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COPYRIGHT AND RELATED RIGHTS IN RELATIONSHIP OF EMPLOYMENT OF ARTISTS IN ENTERTAINMENT SHOWS

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ABSTRACT

This work aims to discuss the possibility or not of transferring copyright and related rights in employment relationship of artists in entertainment shows, based on analysis of provisions of Laws 6,533 / 1978 and 9,610 / 1998. For that, initially, the distinction between concepts of copyright and related rights is done, analyzing them in their patrimonial and moral aspects. After that, it examines the principles of labor law, which rule all types of labor relations, including those signed with artists in shows, whether such relationships are maintained through employment bond or autonomous service provision. With the study of law 6.553 / 1988, which deals with work contract of artists and technicians in entertainment shows, the determining characteristics of work contract signed with the performer and interpreter of works are analyzed, in order to verify if there is possibility of assignment of copyright and related rights during the validity of aforementioned labor agreement.

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INTRODUCTION

At a time when concepts, ideas and images became the new driving force of economy and capital ceased to be represented by corporeal things to be replaced by intellectual property, it is essential to fix the role of creators, in relation to owners of means of production. It has been called copyright the legal protection conferred to works of intelligence of human person as aesthetic works, be they literary, cultural, scientific or artistic. Such protection of intellectual works must be adequate to technological advancement of media and covers both copyright and related rights.

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Based on those premises, the present article has analyzed the possibility of transferring copyright and related rights in employment relations maintained with artists in amusement shows through examination of legislation and doctrine related to the theme.

Concept of Copyright and Related Rights: It is considered an intellectual work all creation from human spirit, being conferred special protection by law. The copyright genre covers two species: i) the rights of author, which concern the protection given to creators themselves; ii) the related rights, which are conferred on performers of intellectual works. Initially, it is verified that art. 7, of Law 9.610 / 1998, shows that intellectual works protected are creations of spirit, expressed by any means or fixed in any base, tangible or intangible, known or invented in future, among others, the

texts of literary works, artistic or scientific; dramatic and dramatic-musical works; musical compositions, whether or not they have lyrics; audiovisual works, whether or not sonorized, including cinematographic works; photographic works and those produced by any process analogous to photography; works of drawing, painting, engraving, sculpture, lithography and kinetic art; and adaptations, translations and other transformations of original works presented as new intellectual creation. Thus, that legal provision protects everyone who prepares a literary, artistic, scientific or communication work, and, as Bittar apud BARROS (2016, p. 414) states, "Copyright is considered to be the branch of law private that regulates legal relations, arising from the creation and economic use of intellectual works, aesthetic and understood in literature, arts and sciences. "

In turn, related rights do not in themselves constitute an intellectual creation, but are "conferred on disseminators of intellectual work, namely, artists, performers, broadcasters, television presenters and producers of phonograms" (BULOS, 2007, p. 475). Related right is recognized to certain professionals who assist in creation, production or even diffusion of intellectual work. Artistic, musical and performance performances and, at corporate level, emission of sounds (transmissions and retransmissions), sound production of discs and tapes, made by means of radio and television broadcasting and by phonogram producers, are object of protection. (BARROS: 2016, p.441). The protection granted to performer or interpreter was initially included in legal order of the country under art. 3 of the Rome Convention, ratified by Brazil through Decree no. 57,125 / 1965. In order to understand the beginning of protection of intellectual property, it is necessary to make a historical background, where it is verified that the aforementioned protection began in 1709 in England with the edition of "Statute of Anne", and subsequently it has been expressly provided for in Berlin Convention of 1908 and Universal Declaration of Human Rights. In the country's law, in turn, intellectual property rights, a genre whose species are cultural and artistic works (copyright) and inventions, patents and trademarks (industrial property), have been elevated to condition of fundamental rights in clauses XVII, XVIII and XXIX of art. 5 of Federal Constitution of 1988.

