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ON THE IMPLICATIONS OF THE UNALIENABILITY OF THE RIGHT OF AUTHORSHIP FOR GHOSTWRITING CONTRACTS

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1. INTRODUCTION

Ghostwriting is a phenomenon defined as an act of creating a work for a client that is then publicly distributed not under the name of the actual author, but that of the client. This notion has been borrowed from American terminology, but has not yet found its equivalent in the legal terminology of many countries. The reason for this might be connected with the structure of the notion itself, the very essence of the activity, consisting of two separate words – "ghost" and "writing". As the specificity of each language made it intensely difficult to translate the wording accurately, many foreign authors chose to adapt the English term for the notion instead.[1]

One of the notable features of ghostwriting is that it raises consternations about its legacy under many national copyright acts providing

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[1] Polish Wikipedia explains that the translation of the term "ghostwriter" would be "murzyn" (meaning a "literary slave") or "widmo" (meaning a "spectrum"). However, these terms are not in common use. We mostly find reference to "ghostwriting" rather than to its translations. Even submissions papers for scientific reviews and journals use the term "ghostwriting" rather than its Polish translation (so-called "zapora ghostwriting"). Source: https://pbn.nauka.gov.pl/static/doc/wyjasnienie_dotyczace_ghostwriting.pdf, accessed on 31.05.2013.

for the unalienability and unwaivability of the right of authorship. This paper argues that a ghostwriting contract should be perceived as invalid under copyright law as such, because it openly infringes ethical or academic standards. In addition, contractual clauses or constructions designed in order to accompany the practice of entering into ghostwriting agreements must be perceived as inconsistent with the principles of community life, not to mention the circumvention of statutory law. These assumptions, in turn, give rise to further underlying questions concerning such issues as the origins of ghostwriting, the broad nature of this term and the basis of its unfavourable social connotation, the legal basis for finding ghostwriting inconsistent with copyright legal norms and whether ghostwriting is allowed from a comparative point of view. There are also questions about political speeches and autobiographies, so commonly referred to under the broad concept of ghostwriting. This paper is divided into five main parts highlighting the fundamental flaws of ghostwriting agreements.

2. THE ORIGINS OF GHOSTWRITING AND THE 'AUTHOR'S CONSCIOUSNESS'

As A. Ng once noted, "it is said that history is always a backdrop to understanding the struggles that we face is modern times, and the historical development of the law of copyright is hardly an exception to this norm."[2] Therefore, referring to the subject of this paper, it could be said that ghostwriting is as old as time, and it certainly existed back in ancient Rome.[3] Back then, the owner of a manuscript would sell it for a specific price, though we have to understand that this situation was judged differently in the past, rather than by today's standards.[4] At a time there was no

[2] A. Ng, Commercializing Motion Pictures and Sound Recordings through the Internet: Copyright Law and Technological Chance, Michigan, 2004, p. 1.

[3] H. Schack, *Urheber – und Urhebervertragsrecht*, Tübingen 1997, p. 126, fn. 272; G. Michaélidès-Nouaros, Le droit moral de l'auteur, Paris 1935, p. 65.

[4] S. Grzybowski, *Prawo autorskie w systemie prawa*, [in:] S. Grzybowski, A. Kopff, J. Serda (ed.), *Zagadnienia prawa autorskiego,* Warszawa 1973, p. 38; K. de la Durantaye, Ruhm Ruhm und Ehre. Der Schutz literarischer Urheberschaft im Rom der klassischen Antike, 2006, Para. 227.

notion of intangible property and no concept of personal rights, there was a different approach to ties between the author and the work.

