



TECHNIUM
SOCIAL SCIENCES JOURNAL

Technium.

52/2023

2023

A new decade for social changes

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Orphan works

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Abstract. Digitization, dissemination or publication of works or other objects protected by copyright or related copyright rights, in the conditions where the copyright holders are not identified or in the second situation when the holder, although identified, is not located represents a new institution by defining it as the institution of "orphan works". In the research we are undertaking, we intend to identify the status of "orphan work", which works have the status of "orphan work" and which category of works cannot acquire the status of "orphan work". In all situations, appropriate research activities are required to conduct a *diligent search* in good faith to verify the status of the work in question and to verify under what conditions a particular work has been declared an *orphan work*.

Keywords. copyright, orphan work, intellectual property

Introduction

One of the themes that led to the evolution of human society, followed the approach of natural goods, then the usufruct of the work of transforming these goods into collective or individual properties, achieved through a creative activity, specific to human work, in the evolution of time until today's form of common law property. The progress of society had a central point, the activity of creation and realization of products of the human spirit, which allowed the passage through different stages of development of civilization as a result of creative work¹.

The regulation of property as the ultimate expression of people's access to possession (mastery), use and disposal (right of alienation) over goods (with economic value), is known since Roman law², attributes also stated in the current³ Romanian Civil Code and which do not require explanations additional, while the words " *intellectual property* " are " *among the most*

¹Viorel Roș, *Intellectual property law. Vol. I. Copyright, related rights and sui-generis rights* . Bucharest: Ed. CH Beeck , 2016, p. 8.

²Mihai Albici , *About law as a complex phenomenon of social life*, Bucharest, Ed. Universul Juridic, 2015, p. 39.

³The Civil Code of 2009 (r1), In force since October 1, 2011, Published in the Official Gazette, Part I no. 505 of July 15, 2011.

confusing there are"⁴. In French law, "intellectual property" was enshrined as sacred, and the search for a balance was subsequent, through the recognition of exceptions (citation, parody, press news, etc.), but also through the "progressive emergence of conditions for access to protection"⁵. Everything cannot be protected or prohibited"⁶.

Indeed, as Pierre Recht also appreciated, "the current intellectual property right is built on sand..., but we should orientate ourselves towards a more solid doctrine, that of a new form of property, property-creation, real right bearing on the creations of the spirit"⁷.

Doctrinally, we agree with the assessment of Professor Viorel Roş, who says that the name "intellectual property" has acquired a more distinctive character, thanks to its intensive use: it has become a title of nobility in the international legal vocabulary, even if it is the result of the wrong translation of a word, but also the fact that this name is used in international conventions and has gained consecration in national legal systems⁸.

As is known, international policy in the matter of intellectual property has not had an upward trend, from the perspective of developing states⁹.

Regarding the clarity of the operative word, we do not find it regulated in the seat of the matter in the field represented by Law no. 8/1996 regarding copyright and related rights (r1)¹⁰, but in agreement with some opinions expressed in specialized literature, the definition of the work can be deduced especially from the provisions of art. 1 and of art. 7 devoted to the object of copyright¹¹.

Thus, pursuant to art. 1, "the copyright on a literary, artistic or scientific work, as well as on other works of intellectual creation is recognized and guaranteed under the conditions of this law" [par. (1) thesis I]. "The work of intellectual creation is recognized and protected, independently of bringing it to public knowledge, by the simple fact of its realization, even in an unfinished form" [par. (2)]. Instead, according to art. 7, "the original works of intellectual creation in the literary, artistic or scientific field, whatever the way of creation, mode or form of expression and independent of their value and destination, constitute the object of copyright".

⁴C. Alleaume, N. Craipeau, *Propriété intellectuelle, Cours et travaux directs*, Lextenso éditions, Montchrestien, Paris, 2010, p. 5. Quoted by Viorel Roş, *Intellectual property law. Vol. I. Copyright, related rights and rights sui-generis*. Bucharest, Ed. CH Beeck, 2016, p. 11.

⁵Anechitoae, Constantine. *The status quo of "Orphan Works"*, In: Viorel Roş, Ciprian Raul Romiţan, *Controversial Problems in Intellectual Property Law*, Bucharest: Ed. Universul Juridic, 2019, pp. 43-54.

⁶Gheorghe Gheorghiu, *Examining the originality of litigious works*, in the Romanian Intellectual Property Law Review, Year XVI, no. 1 (58), March 2019, p. 17.

⁷Viorel Roş, *Intellectual property law. Vol. I.*, op. quote pp. 12-13.

⁸Roş Viorel, Spineanu-Matei Octavia, Bogdan Dragoş, *Copyright and related rights – Treaty*, AII Beck Publishing House, Bucharest, 2005, p. 3.

⁹Paul George Buta, *Intellectual Property Rights Disputes before the World Trade Organization (Part I)*, in the Romanian Review of Intellectual Property Rights, Year XVI, no. 1 (58), March 2019 p. 72.

