

Comments on the Protection of the Portrait and the Consignee of Correspondence in Romania

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ABSTRACT: In the matter of copyright, Romanian legislation sets out a number of rights in terms of protection and use of a creation containing a person's portrait. In this respect, the rights which the person has in relation to the publication and reproduction of these works are provided in Law 8/1996. In this paper we propose to present aspects of the protection of the portrait, the consignee of correspondence and the secret of the source of information as provided for in Articles 89 to 92 of the above law, together with opinions and comments from the specialist doctrine on these articles. We also pointed out the link of this text of law with the general rule, namely the Civil Code, and we have exemplified with the case-law certain situations that may arise, in order to emphasize the particular importance to be granted to regulations in the field. We believe that this topic is of great interest in the context of the technological advance and the development of communication that relieves the transmission of information and we believe that this work will help to better understand legal regulations on this topic.

KEYWORDS: intellectual property, multiplication right, use of the work, protection of the recipient, consent

Introduction

In the context of the technological advance and the development of communication means which facilitate the transmission of mass information or social networks where, with a simple click, the opera can be disseminated anywhere in the world and to a large number of people, it has become easy to violate the rights of authors of those works or, in the case of portraits, of the persons portrayed.

The law in matters recognises the right to its own image at both national and international level and even though that right by its nature has an extra patrimonial character, it has not been excluded by the legislator the right to its own property exploitation.

Romanian legislation establishes a number of rights with regard to the protection and use of a work containing a person's portrait both by general rules and by special legislation such as Law no 8/1996 on copyright and related rights.

First of all, it should be noted that, in matters of copyright, the rules laid down in Law no 8/1996 do not have as their purpose or object of regulating the protection of rights with regard to the image of persons, the secrecy of sources of information or the inviolability of correspondence, but establish a number of rules for their protection only in so far as works or copyrights are protected.

The portrait, in this context, can be defined as immortalizing a person's face by artistic means such as photographing, drawing, painting, sculpting, etc. Furthermore, the publication of a person's photograph without his consent constitutes a breach of the special legislation on the processing of personal data, the data subjects having the right to oppose their processing. In addition, they may oblige the person who publishes them to delete those images (Law no 677/2001).

The court may also order him to pay moral damages if the data subject suffers a moral injury in that case and the cessation of the use of the image is not sufficient to cover that loss. It may be up to the situation where it is ordered that the person concerned be ordered to pay a fine fixed per day of delay until the court has been complied with in the case of refusal to delete those images as provided by the court.

Opinions in doctrine

We consider that not all portraits are subject to copyright in respect of the protection of the image of persons, an example of this being the making of one person's face on the basis of the description made by another.

In the same sense in other specialized works it is considered that the protection conferred by the law applies only to artistic portraits and does not apply for example in the case of the robot portrait, i.e. the drawing of a person's face on the basis of witnesses' or victim's relators (Cătuna 2013, 61). On the other hand, there are opinions in the doctrine which argue that it would be a restriction of the concept of portrait if descriptive representation were excluded (Roş 2016, 500).

However, account must be taken of the difference between the intellectual property right and the right to image of the goods, which is also the opinion of the specialized doctrine (Roş 2016, 497).

It is also worth mentioning that a distinction must be made between the patrimonial right and the moral right that the person portrayed has. In this respect, the High Court of Cassation and Justice ruled by Decision no. 3167/2014 finding that the *legislature sought to provide protection to the person represented in a photograph (portrait), recognizing both a patrimonial right, (...), and a moral right to the inviolability of the work enjoyed by the author of that work.*

In addition, the High Court found no moral right to inviolability could be applied if it had not been laid down in the law and that moral rights cannot be subject to any waiver or estrangements as provided for in Article 11(1).

At the same time, in our opinion, there is a difference between touching the portrait of a person and damaging the image of the author of that work. That is why we believe that we are facing two distinct situations. In the first, it is assumed that any touch to the portrait affects the entire work and it can be considered that the person portrayed has an interest in the whole work, stating that it is not mandatory to affect the image of the author, but only that of the person portrayed. In the latter case, the person portrayed can justify an interest only in his portrait and not in his whole work.

The law, however, does not make a clear distinction about this.

At the same time, there are also opinions that question the right to an image over the property that allows the owner of a good to oppose any exploitation of it, based on the exclusive nature of the right of ownership.

Thus, we have opinions that when the owner of a reproduction is used for himself by a third party, the latter acquires some of the economic utility of the good by giving the exclusive right of use that the owner of the property has (Ungureanu and Munteanu 2013, 141-151).

For the use of the portrait, account must be taken first of all of the consent of the person represented, as provided for in Article 89 (1) of Law 8/1996.

It is also necessary to take into account the right of the person to his own image as provided for in Article 73 of the New Civil Code which stipulates that a person *"may prohibit or prevent the reproduction, in any way, of his physical appearance or his voice or, where appropriate, the use of such reproduction"*.

An example of this is given by the Bucharest Court of Appeal – Ninth Civil and Intellectual Property Division by Decision no 223A /15.12.2009 in which it is verified that the portrait published in a magazine, without the consent of the person in the portrait, violates the provisions of Law no 8/1996.

Even after the death of the person, the portrait cannot be used or reproduced without the consent of the successors, for a period of 20 years, applying the rights provided for in Article 79 of the Civil Code which protects the memory of the deceased.

The legislature has also provided for situations where consent is not necessary as is the case where remuneration has been paid or the person represented is a model.

However, it is not constituted as a violation of these rights if the violations are permitted by law or by international agreements to which Romania is a party, as well as the exercise in good faith of the rights and freedoms provided for in the Romanian Constitution.

