

## Ghostwriting in Polish Copyright Law – A New Perspective Needed?

Marlena Maria Jankowska†

Department of Civil Law and Private International Law, Faculty of Law and Administration, University of Silesia, Katowice, Poland

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It is worthy of note that the so-called ‘ghostwriting’ contracts are subject to much debate under the copyright legislation of most countries. There is usually little concern where moral rights are perceived as waivable, which appears to be the current situation in most common law systems. However, in most civil law systems in continental Europe, where it may have been explicitly stated that these rights are not transferable (and sometimes unwaivable too), statutory law struggles to find the answer as to whether ghostwriting constitutes an unenforceable or even illegal activity. Yet, it is known that in the legal doctrine of certain countries (Germany, Switzerland) ghostwriting contracts are in principle allowed under copyright law. This paper provides a detailed analysis of the ghostwriting contract from a ‘hometown’ perspective, which happens to be Polish copyright law.

**Keywords:** Ghostwriting, moral rights, copyright, contracts, right of authorship

To paraphrase the old jazz standard, when it comes to artistic works one may ask ‘*is you is or is you ain’t the author.*’<sup>1</sup> This question which comes up every time we hear about ghostwriting, is not a question which can be answered easily. This practice tacitly makes the person who orders or commissions the work an author, although inalienability and unwaivability of authorship seems to be the general rule in the copyright systems of many countries. This paper aims to analyse the Polish doctrine of copyright law on the issue of how much liberty the author has, especially as regards contracting the right of authorship. Therefore this paper consists of two parts. The first part introduces the ghostwriter’s profession as well as the nature of moral rights. The second part illustrates how ghostwriting is perceived from the point of view of Polish copyright law. This article proposes a hybrid approach to the issue.

### Ghostwriting and the Nature of Moral Rights

#### The Practice of Ghostwriting

The notion of a ‘ghostwriter’ on the European continent has been borrowed from American terminology and has not yet been replaced by a good equivalent in Polish or in German. A free translation has appeared only in French (French: *nègre*, meaning a ‘slave’ in English).<sup>2</sup> A Polish translation of the term ‘ghostwriter’ could be ‘murzyn’ (meaning a ‘literary

slave’ in English) or ‘widmo’ (meaning a ‘phantom’ in English), as suggested by the Polish Wikipedia, but as a matter of fact, the term ‘ghostwriter’ is better recognised than its Polish translations. The practice of using the original term is illustrated by its reference in countless Polish journals that address ghostwriting in the submission requirements.<sup>3</sup>

The use of English terminology which is probably a result of the nature of the concept itself, is difficult to substitute. Typically, a person associated with ghostwriting is one who is mandated to write down another’s autobiography, or speech; namely, someone who effectively ‘enters’ the character of the other party, their style, their way of thinking and speaking, as a result of which they remain a sort of ‘ghost’ shadowing the whole creation of a work.<sup>4</sup> In German, this phenomenon has been described as ‘Fremdorientierung’ (which in English might be translated as ‘other-oriented’).

Ghostwriting is a phenomenon defined as the act of creating a work for a commissioning party, to be later circulated among public, but credited to the commissioning party rather than the actual author. It is worth noting, that the borders of this practice seem to be both broad and blurred. They are blurred, in that it is sometimes difficult from the external perspective to separate ghostwriting from seemingly similar situations such as: (1) signing one’s work in the name of another famous author (without consent) in order to attract an audience; (2) assuming a pen-name that

†Email: marlena.jankowska@interia.pl

creates a false impression of a connection with a famous author; (3) concealing one's identity by assuming a pen-name and allowing another person to take credit for the work.<sup>5</sup> Thus, there are quite a few situations that may appear to be similar to ghostwriting, but as a matter of fact are subject to different provisions of law due to different legal qualifications. For instance, in case of misattribution designed to mislead public and gain profit, the original author may claim right to non-attribution. Though the above situations differ somewhat from ghostwriting, they happen to have one feature in common – the works bear a name that is not that of the actual author. At the same time, ghostwriting is a very broad practice, with many varied actions actually recognised under copyright laws as leading to the creation of a work ranging from joint authorship to independent authorship, not to mention derivative work.<sup>6</sup> Therefore, the process of creating the work is worth a deeper look to understand the legal qualification.

