THE PUBLISHING CONTRACT FOR WRITTEN WORKS

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Abstract

The article analyses the main clauses of a publishing contract for written works and aims to be a guide for authors, including the students and the participants of CKS, if they want to publish their works. It will offer the main aspects that every author should know, when is concluding a publishing contract. Also, the article will present the authors economic rights transferred to the publisher, the legal characteristics of the contract, the notions of author, written works and publisher, the obligations of the parties.

The article will underline the importance of the publishing contract as the most common way to exploit the rights of the written works authors, hence the rules of this contract offer solutions that can be applied by similarity to other contracts that assert the rights of the authors.

Keywords: *author, written works, publisher, publishing contract, clauses.*

1. Introduction

The contract is the most important institution of civil law, the legal instrument used in both economic activity (exchange of activities and commodities) and in relations between individuals (sale, lease, rent, loan, etc.)[2]. As is known, the contract is the agreement between two or more persons with the intention to establish, modify or extinguish a legal relationship[3]. In this regard, the contract is concluded through negotiation by the parties or through unreserved acceptance of an offer to contract[4], therefore it is only necessary the agreement between the parties on the essential elements of the contract, secondary elements can be agreed or determined by another person[5].

As was pointed out in the literature on special contracts of civil law[6], contract law to exploit the rights of the author, as an integral part of copyright and related rights, covers regulatory legal instruments by means of which the work is published, used, rented and also the conditions of using the work. Therefore, the legal regime to exploit the rights of the author are an important part both theoretically and practically of the private law in general and copyright in particular[7].

From this point of view, the publishing contract is the most important legal instrument through which written works in all areas are made public, becoming as doctrine said[8], "the most common way to exploit the patrimonial copyright", therefore "the rules from this field offer solutions that can be applied by resemblance to other contracts valuing the patrimonial copyright".

Although the state of knowledge in the concerned field is high enough, the article aims to be a guide for any written works author, that wish to conclude a publishing contract, and provides the most important elements that it should be consider at the conclusion of such an agreement in order to avoid, on the one hand, any confusion as to the legal terminology used because not all authors have legal knowledge, and, secondly, to limit the possible abuses done by the publishers. To achieve these objectives, the article will present the applicable statutory provisions, will analyze the most important clauses of the publishing contract, the obligations of the parties, and the legal characteristics of the contract and will provide practical solutions to problems encountered in practice.

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[1] See in detail Ana-Maria Marinescu, "*Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (II).) Contractele de valorificare a drepturilor patrimoniale de autor: contractual de comandă a unei opera viitoare și contractual de editare" (Contracts for the exploiting patrimonial copyright: contract for ordering a future work and publishing contract)*, Revista Română de Dreptul Proprietății Intelectuale nr. 4/2015, p. 134-135. (Romanian Magazine for the Intellectual Property Law no. 4/2015, p. 134-135).

[2] See in detail Constantin Stătescu, Corneliu Bîrsan, "*Drept civil. Teoria generală a obligațiilor"*, 3rd edition, All Beck Publishing House 2000, Bucharest, p. 21.

[3] Art. 1.166 the New Civil Code.

[4] Art. 1.182 par. (1) the New Civil Code.

[5] Art. 1.182 par. (2) the New Civil Code.

[6] Francisc Deak, *"Tratat de drept civil. Contractele speciale"*, 2nd edition, updated and supplemented, Actami Publishing House, Bucharest, 1999, p. 5.

[7] *Idem*.

[8] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *"Dreptul de autor și drepturile conexe – Tratat"*, All Beck Publishing House, Bucharest, 2005, p. 372.

2. Content

According to art. 1 para. (1) of Law no. 8/1996 on copyright and related rights, as amended and supplemented (hereinafter Law no. 8/1996), the copyright in a literary, artistic or scientific work, as well as other works of intellectual creation is recognized and guaranteed under the law, being related to the author and embodies attributes of moral and patrimonial character. Characteristic of the copyright system is that creative intellectual work is recognized and protected, independent of the public disclosure, by the mere fact of its creation, even in unfinished form. This is the foundation of the copyright protection system therefore the work is recognized and protected by the mere fact of its creation, even if it was or not made public, without further formality, for example concerning the registration of the works, unlike industrial property, where the recognition of the rights over trademarks, patents, inventions, etc. requires a registration system.

Law no. 8/1996 regulates **three ways for proving the existence and the content of a work.**

The first is governed by art. 148(1) on the registration, as evidence, of the works made in Romania, in the National Register of Works (RNO), administered by the Romanian Copyright Office. Registration is optional and is chargeable[9], according to the methodological rules and tariffs set by Government decision. The registration is made on the applicant's own responsibility.

It follows that a work of intellectual creation recorded in the National Register of Works managed by ORDA: is not constitutive of copyright, is optional, is chargeable and is based on an affidavit of the applicant. Applicants shall declare on their own responsibility that the works submitted for registration are original, belong to a natural or legal person and that are observing the provisions of Law no. 8/1996.

We mention that in the National Register of Works are recorded the works of intellectual creation and not the copyright on the works. As a result, ORDA is not registering, is not according and is not certifying in any way the copyright in a work of intellectual creation. The registration of the work in the National Register of Works is only a proof / evidence about the title of the work, its content and the date when it was submitted to ORDA.

The second is referred to art. 148 (2), namely any evidence. In this regard, I mention that the notion of "any evidence" must take into account the evidences provided by the Civil Procedure Code in order to demonstrate the existence and the content of a work. The last way is included in the notion of "evidence", respectively "by including the work in the repertoire of a collecting society*”*[10]. Therefore, the author becoming a member of the collective management society, declaring the work that he created in the repertoire of the collective management society, this will be an evidence of the existence and content of the work. Moreover, Law no. 8/1996 shows that[11] *”the authors of works and the owners of rights may, at the same time as their works are entered the repertoire of the collective management organization also may register the name under which they write, perform or create registered, for the sole purpose of making it known to the public”*. Thus, by entering the work in the repertoire of the collective management organization, it is acknowledge to the copyright owner also the moral right to decide under what name the work will be brought to public knowledge, respectively the right to a nickname (the literally name).

Author - According to art. 3 paragraph (1) of Law no. 8/1996 is the author the individual or the individuals who created the work; are presumed to be the author, until proved otherwise, the person under whose name the work was first brought to public knowledge. When the work was made public in anonymous form or under a pseudonym that does not identify the author, the copyright shall be exercised by the natural or legal person who makes it public with the author's consent, as long as it does not reveal his identity. For example, in the case a written work (novel), which was made public in the form anonymously or under a pseudonym that does not identify the author, copyright is exercised either by the editor, the legal entity which brings the novel to the public by editing, with the consent of the author, either by the author's agent, natural or legal person, representing the author, working on its behalf and concluding legal agreements, including publishing contracts of the work.

