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FRYDERYK ZOLL'S JR. THEORY OF COPYRIGHT AND THE CHALLENGES OF OUR TIMES*

In 1919, at the second year of Polish independence after World War I, the introduction of a Polish copyright law was among the priorities of the political decision makers. They believed that the new copyright law had to come as a unified regime, cutting across the borders of the former partition districts. The chief drafter of the Copyright Act[1] was Fryderyk Zoll jr., who had been formerly teaching copyright law at the University of Vienna[2].

Zoll's idea for the first Polish copyright act was founded on two building blocks. One of them was the so–called *civil law* method of author's protection. The second was the concept of *droit moral*[3].

The *civil law* method is an alternative to another approach, which was previously the dominating one – the *criminal* method. The *criminal* method defines particular protected interests of the author. Only such violations are actionable, that could be additionally qualified as unlawful. In contrary, the *civil law* method uses an instrument of subjective rights. Under this theory, the authorship is protected by a subjective right. Each violation of this right is unlawful and therefore actionable. According to Zoll, the *criminal* method allowed for too many gaps in the system of protection. It was easy to transgress against the interest of the authors, if they were not strictly defined in law. The *civil law* method of protection resembles the property protection of tangible objects. In the concept of Zoll, copyright was a so–called *ownership–like right*[4].

The second pillar of Zoll's concept was the distinction of author's personal and economic rights. The personal rights attracted special attention of Zoll. He was trying to protect the special link between the author and his work

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* Fryderyk Zoll (b. 1970) is the great–grandson of Fryderyk Zoll jr. (1865–1948). The topic for this paper was proposed by the editorial board of *Organon*.

[1] Ustawa z dnia 29 marca 1926 o prawie autorskiem.

[2] P. L. Górnicki, *Prawo cywilne w pracach komisji kodyfikacyjnej Rzeczypospolitej Polskiej 1919–1939*, Wrocław 2000, p. 134.

[3] F. Zoll jr., *Polska Ustawa o Prawie Autorskim i Konwencja Berneńska*, Warszawa – Kraków – Poznań – Lwów 1926, pp. 7–9.

[4] See A. Kopff, *Fryderyka Zolla koncepcja praw do rzeczowych podobna* in: A. Mączyński (ed.), *Fryderyk Zoll: prawnik – uczony – kodyfikator*, Kraków 1994, pp. 45–50.

– the link of an emotional nature. However, the goal of this doctrine was not only to protect the personal interest of the author as integrity and attribution of the work etc. Zoll aimed at securing the interest of the society as a whole. The interest of the public was to protect the valuable heritage of artistic creation. Zoll was referring to the French concept of *droit moral.* The interesting point was that although the right of authorship had a strictly personal character, it would not perish with the author. After the death of the author, some of the members of the family, as well as given public institutions, were authorized to seek protection of the author's personal rights[1].

Both pillars of the new legislation served to secure the strongest possible protection for the author. The author was seen as an inherently weaker party to the contract, likely to be abused. The same assumption of the lawmaker holds as for the current regulation. This extremely author's friendly system survived not only in Poland. The European continental model was aiming at the protection of ethical values, whereas the Anglo–American regime focused rather on economical incentives. Under the latter model the author was rewarded with a temporary monopoly and the personal interest was not the central issue.

According to Zoll, *droit moral* was the central and most crucial element of copyright system. Today we are facing once again the question whether the justification of the established system of copyright protection still preserves its convincing value.

Under the influence of Zoll's concept, the Polish prewar and current copyright law is based on the assumption that the author deserves protection. The lawmaker's intention was to guard the *emotional relation* between the author and his work, the *love* that the author feels to his creation[2]. This assumption was treated as an axiom. The Polish doctrine of that time never explained why should this particular emotional relation be granted such protection by law. Our impression is that such regime was felt as a moral necessity in continental Europe. It was not controversial among the elite, whether authors deserved such protection – it was obvious that they did[3]. Certainly, behind this metaphysical background there existed rational arguments. The author of this time was often a person who could not sustain himself from his creation. On the other hand, the authors started to get organized and lobby for stronger protection[4]. The prewar copyright law seems to share a common method with contemporary consumer law, as it serves to protect the weaker party. Another goal of such legislation was probably to make the occupation of an artist more attractive, so that the society benefits from richer spiritual and intellectual life. Under this theory, the society benefits from the fact that it is not only the author who protects the work but certain public insti-

[1] J. Serda, *Wkład Fryderyka Zolla w rozwój prawa autorskiego* in: A. Mączyński (ed.), *Fryderyk Zoll ...* , p. 54.

[2] S. Grzybowski in: H. Konic (ed.), *Encyklopedia podręczna prawa prywatnego*, Warszawa 1931, p. 21.

[3] Diderot as quoted by F. Zoll jr. in: *Wspomnienia Fryderyka Zolla* (ed. I. Homola Skąpska), Kraków 2000, p. 323; F. Zoll jr., *Le droit patrimonial et le droit moral dans la conception polonaise du droit de l'auteur*, in: *Recueil d'Etudes en l'honneur d'Edouard Lambert*, p. 528.

