Transfer of copyright in architectural works for purposes of reworking architecture projects and making alterations to finished buildings

Subject to copyright is any work of literature, the arts and science that is the product of a creative process carried out in any manner of expression and in any objective form. The provisions of article 3(1), subparagraphs 6 & 8 of the Copyright and Related Rights Act (CRRA) envision two separate and independent copyright works when it comes to architectural works, differing from each other in their essence. The rights holder (i.e. the architect/author) holds, firstly, the copyright of the architecture project (subparagraph 8) as a separate type of copyright works and a work of architecture. Said copyright works differ substantially from the second type of copyright works, the finished architectural work (subparagraph 6), i.e. a building or other structure, in which the rights holder holds a separate copyright. This distinction is of paramount importance since, if said rights are to be ceded to another party, this must be done simultaneously and in parallel, in order to secure legal certainty for the acquirer. Of major importance for the transfer of copyright in architectural works are also the provisions of CRRA article 12(1)(2), which make a clear distinction between the ownership of a building and the architect's copyright in that same building as a work of architecture, and apart from that, his/her copyright in the architecture project as a separate, primary creative work. Article 12(1) explicitly states that the copyright in a work of architecture is held by the person who created it in the first place, even in cases where the work itself is in another party's ownership. For its part, article 12(2) explicitly states that the copyright in a work of architecture created as a result of the realization of an architecture project (i.e. the finished building) is also held by the creator of said architecture project. In any event, the author/architect has the exclusive right to use the architectural work created by him/herself and to authorize its use by other parties.

In a typical scenario, the 'use' of a work of architecture means the realization of an architecture project into the building for which it was intended. An original architecture project created by an original author is also 'used' in case where it is being adapted or used for creating a new design and making all sorts of changes and alterations in it. As for the 'use' of the copyright of the original author in a finished architectural work (the building completed to his/her design), such use is invoked in cases where the building is being altered through the addition of annexes or stories, or by its reconstruction or change of purpose (the list is exhaustive).

CR legal DL 2018. Всички права запазени.

The moral rights of the author include the right to demand to be recognized as the author and to have his/her name mentioned in every instance of use of the architectural work created by him/her, the right to freely alter or modify his/her work, including to demand protection for its integrity and to oppose any unauthorized alterations or modifications therein, as well as any other action as may infringe on the author's legitimate interests or personal dignity. CRRA article 19 provides that the author also holds the property right to claim compensation for any and all manner of use of the architectural work created by him/her, and for each subsequent instance of such use. Whether the copyright holder will indeed receive such compensation depends solely on whether a contract for use has been executed in accordance with CRRA article 36. This means that the author will always have the legal certainty that he/she should increase his/her wealth by the amount of compensation for the use of the work created by him/her, by means of a contract executed between the author and the user authorizing the latter to use the work. Therefore, in the absence of such a contract, and lacking any compensation paid to the author for the use of the architectural work created by him/her, regardless of whether said work amounts to an architecture project or a finished building, the copyright holder will be considered to have sustained pecuniary damages.

In the context of the theoretical framework presented above concerning legal relations among architects as authors or between architects as authors and the users of their works, there is an inexplicable disregard in actual practice for the sole law-governed manner of regulating those relations as far as copyright is concerned: the execution of a contract for use in accordance with CRRA article 36. Instead, in the process of designing and building, there are all sorts of highly diverse yet similarly inadequate methods of copyright 'enforcement': typically, verbal or written agreements concluded in different forms, none of which satisfy the requirements of CRRA. The most common of those are the so-called 'copyright waivers' that, whether they contain a provision for compensation or not, whether they constitute a notarized document or just a simple written statement, have no legal effect whatsoever that would amount to authorizing the user to use a work of architecture. The arguments against that practice are many and may vary from one case to the next, but most commonly boil down to the fact that these statements are a unilateral act of the author rather than a bilateral agreement, as provided by the legislator as the legal basis for the right to use an

CR legal DL 2018. Всички права запазени.

author's work.

The provision of CRRA article 35 concerning the need for advance consent on the part of the author to the use of the work by a third party is in Chapter Seven: "Use of Works", Section I: "General Provisions" of CRRA, in the same section of the law as the provisions governing the execution of a contract for use of the author's work, its essential elements, scope of application and term of validity, as well as the options and manner for invalidating such a contract (CRRA articles 36 through 39). On the basis of the location of article 35 within the structure of CRRA, and the fact that this provision is interpreted in conjunction with all other provisions encompassed within the same section and chapter of the law, case law concludes that the author's consent to the use of his/her work by the user must be given by means of the execution of a contract for use within the meaning as per CRRA article 36. Such consent may not be given in any other way, including a unilateral statement addressed by the author to the user, e.g. a copyright waiver, or by any other implicit acts on the part of the author.