A **work of joint authorship** shall be a work created by several co-authors in collaboration[12], The copyright in a work of joint authorship shall belong to the co-authors thereof, one of whom may be the main author. Unless otherwise agreed, the co-authors may only use the work jointly[13], and if the contribution of each co-author is separate, it can be used separately, provided that it does not prejudice the use of the joint work or the rights of the other coauthors[14]. For example, in the case of written works can be any work created by several co-authors

[9] Registration is made based on filling in the form F24 and the fee is RON 100/work.
[10] Art. 148 par. (2) Law no. 8/1996.
[11] Art. 148 par. (7) Law no. 8/1996.
[12] Art. 5 par. (1) Law no. 8/1996.
[13] Art. 5 par. (3) Law no. 8/1996.
[14] Art. 5 par. (4) Law no. 8/1996.

in collaboration, each of the authors elaborating certain chapters of the book. If the authors have written chapters in the book, they can be used separately by each of the authors, for example by publishing the chapter in the form of an article in a professional journal.

A **collective work** shall be a work in which the personal contributions of the co-authors form a whole, without it being possible, in view of the nature of the work, to ascribe a distinct right to any one of the co-authors in the whole work so created[15]. Unless agreed otherwise, the copyright in a collective work shall belong to the person, whether natural person or legal entity, on whose initiative and responsibility and under whose name the work was created[16]. For example, in the case of written works, a dictionary, atlas or encyclopedia, collective works where the copyright belongs to the editor legal entity, on whose initiative, responsibility and under whose name the collective work created.

The subject matter of copyright - Also, specific for the copyright system is its subject, namely: the original works of intellectual creation in the literary, artistic, or scientific field. Therefore constitutes copyright object the original works of intellectual creation in the literary, artistic, or scientific field[17]. Thus, **originality** is required as a prerequisite for the copyright object, regardless of manner of creation, mode or form of expression and regardless of their value and destination[18]. In the case of written works, are the object of copyright the original written works, whether they were written by hand or typed on the computer, regardless of the writing style, the economic value of work and whether they were intended for the general public or only for a community of specialists

Law no. 8/1996 lists as the object of copyright the written works: literary and journalistic writings, lectures, sermons, pleadings, addresses and any other written or oral works[19], and the scientific works, written or oral, such as such as presentations, studies, university textbooks, and school textbooks and scientific projects and documentation[20]. Therefore, are written works both literal and scientific works, each of them are only genres, categories of written works, between them and the notion of "written works" there is a linkage part-whole. In the France doctrine[21], it was shown that copyright protects all written works, subject to respect the condition of originality, the law protects all texts in all languages and dialects, regardless of their support.

Derived works - It is also an object of copyright derived works were created based on one or more pre-existing works, namely[22]: (a) translations, adaptations, annotations, documentary works, arrangements of music and any other transformation of a literary, artistic or scientific work that themselves entail creative intellectual work; (b) collections of literary, artistic or scientific works, such as encyclopedias, anthologies and collections and compilations of protected or unprotected material or data, including databases, which, by reason of the selection or arrangement of their subject matter constitute intellectual creations. Therefore, in the case of written works, constitute derivative works: the translation of a university course from French to Romanian, an encyclopedia or a collection of intellectual property laws.

The third principle applicable to copyright in this matter is referring to the the elements that do not fall under the legal protection of copyright, including in the case of written works, ideas, theories, concepts, scientific discoveries, procedures, methods of operation or mathematical concepts as such and inventions contained in a work, whatever the mode of adoption, writing, explanation or expression[23]. Therefore, ideas, theories, concepts, scientific discoveries, procedures, methods of operation or mathematical concepts as such and inventions contained in a work are not the subject of copyright, which is recognized and protected only to the written work itself.

Given the context described above of the written works, in what follows I will analyze the best used way in which the written works are made public, namely the publishing activity, and the most frequently used in practice legal document in order to fulfill the publishing activity: **publishing contract**[24], regulated by the Law no. 8/1996 to art. 48-57.

Definition - According to art. 48 para. (1) of Law no. 8/1996 by publishing contract, the owner of the copyright assigns to the publisher, in exchange

[15] Art. 6 par. (1) Law no. 8/1996.
[16] Art. 6 par. (2) Law no. 8/1996.
[17] Art. 7 par. (1) Law no. 8/1996.
[18] Art. 7 par. (1) Law no. 8/1996.
[19] Art. 7 par. (1) letter a) Law no. 8/1996.
[20] Art. 7 par. (1) letter b) Law no. 8/1996.
[21] André Bertrand, *"Le droit d'auteur et les droits voisins"*, 2e édition, Dalloz, Paris, 1999, p. 169.
[22] Art. 8 Law no. 8/1996.
[23] Art. 9 letter a) Law no. 8/1996.
[24] See in detail Ana-Maria Marinescu, "*Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (II). Contractele de valorificare a drepturilor patrimoniale de autor: contractual de comandă a unei opera viitoare și contractual de editare" (Contracts for the exploiting patrimonial copyright: contract for ordering a future work and publishing contract)*, Revista Română de Dreptul Proprietății Intelectuale nr. 4/2015, p. 140-152. (Romanian Magazine for the Intellectual Property Law no. 4/2015, p. 134-135).

for remuneration, the right to reproduce and distribute the work. Therefore, does not constitute a publishing contract the agreement by which the owner of the copyright in a work empowers a publisher to reproduce and possibly also to distribute the work at the former's expense (art. 48 par. 2).

From the definition of the publishing contract, results the following characteristics:

- The assignment is the nature of the publishing contract, otherwise the simple mandate given by the author to the editor represents enterprise contract (art. 48 par. 3);

- The assignment usually is made for a remuneration;

- Reproduction and distribution of the work assignment involves both assignment and license[25], because under art. 51 para. (1) b) the publishing contract must contain, under the penalty of cancellation, the exclusive or non-exclusive nature of the assignment.

The **scope** of the publishing contract involves the following elements:

- The importance of the publishing contract results, among others, from its scope[26], as any type of intellectual creation works that could be reproduced may be published[27]: literary, graphical, musical works etc. Concurrently, a work can be published in may ways[28], depending on the carrier on which it is fixed, e.g. a musical work can be published on paper, as a score, then in the form of CDs. Considering these issues, the fact results that the publishing contract is a complex one.

