

# The Pre-emption Right within the Copyright Domain

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*Abstract:* - This essay analyzes the right to pre-emption established in the field of copyright and regulated by art 52 from Law no. 8/1996 regarding the copyright and neighbouring rights. This right gives to the publisher who had signed a publishing contract with the author of a scientific, literary or artistic works priority to publish right the work in electronic format. The entire analysis of the conditions in which it can be exercised the right of pre-emption in this area is the authors' personal work in the conditions where in our country there are no studies that examine the right of preemption.

*Key-Words:* - right, pre-emption, copyright, editor, publisher, author

## 1 The pre-emption right's legal regulation

Within the copyright domain, the article no. 52 from Law no. 8/1996 regarding the copyright and neighbouring rights [1] establishes a pre-emption right in favour of the editor when publishing the work in electronic format as follows: *“(1)The editor who acquired the right to publish a work as a volume has, towards other similar bidders, at an equal price, the first publishing right of the work in electronic format. The editor has to opt in writing, within at most 30 days after receiving the author's written offer. (2)The right mentioned in paragraph (1) is valid for 3 years from the publishing date of the work*

Law no. 8/1996 regarding the copyright and neighbouring rights represents the normative act that deals with the protection of the literary, artistic and scientific works, as well as the protection of those who created these works.

In conformity with the article no. 27 from the Universal declaration of human rights: *“(1) Any person has the right to freely participate to the cultural life of the community, to enjoy arts and be part of the scientific progress and its benefits. (2) Every person has the right to guard the moral and material interests that arise from any scientific, literary or artistic work of whose author he is*

In the specialty literature [2] it has been proved that the two important arguments that determined the establishment of the copyright arise from the

premises established in article no.27 from the Universal declaration of human rights.

Firstly, in order for the author to retain his right in using his work and to request, in this capacity, a certain remuneration; secondly, in order for the society to have access to it.

The same authors show that the two principles are strongly connected, and that the copyright law aims to establish a balance, as fair as possible, between these aspects.

The author is encouraged to create and publish his works, so that they can be at everyone's disposal.

Therefore, the author is guaranteed enough exclusiveness by law, a limited period activity monopoly that can provide an income, but, on the grounds that the society is the one that offers working conditions for the author, it considers itself entitled to dispose, to certain limits, of the published works, reason for which the exclusiveness duration is limited in time and at its end, the work becomes part of the public domain.

## 2.The implementation domain for pre-emption right

In order to define the implementation domain for the pre-emption right mentioned in article no. 8 from Law no. 8/1996, we must identify the rights given to the author of a literary, scientific or artistic work, what the editing contract consists of and the

conditions in which the pre-emption right is applied.

### 2.1 The rights granted to the author of a literary, artistic or scientific work

Through Law no. 8/1996, the author of a literary, scientific or artistic work benefits from legal protection for his property rights, as well as for his non-property rights.

Article no. from Law no. 8/1996 modified through Law no. 285/2004 [3] specifies the property and non-property rights which are guaranteed and protected by law: these rights are the following: **a) the right to reveal the work**—*the right to decide if, how and when the work will be available for the public*; **b) the paternity right**—*the right to request the recognition for being the author of the work*; **c) the right to have a title**—*the right to decide which title the work will have when it will be available for the public*; **d) the right for the inviolability of the work**—*the right to request the observation, for the integrity of the work and to oppose to any modifications as well as to any damage brought to the work, if it prejudices his honor or reputation*; **e) the retraction right**—*the right to retract the work, indemnifying, if necessary, the injured holders of the right to use.*

The author's moral rights [4] are the legal expression of the connection that unites the author with his work [5], being strongly connected to the author's personality [6].

For this reason, the author's moral rights are inalienable [7], imperceptible [8] and indefeasible [9].

The copyright law, establishes through article no. 11 the inalienable character of the author's moral rights, showing that they cannot be the subject of a renouncement or alienation, however it allows the fact that certain moral rights of the author to be transmitted through succession. These rights are the the right to reveal, the paternity right and the right for the inviolability of the work, that are transmitted to the work author's inheritors, and if there are not any inheritors, these rights are transmitted to the collective management body which has administered the rights of his author, as the case may be, the body that has the largest number of members, from the respective creation domain.

The protection of the author's moral rights is ensured also through the incrimination of certain violations of these rights as offences.

Therefore, according to article no. 141, the offence refers to the deed of a person who

misappropriates the capacity of being the author of a work or the deed of a person who brings to the public awareness a work under a different name than that chosen by the author. Regarding the author category of rights, the articles no. 12 and 13 must be taken into consideration.

