



## **(Lack of) Protection of Author's Moral Rights in Kosovo**

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**Abstract:** In Kosovo we have many young artists, writers, singers, actors, photographers, architects, painters and sculptors, who are young, talented and special, which amaze you with their works. The applicable law recognizes the aforementioned authors certain rights over their works (there are property, moral and other rights). But the problem is that the protection of the moral rights of the author is problematic in Kosovo. This protection is missing or is very pale. As a hypothesis of this paper I have decided: the differences between the moral and property rights of the author, the non-implementation and reasons of non-implementation of the moral rights of the author in Kosovo, the need for a deeper legal reform in this regard. The scientific methods I have used to come to conclusions are the method of research, analysis, especially the method of analysis of legislation, the method of comparison etc.

**Keywords:** author; property rights; moral rights; other rights; legal reform; non-implementation of moral rights

### **1. Introduction**

Kosovo, in terms of legal infrastructure, we can say that it has progressed far since its declaration of independence in 2008 by the Assembly of Kosovo. Kosovo now has a modern constitution, there are many laws and sub-legal acts that regulate different fields, in this regard also the field of intellectual property, namely the field of copyright. Kosovo protects the right of intellectual property by constitutional provisions (article 46 of the Constitution of Kosovo, approved on 09 April 2008 and entered in to force on 15 June 2008). Despite to the constitutional protection provided for in the above-mentioned constitutional provision and despite the fact that Kosovo in article 22 of its Constitution envisages the direct application

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of many fundamental international legal acts, inter alia, eg the Universal Declaration of Human Rights under article 27 foresees that “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”, we can say that legal protection of copyright in general in Kosovo is not in the right place, there is a lot of work to be done so that Kosovo joins the European countries which have made a comprehensive and rigorous legal regulation regarding with copyrights, in particular with moral rights. But in this regard, one should not look at things only negatively, in this regard the positive news is that Kosovo has tried before declaring its independence to regulate this field with legal norms. Prior to promulgation of Kosovo’s independence, Law no. 2004/45 on copyright and related rights (hereinafter: LCRR) which regulated this field, this law has been abolished and now we have a new LCRR no. 04/L-065, approved by the Assembly of the Republic of Kosovo. This law, in late 2016, has been subject to the procedure of supplementing and amending by the Assembly of the Republic of Kosovo, in this context we have the Law no. 05/L-047, amending and supplementing the LCRR. The recent legal changes have been made in accordance with the standards set out in the European Union directives in this field as Kosovo claims to be a member of the European Union in the future, in this respect the transposing of the directives in the domestic legislation is inevitable and necessary.

## **2. The Legal Regulation of Author’s Moral Rights in Kosovo**

Out of all immaterial goods, copyright protects original works in the field of literature and the arts. Traditionally, these include writings, musical compositions and works of visual arts as well as other creations of the mind (Kur & Dreier, 2013, p. 241). The fact of authorship is inalienable; it cannot be sold by the actual creator, and cannot be purchased by a third party (Merges, 2011, p. 157). Authors’ note that yet, although most of the justifications for copyright law point to this factor, one of the poorest areas of development in international copyright law is in relation to moral rights, and rights for employees (Dutfield & Suthersanen, 2008, pp. 89-90). The moral rights of the author, in essence, protect the personality of the author, the integrity of the author, the integrity of his work. The law calls them the exclusive rights which protect the integrity of a copyright work and the personality of its author (article 1.1.5 of the LCRR of Kosovo). Therefore, in essence, these rights are inalienable, eternal, may not become statute-barred and are exclusively personal and the author cannot renounce from them. It is said that moral rights in a