- it does not include the adaptation of the work and the specialized literature[29], stresses the fact that the assignment of the translation or adaptation right does not represent a publishing contract. And that is considering that according to art. 13(i) the author is entitled to authorize or forbid the development of derived works and, according to art. 16, derived works comprise the translation, publication in compendia, adaptation, as well as any and all transformations of a preexisting work, if the same is an intellectual creation. To this end, by Decision no. 963/2007[30], the High Court of Cassation and Justice – Civil and Intellectual Property Division regarded the action for counterfeit lodged by the translation author's heir against the printing house that had published the work (in this case a novel), translated by the claimant's father, without her consent, as grounded.

The aforementioned articles should be correlated with the special provisions concerning the publishing contract, i.e.: *"Art. 49. - The holder of the copyright may assign to the editor the right to authorize the translation and to adapt the work."* and "*Art. 50. - The assignment of the right to authorize other parties to adapt the work or to make use of the same in any way whatsoever to the publisher must be the subject of an explicit contractual provision",* in that the author may assign to the publisher, just as they may assign to other parties according to art. 13, the translation and adaptation of the work, and such a mandatory clause must be expressly stipulated in the contract (art. 50).

Hence, through the publishing contract of a novel or a legal treaty, the author may assign to the publisher the right to authorize the translation and adaptation of the work, and these provisions must be the subject of express contractual provisions.

Considering the provisions in art. 48-50 of Law no. 8/1996, the publishing agreement was defined by the specialized literature[31] as *the means of the author patrimony right assignment agreement based on which the holder of the copyright commits, within the limits of the law on public order and good morals, to assign to another person, referred to as publisher, for a determined period of time, in exchange for a remuneration, the right to reproduce, to distribute, and, possibly, authorize the translation and adaptation of the work on their own expense*.

The parties to the publishing contract are the holder of the rights and the publisher.

The holder of the rights - The notion of holder of the rights includes the **author**, as well as **other natural or legal persons that, according to Law no. 8/1996, acquire patrimony copyright**:

- legal or testament heirs of the author (art. 25(1) thesis 2, art. 26);

- the collective management body authorized by the author during his life, if there are no heirs (art. 25(1) thesis 3, art. 26(2));

- the collective management body holding the largest number of members in the respective creation field, if there are no heirs, and if the author did not authorize a collective management body during his life (art. 25(1) thesis 4, art. 26(2));

- the natural or legal person that makes a work public, with the author's consent, publicly communicated anonymously or under a pseudonym, which prevents the identification of the author, as long as the latter does not disclose his identity (art. 4(2));

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[25] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 373.
[26] *Idem.*
[27] *Idem.*
[28] *Idem.*
[29] *Idem*; André Lucas, Henri-Jacques Lucas, *"Traité de la propriété littéraire et artistique"*, 3e édition, Litec, Paris, p. 490.
[30] Published in Revista Română de Dreptul Proprietății Intelectuale (Romanian Magazine for Intellectual Property Law) issue 2(11)/2007, p. 186 (selection and processing by Octavia Spineanu-Matei).
[31] Teodor Bodoașcă, *"Dreptul proprietății intelectuale"*, Universul Juridic Printing House, Bucharest, 2010, p. 114.

- the natural or legal person upon whose initiative, under whose name, and responsibility a collective work was created (art. 6(2)).

Publisher - The definition of the publishing contract[32], also provides the definition of the publisher, respectively the person committing to reproduce and distribute the work made available by the holder of the rights. The French specialized literature[33] highlighted the evolution of the publisher's right: they have always been the professionals reproducing and distributing the work, but the conditions under which they carry out their activity have drastically changed in time: the technical advances have allowed for the improvement of the activity, but the competition requirements determined them, without waiving their cultural right, to grant prevalence to the economic logic within their activity.

The capacity of the parties[34] - In so far as the **capacity of the parties is concerned**, the generally applicable rules for assignments apply[35], in general, editors are legal persons, companies.

In the case of natural person authors:

- minors under the age of 14 (art. 41 of the New Civil Code), do not hold the exercise capacity, hence, they cannot conclude legal documents (contracts) for the assignment of patrimony copyright other than through their legal representatives (e.g. parents). By way of consequence, minors under the age of 14 cannot conclude publishing contracts on their own, they must be concluded by their legal representatives.

- minors aged 14 to 18 (art. 41 of the New Civil Code), hold the exercise capacity, i.e. they can conclude legal documents (contracts) for the assignment of patrimony copyright with the prior consent of their legal representatives (e.g. parents). Thus minors aged 14 to 18 may conclude contracts for the publishing of written documents with the prior consent of their parents only.

- people above the age of 18 (art. 38 of the New Civil Code) hold full exercise capacity, hence, they can conclude legal documents (contracts) for the assignment of patrimony copyright without any limitations.

By way of exception, minors do acquire, by marriage, the full exercise capacity, and for grounded reasons, for minors above the age of 16, the custody court may acknowledge the full exercise capacity (to this end, the parents or the custodian of the minor shall also be heard, the approval of the family council also being requested if needed). Hence, married minors may conclude legal documents (contracts) for the assignment of patrimony copyright by themselves.

According to art. 42 of the New Civil Code, the minor may conclude legal documents concerning work, artistic or sports activities concerning their profession with the parents' or tutor's consent, as well as in compliance with the special law, if applicable. In this case, the minor enforces the rights and performs the obligations resulting from such acts in the same way, and may individually dispose of the income acquired. This legal provision clearly also concerns the author or the performer, which may conclude, with the prior consent of the parents, contracts concerning the assignment of their patrimony rights and, very importantly, may individually use the income acquired pursuant to the conclusion of such assignment agreements. Hence, the minor may conclude publishing agreements with the consent of the legal representatives and, to this end, they can conclude publishing contracts with the consent of the legal representatives and, in this case, they individually carry out the obligations resulting under the agreement, e.g. deadlines, form requirements, etc., but also individually dispose of the rights obtained, i.e. the remuneration cashed in for the publishing of the work.

Legal persons (publishers) may be, in the cases expressly stipulated under the law, holders of the copyright and may assign or acquire such rights[36].

Legal persons acquire the exercise capacity, so they may conclude legal documents, generally as of the establishment date (art. 209 New Civil Code), respectively as of the date of registration with the Trade Register, the specialty principle being applicable in this case, which is why they can only hold the rights corresponding to their purpose, established by the law, the incorporation deed or the state.

Subject-matter[37] - The common assignment rules also apply for the **subject-matter** of the agreement[38], but:

a) it must exist - Law no. 8/1996 institutes under art. 41(2) the interdiction to assign patrimony rights concerning all author's future works, whether specified or not, stricken by full nullity. Hence, a

[32] Art. 48(1) of Law no. 8/1996, as subsequently amended and supplemented.