Although the Middle Ages were not a time of self-esteemed authors striving for fame, there are noted occasional cases of authors revealing strong ties to their works. Eike von Repgow in "Sachsenspiegel" (lit. "Mirror of the Saxons")" of 1230 was said to have written "Eyke von Repchowe iz tete,"[5] and Nicolaus von Jeroschin, in "Kronike von Pruzinlant" of 1330 wrote, "Nu sol ich ouch hi nennen mich, zwar nicht in rumis gere, want ich des gerne impere."[6] These were the beginnings of 'author consciousness', called by Strömholm the "conscience du fait créateur."[7]

In fact, hundreds of years had to pass so that, at the time of the historic transformations of the 18th century, the romantic concept of authorship could develop. This enabled an average individual to understand why the creation of a work and its use do not, in fact, come down only to the creation of an object ('res') that may be freely disposed of. This concept helps explain why, in addition to the financial rights, the author also acquires

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[5] L. Gieseke, *Vom Privileg zum Urheberrecht. Die Entwicklung des Urheberrechts in Deutschland bis 1845*, Baden Baden 1998, p. 10; por. "Zurückschauend aus einer Gegenwart mit ausgebildetem Urheberrechte auf Zeiten, die noch kein Urheberschutz kannten, sehen wir schon in der Namengebung durch den Schöpfer eine gebührende, bereits jenen Tagen selbstverständliche Äusserung höchst persönlicher Verbundenheit zwischen Verfasser und Werk. [...] So meldet sich schon im hohen Mittelanter die Abwehr gegen Verschandelung, die wir heute als ein Stück Urheberpersönlichkeitsrecht anerkennen". G. Müller, *Eyke von Repgow als Urheber*, UFITA nr 10, 1937, p. 417-419.

[6] S. Strömholm, *Le droit moral de l'auteur*, Stockholm 1967, p. 65; E. Strehlke (ed.), *Scriptores Rerum Prussicarium*, vol. I, Leipzig 1861, p. 305.

[7] S. Strömholm, *Le droit...*, p. 65. "Die Bereicherung, die der Entwicklungsgang zum Urheberrechtsbewusstsein durch das Mittelalter erhielt, lag also auf dem Gebiet des persönlichen Verhältnisses zwischen Urheber und Werk. Im Hoch mittelalter wurde die Leistung der Werkverwirklichung zum erstenmal noch ausschliesslich im rationale Bereich verblieb und mehr die Ausübung einer Verpflichtung als ein Verdienst darstellte. Dennoch reichte diese Weiterentwicklung des Bewusstseinsstandes über die persönliche Leistung im Hochmittelalter bereits auf, um konkrete urheberrechtlich relevante Folgen zu zeitigen: eine Auflockerung des küstlerischen Aktionsbereich und eine Steigerung des persönlichen Wertbewusstseins in den Kreisen der Autoren im Sinne einer Verengung und Individualisierung des Verhältnisses zwischen Schöpfer und Werk. [...] Das *objective* Interesse am Werk began sich allmählich mit *subjektiven* Belangen zu durchsetzen" W. Bappert, *Wege zum Urheberrecht*, Frankfurt am Main 1962, p. 88.

personal rights securing his bond with the work. And even though the law presently protects a much broader catalogue of work than the romantic concept of authorship would permit, this serves to illustrate the *ratio legis* behind making moral rights unalienable and irrevocable.

Over many centuries, authors have manifested their link with their work by explicit manifestation. There is a well-known anecdote about Michelangelo who, upon finding out that his sculpture for the chapel at St. Peter's Basilica had been attributed to his patron, sneaked up to the Basilica one night to secretly carve his name on the palm of the Pieta. In its essence, the idea of ghostwriting resembles the relationship between an artist and a patron from the Renaissance, though it seems that the Renaissance author suffered more from authorship being attributed to a different person than, in many instances, a contemporary author would. In times of patronage, artists looked for it to secure their financial needs and facilitate the publication of their work. In return for protection, the composer usually dedicated his work to the patron, which was sometimes regarded as attributing the authorship of the work to him. 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."[8]

If we dare suggest that ghostwriting resembles disseminating works of authorship anonymously, which happened to be the case still up to the late 18th century, then it is important to note that authors have always had "a hunch" that creating a work of authorship is a very personal act that should not be acknowledged to anyone else but them. Therefore, they used various methods to hide details in works to indicate their parentage.