Another situation is that consent is presumed, for example “*when the person to whom information or material refers makes it available to a natural or legal person who is aware of his activity in the field of public information*”, as provided for in Article 76 of the Civil Code. In this case, a written agreement is not required.

The recipient's consent, or, in the event of his death, the consent of his or her successors, is also required in the matter of the use of correspondence addressed to a person, unless otherwise ordered. In this case, the provisions on the right to privacy provided for in Article 71 of the New Civil Code shall also apply.

Thus, in paragraph 3 of that article, it is clearly stated that it is “*prohibited the use, in any way, of correspondence, manuscripts or other personal documents, as well as information in a person's private life, without his consent...*”. At the same time, in this context, account must also be taken of the fact that the law provides that every person is protected from the right to dignity and his own image.

In the event of the use of correspondence, account should be taken of the provisions of Article 90 which provide that the use of a correspondence addressed to a person requires the consent of the consignee. Moreover, even after his death, the consent of his successors is necessary for 20 years if the recipient did not wish otherwise.

In addition, the Romanian Constitution provided for in Article 28 that the secret of letters, telegrams, other postal references, telephone calls and other legal means of communication is inviolable.

Failure to comply with the rules for the use of correspondence without the consent of the addressee may meet the elements of the offence of violating the secrecy of correspondence, which is provided for and sanctioned by Article 302 of the Criminal Code.

A special situation is raised by the issue of open letters, i.e. whether the conditions are met for them to be considered a protected work covered by the copyright and related rights law or merely correspondence.

Through the regulations made, the legislature wanted to give the right to claim respect for the integrity of the portrait and the correspondence, respectively, both to the person represented in the portrait and to the recipient of the correspondence. They shall enjoy, in accordance with the rules, the right to object to any change thereto and any damage to the work if it prejudices their honor or reputation.

If Article 91 is infringed, we are in the situation of disclosure of professional secrecy, the fact provided for in Article 227 of the New Criminal Code providing that the disclosure of data or information on a person's private life, such as to bring injury to a person, is penalised by fine or prison from 3 months to 3 years.

However, it is made that this act must be done by the person who has taken aware of this data by the profession or its function and which is obliged to keep their confidentiality.

In the same Article, in paragraph 2 shall be stated that in this case, the action will start at the pre-complaint of the injured party.

As regards the preservation of the sources of information used in the works and the non-publication of documents relating to them, the publisher or producer is obliged to keep the secret, the disclosure being permitted only on the basis of a court order or with the consent of the person who entrusted it to him.

Remedies for violating rights on portrait protection

As remedies for the violation of their rights, Law no 8/1996, Article 188 (1) provides that the rightsholders may request to the courts or other competent bodies, as appropriate, for recognition and a finding of infringement. In addition, they may also claim compensation for the damage

caused. The same requests may be made by management bodies, associations to combat piracy or persons authorised to use protected rights on behalf and rightsholders under the mandate granted for this purpose.

Persons authorised to use protected rights may also intervene in the process, requesting repair of the damage caused to them and where the action was initiated by the rightsholder.

With regard to the protection of personal data, the person may complain to the National Authority for the Supervision of Personal Data Processing. It may carry out checks and impose sanctions on operators in Romania.

It is much more difficult to apply a remedy if the data operator is abroad, especially if it is outside the European Union or in a region where international agreements to which Romania is a party are not applicable.

The use of a work containing a portrait without the consent of the person represented in the work and without such consent being implicit, constitutes an offence and is punishable by a fine in the case of both natural persons and legal persons who use portraits for commercial purposes without right.

The finding and sanctioning of the infringement shall be made on the basis of a complaint made and submitted to the competent authorities by the person who considers himself damaged.

Conclusions

We consider that in the matter of the protection of the portrait, the recipient of the correspondence and the secret of the source of information, the regulations of Law no. 8/1996 are sufficiently clear, but they must be corroborated by the general rules.

In all cases, a person who considers that he has suffered damage by using his portrait may apply to the court to seek an end to the injury and cover the damage suffered, whether it is material damage as is the case where the work is used for commercial purposes or moral damage in the event of damage to his reputation.

In the future the law will have to be updated in such a way as to cover new situations that will be due to the technological advance.

References

- Bodoaşcă, T. 2012. *Intellectual Property Law. 2nd edition*. Bucharest: Universul Juridic Publishing House.
- Bucharest Court of Appeal – Ninth Civil and Intellectual Property Section, Decision no 223A/15.12.2009.
- Cătuna, L. 2013. *Civil Law - Intellectual Property*. Bucharest: C.H. Beck Publishing House.
- High Court of Cassation and Justice, Civil Section 1, Decision no 3167/2014. Civil. Copyright and related rights.
- Law no 286/2009 – New Criminal Code, published in the Official Gazette no 510/24 July 2009.
- Law no 297/2009 – New Civil Code, published in the Official Gazette no 505/15 July 2011.
- Law no 677/21.11.2001 for the protection of persons with regard to the processing of personal data and the free movement of such data, published in Official Gazette no. 790/2 December 2001.
- Law no 8/1996 on copyright and related rights, published in the Official Gazette no 489 of June, 14 2018.
- Roş V. 2016. *Intellectual Property Law, Vol. 1, Copyright, Related Rights and Sui Generis Rights*. Bucharest: C.H. Beck Publishing House.
- The Constitution of Romania, amended in 2003, published in the Official Gazette no 767/31 October 2003.
- Ungureanu, O. and Munteanu, C. 2013. *Considerations on the right to image on goods*. Bucharest: Hamangiu Publishing House.