¹⁰Law no. 8/1996 regarding copyright and related rights (r1). Effective from June 14, 2018. Published in the Official Gazette, Part I no. 489 of June 14, 2018 and includes the amendments brought by the following acts: L 203/2018; L 15/2019; L 8/2020; L 39/2022; L 69/2022.

¹¹Teodor Bodoască, *Studies on intellectual property law*, Bucharest: Ed. Universul Juridic, 2018, pp. 7-16. Teodor Bodoască, *Discussions regarding the concept of the work and the basic conditions for its legal protection*. Article published in Law no. 5/201

According to paragraph (5) from the statement of reasons of Directive 2012/28/EU¹², copyright is the economic foundation of the creative industry, as it stimulates innovation, creative activity, investment and production. Therefore, the digitization and dissemination of works is a method of protection of the European cultural heritage. Copyright is an important means of ensuring that activities in the creative sector are rewarded.

Next, para. (6) clarifies the situation of the exclusive rights of copyright holders regarding the reproduction and making available to the public of their works and other protected objects, as harmonized by Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society¹³, implies their prior consent for the digitization and making available to the public of works or other protected objects.

The concept of "orphan work" was introduced into the national legislation only on July 27, 2015¹⁴, although the transposition term provided by art. 9 of Directive 2012/28/EU of the European Parliament and of the Council was for October 29, 2014¹⁵.

In the case of orphan works, this prior agreement regarding the performance of acts of reproduction or making the work available to the public cannot be obtained, because for circumstantial reasons, the most important bibliographic data are missing and for which the owners cannot be determined or contacted of rights. They are works that have not been "signed" by their intellectual author¹⁶.

The image of the interest in regulating the legal situation of "orphan works" is also completed by Cristina Ștefan, who says that "within the limits in which the analogy is suggestive, we can accept that, just as the lives of children whose parents are not known, take place through the care of others adults, in parameters as close as possible to what the community agrees is a normal life, likewise the trajectory of works with unknown authors should have a path regulated by social norms"¹⁷.

"Orphan work" status

The trajectory of works with a known author is regulated by Law no. 8/1996, within which is the regulation and the status of orphan work in art. Art. 122 paragraph (2)¹⁸.

¹²Anechitoae Constantine. *Intellectual property law*. Craiova, Ed. Sitech, 2019, p. 149. From October 25, 2012, regarding certain permitted uses of orphan works. Published in the Official Journal of the European Union, series L, no. 299 of October 27, 2012.

¹³OJ L 167, 22.6.2001, p. 10.

¹⁴Law no. 210/2015 to supplement Law no. 8/1996 regarding copyright and related rights. In force since July 27, 2015. Published in the Official Gazette, Part I no. 550 of July 24, 2015.

¹⁵<https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX%3A32012L0028>.

¹⁶Rahme, Nicoleta. *Orphan works: conceptual approaches and legal solutions (part I)*, Library; Bucharest Vol. 2015, Iss. 6, (June 2015), p. 165.

¹⁷Cristina Ștefan. *From orphan works to the culture of information*, Education Tribune from 23/05/2017, Online edition: <https://tribunainvatamantului.ro/de-la-operele-orfane-la-cultura-informatei/>

¹⁸The seat of the matter can be found in Law no. 8/1996 art. 122 - art. 128.

The interest in publishing / republishing or broadcasting through the mass media¹⁹ or online²⁰ works or audio recordings with educational, historical or cultural value, often insufficient amounts of money are allocated to them, thus also bringing them to public knowledge involves some weight²¹. It is often cited that such projects are blocked due to the lack of a solution satisfactory for the problem of orphan works. Protected works can become orphans if the data relating to the author and/or other holder or rights holders (such as publishers or film producers) is missing or no longer updated. This often happens with works that are no longer commercially exploited²².

Orphan works are by definition those works or phonograms, which still bear economic, moral and related rights (sound recordings, interpretations, screenings, databases, transmissions, or works that have never been published or broadcast), situation where no copyright holder of the work or phonogram has been identified or, even if one or more of the copyright holders are identified, none is located, despite a diligent search for copyright holders being conducted and recorded.

Apart from book titles, libraries, museums or archives of public broadcasting and television bodies and in other public institutions in the EU currently hold millions of orphan works, such as photographs and audiovisual works. The lack of data about their owner can be an obstacle to making these works available to the public online and can hinder digital restoration efforts. We can encounter this situation in particular, in the case of orphan films.