This view can be confirmed by examining individual pieces of work since the Renaissance. For example, on his painting, *Coronation of the Virgin,* Fra Filippo Lippi placed an inscription by the portrait of his patron: "*is perfecit opus*", which means, "he brought this work to completion." At first, those authors coming out of the shadow of anonymity did not necessarily sign their works with their names. They often included their portrait among the presented figures, or in some other way left a trace of

[8] M.M. Carroll, *Whose music is it anyway?: How we came to view musical expression as a form of property*, U. Cin. L. Rev. 2004, No. 72, p. 1477.

their creative act. For example, on one of his paintings, Mantegna painted Cardinal Gonzaga holding a sheet of paper with the inscription: "Andrea me pinxit". It is considered that the voices of these authors, raised ever more frequently and loudly as the 19th century drew closer, were what laid the foundations for establishing a need to regulate the legal situation of the author under law. The authors' attitude itself, commonly accepted among lawyers and philosophers, became the cornerstone of legal changes brought to the Berne Convention by its revision in 1928 in Rome. The convention was amended by adding Article 6bis reading in Article 6bis paragraph 1: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation". According to Article 6 bis paragraph 2 of the Berne Convention "the rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed". It would seem that granting authors moral rights that were considered inalienable and (in principle) irrevocable,[9] would solve a problem that had existed for decades concerning the preservation of the author-work authorship bond.[10] It turned out, however, that new problem arose, namely ghostwritng, which would lose any legal justification it may have had.

3. THE SCOPE OF THE NOTION AND ITS SOCIAL PERCEPTIONS

The difficulty posed by attempts to properly classify ghostwriting in legal terms is that this institution covers a number of varied situations, including writing speeches for politicians, writing the memoirs of known

[9] S. Ricketson, J.C. Ginsburg, *International Copyright and Neighbouring Rights, The Berne Convention and Beyond,* II ed., vol. I, Oxford University Press 2006, p. 587.

[10] Cf. I. Lee, *Toward an American Moral Rights in Copyright*, 58 Wash.&Lee L.Rev. 795, 2001, p. 799 et seq.

persons, writing works of fiction, writing student and PhD theses or writing songs.[11] Its omnipresence is highlighted through examples of ghostwriting's sister institutions, such as ghostcomposing or ghostpainting, the meaning of which needs no explanation. However, the existence of these concepts makes it evidently clear that this practice occurs in all areas of artistic and scholar work.

The problem with ghostwriting is that its broad and varied scope leave it very difficult for the legislator to answer the question as to where a line should be drawn, and when its use should be prohibited. Sometimes we see the significance of this seemingly theoretical discussion in drastic examples, e.g. signing medical articles with the names of famous authorities in the field in return for money. To draw a good example, dubious medical ghostwriting practices can be raised. On renowned example of this frowned upon practice is that of Dr. Troyen Brennan of the Brigham and Women's Hospital in Boston, who was asked to submit a ghostwritten editorial for a pharmaceutical company about the possible legal liability of physicians who prescribe antihistamine drugs causing drowsiness. The editorial was to be remunerated hansomely, followed by an offer of several publications in reputable magazines. Dr. Brennan declined, but wrote about his experience, offering it as a warning of potential conflicts of interests in the profession.[12] The darker side of medical ghostwriting can also be found in the example of L. Lodgberg, who was hired to revise a manuscript supporting the use of a drug for attention deficit-hyperactivity disorder (ADHD). As she had two children with ADHD herself and knew the drug, she was genuinely concerned about the accuracy of the facts given and claims made. She wrote sometime later, "attempts to discuss my misgivings with the [medical] contact met with the curt admonition to 'just write it.' But perhaps because this particular disorder was so close to home, I was unwilling to turn this ugly duckling of a "me-too" drug into a marketable swan."[13] This

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[11] R. Markiewicz, *Dzieło literackie i jego twórca w polskim prawie autorskim*, Kraków 1984, p. 120, 151-154; . Wojnicka (in:) J. Barta (ed.), *System Prawa Prywatnego. Prawo autorskie*, vol. 13, Warszawa 2003 , p. 252.