Hence, according to article no.12: *“The author of a work has the exclusive property right to decide if, how and when his work can be used, including the right to consent to the usage of the work by other persons.”*

Again, in conformity with the article no. 13, the usage of a work determines the following property rights, distinct and exclusive, of the author to authorize or proscribe: a) the work reproduction; b)the distribution of the work; c)the import for the management on the internal market of the copies produced with the author's consent; d)the lease of the work; e)the lending of the work;;f)the direct or indirect public communication of the work, through every means, including by making it available to the public, so that it can be individually accessed in every chosen moment or place by the public; g) the broadcasting of the work; h) the cable broadcasting of the work; i)the execution of derived works.

These property rights can be transmitted by the author, both through documents among the living, and for a death cause, as well as, in certain cases, by operation of the law.

Concerning the exclusive nature of these rights, it has been proved in doctrine [10] that this nature has a double meaning: firstly, the author has the sovereign right to decide whether the work is going to be used, how and when, secondly, the usage monopoly belongs to the author.

Regarding, the duration of these rights, the article no. 25 paragraph 1 establishes the general law according to which the author's property rights last for the entire life of the author, and after his death they are transmitted by legacy, according to the civil legislation, for a period of 70 years or, on their absence, to the bodies mentioned above [11].

When the author's rights legal protection period expires, the literary, scientific or artistic works come to the public domain, the property rights are vanished, their usage will not involve anymore the payment of the remunerations to the author.

The public domain notion must not be confounded to the signification that this notion has in civil right.

A work coming to the public domain refers to the fact that the monopoly for the usage of that work by the holders has stopped and that, from that

moment on, the work represents a part of the cultural patrimony of the humanity, at everyone's disposal, being freely used [12].

And these property rights of the author have a special legal protection, their violation being considered an offence [13].

## 2.2 The editing contract

Law no. 8/1996 regarding the copyright and the neighboring rights brings under regulation, in chapter VII, the main types of the author's property rights exploitation contracts.

These are: the editing contract (2<sup>nd</sup> section), the contract for dramatic representation or musical execution, (3<sup>rd</sup> section), the lease contract (4<sup>th</sup> section), the order contract (art. 46) and the contract for audio-video arrangement (2<sup>nd</sup> part, chapter VIII, art.68).

The editing contract is defined by law as being the convention through which the copyright holder cedes the editor, in exchange for a remuneration, the right to reproduce and to distribute his work (art. 48).

Although in common language the term *publication* refers to books, to the reproduction of written works, the implementation domain for the editing contract is not limited to the written works and to their reproduction, but refers to any type of reproduction susceptible intellectual creations: literary, graphical, musical, multimedia works etc [14].

Any work can be published in different ways, according to its format: paper format, electronic format etc.

Also, it must be mentioned the fact that the publication refers only to its reproduction, not to its adaptation.

The lawgiver stipulates in article no. 49 that: "*the copyright holder may cede the editor also the right to authorize the work's translation and adaptation*", and the article no. 50 specifies that: "*the cession towards the editor of the right to authorize other persons to adapt the work or to use it in any other way must be the subject of an explicit contract stipulation*".

The editing contract is a reciprocal [15], consensual [16], onerous and commutative [17], contract and if it represents an exclusive cession, it is a translative rights contract, because the author transmits to editor the real right to reproduce and distribute the work, under the conditions stipulated by the contract.

Also, the editing contract is a *intuitu personae* contract, article no. 54 establishing, in virtue of this aspect, that *the editor will not be able*

*to cede the editing contract unless he has the author's consent*. The parties of the editing contract are the author of the work or his successor and the editor is practically a mediator between the author and the public, the work being given to circulation through his activity, to the public, by publicity, with the help of the printing factory and of the bookshop.

According to the stipulations of article no. 3 item no. 10 from the Commercial Code, the publishing houses, bookshop, art objects are considered to be objective trade acts, in situations in which the person who sells is other than the author.

This means that editing and distribution of the works are unilateral trade acts, the editing contract being trade act for the editor and a civil act for the author of the work, in case of litigation, the commercial legislation being applicable, in conformity with the stipulations of the article no. 56 from the Commercial Code.

According to the stipulations of the art. 51 from the law: "*the editing contract must comprise clauses concerning: a)the transfer duration; b)the exclusive or nonexclusive nature and the territorial extension of the transfer; c)the minimum and maximum number of original copies; d)the author's remuneration, established according to the herein law; e)the number of original copies reserved to the author on a free basis; f)the term for the apparition and publication of the original copies of each edition or, according to the case, of every printing; g)the delivery term of the original by the author; h)the control procedure of the number of original copies produced by the editor. (2)The absence of any of the clauses stipulated at letter a), b) and d) entitles the interested party to cancel the contract.*"

In the doctrine [18] it had been proved that by means of corroboration with the art. 41 paragraph 1 from the law, which talks about the transfer contracts of the patrimonial copyrights, the editing contract has to comprise generally dispositions concerning the mentioning of the transferred rights and the ways of use, under the same sanction of the relative nullity.

