Anonymised version

Case C-649/23

Request for a preliminary ruling

Date lodged:

31 October 2023

Referring court:

Înalta Curte de Casație și Justiție (Romania)

Date of the decision to refer:

6 December 2022

Appellants in the appeal on a point of law, appellants on appeal and defendants at first instance:

Institutul de Istorie și Teorie Literară ‘G. Călinescu’

Fundația Națională pentru Știință și Artă

Defendants in the appeal on a point of law, defendants on appeal and applicants at first instance:

HK, heir of TB

VP

Defendant in the appeal on a point of law and defendant at first instance:

GR

[…]

INALTA CURTE DE CASAȚIE ȘI JUSTIȚIE

SECȚIA I CIVILĂ

(HIGH COURT OF CASSATION AND JUSTICE

FIRST DIVISION FOR CIVIL MATTERS)

Order [...]

Public hearing on 6 December 2022

[...]

A ruling has been given on the request for a reference to be made to the Court of Justice of the European Union by the Institutul de Istorie și teorie literară 'G. Călinescu' (G. Călinescu Institute of History and Literary Theory), the appellant in the appeal on a point of law, appellant on appeal and defendant at first instance, in the proceedings [...] relating to the appeals on a point of law brought by the G. Călinescu Institute of History and Literary Theory and the Fundația Națională pentru Știință și Artă (National Foundation for Science and Art), the defendants at first instance and appellants on appeal ('the defendants'), against the civil judgment [...] of 7 April 2021 delivered by the Curtea de Apel București, Secția a IV-a civilă (Court of Appeal, Bucharest, Fourth Division for Civil Matters, Romania).

[...]

[procedural aspects]

THE HIGH COURT,

In the present civil case, notes the following:

Subject matter of the application

1. By their action before the Tribunalul București (Regional Court, Bucharest, Romania) [...], TB and VP, acting as heirs of Professor Dan Slușanschi, alleged that the defendants (the G. Călinescu Institute of History and Literary Theory and the National Foundation for Science and Art) had infringed the copyright of the work in Latin – critical edition – entitled '*Demetrii principis Cantemirii. Incrementorvm et decrementorvm avlae othman(n)icae sive aliothman(n)icae historiae a prima gentis origine ad nostra vsqve tempora dedvctae libri tres'* (*'l'«Istoria creșterilor și a descreșterilor Curții Othman[n]ice sau Aliothman[n]ice de la primul început al neamului, adusă până în vremurile noastre, în trei cărți'*) ('History of the rise and fall of the Ottoman or Aliottoman court from the origins of the lineage to the present day, in three books') – as translated by Professor Dan Slușanschi.

2. Accordingly, the applicants sought compensation for the material and non-material damage suffered as a result of the publication by the Academia Română (Romanian Academy)/National Foundation for Science and Art, in 2015, of a work entitled *'Istoria măririi și decăderii Curții otomane' ('History of the greatness and decadence of the Ottoman court'*), bilingual Latin and Romanian

version, also including a critical edition (‘the Academy’s critical edition’) which, the applicants claim, is a copy of the earlier critical edition of the author of the above-mentioned works, Dan Slușanschi (‘the Slușanschi critical edition’).

3. [...]

4. [...]

[aspects of the application at first instance which are not the subject of the appeal on a point of law]

Judgments of the Regional Court and of the Court of Appeal

5. By civil judgment of [...] 21 December 2017, the Regional Court of Bucharest found that the defendants had infringed the moral right of Professor Dan Slușanschi to be recognised as the author of the critical edition, and had infringed the copyright belonging to the heirs (the applicants at first instance), by publishing and distributing the work ‘Istoria măririi și decăderii Curții otomane’, which incorporates the Slușanschi critical edition, without obtaining authorisation from the applicants.

6. Consequently, the Regional Court of Bucharest ordered the defendants, jointly and severally, to pay the applicants compensation for material and non-material damage and to withdraw the Academy’s critical edition from Romania, as it had been produced without the consent of the holders of the copyright to the Slușanschi critical edition and without any indication that Dan Slușanschi was the author.

