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# Legal Protection of Derivative Works and the Condition of Their Originality in Romanian Law

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**Abstract.** According to Romanian law, creative intellectual work is acknowledged and protected, independent of its public disclosure, by the mere fact of its creation, even in unfinished form. From the multitude of intellectual creations protected by the special law in this field, in this study, the author analyzes how derivative works are protected when they are realized by using an original (pre-existing) work. The analysis considers both national legislation and European Union regulations, alongside numerous scholarly contributions from Romanian authors and relevant decisions of the Court of Justice of the European Union and national courts. The study aims to clarify the conditions under which an intellectual creation qualifies as a derivative work and examine whether the creation of such works infringes upon the patrimonial or moral rights of the original author. At the same time, given that the making of a derivative work without the written consent of the author of the original (pre-existing) work is unlawful and may entail civil or criminal liability, this paper briefly addresses the implications of this offense.

**Keywords:** Derivative Work, Intellectual Creation, Originary (Pre-Existing) Work, Originality, Mark of Personality

## 1 An introduction to the concept of work in Romanian law

Human creative activity is expressed through work in any of the scientific, literary, artistic or technical fields. Therefore, "intellectual creation" is "the result of the activity of the human intellect, encompassing ideas, concepts, thoughts transposed in various forms into the material and spiritual life of society in the form of literary, artistic, scientific or technical works. Everything that has been created by man throughout his existence and evolution has proved useful and necessary, leading to the technical, technological, cultural and spiritual progress of the whole of humanity" [1].

In Romania, according to the provisions of Art. 1 para. (1) sentence I of Law No 8/1996 on copyright and related rights [2], the copyright on a literary, artistic, scientific or technical work, as well as on other works of intellectual creation is acknowledged and guaranteed under the conditions of this normative act. From the interpretation of

Article 1 paragraph (2) of the same law, according to which, "the work of intellectual creation shall be acknowledged and protected, regardless of its public disclosure, by the mere fact of its realization, even in unfinished form", we can define the *work* as "the original intellectual creation in the literary, artistic, scientific or technical field, whatever the manner of its creation, the mode or concrete form of expression and regardless of its value and intended purpose" [1].

## 2 Derivative works - subject-matter of protection by copyright

### 2.1 Subject-matter of protection and definition of derivative works

According to the provisions of Article 8 of Law No. 8/1996, republished, "without prejudice to the rights of the authors of the original work, **derivative works** which have been created on the basis of one or more pre-existing works shall constitute the subject-matter of copyright" (s.a.). The Romanian law on copyright and related rights, namely Law No.8/1996, republished, lists, in the same art.8, *two categories of derivative works* that constitute the subject matter of copyright:

- the *first category* comprises: "translations, adaptations, annotations, documentary works, musical arrangements and any other transformations of a literary, artistic or scientific work which constitute an intellectual work of creation" [letter a)];
- *the second category* comprises: "collections of literary, artistic or scientific works, such as encyclopedias and anthologies, collections or compilations of materials or data, whether protected or not, including databases, which, by their choice or arrangement of material, constitute intellectual creations" [letter b)].

Thus, for example, in a dispute, Romanian Supreme Court stated that the volume *"Zoia Ceaușescu, 237 zilen-n mormânt"*, published by Semne Publishing House in Bucharest in 2009, "which includes both literary writings and photographs, constitutes a *derivative work*, since the collection of data (the written part and the photographs), their arrangement in a certain logical sequence, their annotation and commentary constitute an intellectual creation within the meaning of the cited text" [3].

For the purposes of Law No. 8/1996, republished, *derivative works* are defined as "the translation, publication in collections, adaptation, as well as any other transformation of a pre-existing work if it constitutes an intellectual creation" (Article 23 of Law No. 8/1996, republished). From the analysis of this text, as well as of Article 8 letter b) of the same normative act, it results that the enumeration is not limitative but *illustrative*, because the Romanian legislator uses the expression "and any other transformation of a pre-existing work", namely "such as". Therefore, as the Romanian courts have also held, "even if the protectable derivative work is not included in any of the categories expressly provided for by the law, due to the conjunctive phrase "such as" provided for in Article 8(b), the text of Article 8(b) contains an illustrative list, and is susceptible of an extensive interpretation". In these circumstances, the decision states, "any other derivative work may constitute a separate legal category and need not necessarily fall within the categories listed by way of example" [4], [5].