By force of the contract for use of the work the author/architect (or his/her heirs or successors, where applicable) can cede to a user the exclusive or non-exclusive rights to use the work created by him/her, subject to certain terms and against compensation. Such compensation, the amount of which is freely negotiable, is a mandatory element of the contract. According to the legislator, the author's compensation for every manner of use of his/her work can be calculated as part of the revenue received from the use of the work, as a lump sum or otherwise. When such compensation, calculated as a lump sum, turns out to be manifestly incommensurate with the revenue received from the use of the work, the author will have the right to demand an increase of the compensation. If no agreement is reached between the parties, the dispute is referred for resolution in fairness to a court of justice.

In practical terms, it should be noted that the starting point for negotiating the compensation may be the amount of the fees paid for design services as stated in the Methodology for Determining the Amount of Compensation for the Provision of Design Services in Spatial Planning and Investment Design, promulgated in *State Gazette* No. 41 of 22 May 2007. The amount of the compensation determined by force of a contract as per CRRA article 36 should not exceed the minimum fees stated in the Methodology for design services of a similar subject matter and extent of transfer of rights since, after all, the transferor/author will not be

CR legal DL 2018. Всички права запазени.

conducting any design or author's supervision activities but will only be receiving the royalties due for the use of a work that has already been created by him/her. The amount of the compensation must be determined taking into consideration whether the user will be given exclusive or non-exclusive rights to use the work of architecture. This is so because, when ceding to a user the exclusive right to use a work, the author of said work has relinquished the right to use it him/herself in the manner, for the term and within the territory agreed upon in the contract, nor is he/she in a position to cede that right to any third parties. In other words, the author will not be able in future to receive royalties from his/her work. Conversely, when a non-exclusive right to use is transferred, the author will be able to continue using the work him/herself, as well as to transfer non-exclusive rights over the work to any third parties.

The legislator has given the parties relatively broad leeway to negotiate the terms of a contract for the use of an author's work in accordance with CRRA article 36. For works of architecture, as an exception, such freedom can be even broader as there is no limit to the duration of time for which such rights to use can be ceded. For all other works, the term of validity of a contract for use cannot exceed ten years. It should be borne in mind that a contract whereby the author cedes to another party the right to use any and all of his/her works yet to be created in his/her lifetime must be deemed null and void. Also, if the contract for ceding an exclusive right sets no specific deadline by which the user is mandated to start using the work, the author may unilaterally terminate the contract if no use of the work has commenced within two years of its execution, or from the date of handover of the work to the user if said handover took place after the execution of the contract. Upon executing a contract, the parties should bear in mind that the moral rights of the author to demand recognition of his/her authorship of the work and to require that his/her name, pseudonym or another identifying mark be mentioned in the agreed manner upon each instance of use of the work, are inalienable, i.e. cannot be made subject to the contract as per CRRA article 36.

Where the obligation to transfer copyright in architectural works for purposes of reworking architecture projects or altering finished buildings designed by the architect in the manner referred to above is ignored, the architect will sustain pecuniary losses in terms of unreceived royalties. The non-payment of royalties constitutes a violation of the substantive right of an

CR legal DL 2018. Всички права запазени.

author to compensation under CRRA article 19. Being an author in accordance with the definition as per CRRA article 36(1), every designer has the right to cede or transfer, by force of a contract for use of his/her work, the exclusive or non-exclusive right to the user to use the work created by him/herself, subject to certain terms and against compensation. If no such written agreement is in place prior to the commencement of the use of the architectural work, this can provide grounds for a legal claim to be filed by the author/architect against the user in accordance with Chapter 12 of CRRA, seeking adjudication of a cash amount in damages equal to the amount by which the author would have increased his/her wealth if the royalties claimed had been duly paid. Typically, such damages are equal to the royalties that the author would have received for the consummated use of a work created by him/her, if a contract for the cession (transfer) of copyright had been in place between him/her and the party at fault (the unlawful user). In the absence of such a contract, the unreceived author's compensation for the use of a work created by him/her constitutes a pecuniary damage sustained by the author. Said damage is a direct and immediate consequence of the copyright infringement resulting in an inability for the author to increase his/her wealth by the compensation due him/her in accordance with CRRA article 19.

CR legal DL 2018. Всички права запазени.