7. The defendants, namely the G. Călinescu Institute of History and Literary Theory and the National Foundation of Science and Art, appealed against the judgment of [...] 21 December 2017.

8. By judgment of [...] 7 April 2021, the Court of Appeal of Bucharest upheld the appeals and varied in part the judgment of the Regional Court, by reducing the amount of non-material damages owed jointly and severally by the defendants, namely the National Foundation of Science and Art and the G. Călinescu Institute of History and Literary Theory, but upholding the order to pay compensation for material damage in the amount fixed at first instance.

Facts

9. Professor Dan Slușanschi is the author of the critical edition of the work in Latin by Prince Dimitrie Cantemir, whose title is translated as ‘Istoria creșterilor și a descreșterilor Curții Othman[n]ice sau Aliothman[n]ice de la primul început al neamului, adusă până în vremurile noastre, în trei cărți’. The critical edition was first published in 2001 by the publishing house Amarcord di Timișoara, followed by a second edition in 2008, revised and corrected by the author, published by the publishing house Paideia, with re-issues in 2010 and 2012.

10. The Slușanschi critical edition was based on the manuscript of the Latin text, discovered in 1984 at the University of Harvard (owner of the 1901 manuscript). In the first edition, the facsimile published in Romania in 1999 was used and, in the second edition, the photographic copies provided by the owner.

11. Dimitrie Cantemir's work was also published in Romanian in a translation by the professor himself, which referred to the Latin text produced as the authoritative version by the Slușanschi critical edition, in revised and correct form.

12. In 2015, the defendant National Foundation of Science and Art organised the publication of the work 'Dimitrie Cantemir – Istoria măririi și decăderii Curții Othomane', a bilingual Latin and Romanian version, in two volumes, which reproduced the Latin text together with critical notes by the editors of the defendant foundation.

13. The Regional Court of Bucharest and the Court of Appeal of Bucharest held that the Academy's critical edition did not merely use certain quotations or passages but reproduced the 2001 Slușanschi critical edition in its entirety. The unpublished additions or corrections made by Professor Dan Slușanschi to his edition and which he had intended to use in the future were also used. References to the author of the previous edition were inserted in footnotes.

14. In accordance with an agreement concluded in 2013 with the defendant G. Călinescu Institute of History and Literary Theory, following the death of Professor Dan Slușanschi, the applicants assigned to the defendant the right to use the professor's transcriptions and translations relating to various texts by Dimitrie Cantemir – including that at issue – for the purpose of publishing an edition of the complete works of Dimitrie Cantemir. The defendant institute made the work of Dan Slușanschi available to the defendant foundation.

15. It is relevant, in this context, to mention a detail that emerges from the witness statement of one of the editors of the Academy's critical edition: in his statement as a witness before the court, he declared that, if he had not worked on the version provided by the applicants, which had been produced by its author, lengthy and laborious research would have been necessary.

16. In addition to the facts relied on by the Regional Court of Bucharest and the Court of Appeal of Bucharest, it may also be mentioned, on the basis of the information in the file, that the work in question by Dimitrie Cantemir has been published post-mortem in numerous versions since the 18th century, and that the first such publication was in English. That version was in all likelihood based on the manuscript in Latin, but it was not a complete translation, as it contained numerous omissions and changes. Subsequently, the versions in French, Italian, Turkish, Romanian, and so forth were translated from the English. The Latin text was only published in 1999 (in facsimile) and the first scientific critical version of the Latin text was the 2001 Slușanschi critical edition.

Legal assessments by the Court of Appeal

17. In the explanatory dictionary of the Romanian language, a 'critical edition' is defined as an edition of an ancient, classical or other text produced as the authoritative version by comparing the variants, and accompanied by comments and the requisite critical apparatus.

18. A critical edition is a derivative work within the meaning of Article 16 of Legea nr. 8 din 14 martie 1996 privind dreptul de autor si drepturile conexe (Law No 8/1996 on copyright and related rights, 'Law No 8/1996') and enjoys the protection provided for by that legislative act.