After regulating the content of the editing contract in art. 51, the lawgiver establishes, in art. 52, the pre-emption right of the editor who has obtained the right to publish the work in a volume, when publishing the work in electronic version.

From the corroboration of the herein dispositions, we consider that means of editing the work should be specified in the editing contract: on paper or electronically, in order to prevent the

interpretations regarding the rights transferred to the editor.

## **2.2 The necessary conditions in order to exert the pre-emption right.**

From the legal dispositions in art. 52, it appears that, in order to be entitled with the pre-emption right stipulated in this article, the following conditions must be fulfilled [19]: it is mandatory that between the author and the editor exist an editing contract, on whose basis the latter should have obtained the possibility of publishing the work only on paper; the author wants that his work to be published by an editor in electronic version; the intention of publishing the work in electronic version has to be manifested by the author within three years since the publication of the work on paper.

As it was shown in the doctrine [20], the publishing of the work, according to the stipulations of the editing contract, becomes a right, but also an obligation of the editor.

This fact arises from the corroboration of the dispositions of art. 48 paragraph 1 with the dispositions of the paragraphs 3 and 4 from the law, because of the fact that art. 48 paragraph 1 stipulates that, by the editing contract, the editor is entitled with the right to reproduce and to deliver the work, and by art. 56 the editor is obliged to publish the work within the term established by the parties, and if not, within maximum one year, otherwise the author has the possibility to request the cancelation of the contract and damages for the noncompliance.

From the corroboration of the same dispositions it arises the fact that the editing notion is intended both for the reproduction and the distribution.

Regarding the publishing notion, it refers to the distribution of the work towards the public [21].

We would like to mention that the work reproduction term is referring to the realisation of one or many copies, the number of original copies in which the work may be reproduced being established by the editing contract [22].

The work distribution [23] towards the public or the publishing may be realised by sale, lease or any other transmission way with onerous or gratuitous title, depending on the modalities suitable to the work's genre. [24].

In the doctrine [25] it is appreciated that the work's distribution should be preceded by advertising, the latter representing a real obligation entitled to the author.

The pre-emption right may be exerted by that editor who has already published the work, on an editing contract basis, but it was impossible to reproduce and to distribute this work other than on paper, according to the parties' agreement.

If the author decides to publish the work in electronic format as well, the editor is entitled with pre-emption right in order to conclude a new editing contract which stipulate these means of distribution towards the public.

We believe that the reason for which this right was instituted is given by the activity performed by the editor on the first editing contract basis regarding the advertising and the distribution of the author's work.

It is obvious that the editor had taken all the necessary measures in order to ensure the advertising conditions, that he knows the public segment which loved the work as well as the issues encountered, creating the customer base.

Publishing the work in electronic version after being published on paper represents in a certain way an extension of the activity performed by the editor-preemptor on the first contract basis.

This is the reason why the lawgiver assures for the editor the priority to conclude a second editing contract.

This pre-emption right cannot be exerted in all the conditions, but only at the same price and if the author wants to conclude a second editing contract within 3 years since the publication on paper.

By exerting the pre-emption right at the same price, we understand that the editor-preemptor has to offer to the author the same remuneration which it was offered by other editors in order to conclude the editing contract in electronic format.

Taking into account the fact that a new editing contract is concluded, it is obvious that this one may be different from the first editing contract content, both regarding the mandatory clauses stipulated at art. 48 and 51 from the law, under the sanction of the relative nullity, but the optional clauses as well.

Regarding the 3 years term in which the editor-preemptor may exert his pre-emption right, we consider that this term was appreciated by the lawgiver as being sufficient to the public to know the editor's activity of promotion and distribution of the work on paper in order to loose the effect, in such way that the reason for which the pre-emption right was instituted becomes void.

### 3. The pre-emption right exerting procedure

For the editor's exertion right, the author has to submit to him a written offer [26] which should comprise the conditions in which he wants to conclude a new editing contract in order to publish his work in electronic format.

As we have shown, the new editing contract may have a different content in rapport to the previous one, the only common elements being, obviously, the parties of the contract and the intellectual creation which has to be published.

In order to convince the preemptor that the requested remuneration is right, the author may attach to the communication the offers received from the other editors, if there is no other confidentiality clause to prohibit the communication of the content.

After receiving the offer, the preemptor has 30 days to express his option concerning the conclusion of the contract.

This term is a period of grace and after its expiration, the editor's pre-emption right becomes void.

Being a period of grace, it cannot be cancelled or interrupted and it cannot be reinstated, as in the case of the prescription term.

Unlike the pre-emption right regulated in the patents domain, the editor neither can refuse the price of the contract established by the author, nor can appeal to the court in this sense.