Unfolding the concept, it is verified that copyright includes a patrimonial and moral sphere. While the patrimonial content gives the author the right to use, possess and dispose of intellectual work, the moral aspect, on the other hand, concerns the claim and recognition of authorship, the decision on circulation or not of the work, including its conservation as an unpublished work, the possibility of introducing changes before or after use and adoption of measures necessary for protection of its integrity. As to patrimonial aspect, item XXVII of art. 5 of Constitution of 1988 establishes that authors have the exclusive right to use, publish or reproduce their works, which is transmitted to heirs for the time fixed by law. In that sense, it should be emphasized "the owner of copyright is, in all evidence, the creator of intellectual work, whether natural or legal person (including public authority), because it is the person who conceived and materialized the work, through his creation and creativity "(FARIAS, 2010, p. 203).

In national legislation, the authors are granted life-long protection for property rights arising from their works, and they are transferred to their heirs and / or legatees for a period of 70 years, after which the work will fall into the public domain. Obviously, the intellectual work will fall into public domain immediately after the death of author, if he does not leave successors. It is also worth mentioning the constitutional protection conferred on individual participations in collective works in art. 5, XXVIII, point a, of the Constitution. According to Gilmar Ferreira Mendes. The constituent assured, in art. 5º, XXVIII, a, protection, according to the law, to individual participations in collective works and to reproduction of human image and voice, including in sports activities. Thus, the scope of protection of rights has been extended to ensure the right of individual participation in collective works and protection of reproduction of human image and voice. José Afonso da Silva points out that that norm seeks to protect participants from collective works, such as soap operas and other television programs, against uncontrolled and unpaid reproduction. The aforementioned rule imposes on legislator, therefore, the creation of a system that ensures protection of situations described therein (MENDES: 2008, p. 429). Likewise, art. 5º, XXVIII, point b, of Federal Constitution, has left to care of law the guarantee of right of control of economic exploitation of works to creators, interpreters and respective trade union and associative representations.

Principles of Labor Law

The doctrine (which, for purposes desired in this work, will be indicated in the person of Bezerra Leite) and jurisprudence recognize the existence of principles inherent in labor law, some of them have express provision in the Constitution, while others are of an infraconstitutional nature. The principle of normative source that is more favorable to worker, which has a constitutional origin, can be cited as basis of all Labor Law norms (being foreseen in article 7, caput, combined with article 5, paragraph 2, of CF) and determines that, although the Constitution indicates a minimum catalog of fundamental social rights at work, it is possible to apply other rights provided for in other normative sources, as long as those rights improve economic, social and legal conditions of workers. That principle must be used to solve antinomies and gaps of legal system, and in confrontation between two equally applicable norms, should prevail the one that brings more benefits to the employee. On the other hand, the principle of protection, of infra-constitutional nature, due to the manifest inequality of fact between the parts of labor pact, aims to establish a legal equality between employee and employer, promoting the attenuation of economic, hierarchical and intellectual inferiority of workers. The above principle unfolds in three other principles: in dubio pro operario, most favorable norm and most beneficial condition or clause.

The principle of in dubio pro operario or in dubio pro misero determines that, in face of a single norm that admits more than one interpretation, the one which is most beneficial to the employee must be applied. Since the principle of application of the most favorable rule establishes that, if there is more than one rule concerning labor rights, the one that favors the employee, regardless of his position in legal system, will prevail. Thus, that principle determines modification of traditional hierarchy of sources, since the norm that most benefits the worker, even if lower hierarchically, will prevail. That is to say, this principle admits "a dynamic theory of hierarchy among labor norms, because at the top of normative

pyramid will not necessarily be the Constitution, but the norm more favorable to worker" (BEZERRA LEITE, 2015, p.82). The principle of the most beneficial condition or clause, which has its origin in principles of legal certainty and acquired right, provides that among clauses established by parts in course of employment relationship, that which is most beneficial to the worker shall prevail. That principle means clauses established upon admission can not be modified to worsen the employee's situation in course of relationship established between the parties. In this sense, art. 468 cites that: "In individual employment contracts it is only lawful to change the respective conditions by mutual consent, and provided that they do not directly or indirectly result in damages to the employee, under penalty of nullity of clause infringing this guarantee ".

