

# THE CONTRACTUAL RIGHT TO WITHDRAW: COPYRIGHT CONTRACT V COMMERCIAL CONTRACT

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## **Abstract**

*Pacta sunt servanda* is the important Roman principle that “equalises” the binding effects of contracts and law. The right to withdraw loosens the sanctity of the contract, bringing some legal uncertainty to the contractual relationship. The right to withdraw based on the change of ones’ mind concerning a transaction is a unilateral act of will, provided both by Albanian Contract Law and the Albanian Law on Author’s Rights.

This paper will point out the Albanian legal conditions according to which the withdrawal can be rightly exercised, highlighting the differences between the right to withdraw from commercial contracts and the author’s moral right to withdraw from copyright contracts.

**Keywords:** *the right to withdraw, copyright contract, commercial contract, author.*

## **1. Introduction**

The contract is a legally binding promise, a commitment to make something happen or not. (Mustafaj, 2016, p. 147) It is a means of circulating rights, goods, and services between persons. The contract is a private agreement, almost a private law operating between two or more persons, but requiring state recognition, which can be achieved slowly, quickly, or with reservations. (Watson, 1984, pp. 1-2) The contract has been attributed by law the fundamental role of making the expressed private will enforceable. The Albanian Contract Law (from now on ACL) stipulates the general rules and principles and provides the most common commercial contracts. However, other contracts like copyright contracts, subject to general contractual rules and principles, are provided by *lex specialis*.

Copyright contracts are not simple commercial contracts. They explain the authors’ rights and determine the financial profits of authors and right

holders. Every law governing authors' rights recognises the author as the primal and sole owner of his work. It grants him a cluster of prerogatives, moral rights to protect his personhood and honour, and economic rights to be exclusively used by him or transferred for use by others. Authors' rights rely on the unique bond between the author and his work, which created the moral rights doctrine in Continental Europe. The basis of the continental author's rights system is the natural-law theories that consider the artist's creation as an extension of his personality. (Quintana, 1996, p.15) It is not a uniform doctrine, rather an assembly of four moral rights, which evolved from a societal concern about the author's personality and reputation exhibited through his works. (Peeler, 1999, p. 426) These strictly *intuitu personae* rights are firmly attached to the author. Even when the law allows them to be exercised *post mortem auctoris* by his legitimate heirs, it is understood that the heirs cannot claim a moral right violation as they do not have the author's personality or reputation and sensitivity towards the works.

The moral and economic rights of the author constitute a complex of rights that gives the author the privileged position to make all the decisions on the work, like any other owner. Typically, due to the unique bond between the author and his work, considered paternal, the author has moral rights, which are not usually applied to classic ownership over tangible objects. The author's economic rights enable him to profit by exploiting his creations financially. Copyright contracts are different from simple commercial contracts. This is because the work is a product of talent, inspiration, and spirit before it is a simple good. The work is *sui generis* good. The moral rights of authors are based on this definable trait, making them inalienable, perpetual, and imprescriptible, which must be respected despite the transferring modalities of economic rights.

In commercial contracts and even in copyright contracts, there are situations of dilemma or of repentance that make it impossible to keep the promise (Solenni, 2020). In such conditions, one of the parties decides to dissolve the contractual bond even though the agreement that generates it is not defective. (Roppo, 2016, p. 433) In two different legal ways, with other modalities, the author may choose to apply *ex lege* the right to withdraw from the copyright contract. One of the commercial contract parties usually exercises the withdrawal *ex contractu*. The Albanian Law on Author's Right (from now on ALAR) provides the right to withdraw, allowing continuous author control over his work and guaranteeing him a "veto-like opportunity" to terminate the further exploitation of the work by third parties. On the other hand, ACL recognises *pacta sunt servanda* as its cornerstone, the unilateral termination of a regular contract is usually considered an illegal act. However, there may be the possibility of the party to "gain" the right to withdraw. In exercising the right of withdrawal, *pacta sunt servanda* is set aside. The role of the "guardian" of the contract is assigned to the bona fides principle, which preserves the system so that the withdrawal does not fall to the level of abuse of right.