[33] André Lucas, Henri-Jacques Lucas, *op.cit.*, p. 482.

[34] See in detail Ana-Maria Marinescu, *"Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (I). Teoria generală a contractelor de valorificare a drepturilor patrimoniale de autor"*, Revista Română de Dreptul Proprietății Intelectuale (Romanian Magazine for Intellectual Property Law) issue 3/2015, p. 89-91.

[35] For developers, see Ana-Maria Marinescu, *op.cit.,* p. 89-91.

[36] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 356.

[37] See in detail Ana-Maria Marinescu, *"Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (I). Teoria generală a contractelor de valorificare a drepturilor patrimoniale de autor"*, Revista Română de Dreptul Proprietății Intelectuale (Romanian Magazine for Intellectual Property Law) issue 3/2015, p. 93-98.

[38] For developers, see Ana-Maria Marinescu, *op.cit.,* p. 93-98.

publishing contract that concerns all the future written works of an author and not a concrete, determined work, is stricken by full nullity. However, according to art. 1.228 of the New Civil Code *”unless otherwise stipulated under the law, contracts may also concern future goods”*. I believe that this provision applies to order contracts and that it may be applicable to publishing contracts for collective works n the case whereof the copyright rests with the publisher, i.e. with the person upon whose initiative, under whose responsibility and name the work was created.

b) it must be identified or identifiable – it supposes, for the publishing contract, that the work is individually determined through means that best suit its nature (e.g., number of pages, number of issues, etc.), the remuneration that the editor must pay to the author, as well as the determination of assigned patrimony rights.

c) it must be feasible, legal, and moral - The requirement that the subject-matter must be legal and moral is very debatable, because, in the copyright field, the appreciation of a work is relative, considering the author's and the public's perception. What is not legal and moral to the author, may be so for the public and vice versa[39]. Moreover, this condition comes into contradiction with the author's freedom of expression right. Due to the lack of plausible criteria that determine the legal and moral nature, we shall take into account art. 1.225(3) of the New Civil Code, which shows that *"the subject-matter is illicit if prohibited by the law or contrary to public order or good morals”*.

d) it must be part of the civil circuit - according to art. 1.229 of the New Civil Code, *"only assets that are part of the civil circuit may be the subject of a contractual provision",* thus for the publishing contracts, works are in the civil circuit because the author manifested its will to make the same public by disclosure.

Cause - At the same time, the general provisions concerning the conclusion of a contract impose the observance of a licit and moral **cause**[40].

Form - From the point of view of the form, the publishing contract relies on mutual agreement, i.e. it is concluded through the mere willful consent of the parties, the written form being stipulated *ad probationem only*[41]. Hence, the mere willful consent of the parties is enough for its valid conclusion and does not require the submission of the manuscript of the work. Concerning the written form *ad probationem*, I claim the need to conclude assignment contracts in written form *ad validitatem* in the copyright field, including the publishing contract, because the written form *ad probationem* will represent means of defense both for the authors against the possible abuses on behalf of the publishers and for the publishers who must protect their investment in the publishing of the work.

The clauses a publishing contract must comprise are regulated by art. 51 of Law no. 8/1996, i.e.:

a) assignment term – generally, in practice, in the case of the publishing contract, it is expressed under the form of a preset term. To this end, the negotiations between the parties on the content of the contract shall also determine the assignment term.

b) the exclusive or non-exclusive nature and the territorial scope of the assignment;

We distinguish between the **exclusive assignment** in which case "the very holder of the copyright may no longer use the work in the ways, on the term, and for the territory agreed upon with the assignee and may no longer transfer the respective right to a third party The exclusive nature of the assignment must be expressly stipulated in the contract”[42], as well as the **non-exclusive assignment,** in which case "the holder of the copyright may individually use the work and assign the non-exclusive right to other parties”[43], and the"Non-exclusive assignee may not transfer its right to another party other than with the express consent of the assignor”[44]. Thus, in the case of the exclusive assignment for a publishing contract, the author assigns its right to the publisher, and can no longer assign the same rights to another publisher, for the same work, whereas, in the case of the non-exclusive assignment, which actually is a license, the publisher may assign the rights transferred by the author, for example, to another publisher, subject to the author's express consent.

As highlighted in the specialized literature[45], the territorial scope of the assignment practically considers the fact that patrimony rights are assigned for Romania and the rest of the world. At the same time, in practice, there are situations in which rights are only assigned for Romania, and the use of the same rights internationally or for a certain territory is possible based on a different publishing contract,

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[39] To this end, the recent scandals concerning the Romanian Cultural Institute in New York, which promoted a series of works regarded as illicit and immoral:
http://www.activenews.ro/prima-pagina/Romania-promovata-pornografic-de-catre-ICR-New-York-111150
http://www.antena3.ro/actualitate/sinteza-zilei-romania-promovata-vulgar-la-new-york-292877.html

[40] Bujorel Florea, ”*Contracte de valorificare a drepturilor patrimoniale de autor”*, Pro Universitaria Printing House, Bucharest, 2013, p. 17.

[41] Art. 42 Law no. 8/1996.

[42] Art. 39(4)(a) of the Law no. 8/1996.

[43] Art. 39(5)(a) of the Law no. 8/1996.

[44] Art. 39(6)(a) of the Law no. 8/1996.

[45] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 360.

concluded with a publisher that carries out its activity on the respective territory.

c) maximum and minimum number of copies – clause concerning the number of copies.

Pursuant to the practice of the relations between the author and the publisher, the clause concerning the number of copies raised numerous suspicions between authors and editors, because it is not the essence of the agreement, its absence being sanctioned[46]. Hence, if such clause is not available, the author has no control over the number of copies that the publisher prints. Moreover, this clause must be mentioned in the contract, especially in the cases in which the author's remuneration is pro rata with the number of copies sold.

d) author's remuneration established according to the law;

The means for the determination of the remuneration due to the holder of the rights are regulated under art. 43(1) which stipulates that "Remuneration due pursuant to a patrimony right assignment agreement is established through the consent of the parties. The amount of the remuneration is calculated either pro rata with the amounts cashed in pursuant to the use of the work, or in a fixed amount or in any other way". Thus, the lawmaker left it to the parties to establish both the amount of the remuneration, and the concrete means for the calculation thereof, indicating 3 possible situations: pro rata with the amounts collected pursuant to the use of the work, fixed amount, or in any other way whatsoever. In practice, the phrase "in any other way whatsoever" is generally transposed as follows: fixed amount plus a percentage or percentage plus fixed amount. Remuneration is similarly regulated in France[47]. In fact, the payment of royalty due by the subcontractor to the assignee is also established, considering their capacity as privileged creditors of the author.

