The Objects of Intellectual Property as Material Objects of the Smuggling Offence Committed on the Customs' Area of Republic of Moldova

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Abstract: The aim of this article is to make a general analysis of the objects of the intellectual property included in art.1CVof the Republic of Moldova. We also make a classification of intellectual property objects according to the legislation of the Republic of Moldova, as well as the existent doctrinal sources in this domain. We explain our opinion regarding the classification of the illegal actions of carrying the objects of intellectual property across the customs' frontier of the country, and the realization of examinations on these objects, and also the application of penal sanctions for committing the smuggling offence of intellectual property objects.

Keywords: objects of intellectual property; intellectual property; customs frontier; smuggling; passing the customs' frontier; subjects of customs activity

1. Introduction

The current legislation of the Republic of Moldova and the doctrinal sources in the domain offer vague information about what intellectual property really means. This aspect makes it impossible to appreciate, delimit or differentiate some objects of intellectual property from other objects. In order to establish and realize a concrete qualified classification of the objects of intellectual property which can be transferred, placed, sent or carried across the customs' frontier of the country, one has to mention them, thus to avoid useless interpretations.

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2. Evaluation of Intellectual Property Objects

According to the changes and completions the legislator has brought to the customs' legislation of the Republic of Moldova, the current customs code has included the material customs-legal term "object of intellectual property" (art. 1 of Law no. 1149/2000), which is being applied in the practical activity of the customs authorities in the Republic of Moldova.

Thus, according to the provisions of article 1CV of the Republic of Moldova, we decide that we can consider objects of intellectual property the results of intellectual activity, confirmed by the authors respective rights to utilize them, which include: objects of industrial property (inventions, models of utility, species of plants, integral circuits topography, names of origin for products, brands of products and services, drawings and industrial models), objects of copyright and connected rights (art, science, literary works, etc. computer programs and databases included) commercial secret (know-how) etc.

As a result of the customs juridical analysis of the content interpretation of the term "objects of intellectual property", stipulated by the legislator in article 1 point 48) of CV of the Republic of Moldova, we decide that the legislator, when adopting a customs material norm respectively, gives a general appreciation not a concrete one, which is a fact imposed by the practical activity of the customs activity not only on the customs' territory of the Republic of Moldova but also on the territory of other countries. When adopting the material law under discussion, the legislator did an approximate enumeration , exhaustively pointing out, according to what he thinks, what could be concretely considered as object of intellectual property, when transporting these objects across the customs' border of the Republic of Moldova. In our opinion, the legislator should have realized a much more exhaustive assessment of the civil-juridical term of estimation, interpretation and classification of the objects of intellectual property, so that there should be no misinterpretation as far as the state authorities, the authorities checking the objects of intellectual property, in the case of taking them across the border of the Republic of Moldova, respectively.

The law regarding the copyright and its connected rights, mentions in a non-exhaustive way the objects of intellectual property, as follows: literary works; computer programs which are protected as well as literary works; scientific works; dramatic and musical-dramatic works, scenarios, and projects for scenarios, librettos, film synopsis; musical works with or without lyrics; choreography and

pantomime; audio-visual works, paintings, sculpture, graphics and other works of art.

Besides, without causing any prejudice to the copyright of the author of the original work, the copyright protects the integral and derived works, which make the base of one or more works, or any other pre-existent materials, such as: translations, adaptations, marginal notes, musical orchestration, and any other transformations of literary, artistic or scientific works, on condition that they are the result of intellectual creation or the literary, artistic or scientific abstracts.

The copyright also protects either a component part or another element of the work (the title and characters included) which represents a intellectual work in itself (art. 7 of Law no. 139/2010).

The law regarding the copyright and its connected rights stipulates that the literary works are any object of copyright, which in their turn are exemplified, in a non-exhaustive way, as follows: stories, essays, novels, poems, which leads us to the conclusion that the legislator has avoided to offer us a concrete list that could include all literary works thus offering their author complete freedom to create and express his ideas, ideas coming from his creative laboratory.

Generally speaking, literature means all kinds of writings having a universal meaning, while in a restricted meaning it means the artistic literature, which differs qualitatively from other literary categories (scientific, philosophic, informational etc.). (McGoughonova, 1999, p. 95)

According to the legislation of other countries, the term "literary and artistic works" includes any work belonging to the literary, artistic and scientific domain, no matter what their way of expressing may be, such as books, pamphlets, other writings, lectures, dissertations, other papers of the same kind, dramatic, musical-dramatic, ballet or pantomime, musical works with or without lyrics, audio visual works, paintings, etc. (art. 2 of Berna convention regarding the protection of literary and artistic works, from 9 September 1886).

According to the way of expressing, the scientific works can be:

- written, that is the works having an objective way of expressing, with the aim to familiarize the public with useful information for their professional development. Here we can include manuscripts, courses, theses, etc.

-oral, with the aim to rise the professional level, but they do not have a material support, that is they do not have an objective way of expressing. Here we include the scientific papers, courses, public lectures, etc.

