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Copyright and Ethics in Architectural Practice – selected issuesy

In order to understand the meaning of ethics it is important to see the relation between ethics and law. Law does not regulate everything in our life – what we experience at work, in social or family life. But even if it did, then – as somebody once said and what is mentioned by Lech Niemojewski – ethics is an internal restriction which sometimes does not allow for the use of our rights.

Andrzej Zwierzchowski

Introductory notes

The specific nature of the architect's profession results in the development of special professional ethics which deals specifically with the activities conducted by that group of specialists. It is usually codified by a self-government or trade associations. This results in the development of a system of norms which demonstrates both consistency and nonconformity with similar systems which may concern architectural operations – especially with the system of statutory law.

It should be presumed that these nonconformities are especially significant where ethical and legal norms come in contact as the latter ones result in the emergence of real liability imposed by the state. The words by A. Zwierzchowski quoted above accurately indicate the reasonability of the system of ethical norms – they often protect the values which are not subject to legal regulation and as such they do not entail legal liability, however, their significance can be greater than applicable legislative regulations.

This elaboration is a continuation of the speech (paper) regarding the relations between the legal regulation of copyright relations in the area of architecture and the rules or norms defined as ethical. In this article, to a large extent due to the time restrictions imposed by the Conference organizers, I would like to tackle selected problems known from practice, and thus present the practical application of the issues presented in the previous paper. This will be specifically concerned with the clauses used in practice of trading and especially contractual provisions; in particular, I will try to present my evaluation of the effectiveness of such clauses in the light of legal norms and in respect of ethical principles which apply to Polish architects. In that latter case, I will make use of the *Architect's Code of Professional Ethics* which is attached to the Resolution 01 of the 3rd National Reporting Conference of the Chamber of Architects adopted on June 18, 2005[1]. It seems that the most interesting practical problems connected with the subject discussed here regard the contractual clauses regulating author's moral rights to an architectural work. That is why the following deliberations are basically devoted to that issue.

[1] I am referring to the text of the document presented on the website of the Polish Chamber of Architects: www.izbaarchitektow.pl; hereinafter the "Code".

Admissibility of an author's permission to interference in his/her moral rights

The introduction to the analysis of the issues discussed here includes the establishing of the conditions of legal effectiveness of the permission granted by an architect and included in the contract to interference in his/her moral rights. In practice of trading, specific contractual clauses can take various forms, and consequently the situation of the parties can be different in respect of the scope of transferred rights and assumed obligations. Therefore, the discussion

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that follows will not refer to any specific clauses in the literal sense, but to the general admissibility and reasonability of their incorporation into the contract as the basis of the relationship between the architect and his contractor.

Such clauses may concern the copyright in general and the copyright was structured "dualistically" by the legislator, therefore, it applies to the author's economic rights (Art. 17 and the following of the Copyright Act) as well as the author's moral rights (basically Art. 16 and 78 of the Copyright Act) which demonstrate significant differences in respect of legal character.

No major doubts arise from the admissibility of transfer of the author's economic rights or authorization (granting license) to use the author's economic rights, including the right to grant the permission to exercise his/her derivative copyright (compare Art. 46 of the Copyright Act). The possibility to administer the author's moral rights can be also tentatively excluded from the discussion as they were structured by the legislator as non-transferable. Some doubts can, however, affect the effectiveness of the obligation – incorporated in some contracts – to use the author's moral rights by the legal successor of the author architect, which sometimes in practice of trading takes the form of obligation to "restrain oneself from the exercise of the author's moral rights".

The doctrine of copyright admits the possibility to contractually *undertake not to exercise towards a specific person a specific moral right or even to allow such a person to exercise a specific right on behalf of the author* [1, p. 68]. Such an act should be classified as exercise of copyright and not its administration. It is also possible to contractually regulate the "granting for a fee of permission by the author to perform specific acts that – otherwise – would be qualified as a violation of the author's moral rights" [ibid.]. In practice this issue seems to be most significant in respect of the right to a work's integrity that protects the right to have the contents and form of the author's specific work of architecture inviolable (Art. 16 pt. 3 of the Copyright Act).