19. The production of such a work involves enriching the manuscript by remedying omissions, choosing appropriate terms where the original terms cannot be deciphered, making changes to the text to ensure that the meaning is maintained, and providing explanations regarding the choices made.

20. All those interventions to the original work are the result of a creative effort, resulting from the authors' intellectual activity.

21. The author of a critical edition chooses from a wide variety of terms or expressions to try to reconstruct, as far as possible, the meaning of the text and convey the message of the original work. Thus, the choice of the appropriate word or expression is what gives the intellectual practice the quality of a personal piece of work, which is included in the concept of originality.

22. The choices made by the author of a critical edition are creative because, in addition to philological skills and scholarly information regarding the author's life, the historical time and the literary period in question, an editor displays his personality through the choices he makes, precisely in the form in which he chooses to transmit the text's message to the reader.

23. Even though a critical edition does not involve an alteration to a pre-existing work, since the aim is to reconstruct the original text as faithfully as possible, critical notes are also the result of a creative choice, since their authors make their own choices when remedying omissions or substituting terms that cannot be deciphered.

Appeal on a point of law

24. The defendants, the G. Călinescu Institute of History and Literary Theory and the National Foundation for Science and Art, brought an appeal on a point of law before the High Court of Cassation and Justice against the decision of [...] 7 April 2021 by the Court of Appeal of Bucharest.

25. By their pleas, the defendants, in essence, criticised the finding of the appeal court relating to the classification of a critical edition as a derivative work, arguing

that the court had failed to apply the criteria resulting from the case-law of the Court of Justice of the European Union for the assessment of copyright protection.

26. According to the appellants in the appeal on a point of law, the degree of freedom of the editor of a critical edition is extremely limited, if not non-existent, in the case of a work of a scientific nature written in a dead language, such as Latin, with precise rules on syntax and the order of words in clauses or of clauses in sentences.

27. In the case of a critical edition, the editor does not have any free creative choices, as his sole aim is to use his professional competence to identify the textual variants – where the original author's intention is not clear from the manuscripts used – that are as close as possible to the original author's intention, and never to the editor's own intention.

28. The fact that it is possible to choose between different options concerning the words or formulations used does not mean that the author has made a creative, original contribution, and thus it cannot be argued that the critical edition prepared by Dan Sluşanschi reflects his personality.

29. In the course of the proceedings, the High Court of Cassation and Justice discussed the request by the G. Călinescu Institute of History and Literary Theory, the defendant, to make a reference to the Court of Justice of the European Union pursuant to Article 267 TFEU for the interpretation of Article 2(a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

The High Court of Cassation and Justice considers it necessary, for the purposes of resolving the case, to refer a question to the Court of Justice of the European Union for a preliminary ruling, for the reasons set out below.

Relevant legal provisions

30. *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works; [...].

31. *Law No 8/1996 on copyright and related rights (version in force in 2001)*

Article 16

The author of a work has the exclusive economic right to authorise the translation, publication in collections, adaptation and any other alteration of his work resulting in a derivative work.

32. *Law No 8/1996 on copyright and related rights (version in force in 2015 and currently)*

Article 23

The creation of derivative works, within the meaning of this law, means the translation, publication in collections, adaptation and any other alteration of a pre-existing work, if that constitutes an intellectual creation.

Reasons which led the court of cassation to refer the question for a preliminary ruling

33. The question referred by the High Court of Cassation and Justice, as a court of cassation, to the Court of Justice of the European Union concerns the classification of a critical edition of a work as a 'work', itself protected by copyright, within the meaning of Article 2(a) of Directive 2001/29.

34. In the case of a critical edition, the end result sought by the editor is to make the original work as close as possible to the form developed by the author of that work, that is, to produce an authoritative version of the text of the original work in a complete and comprehensible form.