If in Romanian doctrine *derivative works* have been defined as "works realized by using a pre-existing work" [6], [7], [8], [9], in French doctrine, for example, Françon [10], the notion of *composite work* is also used, a notion that has not been adopted by the Romanian law on the matter. A *composite work,* according to Article L. 113-2 of the French Intellectual Property Code (IPC), is defined as "a new creation in which a pre-existing work is incorporated, without the author of the pre-existing work collaborating in the creation of the new work".

### 2.2 Conditions required for the protection of derivative works

From the interpretation of the two provisions regulated in Art. 8 and Art. 23 of Law No. 8/1996, republished, it follows that in order for a derivative work to constitute the subject matter of copyright, it must fulfill, in the field we are analyzing, *two important conditions*, namely:

- Not to prejudice the rights of the author of the original (pre-existing) work;
- The derivative work to constitute an intellectual creation.

#### 2.2.1. Condition not to prejudice the rights of the author of the original (pre-existing) work

The condition that the derivative work shall not *prejudice the rights of the author of the originary (pre-existing) work* is regulated in Article 8, sentence I of Law No.8/1996, republished. As I have shown in my other works [11], [12], by creating a scientific, literary, artistic or technical work, its author acquires both *patrimonial* and *moral (non-patrimonial) rights*. These rights (patrimonial and moral) of the author of an intellectual creation in the literary, artistic, scientific or technical field are *complex in content* and comprise two categories of prerogatives:

- *the right of the author to derive material benefits* for himself/herself or his/her successors in title from the use of his/her intellectual creations;
- *the author's right to enjoy all the intangible benefits* that bring him/her fame, celebrity, renown or recognition in the domestic or international literary, artistic or scientific (academic) world [6].

The condition that the rights of the author of a derivative work must not prejudice the rights of the author of the originary (pre-existing) work was enshrined in Article 2(3,,) of the Berne Convention for the Protection of Literary and Artistic Works of 1886 [13], [14], and has also been taken over by the national legislations of the states that have acceded to this international convention. As of May 25, 2024, a total of 191 states are signatories to this convention and are part of the Berne Union [13].

#### 2.2.2. Condition that the derivative work to constitute an intellectual creation

From the interpretation of Article 23 of Law No. 8/1996, republished, it follows that in order for a *derivative work* to be protected by copyright, and it must *constitute an intellectual creation*. In other words, the *derivative work* must be *original*. The condition of the originality of a work was enshrined in the same Article 2(3) of the Berne Convention of 1886, according to which "the following are protected as original

works, without prejudice to the rights of the author of the original work, translations, adaptations, musical arrangements and other transformations of a literary or artistic work".

The condition of originality of works, irrespective of the field in which they have been produced (literary, artistic, scientific or technical) is regulated at EU level in five legal acts, namely:

- Council Directive 93/98/EEC of October 29, 1993, harmonizing the term of protection of copyright and certain related rights [15], which stipulates that to be protected, photographs must be original, meaning that they must "represent the author's own intellectual creation" (Article 6);

- Directive 2009/24/EC of the European Parliament and of the Council of April 23, 2009 on the legal protection of computer programs [16] which, in Article 1, para. (3) provides that "a computer program shall be protected if it is original in the sense that it is the author's own intellectual creation";

- Directive 96/9/EC of the European Parliament and of the Council of March 11, 1996, on the legal protection of databases [17], which, in Article 3(1), states that only "databases which, by reason of the choice or arrangement of their contents, constitute the author's own intellectual creation" are protected by copyright;

- Directive 2001/84/EC of the European Parliament and of the Council of September 27, 2001, on the resale right for the benefit of the author of an original work of art [18], which provides that only authors of original works of fine or graphic art shall benefit from the resale right, provided that they have been "created by the artist himself/herself" (Article 2);

- Directive (EU) 2019/790 of the European Parliament and of the Council of April 17, 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [19], which, in Art.14, provides that any material that has resulted from the reproduction of a work of visual art that has fallen into the public domain will be subject to copyright or related rights protection provided that it is "original", which means that it must represent "an author's own intellectual creation".