Concerning the *works of art*, from the provisions of the Copyright and the connected rights, we conclude that they include works such as: dramatic and musical-dramatic works, scenarios, projects for scenarios, librettos, film synopsis; musical works with or without lyrics; choreographic works and pantomime.

Works of art have some tangential points with the literary works, since their way of conveying meaning and the artistic qualities resemble those of literary works (e.g. the dialogues and monologues of the characters from the dramatic work, which have as a way of expression the speech or public interpretation).

Besides the dramatic and musical-dramatic works, the Copyright Law and the law regarding the connected rights, protects the musical works with or without lyrics. However, The Copyright Law and its connected rights does not mention what musical works are protected, mentioning just the fact that the musical works with or without lyrics are protected.

The *musical works* include: opera, overture and suite. It is by no means certain that these works must represent the end result of the intellectual creation and, thus, they will be protected, no matter the value criterion of that work.

An important place as far as the Copyright Law is concerned is attributed to the *audiovisua*l works.

According to Art.3 of the Copyright Law and the law regarding the connected rights, the audiovisual work is that work which consists in a succession of coherent images, either accompanied by sounds or not, conveying the impression of movement, meant to be perceived visually and auditory (in case images are accompanied by sound) by means of a specific device.

All audiovisual works represent a combination of several works of art, literature or science as a whole. Finally, we get an artistic work, the most widely known being the film (cinematographic work). This one can be defined as a succession of images which are put into motion by a projector. The close connection with the material support is what makes the specific of this work. To better understand the importance of the copyright of the given work, it is necessary to describe the stages of film-making. Before doing this, the work manuscript can take several forms, among which one can distinguish the scenario and the synopsis.

The synopsis represents the summary of the forthcoming film. (Eminescu, 1997, p. 97) As previously mentioned, the scenario represents the artistic work according to which the feature films are shot as well as the plays, etc. Moreover the scenario comprises the characters' appearance, their physical and psychological aspect.

It seems that the most highly debated problem is the determination of the author of the audiovisual work. This problem is seen from different perspectives, depending on the law system that influences the country's legislation. The countries under the influence of the German law consider the cinematographic work as a work derived from the pre-existent works, and its author is different from the authors of the works used for making the film. (Eminescu, 1997, p. 99) On the contrary, in the legislation of those countries where the system of common law is applied, the cinematographic work is a common duty work, and its authors are considered clerks while the author is the film studio. As regards the Republic of Moldova, the copyright law and the connected rights, art. 18, stipulate that the following can be the authors of the audiovisual work: the script writer, the author of the dialogue, the composer-the author of any musical work with or without lyrics, especially written for the audiovisual work, the scene painter as well as any other possible authors who worked in a creative way to achieve the audiovisual work. We may also consider to be co-author of the audiovisual work the author of any work that was previously created and which was included, after adapting or maintaining it in the original form, in the audiovisual work.

Among the objects of the copyright an important part is played by the art works. The law regarding the copyright and the connected rights does not stipulate the notion of plastic art, but it mentions as examples and in an inexhaustible way the works belonging to this category, art.7, line (2), lit. (h), namely: paintings, sculptures, graphics.

What characterizes the plastic arts is their close connection with their material support. In most cases the artist does not create the work only with a brush and paper. To create plastic arts, one needs several materials, which finally will get a shape which represents the artist's intellectual idea. In this respect, one should mention the study regarding the content and the shape, but also the juridical elements of the plastic arts.

Among the objects protected by the Copyright Law and its connected rights we can also mention the architectural, urban and horticultural works.

The architectural works include both buildings and edifices, as well as their interiors, which assimilated to the horticultural arts, make up a unique architectural project.

In turn, the architectural project is part of the required architectural documentation that is vital for the construction of buildings and edifices, which regards the solving of social, economic, engineering, anti-fire, sanitary-hygienic, ecological, as well as many other object requirements which are absolutely necessary to elaborate the documentation, and which involve the architect's participation.

These objects can be divided into strictly speaking objects (*buildings, edifices, gardens, parks etc.), and diagrams or graphs (drawings, models, facades, rough drafts, etc.). Unfortunately the law does not stipulate which of these two compartments is under the protection of the Copyright Law. As a result, we conclude that both the so-called objects and the architectural graphs are protected, since they represent an objective way to express intellectual creation. The authors of the architectural, urban and horticultural work enjoy all the moral and patrimonial rights.

The Copyright Law and its connected rights mention as objects of intellectual property the photographic works or the works obtained by a similar technique to that of photography: it includes plans, sketches and plastic arts referring to geography, topography, architecture and other sciences, in a special category of documentation.

Among the independent objects of the copyright law the legislator mentions the derived works and the integrated ones, which include translations, adaptations, explanatory notes, musical arrangements and any other transformations of literary, artistic or scientific works (encyclopedias and anthologies, compilations of other materials or data, no matter whether they are under protection or not, databases included). According to the criterion of selecting and systematization of their content, they are considered as objects of intellectual property.