The principle of primacy of reality determines that facts prevail over the formally agreed upon in the execution of employment contract. The origin of that principle refers to the theory of contract-reality arising from the work of Mario de La Cueva, which was adapted to labor law in sense that reality predominates over writing and forms. In this regard, art. 9 of Constitution cites that acts practiced with the objective of distorting, preventing or defrauding labor rights are considered null. In turn, the principle of imperative labor norms determines that, in labor law, mandatory legal rules prevail over those of a device character. That is because labor standards are essentially imperative, and their application can not be ruled out by mere manifestation of will of the parties. That norm is an important assecuratory instrument of fundamental guarantees of worker in face of prevailing imbalance between the parties, since in this principle "the autonomy of will prevails in labor contract, as opposed to civil guideline of sovereignty of parties in adjustment of contractual conditions "(DELGADO, 2016, page 204). It is argued that the principles mentioned above are milestones of hermeneutics, which should guide the applicator of legal norm for its interpretation or integration when analyzing the conflicts of interest that come to Labor Court. That is because, as stated earlier, labor legislation has as a parameter the need to attenuate the existing inequality between worker and employer, by recognizing the employee's hyposufficiency and limiting the autonomy between the parties.

Employment Contract of Artists: The development of professional activity of artists in amusement shows can occur through provision of autonomous services or formal employment. The concept of an employment contract derives from the very definition of an employee from provisions of art. 3 of Consolidation of Labor Laws, according to which "any natural person who provides services of a non-contingent nature to an employer, under his or her dependence and for salary". In that way, the essential requirements of employment relationship are personality, onerousness, non-contingency and subordination.

Repeatedly, the doctrine has tried to catalog the legal nature of contract signed by artists. In an exclusively dedicated work, Alice Monteiro de Barros states that:

Since the end of the nineteenth century, artists have sought a definition of juridical nature of their contracts, since previously they were granted the status of domestic, in face of bond that united them to kings, princes and ecclesiastical power. The main difficulty in defining the nature of those contracts lies in the fact that the artists constitute a heterogeneous group, with several activities, which have specific qualifications. In addition, irregularity and instability of their occupation, combined with the scarcity of information on specific working conditions, create difficulties in obtaining data. In doctrine, several theories were proposed to define the juridical nature of the artist's contract, among them that of mandate, that of nameless contract, that of society contract, that of self-employment and that of employment contract, disciplined by Labor Law. The latter is verified as long as the work is provided through legal subordination, manifested by observance of directives of employer, based on the faculty of determining function, time, mode and place of provision of services. In that case, the artist submits to a disciplinary system, collaborating with the business activity (BARROS, 2003, pp. 43-44). Thus, the delineating trait in defining the legal nature of contract signed with the artist, whether of employment or provision of services, will be subordination. It occurs that, by its very nature, although existing, often subordination will be mitigated in the mentioned contracts of work of artists, as well emphasized Vólia Bomfim Cassar:

With proletarization of intellectual work, some activities were moved to other sectors. Intellectual workers who until then, worked independently (autonomous), became employees of large enterprises. Hence, those professionals have multiplied. Intellectual or professional workers are those employees who have a special scientific or artistic culture. They distinguish themselves from those who perform manual or merely technical services for two reasons: they develop intellectual or artistic works and because the degree of dependence and subordination is more tenuous because they perform their work with more autonomy. Those workers have a more subtle subordination and can act with a little more freedom in execution of their activities. When the intellectuality of services increases, functional trust in employee is also intensified. Examples of those workers are lawyers, engineers, doctors, accountants, artists in general, etc. (CASSAR, 2008: 313). In a society characterized by specialization of work, the employer will not always be the holder of knowledge necessary for performance of professional activity by the employee. On the contrary, the hiring has happened more and more, exactly, because the employee is the owner of know-how that does not have the employer. The so-called functional subordination becomes insufficient as a decisive framework for the employment contract and the integration of worker into the company is the essential factor in defining the existence of labor pact. That is, the characterizing trait to originate the existence or not of relation of employment resides in the fact that the employee constitutes an integral part of organization. In case of entertainment companies, all those who contribute to the end-activity, such as actresses, singers, presenters, directors and writers, are an integral part of organization, and work or service pact may be established with those that carry out intermediary activities, such as porters, caretakers and chambermaids, and the circumstances of situation must be analyzed.