[12] J.P. Kassirer, *On the Take: How Medicine's Complicity with Big Business Can Endanger your Health*, New York 2005, p. 33.

[13] L. Logdberg (2011) Being the Ghost in the Machine: A Medical Ghostwriter's Personal View. PLoS Med 8(8): e1001071. doi:10.1371/journal.pmed.1001071, http://

is also why medical ghostwriting is being challenged in US with increasing frequency and vehemence.

4. GHOSTWRITING VS. COPYRIGHT LAW

In the theory of law, it has been commonly stated that a legal norm can only be held binding when it complies with commonly-approved moral and social norms.[14] Ghostwriting appears to have escaped this rule and, because of its practical significance, effectively casts a shadow over the principle of the inalienability of the right to authorship, introduced not only to the Berne Convention in Article 6bis, but also to numerous national copyright acts. Even lawyers practicing copyright law must ask themselves on occasion, "if one side wants to sell and the other needs to buy, what is the problem?" Well, the problem is much larger than it may at first seem, and lies in a completely different dimension to that in which we are inclined to look.

Ghostwriting is a phenomenon that, due to its general acceptance, is escaping the rule of the inalienability of moral rights. The concept of moral rights owes its existence to the strong structure that has been hammered out of the philosophical and legal concepts, which, together with economic rights, has created a framework for the existence of copyright. The principles governing moral rights seem to be clear in the theory of copyright law, and it is therefore topical and interesting to describe and assess this

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www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001071, accessed 20.05.2013; S. Stern, T. Lemmens, Legal Remedies for Medical Ghostwriting: Imposing Fraud Liability on Guest Authors of Ghostwritten Articles, 2011, PLoS Med 8: e1001070, http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001070#pmed.1001070-International1, accessed 01.05.2013 r., por. X. Bosch, B. Esfandiari , L. McHenry (2012) Challenging Medical Ghostwriting in US Courts. PLoS Med 9(1): e1001163. doi:10.1371/journal.pmed.1001163, P.C. Gøtzsche, J.P. Kassirer, K.L. Woolley, E. Wager, A. Jacobs et al. (2009) What should be done to tackle ghostwriting in the medical literature? PLoS Med 6: e23. doi:10.1371/journal.pmed.1000023; J.S. Ross, K.P. Hill, D.S. Egilman, H.M. Krumholz (2008) Guest authorship and ghostwriting in publications related to rofecoxib: a case study of industry documents from rofecoxib litigation. JAMA 299: 1800–1812.

[14] A. Stelmachowski, *Wstęp do teorii prawa cywilnego*, Warszawa 1984.

phenomenon. Details of concepts applied to ghostwriting and approving this activity will be discussed in the next session, but it is important to foreshadow this by asking whether allowing for ghostwriting is simply circumventing copyright law, and the long-held assumption that moral rights are inalienable. As a result of allowing various concepts favourable to ghostwriting, any departure from the principle of the non-transferability of the right to the authorship of the work has the effect of "removing a brick", significantly weakening one of the pillars of the structure of copyright, and consequently resulting in the distortion of the stability of copyright as a whole.

This situation can be taken to resemble the game Jenga, where players take turns to remove a block from a tower and balance it on top, creating an ever taller and increasingly unstable structure as the game progresses.[15] The problem of completely negating the admissibility of ghostwriting is related with the fact that it takes many forms, of which some are socially as well as morally acceptable, and others, even though morally and legally inadmissible, are commonly practiced. The process of looking for the appropriate legal concept justifying the admissibility of specific forms of ghostwriting in the doctrine additionally reinforces the uncertainty of law, and intensifies the practice to that extent.

The many on-going considerations approving ghostwriting seem justified due to the very broad and general wording of Article 6bis of the Berne Convention. Non-transferability and non-waivability rules have not been introduced explicitly, as the wording of the regulation was heavily discussed at the time of amending the convention. The best solution to the deadlock that arose turned out to be a "minimalist approach" intended to make the Berne Convention flexible and open to specific national regulations. However, the inalienation of the right of authorship was deemed to be sufficiently evident, as it resulted from the very nature of the author-work relationship.[16]

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[15] Cf. explanation of the rules of the game at http://en.wikipedia.org/wiki/Jenga, accessed 01.05.2013.