This paper will focus first on the origin and content of the right to withdraw, provided by ACL and ALAR, its *ratio*, and how it is introduced in

law. This paper will deal with the ACL right to withdraw from standard commercial contracts and not with the well-known right of withdrawal granted to consumers in consumers' contracts under certain conditions. The central part of the paper will analyse and interpret the right to withdraw according to ALAR and ACL and how it must be rightly exercised and with respect for the sanctity of contracts (Masiyakurima, 2005, p. 412), highlighting the differences in exercising this right. The last part of the paper deals with the right of revocation introduced by the CDSM Directive to clarify not only the differences with the ALAR right to withdraw but also to explain the ALAR approach through the request of termination of copyright contract, an author's right that may be exercised the same as the right of revocation.

## 2. The Dilemma that Bore a Right

*Paenitentia* was the change of ones' mind concerning a transaction already concluded or an omission of the performance of a legal act within a fixed term. Although it had no legal effect, Justinian's law recognised some particular cases in which a person could unilaterally withdraw from a legal transaction by a simple change of mind. (Berger, 1953, p. 616) It was known as *jus poenitendi*, a particular characteristic of Roman law that was exercised whenever a contractual performance had been made, but the counter-performance had not been made. (Mackeldey, 1883, p. 342) Today the withdrawal right is not necessarily related to the lack of performance of contractual obligations. Several European national legal systems recognise the contractual right to withdraw and, in recent decades, it has been introduced through a series of issued EU directives. (Ben-Shahar and Posner, 2010, p. 2) The right of withdrawal is a facility of one of the parties to terminate the contract *ad nutum*. (Monzonís and Catalán, 2015) It can be defined as the manifestation of will through which one of the parties produces the total or partial dissolution of the legal relationship of contractual origin. (Roselli, 2002) Dictating general provisions on the effects of the contract, ACL provides for the possibility that the contracting parties attribute to each other, or are attributed by the law, the right to withdraw, that is to decide individually on the survival of the relationship they have desired. (Roselli, 2002) The withdrawal implies a contrary attitude to what is wished for until the conclusion of the contract. Law provides it through a permissive provision, as an opportunity known to one party or the other (Solenni, 2020). This unilateral act also affects the other party by cancelling the legal situations created for both parties. (Roppo, 2016, p. 359) The right to withdraw, which in various ACL contracts is referred to as waiving right or revocation, is found through the moral rights of the author, notably tailored to deal with the genius's unique integrity.

The history of moral rights is shaped by the different conceptions successively prevailing in the Western world regarding the true nature of literary and artistic creativity. (Strömholm, 1957, p. 221) The differences between Author's Rights and Copyright are based on the differences between *Iusnaturalism* and Utilitarianism. The author's moral rights doctrine is strongly linked to the Hegelian personality theory of property, which requires that

society respects any type of property. Thus, intellectual property could be analysed not as *sui generis* right merely analogous to property, but as “true property”. (Schroeder, 2006, pp 453-454) Moral rights originated in France, interestingly first from the French courts in the nineteenth century and only after were codified (Lee, 2001, p. 804). Although later extended to other continental lands, their regulation is far from homogenous, and they reflect some discrepancies between different national legislations, even within the continental group. (Fernández-Molina and Peis, 2001, p. 110) So, the amount of recognised moral rights ranges from the minimum, which provides for the right of divulgation, attribution, and integrity, to the maximum known mainly in France, which is not only the pioneer in introducing “new” moral rights but also offers the most vital legal position in protecting them. Among other well-known moral rights stands the author’s right to withdraw.

Copyright sees culture as any other property that can be bought and sold. The author’s rights ideology speaks for high culture, and their moral rights remain with the creators even if they conflict with the commercial ambitions of the right owners. (Baldwin, 2014, pp. 15-16) The underlying final justification for moral rights is linked to the author’s personhood. (Schere, 2018, p. 776) The prevailing idea is that the work constitutes in an exceptionally high degree an involvement and expression of the innermost personality of the author and that, come what may, the work thus always remains his “spiritual offspring”. (Strömholm, 1957, p. 220) The right to withdraw is based initially on the author’s doubt and subsequently on his belief that further exploitation of the work would be harmful to him both as a person and as an author. This disturbing situation does not match the purpose of creating the work. But the author’s position is already complicated by the presence of the lawful right holder, who has every right transferred to him by the contract. The author’s dilemma to prioritise his hurt personhood or the observance of the contract’s sanctity bear the moral right to withdraw.