35. To that end, the editor consults the manuscript, and may make corrections or additions to it in order to ensure that the meaning is maintained, with comments and explanations regarding the choice of the appropriate terms. The accompanying critical apparatus involves an intellectual effort requiring research that is often extremely laborious and lengthy.

36. Under no circumstances may the work of the editor be equated with making a copy or transcription of a facsimile of the manuscript.

37. The case-law of the Court of Justice of the European Union contains important elements relating to the concept of 'work', referred to in Article 2(a) of Directive 2001/29, as regards the exclusive right of authors to authorise or prohibit the reproduction of their works, as well as in other provisions of that directive (concerning the exclusive rights of authors in respect of communication to the public and distribution, as well as the exceptions and limitations that may be made to those exclusive rights).

38. The concept of 'work' is an autonomous concept of EU law which must be interpreted and applied uniformly by the national courts (judgment of 12 September 2019, *Cofemel*, C-683/17, EU:C:2019:721, paragraph 29 and the case-law cited).

39. According to the Court of Justice, that concept requires two cumulative conditions to be satisfied; if they are met, the element at issue is a 'work' which, accordingly, must qualify for copyright protection (*Cofemel* judgment, paragraph 35 and the case-law cited).

40. First, there must be an original subject matter, meaning that it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choices. In so far as the realisation of a subject matter has been dictated by technical considerations, rules or other constraints, which have left no room for creative freedom, that subject matter cannot be regarded as possessing the originality required for it to constitute a work (*Cofemel* judgment, paragraphs 29 to 31).

41. Second, classification as a work is reserved for the elements that are the expression of such an intellectual creation, since the concept of a 'work' necessarily entails the existence of a subject matter that is identifiable with sufficient precision and objectivity (*Cofemel* judgment, paragraphs 29 and 32).

42. At the same time, use (including by reproduction) of a 'work' may consist of a third party using parts of a work without the consent of the copyright holder, if the elements used are, in themselves, an expression of the author's own intellectual creation (judgment of 16 July 2009, *Infopaq International*, C-5/08, EU:C:2009:465, paragraphs 48 and 49).

43. *The present question referred to the Court of Justice relates to the two criteria for the classification of a work protected by copyright, namely the existence of an original subject matter and the existence of an identifiable subject matter.*

44. From the point of view of the admissibility of the request for a preliminary ruling, there is no doubt that the Court of Justice has consistently held that it is for the national court to determine whether a specific intellectual creation, such as the one at issue in the case before it, may be classified as a 'work' within the meaning of Article 2(a) of Directive 2001/29 (or, as the case may be, another provision of an act of EU law) and may therefore be protected by copyright.

45. However, it is undisputed that the Court of Justice has analysed the specific way in which the two criteria operate in the case of different creations and has provided the elements that the national court must assess in order to determine whether copyright protection may be granted.

46. For example, in the case of a database, the free and creative choices – on which originality depends – concern the selection and arrangement of the data through which the author of the database gives the database its structure, and those

concepts do not apply to the creation of the data contained in that database, except where the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom (judgment of 1 March 2012, *Football Dataco and Others*, C-604/10, EU:C:2012:115, paragraphs 32, 38 and 39).

47. Similarly, a portrait photographer can make free and creative choices in several ways and at various points in the photograph's production, so as to stamp his 'personal touch' on the work created, and the Court of Justice has specifically set out the ways in which a portrait photographer may express himself, so that the freedom available to him to exercise his creative abilities will not necessarily be minor or even non-existent (judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraphs 90 to 94).

48. In relation to a literary work (newspaper article), the Court of Justice has held that, as such, words do not constitute elements covered by protection, but that it is through the choice, sequence and combination of the words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation (*Infopaq International* judgment, paragraphs 44 and 45).

49. Even the fact that a document is an official informative report does not automatically preclude the existence of originality, which may result from the choice, sequence and combination of words. However, the Court of Justice has made it clear that any originality is precluded in the case of purely informative documents, the content of which is essentially determined by the information which they contain and which are thus entirely characterised by their technical function. Similarly, the mere intellectual effort and skill of creating such reports are not relevant for the purposes of classification as a 'work' (judgment of 29 July 2019, *Funke Medien NRW*, C-469/17, EU:C:2019:623, paragraphs 23 and 24).