Analysis and interpretation of the provisions mentioned in the five European directives show that the originality of a work, regardless of the field of creation in which it was made, presupposes that it *"constitutes the author's own intellectual creation"*.

In order to be original, a derivative work, regardless of the field to which it belongs (literary, artistic, scientific or technical), *"must bear the stamp of the author's personality"*, a conception shared both in Romanian doctrine by the majority of authors who have done research in this field [20], [21], [22], as well as by the courts, both at EU level and by our domestic courts.

Thus, for example, the Court of Justice of the European Union has consistently held that for a creation to constitute a work within the meaning of copyright, it must be *"original",* which means that it must be *"the author's own intellectual creation"* (Judgment of the Court of Justice of the European Union of July 16, 2009, *Infopaq International v/s Danske Dagblades Forening*, 5/08 [23]; Judgment of the Court of Justice of the European Union of November 13, 2018, *Levola Hengelo BV v/s Smilde Foods BV* [24]). In another dispute, the Court explained that an *"intellectual creation is the property of its author when it reflects his/her personality"* (Judgment of the Court

of Justice of the European Union of December 1, 2011, *Eva-Maria Painer v/s Standard VerlagsGmbH and Others* [25]).

Romanian courts have also ruled in the same way. Thus, in a case judged by our Supreme Court, it was held that "the creation of a derivative work confers protection only *in respect of the elements of originality* relating to the choice or arrangement of its content. Copyright protection does not extend to its constituent elements and does not cover the creation of the data contained in the work. In order to benefit from copyright protection, with the rights that it claims, the derivative work must bear the *stamp of the author's own personality*, that is to say, his own creative contribution, and these in terms of the originality of the structure, relating to the choice or arrangement of its content. These elements are not present when the creation of the derivative work is imposed by technical considerations, rules or limitations which leave no room for any creative freedom" [26].

In another dispute, the court pointed out that "the oratorical talent, the joking wit of the person who tells the alleged work does not influence the quality of the work, whether oral or not, of being original. In addition to the idea and composition (the concretization of the idea), the originality of the work is given by the intrinsic form of expression of the work (words, figures of speech, etc.), which must reflect the intellectual creative activity of the author (the author's spiritual qualities, his/her talent, his/her personality), and not by the oratorical qualities of the person who tells it" [27].

Along the same lines, in another case, the Romanian High Court of Cassation and Justice defined originality as "a manifestation of the author's personality, and at the basis of the creative activity is the author's imagination, the way in which he/she knows and manages to express his/her thoughts, feelings, experiences" [28]. Lastly, in another dispute, our Supreme Court stated that "a work is original if it is a creation of the person claiming to be the author and not a mere copy of an earlier work" [29].

It should be emphasized that in the case of derivative works the condition of originality varies depending on the extent to which the pre-existing work is used in the derivative work. Thus, a derivative work *is absolutely original* when it is not dependent on a pre-existing creation and is *relatively original* when it borrows elements of form passed through a personal filter from a pre-existing work [6], [30], [31].

For example, if, in the case of translations of scientific works, "similarities are inevitable, the translator being obliged to rigorously render the pre-existing work in its entirety" [32] in the case of adaptations and transformations of literary works, the author of the derivative work has an important role of intellectual creation in the sense that he/she analyzes, selects and interprets the particularities of the text of the pre-existing work, chooses the most appropriate reformulations of the text of the pre-existing work in the new creation, the derivative work [33].

From the above, it can be seen that derivative works *are dependent on* the pre-existing work, and in the case of translations, for example, the translator must strictly respect the composition of the work, otherwise he/she would violate the moral right of the author to claim respect for the integrity of the work and to oppose any modification and any interference with the work (right to inviolability of the work), a right regulated in Article 10, letter d) of Law No. 8/1996, republished [6].

As we have already stated, in Romanian law, the manner of creation, the way or form in which the work is expressed, its value or its intended purpose are of no relevance (Article 7 of Law No. 8/1996 [2], republished).