Out of the need to protect the authors' interests, the lawmaker regulated under art. 43(2) the situation in which the remuneration was not established under the contract, in which case "the author may request competent bodies to establish the remuneration, according to the law. This shall be performed taking into account the amounts usually paid for the same category of works, the destination and duration of use, as well as other circumstances of the case", and under para (3) the situation of the obvious discrepancy between the amount of the remuneration and the benefits obtained by the assignee, for which "the author may request the competent bodies to review the contract or adequately increase the remuneration".

Moreover, these provisions must be correlated with the ones in art. 1.233 of the New Civil Code, concerning the determination of the price between professionals, in which case, if the price is not established or the concrete method for the calculation of the price is not indicated, it is assumed that the parties took into account the price customarily charged in the respective field for the same services carried out under similar conditions or, in the absence of such a rate, a reasonable price.

e) number of copies reserved to the author free of charge;

This clause has not led to any issues in the contractual relation between the author and the publisher, but I do however believe that the number of copies reserved to the author free of charge must take into account the number of copies of the work; hence, it must not be disproportionately high as compared to the overall number of published copies.

f) the term for the publishing and distribution of the copies of each edition or, as applicable, of each run;

If the clause concerning the number of editions, respectively the number of copies in each run was not included in the publishing contract, the specialized literature is unanimous[48], in that the publisher will be entitled to publish as many editions as it desires without requiring the author's consent, but in compliance with the related obligations: to inform the author on the published editions, to remunerate the author, and to observe their moral rights.

g) the term for the handover of the original work to the author – in this case as well, the negotiations between the parties concerning the content of the contract shall determine the establishing of the term for the handover of the original of the work by the author, considering that the author holds the sovereign right to decide as to when the work is completed, but also to protect the publisher's investments.

h) procedure for the control of the number of copies produced by the publisher.

If the publishing contract does not include any clauses concerning the duration of the assignment, the exclusive or non-exclusive nature or the territorial scope of the assignment and the author's remuneration, the interested party holds the right to claim the termination of the contract[49], respectively the relative nullity of the contract, which can be invoked by the author.

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[46] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 384.
[47] Claude Colombet, *"Propriété littéraire et artistique et droits voisins"*, Dalloz, Paris, 1999, p. 244-253.
[48] *Idem*; André Lucas, Henri-Jacques Lucas, *op.cit.*, p. 502.
[49] Art. 51 par. (2) Law no. 8/1996.

Obligations of the parties[50] – in relation to the same:

The author has the following main obligations:

a) The obligation to make available to the publisher the subject-matter of the publishing contract

This obligation results from the very nature of the publishing contract, regardless of the form under which the work is made available to the publisher, of course, with the exception of imitative art works, and it is reinforced, inter alia, by the clause concerning the establishing of the term for the handover of the work to the publisher (art. 51(1)(g).

The situation in which the work is not made available to the editor by the author equals the enforcement by the author of the withdrawal right, because the withdrawal right may only be enforced by the author, and by its heirs. The withdrawal situation also applies if the author, through the contract, holds the right to pass the work for press and refuses to do the same after the contract with the publisher was signed[51]. I believe it is in the interest of both parties the fact that the author's right to pass for press must be expressly mentioned in the publishing contracts.

In the case of a refusal to make available[52], if it comes from the author, then the author may be bound to pay damages to the publisher, and if it comes from the author's heirs, the editor cannot claim the forced execution of the contract or the termination thereof with damages.

According to art. 55, the publisher is bound to return the original of the work to the author, the originals of the works of art, the pictures, and any and all other documents received for publication, unless agreed otherwise. Hence, the holder of the rights maintains the property right over the material media. The solution adopted by the Romanian lawmaker in the case of other categories of works, i.e. the photographic ones, is different; art. 86(3) stipulates that”the alienation of the negative of a work of art triggers the transmission of the copyright holder's patrimony rights over the same, unless otherwise stipulated in the contract”.

b) Guarantee obligation

Considering that Law no. 8/1996 does not regulate this obligation of the right holder, the common law provisions in the field are applied, and we distinguish between the guarantee for the personal deed and for a third party's deed.

Amongst the obligations, the doctrine lists[53]: the author is liable for previous or subsequent assignments made, even if they concern a different work, but which only is different from the first one by insignificant details; the assignor must refrain from any acts or actions that disturb the normal use of the work; if the assignor transferred to the publisher the right of reproduction and distribution for one edition only, they may not conclude another contract before the first print is exhausted, respectively they may not include the work in a complete edition of their works before the previous print is exhausted; the assignor guarantees the publisher against the vices of the edition subject and that make the work improper for reproduction and distribution.

The guarantee for a third party's deed only includes the rightful nuisance, hence the holder of rights guarantees the publisher both against counterfeit that it could perform itself, and against the counterfeiting of the work by third parties. Against the latter, both the publisher and the holder of rights may initiate the action in counterfeit against the latter.

The publisher holds the following obligations:

a) The obligation to publish the work (art. 48 (1) and art. 56(3))

By the nature of the publishing contract, the obligation to publish the work is both a right, and an obligation of the publisher, but Law no. 8/1996 regulates this obligation indirectly[54], by sanctioning the publisher's failure to observe the work publication term. To this end, art. 56(3)-(4) stipulates as follows: ”(3) If the publisher does not publish the work within the agreed term, the author may request the termination of the contract and non-performance damages. In this case, the author maintains the remuneration received, or, as the case may be, can request the payment of the full compensation stipulated in the contract.

(4) If the term for the publication of the work is not stipulated in the contract, the publisher is bound to publish the same within no more than one year as of the acceptance thereof.”

In so far as the term for the publication of the work is concerned, in the absence of an express contractual clause, it follows that it is of 1 year as of the acceptance of the work.

The obligation to publish the work is a result obligation resting with the publisher, as publication

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[50] See in detail Ana-Maria Marinescu, ”*Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (II). Contractele de valorificare a drepturilor patrimoniale de autor: contractul de comandă a unei opera viitoare și contractual de editare” (Contracts for the exploiting patrimonial copyright: contract for ordering a future work and publishing contract)*, Revista Română de Dreptul Proprietății Intelectuale nr. 4/2015, p. 144-151. (Romanian Magazine for the Intellectual Property Law no. 4/2015, p. 134-135).

[51] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 381.

[52] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 380.

[53] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 381-382.

[54] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 383.

supposes the communication and distribution of the work to the public, mainly, **the reproduction and distribution of the work**.