According to E. Traple, there are […] *no restrictions for the author to permit the person who acquires the rights to make any changes that the author can deem necessary from the point of view of an assumed way of use of the work* [3, p. 856]. On the other hand, M. Kępiński assumes that […] *the author can agree only to specific changes suggested by the person who acquires the rights. The author, however, cannot effectively permit the person who acquires the rights to make any changes in the future* [2, p. 444], and in the case when such a clause is used, he/she grants the author the right to revoke the permission and oppose the changes to the work; provided, however, that such a "universal" permission can affect the scope of claims made on the grounds of violation of the integrity of the work [ibid.].

It seems then that the opinions of lawyers on the issue discussed here are rather varied and in effect the doctrine of law does not provide a completely straightforward answer to the questions posed at the beginning. Furthermore, referring these issues to the provisions of the aforementioned Code leads to the conclusion that in this respect the professional ethics of architects considers that issue an "internal" problem of individual authors, imposing a general restriction of the compliance of such acts with applicable legal regulations. This means that its resolution was considered to lie within the domain of regulated law, so acting in compliance with legal norms applicable in this respect, in particular the Copyright Law should be considered to be in compliance with ethics.

The analysis of the provisions of doctrine of the copyright law referred to above indicates that the possibility of granting an unrestricted permission to interfere in the structure of a piece of work is rather unequivocally excluded. However, there is a universal agreement to the possibility of granting an "incomplete" permission, which, in respect of architects' activities, can refer only to the modification of designated parts of an architectural structure or only to the modification of a specific kind of such a structure. In practice, only the cases when the permission is granted in a too general way can be effectively questioned.

Furthermore, the author is required to know the circumstances and the scope of changes which his/her obligation refers to so that the nature of the permission is not "universal". In reference to practice of trading, it can be assumed that the permission of an authorized owner of the author's moral rights does not have that quality if its content indicates circumstances in which adequate modifications interfering in the moral rights shall be made. When assessing specific contractual provisions, one should also refer to the experience which the designer should have in connection with the execution of building investments, including the one which can be verified by the criterion of the circumstances indicated i.e. in the contract.

The problem of possible revocation of the previously granted permission to interfere in the author's moral rights is a significant issue. On the whole, it is possible to revoke such statements. However, such an act on the part of the author results in his/her possible liability for violation of his/her contractual obligations [1, p. 70]. It is, however, impossible to revoke such permission in situations when it was granted in reference to authorship designation, a decision to make it available to the public for the first time and if it applies to a specific change in the complete piece of work [ibid.]. It can be assumed that this refers to the situation when an intended objective of such an act was in a special way "consumed", and consequently the effects which are difficult to reverse of the arrangements made in this respect already took place.

Furthermore, the interpretations of the doctrine of law emphasize the principle whose aim is to slightly objectify the assessment of the possibility of revocation of the permission with reference to the protection of moral rights by the author: […] *the author* […] *can revoke his/her permission to specific acts by the third person only when he/she proves that in a specific situation, when granting the permission to specific interference in the work or conduct of the third person (e.g. in reference to the decision on dissemination of work), he/she could not be aware of the consequences thereof due to the violation of his/her link with the work* [ibid.].

Hence, the legally admissible disposition of the author's interests protected by the author's moral rights seems to be generally possible, but at the same time it is substantially limited in the interest of the author. This results in a situation when formulating adequate contractual clauses, if they are supposed to legally – and as such permanently and legally predictable in respect of their effects – build the relations

between the parties to a specific contract, requires that a number of arrangements between them be complied with. Such arrangements, in compliance with the criteria referred to above, must take into account the specific character of a particular relationship. This means that in practice of trading it will be basically difficult to suggest *a priori* a "universal" clause which would fit every possible situation.

The above interpretation of the provisions of the Copyright Act is dominant, but not the only possible one. To complement the whole picture, it should be mentioned that J. Barta and R. Markiewicz [ibid., p. 71] do not exclude the development of a court interpretation (although it will be in total violation of practice and theory applied so far), according to which individual author's moral rights could constitute an object of trading, waiver or transfer [ibid.], which would make them similar to the current situation of the author's economic rights.