[4] F. Zoll, *Tzw. „Droit moral" w dziedzinie prawa autorskiego*, Kraków 1929, p. 282.

tutions as well – for example certain government agencies could file law suits to protect the works of authorship.

Such continental Europe's quite obvious justification for the strong protection of authors was not necessarily shared in the countries of Anglo–American law. These systems took under greater consideration the utilitarian value of creation[1]. The idea of the protection of personal values was a foreign transplant into this body of thought. It still faces some criticism as a concept that results in more constrains and burdens on the society than actual benefit to the authors (with the exception of attribution rights)[2].

The great challenge that the concept of *droit moral* faces today is whether the initial assumption about the need for protection still holds. Media, entertainment and communication industries use the works of authorship as merchandize. Certainly, they are not the entities that the drafters of the prewar Polish copyright law had in mind. Strong protection of economical interest of the owners of copyright (often media and entertainment business) combined with strong protection of the personal interest of the author (*droit moral*) put substantial constrains on the public. How much freedom do we have to make use of the creation of others? With the advancement of information technologies and encryption that allow to control the content (like Digital Rights Management) and on the other hand the contract law, it might turn out that the sphere of freedom is pretty small. This can harm the progress of innovation and creativity. New creation and innovation need broad access to creation and inventions of others. Creativity and innovation in order to flourish, need a balance between control and access, in other words between the interest of the past and future authors (or inventors)[3]. *Droit moral* is one of the factors that gives more control to the owner of the copyright. It certainly needs a careful consideration if we do want more control. Especially, that moral rights in the business reality are contracted around. Even if they are not transferable, it is held in the Polish doctrine that the contract to abstain from enforcement of a defined moral right would be binding[4]. The conclusion from this theory is that for instance a writer can effectively agree with the publisher not to be mentioned as an author of a book. Therefore, the protection of moral rights frequently comes down to an additional amount of money that the publisher pays to the author and at the same charges to the consumer.

It is certainly an open question to predict the future of Fryderyk Zoll's ideas related to the copyright law. But it is important to stress, that he was most of all a faithful student of Rudolf von Ihering. Zoll's legal methodology belonged to the concept of the so–called *fair law* – approach, or jurisprudence of interests. The members of this school of thought were very conscious of the

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[1] R. Gorman, J. C. Ginsburg: *Copyright – Cases and Materials*, New York 2002, pp. 14–29.

[2] W. Landes, R. Posner, *The Economic Structure of Intellectual Property Law*, Cambridge – London 2003, p. 276.

[3] L. Lessig, *The Future of Ideas – The Fate of the Commons in a Connected World*, New York 2002, p. 250.

[4] J. Barta, R. Markiewicz in: *Ustawa o prawie autorskim i prawach pokrewnych*, Warszawa 2001, p. 195.

process of permanent change within society. They were convinced, that this process has to be reflected by the interpretation of the black letter of the law. A presumption of the legislator, based usually on the very current situation, is very quickly out of date. The jurisprudence of interest always recognized the existence of the different and often conflicting needs in the society. To find the balance between those interests was always on their agenda, and they were aware that it needs to be constantly updated. We assume that being a member of such flexible school of the legal thought, Fryderyk Zoll jr. could not expect the permanent value of his concepts. We can be sure, that the general change of assumptions, which formed the base for the copyright law, would be noticed and processed by this scholar. In his time the authors were typically the weaker party of the contract. Copyright law was a tool to give them strong protection. But it also indirectly protects corporations, which achieved because of this a dominating player's position on the market of the exchange of information and thought. They are often the owners of the *economic* copyright law. To some extend the creators of the copyright law from the Twenties have seen it. The idea of *droit moral* was a tool to protect the original author. It was also a tool to protect his economic interests. The concept of *droit moral* was an attempt to sustain the protection of the weak player on the market, who created the work, but who, for instance as an employee, never acquired the economic rights to his work, or who sold them, often under non satisfactory terms. The fear, that the real author would not be able to get sufficient gains from his work, can be seen in this statute. The instrument of *droit de suite* was developed as a reaction to it as well. But generally the *civil law method* of the protection, accommodated in these laws has a dangerous potential of monopolizing new areas of freedom.

Zoll always assumed a similarity between property rights on tangible goods and rights on immaterial goods. The concept of the *ownership–like rights* stressed this close relation. The idea of *ownership–like rights* was not formally introduced into Polish legislation, but the concept of the monopolized position of the authorized person is flourishing today. This solution however needs to be challenged. Is it true, that the nature of the immaterial goods is so similar to tangible goods, that similar legal tools should protect them? Actually it is not an issue of the similarity of the *nature* of these goods, but of the interests involved in this protection. It is a purely political question. The idea of the socialization of the property was not a foreign idea to Zoll. He saw that property should be used in a way that enriches the society as a whole. In case of the monopoly rights on immaterial goods there is an important problem of ensuring broad access to information. Being excluded today from the process of the information exchange causes far deeper consequences that being excluded from owning tangible property. The societies which cannot fully participate in it, are deprived from any chances of development. We are convinced that in the modern world of information, Zoll with his idea of the *fair law*, would face the new challenges with concepts that take the real existing interests under serious consideration. All his scholarship demonstrates clearly, that he would give up his own theories without regret, should he recognize that they are not able to respond to the needs of the modern society.