According to art. 14 of Law no. 8/1996, **reproduction** means the full or partial performance of several copies of a work, either directly or indirectly, temporarily or permanently, by all means and under any form, including the performance of any and all sound or audiovisual recording of a work, as well as the permanent or temporary storage thereof using electronic means.

In the case of the publishing contract, reproduction considers:

- **a minimum and a maximum number of copies** (art. 51(c)), hence **the clause concerning the number of copies**;

- **the number of editions** (art. 51(f));

- **the number of copies reserved to the author free of charge** (art. 51(e));

- **the conditions of use**, for example, the edition type (luxury, pocket, volume, etc.), the distribution channel, the number of volumes, the format, quality, media, run, sale price, etc.

Considering the definition of the reproduction notion, I hereby stress the focus that should be laid on the "means" and the "form" of the reproduction. Hence, the electronic reproduction of the works must be expressly stipulated in the contract. According to the past years' practice, in the case of written works, authors assign to publishers both the physical, print or hardcopy reproduction, and the digital reproduction, regardless of the means through which it is achieved (scanning, audio book etc). I see digital reproduction as associated to works already published in print format and for which a publishing contract was already concluded, but it only stipulates the print reproduction, it is carried out without the consent of the holder of rights and normally the publisher must authorize this type of reproduction as well, with the correlated payment of a remuneration.

To this end, art. 52 of Law no. 8/1996 stipulates that the publisher acquiring the right to publish the work under the form of a volume holds, towards other similar offerers, with an equal price, the priority right to publish the work in electronic format. The publisher must communicate its option in writing, within no more than 30 days as of the receipt of the author's written request. This priority right of the publisher is valid for 3 years as of the publication of the work.

Thus, it follows that the publisher who concluded a publishing contract with the author concerning the publication of the work under the form of a volume, holds the priority right to publish the work in electronic format. This right may be enforced by formulating a written offer on behalf of the author, submitted with the publisher, to which the latter must respond within 30 days as of the receipt of the offer.

reproduction term;

As shown above (art. 48(1) and art. 56(3)), the law only makes reference to the work publication term, i.e. 1 year as of the acceptance of the work, not the one for the performance of the copies. I believe that, through the application in extenso of the work publication term, it also affects the copy performance term and, by way of consequence, if the copies are not performed within 1 year, the work cannot be published, under the sanction of the termination of the contract and payment of damages to the author.

The second part of the obligation to publish the work is the **distribution** one. According to art. 14[1] of Law no. 8/1996, distribution means the sale or the transmission under any form whatsoever, in exchange for a price or free of charge, of the original or of the copies of a work, as well as the public offering thereof. Thus, the distribution of the work depending on its type supposes the sale, lease, or borrowing thereof.

The specialized literature in our country[55] brings into discussion a very important aspect from the economic perspective of the distribution of the work, i.e. the **publicity** thereof, and which consists of the operations through which the work is promoted, communicated, in order to attract clients. Moreover, the specialized French literature[56] shows that the publicity of the work for the promotion thereof is an actual obligation of the publisher. This obligation is a means and not a result obligation, and, hence, it shall be fulfilled according to the general practices, depending on the nature of the work and according to the publisher's financial resources, e.g., by: posters, the inclusion in work catalogues, the offering free of charge, etc.

The work distribution activity will of course be carried out by the publisher, but it can also be performed by a third party with whom the latter concluded a distribution contract. In general, the publishing contract must also stipulate the distribution price, but if no reference is made to the same, then it is presumed that the assignor agreed it being established by the publisher. Of course the publisher cannot establish an exaggerated distribution price, because it would prevent the sale of the work, and would make its own activity more difficult.

b) The obligation to use the work (art. 47 (1)-(3))

The obligation to use the work is not specifically regulated under the legal provisions on the publishing contract, but under the general assignment contracts. Thus, art. 47(1)-(3) stipulates:

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[55] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 385.

[56] André Lucas, Henri-Jacques Lucas, *op.cit.*, p. 501.

”(1) The author may request the termination of the contract for the assignment of the patrimony right if the assignor does not use it or insufficiently uses it and if, through the same, the justified interests of the author are considerably affected.

(2) The author cannot request the termination of the assignment contract, if the reasons for the non-use or insufficient use are due to its own fault, to a third party's act, an Act of God, or a force majeure event.

(3) The termination of the assignment contract, mentioned under para (1), cannot be requested before the expiry of a two-year term as of the assignment of the patrimony right over a work. In the case of the works assigned for daily publications, this term shall be of three months, whereas in the case of periodicals, it shall be of one year."

At the same time, the obligation to use the work follows from the publisher's obligation to publish the work, thus turning the publishing contract, as all other assignment contracts, in fact, into a successive performance contract[57]. In the light of the same, the doctrine[58] has identified the following obligations for the publisher: to hold a sufficient number of copies, both on stock, and for sale, and to reprint the work, if exhausted. According to art. 53 of the law, the publisher is bound to allow the author to make improvements or other changes to the work in the case of a new edition, provided that the same do not essentially increase the publisher's costs and that they do not change the nature of the work, unless otherwise stipulated in the contract. Hence, in the case of a new edition, the publisher is bound to allow the author to make improvements to the work, and such improvements must cumulatively observe two conditions: not to essentially increase the publisher's costs and not to change the nature of the work.

c) The obligation to pay the remuneration due to the holder of the rights (art. 48)

On the one hand, the obligation to pay the remuneration due to the holder of the rights is subjected to the general assignment rules: it shall be paid to the author, but also to its successors in rights; it is established by mutual consent: in a fixed amount, or pro rata with the amounts collected from the use of the work, or in another way, for example fixed amount plus percentage; if the remuneration was not established under the contract, the author can request the courts to cancel the publishing contract; in the case of an obvious discrepancy between the amount of the remuneration and the benefits obtained by the assignee, for which the author may request the competent bodies to review the contract or adequately increase the remuneration.

On the other hand, in the case of the obligation to pay the remuneration due to the holder of the rights, Law no. 8/1996 also regulates certain specific aspects concerning the destruction of the work by force majeure, the author being entitled to a remuneration, which shall only be paid if the work is published. The law distinguishes between full and partial destruction of an edition. Thus, according to art. 57(2) of Law no. 8/1996, if a prepared edition is fully destroyed, as a consequence of force majeure, before it is published, the publisher is entitled to prepare a new edition, and the author shall hold the right to receive a remuneration for one of these editions only, and according to art. 57(3) of Law no. 8/1996, if a prepared edition is fully destroyed as a consequence of force majeure, before it is published, the publisher is entitled to reproduce, without paying a remuneration to the author, the number of copies destroyed.

d) Obligation to return the original of the work (art. 55)

This obligation is specific to the publishing contract, pursuant to art. 55 of Law no. 8/1996, the publisher being bound to return the original of the work, the originals of the works of art, the illustrations, and any other documents received for publication, unless agreed otherwise.

e) The obligation to offer the copies available on stock (art. 56(5))

This obligation also is specific to the publishing contract, pursuant to art. 56(3) of Law no. 8/1996, the publisher being bound to first offer to the author the copies of the work, which the publisher intends to destroy, if the same are on stock over a period of 2 years as of the publication date, and unless a different term is stipulated in the contract. Under the current wording of Law no. 8/1996, the offering of the works on stock to the operator is free of charge, because the non-altered wording of the work stated that the publisher was to first make an offer to the author, according to the price it would have obtained by selling the same to be destroyed.