As we have already mentioned, the derived work represents a product of intellectual creation that derives from another work, that is, translation, processing and adaptation. In this respect, we should mention the fact that there are two categories of translations: the literary translation and the word for word translation.

The literary translation requires a steady training in the domain of language and literature, excellent and thorough knowledge to render not only the work content

but also all the literary and scientific details of the original work. (Nikitina, 1972, p. 52)

Word for word translation is considered to be a mechanic translation that does not require a special training, because it means the direct translation of words, without any literary involvement. The Copyright Law and its connected rights include the translations, in general, as object of intellectual property and it does not specify any other classifications. As a result, we can conclude that any translation, either literary or word for word, may be considered as object of intellectual property.

Regarding the rights of the translator, the Copyright Law and its connected rights stipulates in art. 16 the fact that translators and other authors of the derived works are the beneficiaries of the Copyright Law for the translations, adaptations, arrangements or any other changes of their work. Moreover translation and any other derived work can be done only with the agreement of the author of the original work. The copyright of the translator or of another author of a derived work will not prejudice the copyright of the author whose original work was translated, adapted, arranged or transformed in one way or another. At the same time, the copyright of the translator or of another author of a derived work is not an impediment for those who want to translate or transform the same work, if the author agrees to it.

There are some cases when the translations are not protected by the norms of copyright, according to art.8 of the Copyright Law and its connected rights and they are: normative, administrative or political official documents as well as their official translations.

The integral works represent those works created by a creative connection of more works into one. This work is characterized by the fact that the author of the integral work is not the author of the connected works, this one realizing a creative mélange of other writers' works. The author of the integral work is not allowed to cause any prejudice to the copyright of the authors included in the integral work. In this context, there are two categories of integral works: works containing objects protected by the copyright law and works which contain objects that are not protected by the copyright law. As regards collections or encyclopedias which do not include materials under the copyright law, for example collections of normative acts or collections of works that are no longer protected, the only beneficiary of the copyright law will be the selections of a creative work of the person who elaborated the integral work. We should also mention that the right of the person

making up the integral work is no impediment for other people who want to use the same works in order to create integral ones.

As regards *the industrial property* the Convention from Paris from 20 March 1883 concerning the copyright stipulates as objects of industrial property copyright the following ones: patents, utility models, industrial drawings and models, trademarks and factory brands, registered trade mark, commercial name and the sources of origin, the names of origin as well as the disloyal competition.

The notion of industrial property is understood in many ways and it is applied not only to industry and commerce but also to agriculture and extractive industry, to all natural or processed products, such as: wine, cereals, tobacco leaves, fruit, minerals, spring water, beer, flowers and flour.

When we refer to the objects of industrial property we should take into consideration the fact that they include: technical creations (industrial drawings and models) and distinctive signs associated with the products (brand, commercial name, geographical details, and copyright against disloyal competition).

As regards the patents, the Convention from Paris, from 1883, establishes several types of patents: industrial patents recognized by the legislation of the Union as patents of import; patents of improvement and additional certificates etc.

Both international and national documents, vaguely offer some classification criteria of the intellectual property objects.

According to the provisions of the Customs Law of the Republic of Moldova, in the case of smuggling objects of intellectual property across the border, according to the classification already done, the wrong doers' actions are to be judged according to art. 224 Customs Law of Republic of Moldova. According to the provisions of the respective customs law, they consider as smuggling any activity of illegally taking goods across the border, without a customs check or avoiding it by hiding the goods, either on a small or bigger scale, either repeatedly or by a group of people already specialized in smuggling goods, or a person with high position who may take advantage of this position, or by using false customs documents or any other documents, either by declaring or non-declaring in the customs documents or in any other documents: such a smuggling may include narcotics, psychoactive substances, toxic, poisonous, radioactive and explosive substances, noxious waste, missiles, explosive devices, fire arms and missiles, with the exception of hunting guns with a lisa pipe and their cartridges, cultural values,

as well as not bringing on the customs area the cultural values taken away from the country, which should be compulsorily brought back to the country of their origin, this is what we consider smuggling and it is punished according to the Penal Code.

We can conclude from the analysis of the norms of the customs law concerning the customs goods, that the legislator refers only to those goods which illegally taken across the country's customs border, represent the material object of this offence. As a result we consider it to be a limited interpretation of the material customs law. The practice of customs activity demonstrates that across the customs border can be taken not only goods but also objects, valuables, belongings, not to mention the objects of intellectual property.

3. Conclusions

In the case of illegally taking objects of intellectual property across the customs border of the country, even if these objects are included in the classification we have already realized, we consider it necessary to include and sanction them according to art. 248 Penal Code of the Republic of Moldova, regarding the objects of intellectual property illegally taken across the customs' border of the country. We should also revise the law in order to identify and evaluate the objects, so as to consider and recognize them as objects of intellectual property.

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