The artist's employment contract in entertainment shows is a special one (not subject to general rules of Consolidation of Labor Laws), governed by a specific law, which "occurs when the artist is subject to directive power of employer, which is externalized by power conferred on the latter to determine function, time, mode and location of provision of services "(BARRO, 2003, page 58). It is Law n. 6.533, 1978, which

regulates the contract of employment with the artist or technician of shows, which has a solemn form, that is, it must be written and follow the guidelines established in instructions of Ministry of Labor and Employment. In the said adjustment, it will also include the name of parties, qualification, nature of function, title of program, show or production, name of character, place of work, journey, remuneration, form of payment, adjustment on travel and travel, payday and portfolio number. As for its validity, the contract may have a fixed or indefinite period, and in the first case, the maximum duration will be two years. Also, that law requires the artist and the technician of shows have a previous professional registration at Regional Labor Office and that the labor agreement signed with them must present a visa of representative union of category within two working days, after which it may be registered in Ministry of Labor. Precepts art. 2 of Law 6.533 / 1978 that artist is the professional who creates, interprets or performs work of a cultural character of any nature, for purpose of public display or publicity, through mass media or in places where public entertainment shows are held.

The attached table of Decree no. 82,385 / 1978, which regulated the mentioned law no. 6,533 / 1978, establishes that acrobat, amphest, actor, dancer, fire eater, contortionist, director, tamer, tightrope, fakir, magician, mannequin and strip teaser are framed as performers in performing arts; in movies, the animator, actor, screenwriter and director; in soap opera, the actor, editor and director; and, in broadcasting, the actor and the extras. Another version, art. 3 of decree n. 57.125 of 1965, which promulgates the International Convention for Protection of Performers, Producers of Phonograms and Broadcasting Organizations (known as the Rome Convention), understands as performers and artists, actors, singers, musicians, dancers and other performers who represent, sing, recite, declaim, interpret or perform, in any form, literary or artistic works. On the other hand, any natural or legal person who has at his service artists, whether creators, performers of works of a literary, cultural or artistic nature, shall be an employer. "Those provisions of law shall apply in relation to individuals or legal entities which have at their service professionals defined above, for performance of shows, programs or advertising messages" (BEZERRA LEITE, 2015, p 245). It says the sole paragraph of art. 3 of Law 6,533 / 1978, also, that agencies of placement of labor are equipped with employer. In case of default of labor obligations, Law 6,533 / 1978, in its art. 17, provides for joint and several liability between labor leasing agency and service provider.

Is it possible the assignment of copyright and related rights arising from employment relationship with artists in amusement shows?

Tough question concerns the possibility of assignment of copyright and related rights. That is because, while the law 6.533 / 1978 that regulates the artists' work contract prohibits the assignment of copyright and related rights, the law of copyright (Law 9.610 / 1998) allows the said assignment. Initially, attention should be paid to the fact that the previous copyright law (Law 5,988 / 1973), in its art. 36, provided that if intellectual work is produced in fulfillment of a functional duty or a contract of employment or service, the rights of author, unless otherwise agreed, shall belong to both parties involved. Thus, while in the former Law 5,988 / 1973 there was an express reference to division of copyright between worker and company if the work was a result of employment or service provision, the current law of copyright (Law 9.610 / 1998) does not speak in that regard, summarizing to dispose in art. 22 that belong to author the moral and patrimonial rights on work that has created. That omission was not a mistake of law writer, and it was intentional because it followed a change in understanding of legislator. If there has been a division between employee and employer of copyright before, resulting from works produced during labor agreement in force in law 5,988 of 1973, with promulgation of law 6,533 of 1978, copyright and related rights will belong only to worker, since no more be allowed to be transferred as a result of provision of professional services (article 13) and those will be due to each exhibition of work (sole paragraph). On the other hand, it should be noted that the prohibition in art. 13 of the aforementioned Law 6,533 / 1978 covers both the rights of author as such and related rights relating to interpeters and performers of intellectual works. That is because, as seen in a previous topic, in attached table of Decree 82385, both activities of actors, as well as those of directors and writers / drafters are covered, that is, the said law reaches both creators and interpreters of intellectual works, once they have been admitted as employees.