work are the soul of that work (Aliu, 2014, p. 98). Moral rights can also be justified on economic and public policy grounds (Stokes, 2001, pp. 65). To mistreat the work of art is to mistreat the artist, to invade his privacy and impair his personality. Another argument advanced in support of moral rights is the belief that “authors” are “almighty creators who pour particular meanings into their creations and therefore inherently have undisputed authority over the uses and interpretations of those creations” (Stokes, 2001, p. 65). The moral right of the author, by its legal nature, is exclusively an absolute right, which operates erga omnes. Absolute rights are of a negative character, all must be abstained from the realization of any action that would affect the violation of the moral rights of the author (Aliu, 2014, p. 99). They are not separated from the author (they are inseparable), the author can not transfer these rights to other persons with a contract, as provided in Article 1.1.2 of LCRR of Kosovo. The exclusive prohibitive norm which prohibits the transfer of the moral rights of the author with contract is article 65 of LCRR of Kosovo which expressly states that: “The author can not transfer his moral rights to another person”, that it to say the transfer of moral rights of the author is strictly prohibited by law. Kosovo recognizes 4 moral rights of the autor, they are: The right to first publication (article 17), the right to recognition of authorship (article 18), the right of the integrity of work (article 19) and The right to remorse (article 20). From this it is noted that the moral rights of the author in Kosovo are “numerus clausus” or expressly defined. Moral rights, on the other hand, cannot be assigned but can be inherited (Brazzell, 1998, p. 77). The right of integrity is a little harder to interpret, since it is open to interpretation what treatment might be derogatory of a work. “Derogatory” is defined as including anything which distorts or mutilates the work or is otherwise prejudicial to the honour or reputation of the author – but authors are famously touchy people, and may feel themselves dishonoured more easily than less creative spirits (Brazzell, 1998, p. 76). The moral component is made up of moral-personal rights of the author, which are accepted solely for the author and which can not be subject of transfer or legal circularity, namely, the same are related to the personality of the author and consequently can not be object of copyright contracts (such as the right to be marked as the author of the work and the right to recognition of authorship, the right to respect the inviolability of the work of the author, the right to remorse - the alteration of the work of the author, and the like) (Blakaj, 2013, p. 15).

### **3. Typical Differences between Moral and Property Rights of the Author**

First, the moral rights of the author are the exclusive personal authorizations to protect the inviolability of the author's work and personality, the integrity of the author and his work, and the property rights are the exclusive property authorizations intended to protect the property interests of the author or the physical person that created the work. The moral and property rights of the author are therefore two sides of the same "currency". Thus, *inter alia*, article 13, paragraph 2 of LCRR no. 167/03, 79/07, 80/11, 125/11, 141/13, 127/14, 62/17 in force from 08.07.2017 of Croatia has ruled that moral rights of the author protect personal and intellectual ties of the author with his work, economic rights of the author protect economic interests of the author in respect of his copyright work (See in a comparative context also article 20 of LCRR no. 35/2016 of Albania, approved on 31.03.2016). Kosovo recognizes these property rights of the author: the right to exploit the work (article 21 of LCRR of Kosovo), this law recognizes 3 forms of exploitation of the work: a) the form of thematic exploitation where it enters particularly the right of reproduction, distribution and leasing, b) the form of nonthematic exploitation where it enters particularly the right for public interpretation, the right for use by "Audiovisual media service", the right for public communication through phonograms and videograms, the right for public disclosure, the right for making the work available to public and c) the form of modified exploitation where it enters particularly the right of processing and the right for audiovisual adaptation (article 22 of LCRR of Kosovo). Whereas, Kosovo recognizes 4 moral rights of the author, they are: The right to first publication (article 17), the right to recognition of authorship (article 18), The right of the integrity of work (article 19) and The right to remorse (article 20). Economic rights allow right owners to derive financial reward from the use of their works by others. Moral rights allow authors and creators to take certain actions to preserve and protect their link with their work (WIPO, 2016, p. 9, Aliu, 2013, pp. 308-309 & Torremans, Semini-Tutulani & Dedi, 2005, p. 79). Property rights are transferable and limited in time (Aliu, 2014, p. 109) whereas the moral rights are not transferable, ie they can not be transferred from the author to another person by contract or by inheritance under the provisions of the Law on Inheritance (Torremans, Semini-Tutulani & Dedi, 2005, p. 79). The applicable law has clearly decided the rule that: "The property rights and other author's rights are component parts of the property of their holder and can be subject to legal transfer" (article 67 of LCRR of Kosovo). Whereas, on the basis of the interpretation of the legal