The right to withdraw is a typical moral right. It represents the legal balance between the “human-creator-author” personality and the high economic interest of the society in the performance of contractual duties and obligations. This is a continuing right under which the author can withdraw his work even after it has left his hands. (Hansmann and Santilli, 1997, p. 96) The withdrawal as a right allows the author to go back on an assignment of rights based on moral and intellectual reasons (Lucas, 2009) or *aesthetic ratio*. Thus, the right holder and his interest are placed by law in a secondary position compared to the power of the author’s repentance to terminate a contractual relationship unilaterally. Despite the impression that the author enjoys a privileged position, and this right creates an imbalance in the usual contractual relationships, the legal approach determines the appropriate conditions for exercising the author’s deterrent power. The right to withdraw expresses the legal intention of protecting the author, giving him the confidence and composure to create further. Still, it is also served at a price imposed by the contract’s *pacta sunt servanda* effect.

### 3. The Albanian Contractual Right to Withdraw

ACL recognises a generic right to withdraw from commercial contracts, which ALAR provides as a moral right. ALAR protects moral and economic rights equally, meaning that it does not give any obvious or indirect priority. The way of enjoying and exercising these rights is expressly provided by law. According to ALAR, moral rights as distinguished from economic rights and are not transferrable by license or assignment, are inalienable, non-waivable, and perpetual (ALAR, Art.24/7) and ensure respect for the intellectual and personal qualities over the work. (ALAR, Art.20/1)

#### 3.1 The withdrawal

According to ACL, a contract is a legal act whose content is freely determined by the parties within limits set by law, by which one or more parties create, change, or terminate a legal relationship. (ACL, Art.659, Art.660) The contract has the force of the law for the parties, and it can be altered or cancelled by mutual consent of the parties or for the reasons provided by law. (ACL, Art.690) ACL stipulates the right to withdraw from standard commercial contracts, which belongs to the party to whom it is given and does not require a specific reason to exercise the right of withdrawal. The ACL provision referring to the right to withdraw establishes the rule that one of the parties authorises a possible future withdrawal of the other through the contract. By granting the right of withdrawal, one party gives absolute power (except for the *conditio* of the commencement of the execution of the contract) to terminate the contract before its execution begins. At the same time, this party deprives itself of the right of control over the decisions of the beneficiary of the right.

ALAR recognises the right to withdraw permission to exploit the work as a moral right that can be exercised by the author or *post mortem auctoris* by his legitimate heirs. The exercise of this right by the author's heirs is not conditional on the previous intention of the author to exercise such right, which he had expressed mainly in his will, or when the author, before his death, was entitled to and tried to exercise but was prevented from doing so. The right to withdraw consists of the legally recognised opportunity to withdraw the permit or the authorisation to exploit the work and further use of what has been made public. The revocation may be used only if further use would be prejudicial to the author's honour or reputation and "*based on good reason*" or "*in other circumstances*". (ALAR, Art.24/1) Referring to the *ratio* that strongly supports moral rights, ALAR's good reasons and other circumstances must be serious ethical reasons or changed intellectual or moral convictions that internally "force" the authors to withdraw the assigned economic rights from their holder and withdraw the work from circulation. The withdrawal right may be exercised even when there is a conflict between the co-authors about using the work or when the author finds preparing the work for publishing tedious, complex, and time-consuming.

The withdrawal right should not be exercised abusively by creating tension between the strict application of the rule granting it and the true spirit of that rule. This right must be exercised formally in conformity with the conditions laid down in the law and not contrary to the objective of that rule.

(Lenaerts, 2010, p. 1122) Even in the case of the express agreement of the right of one of the parties to withdraw, this cannot be exercised to cause excessive damage to the other party. Therefore, the judge can review the concrete methods of exercising the withdrawal and deny its effectiveness or consider that the other party has a right to compensation for damage. (Torrente and Schlesinger, p. 606)

The way the right to withdraw, provided both by ALAR and ACL, shows some differences that are important to note.

