content: Radio and television organizations have the exclusive patrimonial right to authorize or prohibit, with the obligation for the authorized person to mention the name of the entities, in a visible place before begining the activities mentioned at letters a) -i), the following:…., the indication of the place where the name of the organism will be mentioned being extremely important.

Also regarding the radio and television entities, we made some contributions regarding the regulation of television services with conditional access.

The fourth chapter refers to the common regulations for authors, performing artists, producers of sound and audiovisual recordings. In this chapter I analyzed some aspects related to the limits of the exercise of the related rights, and in particular aspects regarding the remuneration due to rightholders, respectively the single equitable remuneration, the remuneration due by cable distributors, the equitable remuneration for borrowing or renting the right, compensatory remuneration for private copy.

Regarding the situation when the parties do not reach an agreement on establishing the methodology through negotiation for the remuneration due by cable distributors, they can choose mediation - I brought a series of criticisms to the legal text. Thus, we consider that the dispositions of the law regarding the role of mediators in negotiation is deficient. We consider that the right of the mediator to notify a proposal to the parties should be execised with caution

because it could be considered as a violation of the obligation of neutrality, which implies that the mediator must remain outside the parties's conflict. The mediator could only facilitate the communication of the proposals of the parties in order to reach a mediation agreement because one of the general principles of mediation is that the parties build their own solution, unanimously accepted, with the support of the mediator. This idea is also strengthened by the dispositions of art. 1 para. (2) of Law no. 192/2006 which provide that mediation is based on the trust that the parties find in the mediator's person, as a person capable of facilitating negotiations between them and supporting them in resolving the conflict, by obtaining a mutually convenient, efficient and sustainable solution.

We appreciate that the proposal referred to in para. (4) mentioned above refers either to the mediation agreement provided by art. 58 of Law no. 192/2006, or to the closing of mediation report which states the failure of the mediation or its denunciation by one of the parties, according to art. 56 of the above-mentioned law. We consider that it would be more appropriate to reformulate par. (4) in the sense that within 3 months from the date of signing the mediation agreement (which would imply that the parties have reached an agreement) or from drawing up the closing report of the mediation (if the parties do not have reached an agreement) the parties will notify the Romanian copyright office regarding the result of the mediation, and, in the favorable case, they will sign the protocol regarding the methodologies under the mediation agreement.

Particular attention must be paid to the unique single remuneration, especially in the current context of technology development. The prohibition of use of phonograms and / or artistic performances, as an attribute belonging to the exclusive patrimonial right of the right holder, could lead to abuses, considering that the prohibition of use would prohibit the public's right to culture, to be informed. Due to the difficulty faced by users who would have to obtain express authorization from each rightholder, which is almost impossible, they would be discouraged from using phonograms and / or artistic performances in their works (especially regarding the public communication, in all of it's forms because within broadcasting there may be, in theory, a control of possible bans on the use of performing artists's phonograms and performances, taking into account the fact that broadcasters are known throughout the market and they usually are in a constant number).

The last chapter of the thesis is dedicated to the scientific research of the capitalization and contractual transmission of the related rights.

A French librettist (his name is Ernest Bourget) enters a famous restaurant in Paris and discovers that his music was played there live - only that no one had asked his consent, he had not received any money, he even had to pay his consumption there. So he sued the restaurant. He won the trial, judges agreeing that text authors and composers should be paid every time when their creations are performed in public. It was 1847, and this is how the history of collective management of copyright and related rights began.

This chapter is structured in 3 sections, the field of collective management being the one that has undergone the most changes with the entry into force of Law no. 74/2018 amending Law no. 8/1996. We dealt with issues related to the mandate given to the collective management entities and independent management entities, the management of these entities, licensing and succession transmission of the rights or as a result of reorganization or termination of the legal entity.

We analyzed the novelties introduced by Law no. 74/2018, especially in the field of the attributions of the collective management entities, their statute, the introduction of the independent management entities with their duties.

Taking into account the reasons set out in detail in subsection 5.2.2. The management of the collective management bodies, I proposed, *de lege ferenda*, to reformulate art. 150 para. (1) with the following content: “collective management entities are, for the puroposes of this law, legal persons established by free association, having as object of activity, the administration of copyright or of the related rights, which is entrusted to them by several authors or copyright holders, for their collective benefit. "

The same, in the situation of independent management entities in subsection 5.2.3. The management of the independent management entities we proposed the reformulation of art. 149 para. (2) with the following content: "independent management entities are, for the purposes of this law, profit legal entities, which operate according to the legal regulations on companies and whose object of activity is the administration of copyright or related rights."

Regarding the transfer of rights as a result of the reorganization or termination of the legal person, we analyzed this situation in the light of the provisions of art. 233 et seq. of the Civil

Code, as well as of Law no. 31/1990, so that the rights will be taken over by the new legal entities.

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