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provisions in force, the legal transfer of the moral rights of the author is prohibited (article 65 in relation with article 82.1.2 of LCRR of Kosovo, article 60 of LCRR nr. 104/2009, 99/2011, 119/2012 i 29/2016 of Serbia and article 24, paragraph 7 of LCRR of Albania). Article 75 of the applicable law begins with expressions “The author can assign the property right to another person...” argumentum ad contrario we can conclude that the author can not transfer to the other moral rights because they aren't from their nature transferable. Another difference according to modern jurisprudence is that moral rights are accorded only to human authors and cannot be “owned” by a company. For this reason, a publishing house cannot claim moral rights (WIPO, 2007, p. 14), whereas according to article 68, paragraph 2 of the applicable law “Except the author, the right holder from paragraph 1 of this Article can be also natural person or legal entity to whom these rights are assigned on legal basis or by legal actions”. Based on the interpretation of this legal provision, we conclude that property rights can be owned by juridical persons as well, while the author's moral rights are owned by the author himself because it is impossible for a juridical person to possess the moral rights of the author in the name of the author. A very problematic issue both in the legal and the doctrinal context is that, can the author renounce from his moral rights? In this context, under article 50 of the LCRR of Croatia expressly it is decided that “The author may not renounce his copyright”. Inter alia, also article 20, paragraph 7 of the LCRR of Albania decides that “own non-property rights of the author are not object of renunciation”. The problem lies in the legal aspect of the Republic of Kosovo because we do not have any legal provision expressly stipulating that the author can not renounce his moral rights. Apart from the theoretical importance of solving this problem, I think that this issue has also practical importance. What if the author does not publish his work throughout his life? Does this mean a “silencing” renunciation of his moral right to the publication of work? Does this “renunciation” also affects the author's inheritors? What if the work is of particular importance, public importance, is it allowed for the inheritors to publish it without the consent of the decedent? In this regard, there are many questions that are worthy of argument. In this regard, it is accepted that the possibility of renouncing moral rights is in contradiction with the essence of the concept of moral rights, as an essential safeguard for the author or leader, as a weaker party. This possibility for the author to renounce from his or her moral rights, in essence weakens the influence and value of moral rights (Torremans, Semini-Tutulani & Dedi, 2005, p. 78). The first sentence of article 17 of the applicable law decides that 'The author has the exclusive right to decide', we can say argumentum ad contrario that the author has the exclusive right to decide

also the opposite, to decide not to publish the work. Nothing and no one can force the author to publish a certain work, it is in his will to decide whether to publish or not the work. In the comparative law, article L-121-1 and the following, in particular articles L-121-2 and L-121-3 of the Code of Intellectual Property of France help us greatly because there it is claimed that the moral rights of the author are unalienable, may not become statute-barred and are eternal. Moral and property rights of the author differ also because of their time limitations. In principle, the copyright shall run for the life of the author and for seventy (70) years after his death (article 61 of LCRR of Kosovo, article 41 of LCRR of Albania, article 55, paragraph 1 of LCRR of Macedonia (Official Gazzete no. 115/10, 140/10, 51/11, 147/13, 154/15 and 27/16), article 102, paragraph 1 of LCRR of Serbia, article 99 of LCRR of Croatia, article 55 of LCRR of Bosnia and Hercegovina (hereinafter: BiH), Official Gazette, No. 543/10 on 13 July 2010. The right of publication and the right of withdrawal referred to in Article 17 and 20 shall run for the life of the author (article 63 of LCRR of Kosovo). Whereas, the obligation for respecting the author's right, Article 18, and the right of the integrity of work, Article 19, shall run without any term limitation (article 64 of the LCRR of Kosovo). In Albania, under article 40 of LCRR, the personal non-property rights of authors are protected without any time limit. After the death of the author, the protection of these rights is taken over by the legal heirs and, in their absence, is done according to the rules set forth in the Civil Code. In Serbia, under article 102, paragraph 2 of LCRR moral rights of an author shall last even after the expiration of his/her pecuniary rights.

#### **4. (Lack Of) Protection of Author's Moral Right in Kosovo - Theory and Practice**

The author protects his moral rights through the court. At the moment the author finds that one of his moral rights has been violated, author can avoid this violation in some ways. First of all, the author may notify his moral right violation at the state prosecutor's office or at the police as a criminal offense. Violation of author's rights is foreseen as a criminal offense under the Criminal Code no. 19, 13 July 2012 of Kosovo under article 396 (Salihu, 2014, p. 417; Salihu, Hasani & Zhitija, 2014, p. 822). Based on the interpretation of this legal provision, we conclude that this legal provision protects the author, inter alia, from violating his moral rights. Leaving aside the criminal aspect of the protection of the moral rights of the author, the author may realize his judicial protection through the court in the civil