*First*, the right to withdraw from copyright contracts is known by law, and it is not of any importance whether it is included as a contractual clause. Usually, there is no need for copyright withdrawal to exist as a contractual clause. Still, if the author insists on having it during negotiations, this right cannot be included differently or under more severe conditions than provided by law. This also clarifies the dilemma of whether waiving the exercise of the right to withdraw can be included as a contractual clause. As the right to withdraw is a moral right, ALAR automatically recognises it as non-waivable; waiving it cannot be part of any contractual copyright clause. The withdrawal from usual commercial contracts is a right given by the contract and must be expressly mentioned.

*Second*, for the withdrawal from copyright contracts, the existence of consent or approval of the right holder is not necessary. In commercial contracts, the consent of the other party the moment the right to withdraw is exercised is also not needed, but the authorisation of the other party as such pre-existed and was expressed in the contract; otherwise, the right would be impossible to exercise lawfully. The right to withdraw must be agreed as a precondition to be enjoyed.

*Third*, for the same reason of being a moral right, the *ipso jure* right to withdraw can be enjoyed and exercised only by the predetermined party of the copyright contract: the author himself or his heirs, whilst the right to withdraw of commercial contracts can be exercised by the party which has acquired this right through the contract or by law. However, the right holder may have the right to withdraw, attributed to him by the author. So, in a copyright contract, two withdrawal rights may coexist, the right to withdrawal of the author, provided by law and exercised according to ALAR provisions, and the right to withdraw of the right holder, provided by the copyright contract and exercised as provided by it. ACL does not recognise the withdrawal right in favour of the party that has previously and unilaterally prepared the contract clauses unless they have been approved separately in writing by the other party. (ACL, Art.686)

*Fourth*, the right to withdraw from copyright contracts may be exercised at any time. Commencing the contract's implementation does not cause the impossibility of exercising the right. It is sufficient that the author's repentance for the assignment of an economic right prevails over his contractual obligations. The ACL provision regarding the right to withdraw expresses two possibilities of exercising it: (1) generally the right to withdraw from a commercial contract can be exercised if the contract has not started to be

implemented, thus when the obligation has arisen, but the execution activity has not begun, (Roselli, 2002) and (2) in contracts with continuous or periodic implementation, this right can be further exercised, but the withdrawal does not affect executions performed or in progress. The withdrawal is valid only for future actions that will be performed. (Mustafaj, 2016, p. 178)

*Fifth*, the right to withdraw from the copyright contract aims to put the work or its specific use out of circulation. When exercised, the right to withdraw revokes the authorisation for the continuation of the use of the work and meets the author's need to withdraw further use of what has been made public.

*Sixth*, the reasons behind the right to withdraw from a copyright contract are strictly connected to the author's personhood. Despite being subjective, they are so important as to allow him to withdraw at any time. ACL does not require any specific reason to withdraw from commercial contracts. Although the exercise of the right is left exclusively to the autonomous decision of one of the parties, it is subject to the general limit of the principle of good faith, meaning that it must safeguard the interest of the other party if this does not involve any appreciable sacrifice for the withdrawing party. (Forgione, n.d.)

*Seventh*, according to ALAR, the right to withdraw is not possible in the case of a work created based on an employment contract or order, nor in the case of audiovisual works or software and database. The author may only request that his name not be mentioned in copies of the work or in any use thereof. (ALAR, Art.24/4) ACL provides for the withdrawal right for commercial contracts in a generic way.

### 3.2 *The compensation and the effective date of withdrawal*

The right to withdraw would be considered a clear abuse of right if it could be exercised without the obligation to compensate the damage to the party deprived of the right of exploitation of the work. This condition constitutes the legal balance between the author's interest and unilateral withdrawal from the contract and the other party's interest in implementing it and his effort and preparatory work.