[16] S. Ricketson, J.C. Ginsburg, International Copyright..., 599; R. Plaisant, *The Employee-Author and Literary and Artistic Property*, Copyright 3/77, s. 276; P. Ruzicka, *Die Problematik eines „ewigen Urheberpersönlichkeitsrechts" unter besonderer Berücksichtigung des Schutzes musikalischer Werke*, Berlin 1979, s. 46; J. Błeszyński, *Ostatnie redakcje*

5. CONCEPTUAL JUSTIFICATIONS FOR ADJUSTING THE LEGAL TREATMENT OF GHOSTWRITING

The results of a broad multi-country analysis of legal regulations falling under copyright law give the opportunity to make some general points on this topic. Generally, ghostwriting is not often referred to by legal scholars, who are usually aware of its problems and so avoid commenting on this phenomenon from a legal perspective. The few studies which have been undertaken in this area are constricted to national regulations and concepts. We may, however, try to group the concepts together in order to refer to the problem on an international level. Generally ghostwriting finds its place on the grounds of these legal bases or doctrinal theories:

1) the waivability of the right of authorship established under copyright law,
2) the waivability of the right of authorship established in legal doctrine,
3) the waivability of the exercise of right of authorship established in the theory of copyright law,
4) dissemination of the work under the purchaser's name where the purchaser's name is considered to be a nickname or pseudonym of the actual author or ghostwriter,
5) transfer of right of authorship,
6) an author's obligation not to exercise his rights.

As far as the waivability of the right of authorship established under copyright law is concerned, there are some exceptional regulations in the copyright law of selected countries. In both the American and English Copyright Acts, it is acceptable to waive the right of authorship (§ 106 A (e) of the American Copyright Act,[17] Article 87 CDPA).[18] Also under Article 25 (3) of the Dutch copyright act the right to oppose the com-

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Konwencji Berneńskiej o ochronie dzieł literackich i artystycznych a prawo wewnętrzne, ZNUJ 1997, no. 13, p. 14.

[17] Source: http://www.copyright.gov/title17/92chap1.html#106a, accessed on 31.05.2013; cf. T. Joffrain, Deriving a (Moral) Right for Creators, 36 Tex. Int. L.J. 735 (2001), p. 756.

[18] Source: http://www.legislation.gov.uk/ukpga/1988/48/section/87, accessed on 31.05.2013.

munication to the public of the work without acknowledgement of the author's name or other indication as author may be waived.[19] Pursuant to Article 3 (statement 3) of the Swedish copyright act the author may waive his right of authorship in relation to uses which are limited as to their character and scope.[20] In Article 14.1(2) of the Canadian Copyright Act we read as well that moral rights may not be assigned but may be waived in whole or in part.[21]

In some instances the right of authorship is assumed to be waivable. This concept can be found in Australian law.[22] Moreover some thought has been given to this concept in German law, but recently in both jurisdictions waivability has been declined.

More often we find concepts referring to the waiver not of the right of authorship itself, but of the right to exercise it. There are differences across many national legal concepts concerning the elements of this kind of waiver such as its form (written, oral, explicit, implied), duration, irrevocableness and scope (in whole or in part). This concept of "waiver of the right to exercise" is found mainly in Belgium and France. As a matter of fact, under Article 2 (2) statement 2 of Belgian Copyright Act overall

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[19] Source: http://www.ivir.nl/legislation/nl/copyrightact.html, accessed on 31.05.2013; H.Cohen Jehoram, The Author's Place in Society and Legal Relations between Authors and those Responsible for Distributing their Works, Copyright 11/78, p. 388; "De maker kan zich ook verzetten tegen onjuiste naamsaanduidingen. Openbaarmaking onder een andere naam dan 'de zijne' [...] is nimmer toegestaan, uiteraard behoundens het geval dat zulks juist door de maker gewid is. Zo is met name uit de sportjournalistiek het verschijnsel 'ghostwriters' bekend: stukken onder de naam van een bekende sportfiguur, in werkelijkheid op schrift gesteld door een redacteur". N. van Lingen, *Auteursrecht in hoofdlijnen*, Amsterdam 2007, p. 117.