Concerning the publisher's obligations, I stress the **relevance of the observance by the publisher of all author's moral rights**. Even if this aspect is not regulated as an express contract clause, I believe that they should be observed beyond all doubt, because they concern the most important intrinsic features of the author's personality:

- the right to decide if, ho9w, and when the work is to be made public – the author is the only one entitled to decide in which way the work is going to be made public, for example, a written work, published as audio book, and when the work is to be made public, for example, when the author is certain that the work will be completed.

- the right to claim the acknowledgement of the capacity as author of the work – i.e. to be mentioned as author of the work, e.g., on the cover of a book;

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[57] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 386.

[58] *Idem.*

- the right to decide on the name under which the work is to be made public – if the work is to be made public under a pseudonym, the publisher must observe the author's will and not to disclose to third parties and to the public the actual identity of the author. This moral right of the author becomes even more important in the relation with the author from the perspective of the plagiarism offence. Without insisting on the plagiarism notion, I hereby stress that according to the provisions in art. 141 thesis 2, the deed of a person that makes a work public under a different title than the one chosen by the author is an offence. Hence, publishers must strictly observe the author's moral right to decide on the name under which the work is to be made public; if not, of it makes the work public under a different name than then one chosen by the author, the deed may be regarded as plagiarism.

- the right to claim the observance of the integrity of the work and to oppose all amendments, as well as any and all prejudice caused to the work, if it affects their honor or reputation – the publisher is bound to observe the integrity of the work, and may only publish it in the form decided upon by the author. The publisher can only eliminate fragments of the work with the consent of the author, i.e. in the form agreed upon by the author. The publisher may only request the author to bring certain changes to the work, if it believes it beneficial for the publication of the work. If the author refuses to bring the changes requested by the publisher, the latter is entitled not to publish the work. It goes without saying that the publisher may correct spelling, punctuation, and syntax mistakes, but not the author's style[59] or add notes, annotations, or comments to the work.

For the very purpose of protecting the author's moral rights, as stipulated above, in the case of a new edition (art. 53), the publisher is bound to allow the author to make improvements or other changes to the work, with the cumulative observation of two conditions: not to essentially increase the publisher's cost and not to change the nature of the work.

- the right to withdraw the work, compensating, if applicable, the holders of the rights of use, prejudiced by the withdrawal – if the work was published and then withdrawn by the author, the latter is bound to compensate the publisher.

Contract assignment - In so far as the **assignment of the publishing contract is concerned**, art. 54 of Law no. 8/1996, stipulates that the publisher may assign the publishing contract with the author's consent only. This legal provision is in compliance with the intuitu personae nature of the publishing contract, determined by the publisher, by the capacity it holds, and by the relations established with the author. Deriving from the intuitu personae nature of the publishing contract, the author's consent must be indicated in writing, even though the law does not stipulate the same, unlike the theatre and musical performance contract, in the case whereof it is stipulated[60] that "The beneficiary of a theatre or musical performance contract may not assign the same to a third party show organizer, without the written consent of the author or of the representative thereof, apart from the case of the simultaneous full or partial assignment of this activity".

The publishing contract may terminate both under the common law provisions (mutual consent of the parties, expiry of the term), and for specific cases (exertion by the author of the right to withdraw the work, the last agreed edition is exhausted, the work is not published within the set term, the original work is destroyed).

Edition means[61] all the copies of a printed work, of one or several runs, for which the same squabble is used, and run[62] means the number of copies a book or a periodical is printed in. Hence, an edition may have one or several runs.

To this end, art. 56(1) of Law no. 8/1996 stipulates that, in the absence of a clause to the contrary, the publishing contract terminates after the expiry of the term agreed upon or after the last edition agreed upon is exhausted. At the same time, para 2 of the same article defines the notion of "exhausted edition", respectively the one for which the number of copies not sold is below 5% of the overall number of copies and, by all means, it is below 100 copies. I believe that this legal provision, especially in the case of books, no longer resonates with the commercial realities, since a run of 100 copies currently is regarded as a large one.

If the work is not published within the set term, the author may claim the termination of the contract and damages.

If the work is destroyed pursuant to the fault of one of the parties, then the entitled party may claim damages. If the work is destroyed pursuant to an Act of God or to force majeure, the contract shall be terminated and no damages may be claimed.

Legal features[63] - Considering all the aspects above, the following **legal features** of the printing

[59] Yolanda Eminescu, *"Dreptul de autor – Legea nr. 8 din 14 martie 1996 comentată"*, Lumina Lex Printing House, Bucharest, 1997, p. 161.
[60] Art. 59(4) of Law no. 8/1996, as subsequently amended and supplemented.
[61] https://dexonline.ro/definitie/ediție
[62] https://dexonline.ro/definitie/tiraj
[63] See in detail Ana-Maria Marinescu, *"Cesiunea și licențierea în materia drepturilor de proprietate intelectuală (II)* (*Assignment and licensing in the field of intellectual property rights (I). Teoria generală a contractelor de valorificare a drepturilor patrimoniale de autor"*, Revista Română de Dreptul Proprietății Intelectuale (Romanian Magazine for Intellectual Property Law) issue 3/2015, p. 101-102.

contract may be identified, which determine a proprietary physiognomy[64]:

- it is a **bilateral contract**, because both parties hold mutual obligations: the publisher to reproduce and distribute the work, and the author to make the work available to the publisher;

- it is **an onerous and commutative contract**, because both parties desire to obtain patrimonial advantages, and mutual obligations are known ever since the conclusion of the contract, even if the author's remuneration is established pro rata with the gains obtains from the distribution of the work, because in this case the scope of the publisher's obligation is determined. I believe that the parties cannot agree upon the conclusion of the publishing contract free of charge[65], because it would void one of the contract elements, i.e. the author's remuneration. To this end, the Romanian lawmaker stresses the onerous nature of the publishing contract (art. 51(1)(d)), because it sanctions the lack of the clause concerning the author's remuneration with the possibility of the interested party to request the termination of the contract (art. 51(2)).