In copyright contracts, the author notifies, in writing the right holder concerning his intention to withdraw the permit or authorisation for the use of the work. The right holder who uses the copyright on the work within three months of receiving the notification for the withdrawal of the permit or authorisation, communicates to the author the extent of the expenses incurred for the use of his work until that day. But the ALAR provision stipulates two kinds of compensation: the compensation of all damages and the reimbursement of the amount of money already spent by the user, the *monetary guarantee*. In this way, the provision itself creates ambiguity. At first, it requires that the reimbursement from the author be submitted in advance, and the author or his heirs must deposit the monetary guarantee for compensation of all the damages. On the other hand, the same provision requires the user to calculate the expenses already incurred, giving a different meaning and value to the term *monetary guarantee*. The value of the *financial guarantee*, which the author must deposit, is equal to the amount of money already spent by the

user of the copyrighted work without deducting from the value that the right holder has earned from the use of the work and without adding what he could have made if he had continued to use the work under the contract until its termination. The deposit of the monetary guarantee, calculated from the right holder, is the only legal requirement for the withdrawal to become effective. If the right holder has other claims for moral or financial damage, he can file a lawsuit according to ACL provisions. ALAR is silent on the possibility that the author objects to the calculated expenses incurred by the right holder.

The withdrawal takes effect the day the monetary guarantee is deposited. If the user fails to exercise the right, the withdrawal enters into force upon the expiration of the three-month term. If the user of the copyrighted work does not notify the author about the expenses, this does not exclude the possibility of the user's lawsuit to claim the effective damages caused by the withdrawal according to ACL provisions.

The copyright withdrawal prevents the future use of the work or further distribution of the copies of the work which have not left the user's hands. The copies of the work already sold or lawfully distributed, as the material objects in which the work is embodied, under the first-sale doctrine or the exhaustive rule can be resold by their owners. By exercising the right to withdraw, the author cannot control the resale of the lawfully made copies of his work. Although the right to withdraw may be effective, the first-sale doctrine impedes the author's right to take control of the circulation of the copies of his work over which his interest is considered exhausted.

The contractual withdrawal is possible when explicitly provided for in the commercial contract. Given that this right must be exercised before the contract's implementation, no penalty is usually applied. ACL specifies that the commercial contract must expressly provide financial compensation for exercising the withdrawal. ACL does not automatically charge compensation payment to the party exercising the right to withdraw. The contract's content must include the right to withdraw (and a possible compensation). The freedom to contract, the "*laissez-faire*", offers the parties the possibility of determining the moment the withdrawal takes effect. No compensation withdrawal takes effect the moment one of the parties accordingly notifies the other party. If there is compensation for exercising the withdrawal, the law establishes that it takes effect when the payment is made unless the parties have agreed otherwise. Although in both cases, ACL precludes the right to seek compensation for other damages. The right to withdraw appears to be a legal means to free the system from eternal contractual ties (Oliva, 2005, p. 303), so the notification of withdrawal is of utmost importance. The contractual withdrawal clause must determine the time of notice, which in accordance with the *bona fides* principle must be reasonable. (Oliva, 2005, p. 303) Although not specified by ACL, the notification of the withdrawal should be done in the same form as the contract, or in the form generally provided in the contract for parties' notifications, or the form explicitly determined in the withdrawal clause. However, it is suggested that the withdrawal notification should not be made orally to avoid potential misunderstandings.



### *3.3 User's priority for regaining the withdrawn rights*

The right to withdraw terminates the relationship between the author and the right holder. Even though the contract served for the copyrights to be transferred seems of no value, a diligent professional does not destroy his contract copy. The exercise of withdrawal contains an essential obligation for the future transfer of the same copyrights over the same work or to a work substantially similar to it. (ALAR, Art.24/5) Suppose, after exercising the right to withdraw, the author intends to assign economic rights again within ten years. He shall be required to offer these rights first to the previous right holder, under the same conditions that were initially stipulated. Comparable to the right of pre-emption, the former revoked user enjoys the right to be considered in advance for a possible new copyright contract based on the same criteria or substantially similar criteria, as initially agreed in the written contract.

This provision suggests the presence of good faith and its protective effect on the user. First, given that the right of priority for the previous user has a long expiration term of ten years, the author cannot abuse the right to withdraw, keeping his work "unused" for such a long time. Second, the provision prevents any possible trickery of the dishonest author from making small and non-substantial changes to the work for the use of which he exercised the withdrawal right, and after that to give permission or authorisation for another use, considering it a new and different work. Insignificant changes in the work cannot be used as a reason for the author to ignore his obligations attached to his moral right to withdraw.

The revoking party who exercises the right to withdraw from standard commercial contracts is not burdened with the future obligation to enter the same contract with the previous contractual party.