[20] Source: http://www.wipo.int/wipolex/en/text.jsp?file_id=129538, accessed on 31.05.2013; J. Axhamn, *The Nordic Countries*, in: *Moral Rights*, G. Davies, K. Garnett (ed.), London 2010, s. 505; J. Nordell, *National Report on moral rights Sweden*, ALAI 1993, Paris 1994, s. 401.

[21] Source: http://laws-lois.justice.gc.ca/eng/acts/c-42/page-8.html#h-8, accessed on 31.05.2013; K. Lingren, Canada (in:) G. Davies, K. Garnett, Moral Rights, London 2010, p. 703; L.E. Harris, Canadian Copyright Law, Toronto 2001, p. 118; D. Vaver, Copyrigh Law, Toronto 2000, p. 159.

[22] E. Adeney, Australia (in:) G. Davies, K. Garnett (eds.), *Moral Rights*, London 2010, p. 668.

renunciation of the future exercise of this right shall be null and void.[23] *A contrario* one may waive the exercise of the right of authorship as long as the waiver is limited in its extent. The waiver that has been established in French doctrine is surprising given that it was France and Germany that influenced and shaped copyright law in many other countries (among them Poland). According to the French concept the author may waive an aspect of his right of authorship, in this instance the exercise of it. But it has been widely admitted that the legality of such "abdication clauses" is not certain even under the French copyright act, and therefore all that is certain is that it is revocable at any time.[24]

The other concept assumes that the author is allowed to disseminate his work under another name, one which would be qualified in law as the author's nickname or pseudonym. This idea has been discussed under German law, but the discussion resulted in a conclusion that the concept does not serve its purpose of acknowledging the work of authorship of the purchaser of the writing service.

Statutory law in Switzerland provides us with the wording of Article 16 of Swiss copyright act, according to which copyrights are transferable and inheritable.[25] This wording spawns a number of copyright questions which will not be answered in this paper, but it is important to note that there are many Swiss commentators who assume that moral rights are transferable and waivable.[26]

The other country which has solved the ghostwriting issue with explicit regulation is China. Articles 13 and 14 of the "Interpretation by the Su-

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[23] Source: http://www.wipo.int/wipolex/en/text.jsp?file_id=125254&tab=2, accessed on 31.05.2013.

[24] A. le Tarnec, *Manuel de la propriété littéraire et artistique*, Paris 1966, p. 4, 41; R.P. Lepaullle, Le droits de l'auteur sur son oeuvre, Paris 1927, p. 60; A.R. Bertrand, *Le droit d'auteur el les droits voisins*, Paris 1999, p. 262.

[25] Source: http://www.wipo.int/wipolex/en/text.jsp?file_id=219856, accessed on 31.05.2013; Cf. Copyright 9/1993; Cf. F. Dessemontet (in:) International Copyright Law and Practice, P.E. Geller (ed.), LexisNexis, 2008, SWI-37 § 4 [2][a]; M. Rehbinder, SchweizerischesUrheberrecht, Bern 1996, p. 130.

[26] J. Nordell, National Report on moral rights Sweden, ALAI 1993, Paris 1994, p. 401; cf. A. von Planta, Ghostwriter, Bern 1998, p. 107 et seq; F. Dessemontet, Intellectual Property Law in Switzerland, Bern 2000, p. 52.

preme People's Court of Several Issues Relating to the Application of Law to Trial in Cases of Civil Disputes over Copyright" issued in 2002 state that the copyright in whole shall be owned by the commissioning party.[27] Bearing in mind that moral rights have not been mentioned explicitly in these regulations one may assume that these shall be considered transferable for the sake of ghostwritten political speeches and autobiographies.