The specialized literature[66] has shown that a publishing contract is free of charge when, for instance, the author assigns to the editor the rights to reproduce and distribute the work without any material claims in exchange.

- it is a **consensual** contract, i.e. it is concluded through the mere willful consent of the parties, the written form being stipulated ad probationem only.

- it is a contract that **translates rights** in the case o the exclusive assignment, because it supposes the transfer of an actual right, whereas, in the case of the non-exclusive assignment, it concerns the establishment of a personal right with the correlative obligations, and the non-exclusive assignor cannot lodge the counterfeit action[67].

- it is a **designated contract**[68] – because it is distinctly appointed as a legal institution by Law no. 8/1996;

- it is a **negotiated contract**[69] – because it is concluded after the negotiation of the contractual clauses between the parties.

Comparative Law - From the point of view of the comparative law, we shall analyze the provisions in the publishing contract in the French law, highlighting certain aspects that I believe to be important for the understanding of the contract, because national regulations are similar. The French Intellectual Property Code regulates the publishing contract under art. 132-1 – art. 132-16 and defines it as the contract through which the author of an intellectual creation work or the holders of rights assign, under predetermined conditions, to a certain party referred to as editor, the right to reproduce the work in exchange for a remuneration, so as to ensure the publication and distribution of the work.

French court orders highlighted the intuitu personae[70] nature of the publishing contract in that it supposes mutual trust between the author and the editor; hence, the deed of the editor that does not admit as to the fact that it presented the author as racist "precursor of contemporary genocide", infringes this specificity of the contract. It is the same with the deed of the publisher indicating to the public the identity of the author who wanted to maintain the pseudonym or, in general, through its behavior, ruined the author's public credibility. According to this specificity of the publishing contract, the publisher must guarantee the protection of the author's moral and intellectual patrimony, in a climate of mutual trust. To this end, the publisher may publish competing works, but it does make a mistake if it takes no action to promote the first work so as to facilitate the launching of the second work.

If the publisher faultily develops the work, result of its own fault and infringement of contractual obligations, the author may request the remedy of the prejudice, which shall be appreciated by the law court and that may consist, for instance, of the destruction of the work copies[71].

The publisher may be bound to correct severe spelling or semantic errors in the manuscript or communicate the same to the author to have them corrected[72].

The insufficient promotion of the work by the publisher, the absence of a satisfactory advertising campaign and the faults in the distribution in bookshops shall be reasons for the termination of the contract by the author[73].

In so far as the author's remuneration is concerned, it must be pro rata with the results of the use of the work, respectively, as stipulated by the French courts, at the level of the public work sale price[74]. By way of exception, art. 132-6 of the Intellectual Property Code stipulates that the remuneration for bookshop editions may be under

[64] Ioan Macovei, *"Tratat de drept al proprietății intelectuale"*, C.H. Beck Printing House, Bucharest, 2010, p. 476.
[65] See the contrary opinion of Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 376; Bujorel Florea, *op.cit.,* p. 22.
[66] *Idem.*
[67] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *op.cit.,* p. 376.
[68] Bujorel Florea, *op.cit.*, p. 25.
[69] Bujorel Florea, *op.cit.*, p. 26.
[70] Code de la Propriété Intellectuelle, LexisNexis Litec, Paris, 2009, p. 217.
[71] Code de la Propriété Intellectuelle, LexisNexis Litec, Paris, 2009, p. 218.
[72] *Idem.*
[73] *Idem.*
[74] *"Droit d'auteur et droits voisins"*, Editions Francis Lefebvre, Levallois, 1996, p. 173.

the form of a lump sum, with the author's consent, for the first edition and for: scientific or technical works; anthologies and encyclopedias; prefaces, notes, introductions, presentations; illustrations; limited deluxe editions; prayer books; upon the translator's request for translations; popular editions; children albums. Thus, the lump sum remuneration only applies to bookshop editions, for the first edition and with the author's formal consent.

The penalty clause may be applied, for instance, in the cases in which: the author tardily sends the manuscript to the publisher and the publisher registers delays in the reproduction and/or distribution of the work[75].

Unlike Law no. 8/1996, the French Intellectual Property Law stipulates that the author must personally express the written consent. Hence, the written form of the publishing contract is an essential condition for the conclusion thereof. To this end, the French courts believes that the republishing of a new run developed by the publisher in the absence of a written publishing contract is illicit.

The editor is bound to reproduce the work only under the conditions, form, and according to the means stipulated in the contract and may not change the work in any way whatsoever without the writer's written consent. Hence, the publisher is bound to respect the work, to which end, if the editor could not bring any changes to the work, this obligation also applies to the title of the work and to its preface[76]. At the same time, the author is bound to issue the ready for press notice, so that if the publisher publishes the work without obtaining such notice from the author, it severely infringes the author's moral entitlement concerning the observance of the integrity of the work[77].

Moreover, the publisher is bound to mention the author's title according to its will and without indicating the identity of the author who wanted the work to be published under a pseudonym[78].

One of the most important obligations of the editor, regulated by the Intellectual Property Code in France[79] unlike Law no. 8/1996, concerns the fact that the publisher is bound to ensure the permanence and commercial distribution of the work, according to professional customs. To this end, the French jurisprudence constantly stated that the obligation of the publisher to publish the work is an essential one, without which there is no editing contract[80]. As a principle, the publisher is bound to ensure the permanent use of the work and binds the publisher to permanently hold copies available for sale and distribution, but not to ensure the publicity of the work during its use. The publisher that did not notably managed, for more than 20 years, to ensure the permanent use of the work, may not republish the work without the consent of the authors[81].

3. Conclusions

Romanian legal regulations concerning the publishing contract are compliant with the ones in the European Union, but they do require better systematization of the wording, which is the subject of *lege ferenda* proposals.

The article presents in detail, by permanent reference to the laws applicable and the specialized literature in the field: the definition of the publishing contract, the parties, with the indication of the capacity thereof, the contract clauses, the obligations of the parties, the termination provisions. Moreover, the legal provisions in France concerning the publishing contract are analyzed. Apart from the practical nature of the article, it also is an important reference source.

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[75] André Bertrand, *op.cit.*, p. 383.
[76] Code de la Propriété Intellectuelle, LexisNexis Litec, Paris, 2009, p. 223.
[77] *Idem.*
[78] Code de la Propriété Intellectuelle, LexisNexis Litec, Paris, 2009, p. 224.
[79] Art. 132-12.
[80] Code de la Propriété Intellectuelle, LexisNexis Litec, Paris, 2009, p. 224.
[81] *Idem.*

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