Contractual obligation not to exercise the copyright and derivative copyright to architectural derivative work

It should be, however, clearly stressed that the circumstances described above assume the maintenance of the identity of the design, its execution and legalization of changes without creating a "new" piece of work in the meaning of law. However, they are not applicable to the situation where on the basis of the original design a different piece of work is developed – one which possibly can be considered a new piece of work, though it is called "derivative work" or a modification in relation to the original work i.e. the work derived from another author's original creative architectural project in the meaning of Art. 2 of the Copyright Act. Then the problem is not directly connected with the protection of the author's moral rights as it is a dominant opinion that the right to grant the permission to exercise derivative copyright is in its nature economic and as such transferable[2].

Sometimes, in practical terms, the difference between those situations, which is legally significant, is not clearly distinguished. The very legalization of the possibility to conduct derivative work (change of the original design) is not a problem here – the production of the work derived from another author's work, even without the permission of its original author, in accordance with the Copyright Act is perfectly legal (compare Art. 2 of the Copyright Act). This arises from the fact that the work to be developed is attributed not to the author of the original work, but to the author of the derivative work (i.e. a modification of the original). It is, however, important how the derivative work is used by the "new" designer.

The rules pertaining to that case arise primarily from Art. 2 of the Copyright Act. In particular in the case when the elements of the original design which are copyrighted (creative elements) are used in the new work, regardless of the permission to use it (Art. 2 pt. 2 of the Copyright Act), it is customarily required to inform the possible recipients of the work that the work derived has the character of the modification of the original design (original work) and to indicate its author as well as its title (compare Art. 2 pt. 5 of the Copyright Act).

It is impossible in this context to ignore yet another situation in which the work produced under the inspiration of the original work is similar to it. This results in creating, also in the light of law, a totally different product, independent work (Art. 2 pt. 4 of the Copyright Act). In practice, resolving the issue of whether a piece of new work is a modification (derivative work) or a result of being inspired by a different work shall require an expert analysis conducted a number of times in the scope of architecture (i.e. opinion of a court expert) which would go beyond a strictly legal assessment of a specific case.

As indicated in the introduction, in practice of trading, sometimes questions are asked about the effectiveness of contractual clauses which provide an obligation not to "exercise the author's moral rights" in relation to a specific architectural work. Sometimes such a conclusion is connected with the clauses regarding the right to grant the permission to exercise the derivative copyright (Art. 2 of the Copyright Act).

It should be clearly emphasized that, in accordance with the opinion which I think is correct and dominant in the Polish literature, the right to grant the permission to exercise the derivative copyright is economic in its nature. Consequently, it does not seem reasonable to derive it from those clauses which refer only to the exercise of the derivative copyright. The right to grant the permission to exercise the derivative copyright is considered a separate field of exploitation which is not mentioned in Art. 50 of the Copyright Act [4, p. 406]. In practice, this means that as a transferable right it can be claimed by legal successors of the original author, and consequently by somebody else than this author. It is especially important in the situations where the execution of a design is complex and it is done by whole teams of participating architects who frequently act in trading as legal persons. In a specific case, there are no restrictions for such a legal person to become an owner of such rights and to perform obliging or administrative acts in this respect.

That situation changes significantly if it is referred directly to the obligation to restrain from exercising the author's moral rights. Those rights are non-transferable so basically their original author remains their owner indefinitely. Consequently, it is only the original author who can effectively assume such an obligation. His/her transfer of even all of the economic rights (including the right to grant the permission to exercise the derivative copyright) does not change that situation.

This issue is not always clearly distinguished in practice of trading. The negative legal effects of this seem to be obvious, but for the sake of the presentation of the whole picture this should be illustrated with an example.

It can happen that an architect – author (or co-author)

[2] Cf. e.g. M. Kępiński, [in:] *System Prawa Prywatnego* (volume 13), *Prawo autorskie* (edited by J. Barta), Warsaw 2003, p. 444, and literature referred thereto.

of a specific piece of work is an employee and then usually (on the basis of Art. 12 of the Copyright Act) his/her employer shall, on certain conditions, acquire the economic rights to his/her creative contribution. If, at the same time such an employee has not accepted an appropriate obligation regarding the exercise of moral rights in the contract of employment or additional declaration connected with a specific piece of work, neither the employer, nor any of his/her legal successors can in legal categories expect that the actual author will restrain himself/herself from exercising his/her rights. In this situation, the obligation towards such entities shall not arise.