Under Polish and German copyright law the concept that we come across is that of the obligation of the author not to exercise his right of authorship in cases when his work is expected to be disseminated under someone else's name. German doctrine seems to be more accustomed to this concept than Polish doctrine.[28] In Poland most authors assume ghostwriting is illegal and that ghostwriting contracts are null and void.[29] The concept of obliging the author not to exercise his right of authorship has

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[27] Article13 Except in the circumstance under Article 11, paragraph three, of the Copyright Law, the copyright in works, such as reports or speeches written by others but proofread and finalised by the persons giving the reports or making the speeches themselves and published in the name of the latter shall be owned by the persons giving the reports or making the speeches. The copyright owners may pay to the person who does the writing appropriate remuneration.

[A]rticle 14 In respect of an autobiographic work created, by the interested parties entering into an agreement, on the basis of the life experiences of a specific person, where the interested parties have agreement on the attribution of the copyright therein, the agreement shall prevail. Where there is no agreement concluded therebetween, the copyright shall be owned by said specific person. Where the person who does the writing or compiler has worked on the creation of said work, the copyright owners may pay them appropriate remuneration. Source: www.mlipa.com/2/fl/26.doc, accessed on 31.05.2013.

[28] M. Rehbinder, Urheberrecht..., p. 226; cf. M. Hock, Namensnennungsrecht des Urhebers, Nomos Verlagsgesellschaft, Baden-Baden 1993, p. 100; O.F. v. Gamm, Die Urheberbenennung in Rechtsprechung und Praxis, NJW 1959, no. 8, p. 319; H. Püschel, Probleme der Übertragung urheberrechtlicher Befugnisse nach dem Urheberrecht der DDR, Studia Cywilistyczne, nr 21, Kraków, 1973, p. 75; A. Dietz [in:] G. Schricker (ed.), Urheberrecht. Kommentar, München 2006, p. 280, 281.

[29] J. Barta, R. Markiewicz*, Autorskoprawne problemy prac magisterskich i doktorskich* [w:] *Raport o zasadach poszanowania autorstwa w pracach dyplomowych oraz doktorskich w instytucjach akademickich i naukowych*, Warszawa 2005, p. 14; J. Błeszyński, *Podstawy prawne i możliwości przeciwdziałania przywłaszczaniu sobie autorstwa cudzej twórczości w pracach dyplomowych i doktorskich* (w:) *Raport o zasadach poszanowania autorstwa w pracach dyplomowych oraz doktorskich w instytucjach akademickich i naukowych*, War-

been discussed widely, however it has been claimed that clauses of this kind in author's contracts would circumvent the law under § 58 Section 1 of the Polish civil code or at least would be perceived as inconsistent with the principles of community life under § 58 Section 2 of the Polish civil code.[30] The untransferable and unwaivable nature of rights of authorship is explicitly mentioned under Article 16 of Polish copyright law.[31] This Article makes any contract involving ghostwriting contrary to the law.

6. THE ARGUMENT FOR ALIENABILITY OF THE RIGHT OF AUTHORSHIP FOR POLITICAL SPEECHES AND AUTOBIOGRAPHIES

Despite the above, the ghostwriting of speeches for politicians is commonly accepted and practiced, even in Poland. The reason for this is largely specific to the politician's profession. A political speech cannot be perceived as a work of authorship that incorporates the author's or politician's bond with the work. The work is more about his political responsibility and the position that he presents when acting on behalf of a given party. Besides, as a matter of fact, in the case of ghostwritten political speeches concealing the ghostwriter's name is of no use, as there is no purpose in doing that.

The right of authorship depends on their being a creative bond between the individual author and their work. But this does not apply for a politician's speech. This is because the function of such a speech is to represent the views of a collective – the political party – and not those of the individual author. Thus neither the politician who commissions, edits and delivers the speech, nor the ghostwriter/s who generate the text have the necessary creative bond with the work. The speech expresses not the inner consciousness of either of them, but the pre-agreed, already public, views of the party. One may argue that the ghostwriters and speaker are merely messengers, and not creators.