procedure initiated by lawsuit. According to article 252 of Law no. 03/L-006 on Contested Procedure of Kosovo “The trial of the case in the court starts with the written claim charge (claim of obligation, certification or change)”. In Kosovo civil protection is foreseen in article 181 of LCRR (see in a comparative context article 162 of LCRR of Albania, article 172 of LCRR of Croatia, article 150 of LCRR of BiH). When the exclusive rights granted by this Law were infringed, the right holder may claim recovery of non-material damages, suffers as a result of an infringement of moral rights under article 181, paragraph 1, subparagraph 1.5 of LCRR of Kosovo, article 205, paragraph 2 of LCRR of Serbia dhe article 194 of LCRR nr. 01-933/2 of Montenegro. Irrespective of any material damages remunerated from the infringer, the author or performer has the right to claim proper monetary remuneration for his violated moral rights (article 183 of LCRR of Kosovo and article 159 of LCRR of BiH). The judicial protection of the moral rights of the author in Kosovo is made by the competent court, which is the Basic Court in Pristina - Department of Economic Affairs, based in Prishtina according to article 13, paragraph 1, subparagraph 5 of the Law on Courts of Kosovo. The court decides in an expedited procedure in relation to matters where the subject matter is the moral rights of the author under article 187 of LCRR of Kosovo. In Kosovo, there have been some changes to the Law on Courts in Kosovo, but the Court’s competence to decide on civil matters related to intellectual property rights (in particular copyright) has never been affected. In this regard, it is worth mentioning that Kosovo has only a few outstanding and experienced experts in the field of copyright. In this regard, in case-law of Kosovo, we have only a few cases of civil protection of author’s moral rights. One case that is worth mentioning is the case J.SH from Shkodra, Albania vs. Publishing Company “Gj.B” with headquarter in Pristina before the District Commercial Court in Pristina (C.nr. 646/2006, dated 28.01.2009) confirmed by the Supreme Court of Kosovo in Pristina (Ac.nr. 28/2009, dated 10.01.2012). The factual issues in this case were as follows: Plaintiff as inheritor of the deceased author, because of the violation of author’s rights (translation without authorization of work), requested from the Court compensation for material and non-material damages namely 6.800 Euros for two prints in 1,000 copies, 50,000 Euros for lost profit and 40,000 euros for moral damage. The first instance court approved the lawsuit in the name of compensation for reprinting the work in the amount of 3,430 Euros, whereas the other part of the lawsuit, inter alia, also for the moral damage in the amount of 40,000 Euros was refused as unfounded. This judgement has been confirmed even by the last instance of the Kosovo Judiciary System (Supreme Court), inter alia, in reasoning it has

been said that in article 66 of LCRR of Kosovo (the old one, no. 2004/45) it is foreseen that moral rights of the author can not be transferred from the author to other persons, while there is no final judgement or written agreement with which the author of this book has been admitted to such request, so in such a case, such a request does not pass on the author's inheritors, whereas the plaintiff herself has no right to this claim because she's not the author of this book. One flagrant case of violation of moral rights of the author is in Albania, case Nuri Çumani vs. "Shekulli" newspaper, with headquarter in Tirana, Albania and "Unipress" company, with headquarter in Tirana, Albania, confirmed by the Civil College of the High Court of Albania, no. 1975 of basic registry, no. 1391 of decision, dated 09.06.2016, where it has been said in the reasoning, inter alia, that: "Publication of this work without the permission of the author, or without citing his name in the publication, and then publication not in the proper professional quality (weak) has diminished the values of this work as well as the public image of the plaintiff."

## 5. Conclusion

In the light of all the aforementioned considerations, I conclude that unfortunately Kosovo sufficiently does not protect moral rights of the author (de facto) while de jure protects them. Moral rights of the author in Kosovo are defined by law, in the sense that they are regulated by law but what is lacking is the proper consciousness of authors' so when moral rights of theirs are violated to file lawsuits before competent courts and to protect them. This element lacks at the awareness of authors' in Kosovo because they are hesitating to raise their voice before the courts and seek legal protection for their works, this should change in the future of Kosovo.

From the analytical elaboration of the topic, I make these recommendations:

1. To raise the awareness of the authors to protect their moral rights through the courts (to make awareness-raising campaigns, organize seminars, scientific conferences, meetings, sessions etc.);
2. To evolve the legal regulation of the moral rights of the author in terms of their protection, in harmony with the achievements of the European civilized countries, with the European Union legislation and with the best judicial practices of the EU;
3. To organize regular legal training sessions by the Academy of Justice for raising the professional awareness of judges dealing with this issue in order to resolve



these civil matters in a fair and lawful manner. These trainings must be held by prominent copyright experts, especially from local and international university professors with experience in this field; and

4. To organize regular legal training by the Chamber of Advocates of Kosovo for increasing professionalism of lawyers involved in these cases so that the interests of the parties are protected as much as possible in the court. These trainings must be held by prominent copyright experts, especially from local and international university professors with experience in this field.

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