Unsigned or indecipherable signed artwork is a problem. They were somehow abandoned by their authors and became orphans. Collectors avoid or simply refuse them, experts dispute their authorship, and fraudsters use them for mystifications and forgeries. An

¹⁹ As regards the MEDIA programmes, the Commission presented, on 8 May, the final evaluation report on the implementation and results of the MEDIA Plus and MEDIA –Training programs [2001 –2006. COM(2008) 245.]. The Commission estimated that these programs effectively contributed to the strengthening of skills, to the development of the European dimension of European audiovisual works from the pre-production phase, to the greater competitiveness of the sector and to the transnational circulation of works. The eighth report of the European Commission on the effectiveness of the regulation for the promotion of European works in the period 2005-2006 –was adopted on July 22 [COM(2008) 481]. According to the report, European broadcasters devote more than 63% of their broadcast time to European works, with works by independent European producers accounting for over 36% of this time. In addition, on 9 April 2008, the European Parliament adopted a declaration on the subtitling of all programs offered by public broadcasters within the European Union. See *the General Report on the activity of the European Union 2008*, p. 76 –77.

²⁰The ways to broadcast the works online are inserted in the EC Green Paper, which launched a debate on the best knowledge in the field of research, science and education. The green paper aims to expose a series of issues related to the role of copyright in the "knowledge economy" and launch a consultation on these issues. The green book is practically composed of two parts. The first part refers to the general aspects regarding the exceptions to exclusive rights provided by the main European legislative instrument in the field of copyright, namely Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (hereinafter "directive"). The second part is devoted to the specific problems raised by exceptions and limitations, which affect to the greatest extent the diffusion of knowledge, as well as the opportunity of the evolution of these exceptions in the era of digital diffusion. See *the Green Paper "Copyrights in the knowledge economy"* COM(2008) 466 final.

²¹Constantin Anecitoae, "Orphan" works and anonymous works, in the Romanian Review of Intellectual Property Law, Year VI, no. 2 (19), March 2009, pp. 47 –58.

²²Ion Dogaru, Edmond Gabriel Olteanu, Lucian Bernd Săuleanu, *Basics of civil law. Volume IV. Special contracts*, CH Beck, Bucharest, 2009, p. 1179 –1191. The commercial exploitation of copyrighted works can be carried out through assignment contracts, publishing contracts, theatrical performance or musical performance contracts, commission contracts, rental contracts, software contracts (computer programs).

unsigned painting can easily receive a famous signature and, in the case of indecipherably signed works, the signature is deleted and a convenient one is added ²³.

The use of a work that includes other types of works (illustrations or photographs in a book) may be subject to obtaining permissions from different rights holders (writer, publisher, illustrator). Orphan work status must be checked for each individual work ²⁴.

The major issue of orphan works is mainly a matter of rights clearance, *i.e.* how users who make available orphan works can be exonerated from liability for copyright infringement if the copyright holder reappears and claim their rights over the work. In addition to liability concerns, the expense and time required to locate and identify rights holders, especially in the case of multiple authors, can prove excessive and not justify the effort. This seems to be especially true in the case of rights to audio recordings and audiovisual works that are currently held in broadcasters' archives.

Art. 3 of the EU Directive 2012/28/EU, establishes common rules for the digitization and online publication of orphan works that were first published or broadcast in the EU.

The recognition of the orphan work status is acquired through the effect of the law ²⁵. So there is no need to look for a specific institution in this regard.

Essentially, the category of orphan works includes: 1) all those works, such as scientific works, books, films, newspaper articles, and other creative materials, or other writings that are found in the collections of local and national libraries, educational institutions of any category or museums accessible to the public, as well as in the collections of archives or institutions of cinematographic or sound heritage and 2) cinematographic and audiovisual works in the collections of libraries, educational institutions or museums accessible to the public, as well as in the collections of archives or cinematographic or sound heritage institutions.

At the same time, anonymous or pseudonymous works do not fall into the category of "orphan works".

Termination of "orphan work" status

The interested general public, or copyright holders, are entitled to search the database and find information about orphan works, as far as their rights are concerned (art. 5, last sentence of Directive no. 2012/28 /EU).

Copyright holders who recognize one of their works in the database can apply to change the status of an orphan work or an orphan phonogram. The national legal basis is the provision of art. 123 paragraph (5) of Law no. 8/1986 (r1), which states: "Copyright holders who put an end to the orphan work status of their works or phonograms benefit from a fair compensation for the use by the institutions provided for in para. (1) of these works or phonograms, in accordance with the law".

The situation in which the search in the database was not diligent (it was carried out in bad faith), or the situation of a work, which was wrongly given the status of an orphan work, or the search in dynamic records in the meantime underwent changes - in all situations, the orphan work status ceases, following which those who consider themselves to have been hit in the

²³Andrei Ion, " *Operele orfane* ", in *the Sunday Newspaper*, no. 12 (294) of 31.03.2006, p. 7. (It appears on Friday together with : *Ziarul Financiar* year VIII, no. 1851 of 31.03.2006).

²⁴ Rahme , Nicoleta, op. quote

²⁵Alexandru Roatǎ-Palade. *Some considerations regarding the regulation of orphan works* . Legal Studies and Research, no. 1/2016, p. 76.

protection rights of the intellectual property right, have recourse to the means of appeal for the infringement of copyright, provided for in the legislation of the member states.