In the same sense, it can be seen that art. 33 of Decree 82385/1978, which regulates Law 6,533 / 1978, provides that the assignment or promise of assignment of copyright and related rights arising from provision of professional services shall not be allowed. On the other hand, art. 34 states that copyright and related rights of professionals shall be due as a result of each exhibition of work. In Law 6,615, also of 1978, the legislator maintains the same line of reasoning for prohibition of assignment, when stipulating in its article 17 that the assignment or promise of assignment of copyright and related rights will not be allowed, arising from the provision of professional services by radio broadcaster. In sole paragraph of said device, it repeats that the copyright and related rights of professionals shall be due as a result of each exhibition of work. It should also be pointed out that Articles 17 and 23 of Law 9.610 / 1998, protect copyrights related to individual participation in collective works. Also worthy of record is that item I of art. 49 of Law 9.610 / 1998, states that it is not possible to assign the rights expressly excluded by law, which is the case precisely those arising from the provision of professional services mentioned in art. 13 of Law 6,533 / 1978. Furthermore, it should be noted that the remuneration due for copyright is of a legal nature different from the salary, since it corresponds to benefit payable by the employer because the employee is simply at his disposal when a work contract is signed between the parties, there is activity or not, as long as it is derived from the production of intellectual or artistic work, whether or not there is an employment relationship between the author and the employer. In that sense, it is the understanding of Minister of the Superior Labor Court Mauricio Godinho Delgado:

Legal nature - Parcels with intellectual property nature may be owed by employer to worker in the context of employment contract. However, they generally preserve their own legal nature, distinct from salary. It is that they derive from specific right acquired by worker throughout the contract, with its own structure, dynamics and legal basis. It may even occur that the legal title of intellectual law itself is not the contract of employment, but a contract parallel to the original employment agreement. In any of those cases, however, such parcels do not communicate with the working wage, preserving a specific and

distinct legal nature (DELGADO: 2016, page 683). Finally, it should be noted that art. 115 of Law 9.610 / 1998 expressly determines that Laws 6,533 / 1978 and 6,615 / 1978 remain in force even after their promulgation, therefore, Laws 6,533 / 1978 and 9,610 / 1998 coexist harmoniously in legal system of the country. It is important to emphasize that in modern times with technological innovations introduced in media, especially in broadcasting, in which works can be reproduced infinitely, having a longer duration until the life of creative artist himself, performer, it is essential to ensure protection of copyright and related rights, which will be due at each exhibition of work.

For all that has been exposed, the prohibition of assignment of copyright and related rights provided in art. 13 of Law 6,533 / 1978 should prevail whenever they derive from provision of professional services, maintained through an employment relationship with the entertainer, given its economic fragility vis-a-vis large corporations holding means of production.

Conclusion

For all that has been exposed in present work, it can be concluded that:

- With the advancement of technology used in media, it is imperative to assure to artists employed in amusement shows the prohibition of transfer of copyright and related rights, which stands out from the very system of labor principles that ensures protection of hyposufficient, in case , the employee;
- The prohibition of assignment of copyright and related rights is also extracted from restriction of contractual autonomy, given the imperative nature of labor standards;
- There was a deliberate omission by legislator, in law 9.610 / 1998, on division between employee and employer of copyright and related rights arising from provision of services or employment contract;
- Art. 13, of Law 6,533 / 1978, expressly prohibits the assignment of copyright and related rights arising from employment relationship maintained with the author or performer of artistic works;
- The maintenance in force of Law 6,533 / 1978 has been determined by art. 115 of Law 9,610 / 1998.

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