If, despite such a defect, the applicable rights are transferred to the investor by the author's employer, which frequently happens in the case of major investments, then such an entity by, for example, undertaking acts in violation of the integrity of a piece of work actually violates the sphere legally reserved for the author and is exposed to liability towards such an entity; at least in the scope in which it is liable regardless of the fault (compare Art. 78 of the Copyright Act).

In the situation described here, the liability of the project's author's employer towards such an investor is relatively limited as it is basically a guarantee in nature in the meaning of art. 392 of the Civil Code. This does not provide for a possibility to prevent a specific author – owner of moral rights from claiming his/her rights and it only results in the creation of the obligation to release the employer's contractor from the consequences of undertaking such acts by the author – employee.

The example presented above shall be referred directly to the cases of acquisition of economic rights from a specific author on the basis of a civil law contract and the situation where the elements of a specific execution are connected with the participation of sub-contractors.

In practice, securing the interests of the participants in such complex relations in the scope described above requires making prior adequate declarations by the owners of the author's moral rights and at the same time "extending" their effectiveness to further legal successors of the entities for whom such declarations were taken. The contractual assurance of acquisition or use of the right to grant the permission to exercise the derivative copyright is then insufficient.

The problems described here are intensified in a special way in the cases of constructing even a part of an architectural structure which is a fixation of a specific piece of work. Unless it is connected with the permission of the owner of the author's moral rights, the interference in such a fixation is illegal.

Summary

The term "ethical norms" is not a strictly legal (statutory) term so its meaning derives from its colloquial interpretation. At the same time it is universally accepted that such norms "are incorporated" into the legal system with the use of the general clause of the "principles of community life". In effect, ethical norms, which are basically identified with moral norms, play a significant role in application of legal regulations, including those concerning architectural operations.

The basic function of such norms is to remove any possible discrepancies between statutory regulations and universally acceptable non-legal rules. In the system of statutory law, whose element is copyright, this is a necessary function. This especially refers to architectural operations; the specific nature of that profession results in the formation of specific professional ethics and the development of a specific system of norms (principles of professional ethics) which in practice demonstrates both consistency and nonconformity with other such systems, which can concern operations conducted by architects – including especially the system of statutory law as well as the moral norms that arise from religious ethics, etc.

References

[1] Barta J., Markiewicz R., *Prawo autorskie,* Warsaw 2008,
[2] Kępiński M., [in:] *System Prawa Prywatnego* (volume 13), *Prawo autorskie* (edited by J. Barta), Warsaw 2003
[3] *Prawo reklamy i promocji*, Warsaw 2007
[4] Traple E., [in:] *Prawo autorskie i prawa pokrewne. Komentarz*, pp. 406–4

Prawo autorskie a etyka w praktyce architektonicznej – wybrane zagadnienia

Określenie „normy etyczne" nie jest terminem prawnym (ustawowym), ale prawniczym, a więc jego znaczenie wynika z jego potocznego rozumienia. Jednocześnie powszechnie przyjmuje się, że normy takie „włączane są" do systemu prawnego poprzez klauzulę generalną „zasad współżycia społecznego". W efekcie normy etyczne, zasadniczo utożsamiane z normami moralnymi, odgrywają istotna rolę w stosowaniu przepisów prawnych, w tym dotyczącym działalności architektonicznej. Podstawową funkcją takich norm jest usuwanie ewentualnych sprzeczności pomiędzy regulacja ustawową a powszechnie akceptowanymi regułami pozaprawnymi. W systemie prawa stanowionego, którego elementem jest prawo autorskie jest to funkcja niezbędna. Dotyczy to zwłaszcza działalności architektonicznej; specyfika wykonywania tego zawodu prowadzi do wytworzenia specyficznej etyki zawodowej. Prowadzi to do powstania swoistego systemu normatywnego (zasad etyki zawodowej), który wykazuje w praktyce zarówno zgodność, jak i rozbieżność z innymi takimi systemami, które mogą dotyczyć działalności wykonywanej przez architektów – w tym zwłaszcza systemem prawa stanowionego, ale także normami moralnymi mającymi swoje źródło w etyce religijnej itp.

Key words: intellectual property law in architecture, code of professional ethics

Słowa kluczowe: prawo autorskie w architekturze, zasady etyki zawodowej