He may only accept the offer of the author unconditionally, the acceptance under certain conditions representing the counteroffer and implicitly, the refusal [27].

If the editor accepts the author's offer after the expiration of the 3 months term, and the author communicates to the editor that he accepts this late acceptance, the editing contract concerning the publishing of the work in electronic format is considered closed, not according to the pre-emption right stipulated in the law, but according to common right.

### 4. The consequences of the pre-emption right non-compliance

It is believed that in the present legislative context, the sanction applicable for the non-compliance of the stipulations regarding the editor-preemptor's pre-emption right is the relative nullity of the editing contract which the author has concluded with another editor.

Taking into account that we are talking about a virtual nullity [28] we have to identify the interest protected by the lawgiver in order to establish which is the applicable nullity and, in our opinion, the protected interest is a particular one, taking into account the fact that this right was created in order to advantage a legal person- the editor- in relation with other legal persons, according to the activity performed in a editing contract.

In consequence, the relative nullity action could be exerted only by the pre-emptor or by his successors in right, within the 3 year general term since he canceled or should have cancelled the contract with the third party.

The action has commercial nature taking into account the fact that, as it was proved in the section regarding the editing contract, this contract represents a subjective commercial act, being a civil act for the author and a commercial act for the editor. According to art. 56, from the Commercial code, the commercial legislation is applicable. The competent court which shall judge in lower court the litigation is the District Court or the County Court, depending on the value of the contract, taking into account the fact that, according to art. 2 point 1 letter a from the Civil procedure code, the County Court judges in lower court the trials and the requests in commercial matter whose object has a value superior to 1 billion lei (ROL), while the District Court shall judge the litigations with a value inferior to this quantum, on the basis of its general competence established by art. 1, point 1 Civil Code Procedure.

The decision pronounced in the lower court could be appealed by means of appeal or action to cancelation, but should be enforceable since the passing, according to art. 720 index 9 Civil procedure code.

Once The New Civil code entered in force, the editor-preemptor shall replace the third party in the contract concluded with the author, invoking the stipulations of the art. 1733 from the Code.

In this matter, the post-contract mechanism regulated by the New Civil code is much more efficient in order to realise the aim followed by the lawgiver, by instituting the pre-emption right, unlike the application of the relative nullity

#### *References:*

- [1] Published in the Official Journal 60/March 26<sup>th</sup>, 2006.
- [2] Viorel Roş, Dragoş Bogdan, Octavia Spineanu Matei, *Copyright and neighbouring*

*rights. Treaty*, All Beck publishing house. Bucharest, 2005, p.33-34

[3] Published in the Official Journal no. 587 from June 30<sup>th</sup>, 2004.

[4] This is the expression used in doctrine to refer to the non-property rights or the author

[5] In this regard Viorel Roş, s.a., op.cit., p. 196.

[6] In this regard Yolanda Eminescu, *Copyright*, Lumina Lex, Bucharest, 1994, p.107

[7] Cannot be alienable and cannot be dropped

[8] It is not the subject of a forced execution

[9] The indefeasibility of the author' moral rights cannot be operated as long as the work remains in the people's memory and represents the object of a usage, and the right to action in defense of these rights is not vanished, irrespectively of the time that passes from their violation

[10] Viorel Roş, s.a., op.cit., p. 287

[11] From this rule there are also some exceptions stipulated by the art. No 25 paragraphs 2-29

[12] In this regard see Viorel Roş, s.a., op. cit. , p. 294

[13] These offences are brought under regulation by art. 14

[14] In this regard see Viorel Roş, s.a., op. cit., p.373

[15] Because it imposes rights and obligations to both parts. The editor assumes the obligation to reproduce and distribute the work, and the author that of making it available to the editor.

[16] Because it can be concluded by a simple agreement, the written format being necessary *ad probationem*

[17] Because both parts wish to obtain a property benefit, the extent of the rights and obligations of the parties being known at the conclusion of the contract

[18] Viorel Roş, s.a., op.cit., p.379

[19] In this regard, to be read Ligia Dănilă, Ion Negru, op. cit., p. 33

[20] Viorel Roş, op.cit., p.383

[21] In the same regard, to be consulted Viorel Roş, ş. a., op. cit., p.383

[22] According to art. 51 from the law, the editing contract should present "the maximum and minimum *number of original copies*", and as well *number of copies reserved to the author, with onerous and gratuitous title*".

[23] By work, we understand the copies realized by reproducing the original work

[24] Art. 14 from the law

[25] In this sense, to be consulted Yolanda Eminescu, op.cit., p. 161

[26] The written offer should be submitted in order to assure the communication, such as registered letter with receiving confirmation

[27] In this regard, to be consulted C. Stătescu, C.Bârsan, op.cit., p.49

[28] Regarding the nullities classification to be consulted G. Beileu, op.cit., p.208-210