As for the subject of the copyright of a derivative work, it is the creator (author) of the derivative work and enjoys all the prerogatives of the [20]. It should be emphasized that the author of a derivative work does not acquire any rights in the originary (pre-existing) work, which remains the author's work. As a rule, the author of a pre-existing work does not participate in the realization of a derivative work, but if he/she does, "then we are in the presence of two distinct works: an originary (pre-existing) work, which belongs exclusively to its author and a derivative work which, being created in collaboration, will be a joint work, belonging to the two authors" [6].

### 2.2.3. Lawfulness of making derivative works

The making of a derivative work *shall be lawful* only if the *written consent of* the author of the pre-existing work has been obtained prior to its making. It should be emphasized that "the conclusion of the assignment contract in writing only is a requirement *ad probationem*. The form required *ad probationem* is mandatory and the sanction consists in the impossibility of proving the act by any other means of proof" [27]. In the same sense, in another case, "the court held that the plaintiff had failed to prove that its author had obtained the prior consent of the author of the novel to produce a derivative work, which is the translation, and that, in the absence of such consent, the translation into Romanian does not benefit from protection" [34], [5].

*Per a contrario,* the making of a derivative work without the written consent of the author of the originary (pre-existing) work *is unlawful* and may give rise to civil or criminal liability, as appropriate. Thus, for example, in a dispute concerning the use of a translation without the consent of its author and the staging of the play at the "Zamolxe" theater in Cluj-Napoca, as well as its distribution on the "YouTube" channel, the court decided that these two actions infringed the patrimonial rights of the author of the translation and, at the same time, caused a patrimonial prejudice [35].

As we have already mentioned, making derivative works without the rightholder's consent can also attract criminal liability. In this regard, according to art.196 paragraph (1) letter e) of Law No.8/1996, republished, the making of derivative works *without the authorization or consent of the holder of the rights* recognized by this law *constitutes an offense* and is punishable by imprisonment from one month to one year or a fine.

*The material element* of the objective part of this offense consists in *making derivative works* without the authorization or consent of the holder of the rights recognized by law. The making of derivative works, within the meaning of Law No. 8/1996, republished, means "the translation, publication in collections, adaptation, as well as any other transformation of a pre-existing work, if it constitutes an intellectual creation" (Article 23). The *material subject-matter* of the offense is the originary work of intellectual creation (pre-existing work) on which the derivative work is based.

*While the active subject* of the offense can be any natural or legal person who meets the conditions required by law to be criminally liable, the *passive subject* is the author or copyright holder of the originary (pre-existing) work.

The commission of the offense in question is conditional on the existence of a work of intellectual creation (a pre-existing work), which is the *prerequisite*. According to Romanian law, the work of intellectual creation shall be acknowledged and protected, independently of bringing it to public knowledge, by the mere fact of its realization, even unfinished [12], [36], [37].

## 3 Conclusions

Creative activity materializes in the work that we produce in any of the scientific, literary, artistic or technical fields. In Romania, according to the provisions of Law No. 8/1996 on copyright and related rights, republished, a work of intellectual creation shall be acknowledged and protected, regardless of its public disclosure, by the mere fact of its realization, even in unfinished form.

According to the law, derivative works that have been created from one or more pre-existing works are the subject-matter of copyright. Therefore, the making of derivative works, within the meaning of the Romanian law, means "the translation, publication in collections, adaptation, as well as any other transformation of a pre-existing work, if it constitutes an intellectual creation". As it results from the analysis of the Romanian doctrine on this matter, as well as from the case law of European or national courts, for a derivative work to constitute a subject-matter of copyright, it must fulfill *two* important *conditions*, namely: it must not prejudice the rights of the author of the originary (pre-existing) work and the derivative work must constitute an intellectual creation, which means that it must be original. Furthermore, as already mentioned, in order to be original, a derivative work, regardless of the field to which it belongs (literary, artistic, scientific or technical), "must bear the stamp of the author's personality." Finally, it should be emphasized that the author of a derivative work does not acquire any rights over the originary (pre-existing) work, which remains the property of its author, and in order for the making of a derivative work to be lawful, it is mandatory to obtain the prior written consent of the author of the work on which it is based.

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