The practice of ghostwriting is associated mainly with writing speeches for politicians, diaries for famous people, and occasionally 'trivial' literature. It is a less known fact that, over the centuries, this institution has managed to cover other kinds of artistic work such as music (hence the term 'ghostcomposing') and fine arts (termed 'ghostpainting'). Nowadays, it is gaining a further dimension and a completely new form in the developing practice of submitting academic works or publications to scientific journals with the results of investigations and medical trials bearing the names of academic doctors whose role in writing the article is limited only to signing it.

Given that ghostwriting is not a new phenomenon, the relative dearth of worldwide literature dedicated to this practice is surprising. This should, therefore, awaken our interest to enquire as to how the concept of authorship is to be perceived, especially when it comes to the practice of ghostwriting.

### **The History of Ghostwriting**

According to Schack, the profession of a person creating a work for a client – which is then publicly distributed not under the name of the actual author, but that of the commissioning party – is as old as time. Doubts concerning the legal justification of ghostwriting became more common only at the beginning of the twentieth century, when regulations concerning moral rights became an obstacle in this practice. It was at this point that scholars came up with different theories allowing for ghostwriting from

the legal point of view. These concepts included the transfer of moral rights, the promise to refrain from executing the right of authorship, and abdication of the right of authorship.<sup>7</sup>

The profession of ghostwriter certainly existed as far back as ancient Rome. There were authors who allowed their works to be circulated in the name of somebody else, in return for money. Martialis mentioned two other poets, Gallus and Lupercus, who sold their works; as well as a certain Paulus, who was said to buy lyrics and present them as his own.<sup>8</sup>

Source texts indicate that ancient civilisations had no legally arranged norms that protected authors, though this thesis seems to be an overgeneralisation.<sup>9</sup> Literary authors attached great significance to ownership and that no one should be allowed to appropriate their works. Violation of these rules caused great commotion and such behaviour was considered as violating social or even ethical norms.<sup>10</sup> According to Grzybowski, a prominent Polish legal scholar, 'the views of the ancient authors, and possibly also a certain group of the readers, anticipated the normative state'.<sup>11</sup> Before the legal regulations granting moral rights to authors were established, 'intellectual property law' had a strictly personal or ethical character. A work was perceived as a material or physical carrier. Also, according to Corpus Iuris, the person entitled to the manuscript was the owner of the material.<sup>12</sup>

Although the Middle Ages were not a time when authors were particular about the fame their work brought them, there were already a number of authors wanting to protect rights that later took on the shape of moral rights. Eike von Repgow in 'Sachsenspiegel' ('Mirror of the Saxons') of 1230 was said to have written 'Eyke von Repchowe iz tete' ('Eike von Repgow is my name').<sup>13</sup> Also Nicolaus von Jeroschin, in 'Kronike von Pruzinlant' ('The Chronicle of Prussia') of 1330 wrote 'Nu sol ich ouch hi nennen mich, zwar nicht in rümis gere, want ich des gerne impere' (the gist in English: 'I want you to name me, but it is not that I desire fame, that I want to have').<sup>14</sup> These were the beginnings of the author's consciousness, called by Strömholm as the 'conscience du fait créateur'.<sup>15</sup>

Over the centuries, authors have demonstrated their ties to their works in increasingly explicit ways. However, as Caroll notes, "many Renaissance composers, in their dedications to their respective patrons, refer to their compositions as their "children"

being sent alone into the world, and implore the patron to protect their work".<sup>16</sup> The protection came to be granted a few centuries later as copyright.

#### **The Berne Convention and the Misconception about Relinquishing Authorship**

The historical development of copyright law, supported by several philosophical explanations, shows that the specific character of moral rights was noticed at quite an early stage. In continental Europe, the concept of moral rights grew on the ground of natural human rights and was explained by the tenet that the creation of an author's mind (the work) is his personal expression and spiritual embodiment.<sup>17</sup> The work, being the manifestation of the personality of the author, became at the same time his 'spiritual child'.<sup>18</sup>

The concept found its way into the text of the revised Berne Convention, and earlier into national legislation, as during the early 1920s a great number of signatory states<sup>19</sup> amended their statutes to assign moral rights to authors. Article 6bis of the Berne Convention, introducing conventional protection to an author's moral rights, was accepted during the Revision Conference in Rome in 1928. The final scope of this regulation was quite extensive. What is interesting is that the idea of introducing the concept of moral rights to the Berne Convention came from Polish delegates (S Siczkowski, F Zoll and S Groeger), who as a matter of fact were taking part in the working committee for the first time.<sup>20</sup> Their proposal of a new text for Article 15 of the Berne Convention was replaced with Article 6bis, which, after amendment by the Italian and Belgian delegates as well as by the International Institute for Intellectual Co-operation, was incorporated into the revised Berne Convention.