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szawa 2005, p. 20; E. Wojnicka (in:) J. Barta (ed.), *System Prawa Prywatnego. Prawo autorskie*, vol. 13, Warszawa 2003, p. 253.

[30] Civil Code of 23rd April 1964 (Dz.U. of 1964, No 16 Item 93).

[31] Law of February 4, 1994 on Copyright and Neighboring Rights (Dz.U. 2006, No 90 Item 631).

Another example is the ghostwriting of autobiographies. As with many other forms of ghostwriting which raise general doubts, the ghostwriting of autobiographies at least muddies the clear waters of conviction. Copyright doctrine is familiar with several concepts (especially those presented on the grounds of Swiss and German law) allowing the ghostwriting of an autobiography. According to one of the German concepts, a person hired to write somebody else's biography or speech enters into the figure of the client, takes on his style, mind-set, and the mode of expression, by which he or she remains a kind of "ghost", accompanying the complete task of creating the work. H. Stolz, writes in this context about negatively distancing from the author's own personality, focusing more on the third party personality (Fremdorienterung).[32]

As an exception, one could consider whether the name of a well-known individual appearing in the place usually reserved for the author's name takes on the role of a distinctive sign by which the depicted person designates his or her product. However, it seems that, even in this situation, the 'true' author still deserves credit, often overleaf, for example. Sometimes this important piece of information may be concealed by using such words as: "*without this person, the book would not have been possible,*" but this gives a user clues about the 'true' author and constitutes an exercise of the right of authorship. On the other hand, it is commonly known that autobiographies are often not written personally, so there may be no point attempting to 'square the circle' by applying fundamental copyright regulations.

If we thus admit that political speeches and autobiographies (as long as the real author's name is mentioned somewhere) are beyond the scope of our concern this makes it easier to separate all the other forms of ghostwriting that are generally not only disapproved of, but even stigmatised

7. CONCLUSIONS

This paper has argued that the right of authorship **is** unalienable when it becomes subject to a commercial contract under different theoretical approaches delivered in the doctrine of copyright law. There are however

[32] H. Stolz, *Ghostwriter im deutschen Recht*, München 1971, p. 33, 35

situations that escape this rule of which the best examples are ghostwriting agreements for autobiographies and political speeches. The reason for this however are not sophisticated conceptual approaches presented in the paper, but the nature of delivering works under these two kinds of contracts. To put it short, ghostwriting that is held illegal, is mainly about dissimulating the author's name in order to disseminate the work under the name of commissioner's. This situation is a typical infringement of right of authorship. However, in situation of delivering political speeches or autobiographies this is not the case. As a matter of fact in many instances famous people acknowledge the author by "thanking for their support" or by "thanking for making the book possible". The paper has argued further that the general concept of moral rights is weakened in legal frameworks which allow ghostwriting more generally in order to keep the theory of copyright law close to practice. Practice, however, is sometimes morally dubious. The paper has fulfilled its purpose of showing that ghostwriting defies many rules because the scope of the term encompasses many very distinct situations that cannot be judged equally, especially those which do and not involve commercial contracts. We have shown that it follows that creating legal constructions in copyright law only to accompany the practice of ghostwriting is risky and might not help us out of this deadlock. The implications of this paper are that the preparation of political speeches and autobiographies under contract needs no new conceptual background in order for their existence in practice to be acceptable legally, whereas any other form of ghostwriting should be declared null and void under copyright law.

SUMMARY

This paper will argue that the right of authorship is unalienable even when it becomes subject to a commercial contract (of which some of examples are ghostwriting agreements such as those for political speeches and autobiographies). The paper will argue further that the general concept of moral rights is weakened by theories which allow ghostwriting in order to keep the theory of copyright law close to practice. Practice, however, is sometimes morally dubious. This paper's purpose is to show that ghostwriting defies many rules as the scope of the term encompasses many

very distinct situations that cannot be judged equally. The corollary will be shown to be that creating legal constructions in copyright law only to accompany the practice of ghostwriting is risky and might not help us out of this deadlock.