## **4. EU right of revocation and the ALAR approach**

Due to rapid technological developments, how works and other subject-matter are created and exploited is continuously changing. Aiming to achieve a well-functioning and fair marketplace, while keeping a high level of protection of copyright and related rights, the necessity emerged to introduce the EU Directive 2019/790 (from now on CDSM Directive), which directed the Member States to implement rules on the transparency of authors' and performers' contracts and remunerations and on the possibility to revoke the rights transferred on an exclusive basis, whenever the right holder failed to exploit their works or performances properly.

The ALAR right to withdraw exercised based on good reasons or other circumstances is applied in different cases than the right of revocation recognised by the CDSM Directive. The right of revocation is a mechanism that allows authors and performers to re-license or re-transfer their rights over the works and performances to other persons if, after the elapse of a reasonable period, their works and performances have not been exploited at all or as having been expected to. The exclusive basis of transferring and licensing the rights over the works and performances is a precondition for exercising the right of revocation. The license or the transfer of rights may be revoked in whole or in

part. However, the CDSM Directive proposes that the Member States further provide through their national laws, the opportunity for authors and performers to choose to terminate the contract's exclusivity instead of revoking the license or transfer of the rights. The author or performer has to set a deadline within which to exploit the licensed or transferred rights, and only after the expiration of that deadline can the revocation occur.

The Directive requires that the Member States take into account the specificities of the different sectors and the different types of works and performances and where a work or other subject-matter contains the contribution of more than one author or performer, the relative importance of the individual contributions, and the legitimate interests of all authors and performers affected by the application of the revocation mechanism by a particular author or performer. In such cases, the national laws may exclude works or other subject-matters from applying the revocation mechanism if such works or other subject-matters usually contain contributions of a plurality of authors or performers.

The transposition deadline of the CDSM Directive (June 7, 2021) has been exceeded. Even if the European Commission has initiated infringement proceedings against most member States, 17 countries have yet to start or finalise the transposition process. (Matas, 2022) ALAR already provides for it, thus, for the unilateral termination of the contract that transfers the rights over the works, if the right holder does not exploit the work within the deadline and the terms agreed in the written contract or if the right holder uses the work in a way that is clearly contrary to the permit and different from the conditions provided in the contract and violates the legitimate interests of the author. Instead of terminating the contract, the author may terminate the exclusivity of the exercise of the rights, reducing, at the same time, his remuneration. (ALAR, Art.53) The author enjoys the right to terminate the contract that transfers the author's economic rights whenever the publisher does not publish the work within the time specified in the contract or does not proceed with issuing a new edition within the time or deadline set by law. (ALAR, Art.64) ALAR has not spared the audiovisual works as works of plural authors and performers. The co-authors of audiovisual work can terminate the contract for the film's production if the producer does not complete the audiovisual work within five years from the day of concluding the contract or if he does not distribute the completed audiovisual work within one year from the time of its realisation. (ALAR, Art.102)

## 5. Conclusions

Contrary to what *pacta sunt servanda* offers, the right to withdraw brings some legal uncertainty to the contractual relationship. The contractual withdrawal is exercised differently in usual commercial contracts and copyright contracts. The first is probably exercised based on economic logic and a reflection perhaps dictated by the fear that the party will not be able to fulfil the contractual obligations. There will be consequences that will aggravate his financial position, or from the total lack of will and interest to proceed further,

which indisputably has an internal motive, that is not of importance to the law, except when the withdrawing party acts in bad faith. The latter belongs primarily to the one who creates, who takes to heart his work, and who has a unique bond with the work. The copyright withdrawal constitutes the continuous control of the author over the use of his work throughout his life and *post mortem*. It is not the only author's right that has this particular characteristic. The *droit de suite* is also an economic right of the author that is enjoyed continuously even when the author is no longer the work owner.

The respective provisions regarding the right to withdraw by ALAR and ACL show differences tailored to situations they govern. The *ipso jure* copyright withdrawal is an extraordinary contractual withdrawal. It is a well-deserved right to who offers the world his genius. But the Albanian right to withdraw from copyright contracts is extremely generous as it is granted to authors' heirs with the same prerogatives.

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