Article 6bis of the Berne Convention was drafted under the influence of three concepts: monistic, dualistic, and inverted monistic theory (the so-called 'patchwork theory').<sup>21</sup> According to the first theory, introduced by the German legal doctrine, the author's personal input influences the nature of his right. This element joins the personal and property interests of the author, which, like the branches of the tree, grow from the same roots. This theory recognises the work as an extension of the author's personality, and hence does not provide for the transferability of the copyright, only permits licensing. The supporters of the dualistic theory, divide the author's rights into moral and property rights. Different regimes for both these rights often result from this division, although, it does not mean that they function in isolation. The

differences become visible in relation to the transferability of property rights as opposed to moral rights, as well as the different period of protection of rights belonging to these two categories. However, in most cases the period of protection of property rights is limited in time, whereas the one of moral rights is not. The dualistic theory was established in the French legal doctrine. As opposed to the concepts worked out in the tradition of the continental law, in the copyright doctrine of the Anglo-Saxon system countries, the rights of the author are defined in economic terms (the 'inverted monistic theory'). This concept is based on an assumption that when the author makes the work available to the public, his connection with the work is broken. The work itself is equated with an independent good, which is subject to the rules of the market, and its fate is based on the position of the contracting sides. At the same time, the existence of copyright laws is justified here mostly by the arguments that are utilitarian in character, but not natural and legal. The above theory is sometimes also described as 'patchwork theory', as the concept of author's moral rights has not been wholly introduced in the copyright law of the common law countries.

The text of Article 6bis para 1 of the Berne Convention was definitely formulated in accordance with the principles of the dualistic theory.<sup>22</sup> The separation of moral rights from economic rights becomes noticeable when one reads that the author retains these rights 'independently of the author's economic rights, and even after the transfer of the said rights.'<sup>23</sup> At the same time, the expression does not introduce either the inalienability or the unwaivability of moral rights. This is why Adolf Dietz described Article 6bis of the Berne Convention as taking the 'minimalist approach'.<sup>24</sup>

However, as Ginsburg and Ricketson note, the transferability of moral rights appears to be contrary to the nature of these rights themselves.<sup>25</sup> Plaisant also points out to not only the unquestionable inalienability of these rights, but also that 'there is a connection between moral rights and authorship based on the fact that the protection of one logically implies recognising the other.'<sup>25</sup> Indeed, Article 6bis of the Berne Convention supported the assumption that moral rights do not protect the author in an abstract way, but rather his relation with the work.<sup>26</sup> Therefore a contractual commitment from the author not to make use of his *droit moral*, which is acceptable in many legal systems, cannot be unlimited.<sup>27</sup>

## Ghostwriting in Poland

### General View

In the Polish legal doctrine, the view that ghostwriting contracts are invalid seems to prevail.<sup>28</sup> This is the opinion shared in the literature by Wojnicka,<sup>29</sup> Barta and Markiewicz,<sup>30</sup> and Wojciechowska,<sup>31</sup> mostly based on the traditionally discussed instance of 'buying academic works'. In fact, the only exception to this rule of invalidity that is tolerated, concerns writing speeches for politicians, as it is a generally known and accepted practice. It has been noted that, while delivering a speech, the politician speaks on behalf of his office, often in the interests of his party or other institution concerned.<sup>29</sup> There is even the view that 'it is necessary [...] to differentiate the authorship of a work from the authorship of a political text, having the quality of a certain declaration or a speech constructed according to some specific circumstances'.<sup>32</sup> As Bleszyński claims, the copyright profits resulting from publishing speeches are not the personal profit of the politician, but are paid to the institution on behalf of which the politician delivers his speech, as a result of the above mentioned assumption.

### The Ghostwriting Contract – The Construct

According to the theory of contracts in Polish law, the ghostwriting contract is a mixed contract<sup>30</sup> that includes elements of:

- (1) a contract of a specific work (a contract of commission);
- (2) a contract transferring the author's economic rights; as well as
- (3) contracts concerning the moral rights of the actual author.

The nature of this contract includes the author's obligation to:

- (a) create the work and to release it to the commissioning party;
- (b) transfer the economic rights concerning the work; and
- (c) adopt the 'proper behaviour concerning the sphere of moral rights' (e.g. to permit the distribution of the work by the commissioning party under its name).

In exchange, the commissioning party assumes the obligation to pay the remuneration to the author. In these contracts, the features mentioned above constitute 'subjectively important elements' (*elementy przedmiotowo istotne* in Polish). The most important contractual provision requiring further explanation

seems to be the obligation concerning the author's *droit moral*, which is generally termed in the Polish doctrine as 'proper behaviour in the sphere of moral rights.' These obligations become the object of the most significant doubts.

### The 'Proper Behaviour in the Sphere of Moral Rights' Clause

The 'proper behaviour in the sphere of moral rights', resulting in attribution of the authorship of a work to a person other than the actual author, in the easiest approach should include the abdication of this right. However, legal action of this kind is opposed to the fundamental rule of copyright, and therefore invalid under the law itself (Article 16 of the Copyright Act in conjunction with Article 58 of the Civil Code). It is constructively possible to imagine the following mechanisms based on the author's binding obligation: (1) not to exercise his right to enforcing his name onto the work as author, and at the same time (2) not to exercise his right against the commissioning party, to put his name on the work as author. The first obligation is indeed acceptable and practised, but the second obligation makes the contract invalid. This view was presented by Barta and Markiewicz.<sup>33</sup> While under Polish law, it is not possible to question the view, one may question the legal basis for the assumption itself. Is the contract invalid because the clauses are designed to circumvent statutory law, or because they are inconsistent with the principles of community life? Pursuant to Article 58 § 1 of the Polish Civil Code<sup>34</sup>, an act in law that is inconsistent with statutory law or is designed to circumvent statutory law is invalid unless the appropriate provision envisages a different effect, in particular that those provisions of the act in law that are invalid are replaced by the appropriate provisions of statutory law. Pursuant to Article 58 § 2 of the Polish Civil Code, an act in law that is inconsistent with the principles of community life is invalid. According to Article 16 of the Polish Copyright Act of 1994, 'moral rights protect the link between the author and his/her work, which is unlimited in time and independent of any waiver or transfer'.<sup>35</sup> Therefore, as per the Polish doctrine, any construction applied in a ghostwriting contract results in violation of the above rule.

### A Legal Ghostwriting Contract under Polish law – A Hybrid Approach

A real problem that has appeared in the Polish copyright doctrine and that needs addressing is whether putting the commissioning party's name on a work of authorship as if it was the real author

constitutes a violation of the personal interests of the actual author, even if the latter person accepts it. In Polish civil law doctrine, under Article 23 and 24 of the Polish Civil Code it has been agreed that the consent of the injured party overrules the unlawfulness of violating his personal goods. Nevertheless, there are personal interests which escape this rule.<sup>36</sup> It has therefore been widely discussed whether it would be legal to ‘oblige the author not to bring legal claims in the case of violating his moral rights’.<sup>30,37</sup>

It may be questioned if this obligation is binding for the author preparing speeches for politicians, or even just writing somebody else’s autobiography. Allowing political speeches is fully understandable. Reasons for this approach may be that in case of political speeches:

- (a) authorship does not seem to be as significant as the legal and political responsibility for promises made in these speeches;
- (b) assigning authorship to the factual authors would be difficult given that preparing a speech lies within the duties of ‘think tanks’ consisting of many people, in which authorship fades and dissolves in a work;
- (c) there is no place for ‘a work of authorship-author’ intellectual bond, which exists in most of works;
- (d) the income from publishing public speeches is considered to be the benefit of the political party, and not the politician himself;
- (e) the authorship of one author’s speeches (as in Barack Obama’s case) is openly revealed;<sup>38</sup>
- (f) no attribution of the authorship is due to practical reasons, and there is no tendency to attribute it to the politician himself.

When it comes to autobiographies, one should note that, given the general cognitive ability of the average person buying this type of book, there is usually a general awareness that the book is not actually written by the celebrity. More recently, there has developed a good practice to put the real author’s name on the second page, or to make some other form of acknowledgement that would indicate the author implicitly. Most recent bestselling biographies available in English bookstores mention the real author of the book written for a famous person. For example in the book ‘Tulisa Honest, my story so far’ the acknowledgements contain the phrase: ‘With a special thank-you to Terry Ronald for making this

book possible’. In the book ‘Cheryl, my story’, the acknowledgements mentions: ‘Rachel Murphy – thank you for helping me write this. We’ve had laughter and tears, but I’m THRILLED with the result! Ha, ha’. In the case of writing autobiographical books it may be asked whether giving the celebrity’s name in the place of the author’s (especially on the cover) is significant. In the author’s opinion, this practice can be interpreted as attaching a sort of ‘trademark’ of the depicted person indicating that the story has been authorised. Acknowledgements, revealing the real name of the ghostwriter(s), would be an example of good practice to be approved of. At the same time the actual author should not be allowed to disclaim his rights, as this action would result in the commissioning party acquiring the status of author of the work. The reasoning underlying the abovementioned limitation of the author’s moral rights’ sphere is to be found in non-copyright obligations and prohibitions, for example, the obligation not to mislead the contracting party about the identity of the contractor (‘error in persona’).

This concept brings a solution for the ghostwriting practice that under Polish copyright law is perceived to be null and void. This ‘hybrid concept’ assumes that ghostwriting, generally perceived as invalid, is to be accepted for political speeches and autobiographies as long as in the second case the celebrity’s name is understood as a quasi ‘trademark’ of the product distributed in the market. This idea provides a solution for the theoretical helplessness under Polish law, but might also seem a generally acceptable solution for foreign regulatory conundrums.

### Conclusion

It is clear that the interpretation applied so far in order to allow the practice of ghostwriting has suffered from many inconsistencies under many concepts presented in the copyright law of many countries.<sup>39</sup> None of them offers a firm and stable construction that would not raise doubts from the perspective of copyright theory. As regards the very practical aspect of ghostwriting agreements, some thought should go into why this phenomenon does not spark as much attention in the theory of law as it should, given the many ethical questions surrounding the issue.

As far as Polish law and doctrine are concerned, ghostwriting contracts are invalid under Polish law no matter which concept is chosen or which clauses are applied in the contract. As pursuant to Article 16 of the Polish Copyright Act, ‘the moral rights will

protect the link between the author and his/her work which is unlimited in time and independent of any waiver or transfer', any of the constructs considered abroad will be perceived as leading to a circumvention of the law, in turn resulting in a violation of the fundamental rules of the non-transferability and unwaivability of moral rights. Therefore, under Article 58 § 1 of the Polish Civil Code, a ghostwriting contract would be invalid. The only option that may be considered valid under Polish law would be incorporating in the contract a clause 'to oblige the author not to exercise his moral rights and e.g. not to bring legal claims in the case of violation'. Whereas some believe that this clause would keep the author from executing his rights, one may ask whether the author is allowed to change his legal situation freely under the freedom of contracts (Article 353 (1) of the Polish Civil Code), which is limited as to the nature of the legal relationship.

From the 'hometown' perspective it should be noted that this theoretical helplessness might be overcome by applying a hybrid approach to the issue. According to this concept ghostwriting shall be deemed invalid except for political speeches and autobiographical works. This idea is based on the grounds that delivering a political speech does not fall under the category of 'ghostwriting' as we understand it. There might be a few reasons given for these assumptions. It shall be observed that political speeches are more about content and the politician's legal and political responsibility, than about authorship as such. Allowance for the practice of the autobiographical works is based on a simple assumption that the name of the celebrity placed on the cover is to be seen as a quasi 'trademark' of the market product, namely, the book. This reasoning is supported by the practice of 'acknowledging' the work of the factual author in the work. The many other cases of ghostwriting are to be deemed invalid.

In conclusion, the case of the ghostwriting begs the question under copyright law - how much freedom does an author have in a contract as far as moral rights are concerned? Indeed, the situation of the ghostwriter depicted under Polish law might even bring to mind the old anecdote of Lincoln: '[t]he shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act, as the destroyer of liberty... Plainly, the sheep and the wolf are not agreed on the definition of the word liberty.'<sup>40</sup>

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- per exceptionem doli mali, utique si bona fide eorum possessionem nactus sim' (in English: Gaius in the second book of his *Jurisprudence of Daily Life*, The ownership of written letters, even if they be of gold, follows the ownership of the papyrus or parchment, like the ownership of buildings or sown seed follows the land. If, therefore, I write a poem or a history or a speech on your papyrus or parchment, you, not I, count as the owner of the work. If you, however, ask me for your papyrus or parchment, and are not willing to pay the cost of the writing, I can defend the suit with the *exceptio doli* – provided that I have obtained the possession in good faith). The translation has been taken from Hausmaninger H & Gamauf R, *A Casebook on Roman Property Law*, translated by G A Sheets (Oxford University Press New York), 2012, p. 186.
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