50. It is also worth recalling the Court of Justice's ruling that the taste of a food product is not protected as such by copyright, under the second criterion for assessment, namely the existence of a subject matter identifiable with sufficient precision and objectivity (judgment of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:899).

51. Consequently, a national court assessing whether a particular creation may constitute a 'work' for the purposes of copyright is guided by the assessment criteria indicated by the Court of Justice, applying one or both of the criteria set out unequivocally, namely the existence of an original subject matter and an identifiable subject matter.

52. However, there are no such indications in the case-law of the Court of Justice that expressly concern a critical edition of a work. According to the referring court, that justifies an interpretation by the Court of Justice pursuant to Article 267 TFEU, since it is not an 'acte clair' in the light of an earlier preliminary ruling

(judgment of 27 March 1963, *Da Costa en Schaake NV and Others* v *Administratie der Belastingen*, Joined Cases 28/62 to 30/62, EU:C:1963:6).

53. According to the High Court of Cassation and Justice, the doubt as to the interpretation of the directive which gave rise to the present reference lies, first, in whether an editor actually makes 'free and creative choices' when *producing the authoritative version of the content of a pre-existing text* in an intelligible form and as making it as close as possible to the original author's intention, while respecting his style and linguistic expression, by accompanying the text with critical notes, comments and explanations for any corrections, replacements of words or additions necessary in order for the manuscript text to be comprehensible.

54. The question which arises is whether, on the one hand, the act of choosing certain words, namely a textual variant, and, on the other hand, the critical apparatus and the comments or explanations, reveal the editor's creativity and personal touch, or merely his professional skills and undeniable intellectual effort (which, according to the Court of Justice, are not sufficient to constitute an original work eligible for copyright protection).

55. Second, the referring court takes the view that it is not possible to state with certainty that the second criterion, consisting of the existence of a subject matter identifiable with sufficient precision and objectivity, is not satisfied.

56. The question therefore arises as to whether a critical edition may be regarded as a creation distinct from the original work or whether it is indissociable from it, being merely a version of the original work, since the purpose of the edition is, as already pointed out, to produce an authoritative version of the text of the pre-existing work.

57. Admittedly, in the latter case, it is possible to speak of 'partial merger', since the editor's input is visible and palpable in the critical notes, comments and explanations which he attaches to the text.

58. A finding that only the notes, comments and explanations have a subject matter that is precisely and objectively identifiable, but that no right in the original work may be attributed to the editor, could lead to a determination that the work is eligible for copyright protection only in respect of those parts whose subject matter is identifiable, in accordance with the second criterion for assessing a work.

59. It should also be pointed out that the above-mentioned aspects are relevant to the outcome of the pending proceedings, since the referring court is called upon to determine whether a critical edition has the status of a derivative work within the meaning of Article 16 of Law No 8/1996 (in its 2001 version – corresponding to Article 23 of the law in its current version).

60. In addition, under Article 2(3) of the Berne Convention, 'translations, adaptations, arrangements of music and other alterations of a literary or artistic

work shall be protected as original works without prejudice to the copyright in the original work'.

61. The original work in the proceedings pending before the referring court is undoubtedly a 'literary work' within the meaning of the Berne Convention, since the definition set out in Article 2(1) thereof includes works of a scientific nature.

62. However, a derivative work, as an 'alteration' of a literary or artistic work, must itself be an original work. The determination by the national court of whether that is the case justifies the present reference for a preliminary ruling, including in order to clarify, in the light of the second criterion for assessing the status of a 'work' resulting from the case-law of the Court of Justice, whether a critical edition of a work may be regarded as an 'alteration' of a literary or artistic work having a subject matter that is precisely and objectively identifiable.

63. It is clear from the Court of Justice's settled case-law that, although the European Union is not a party to the Berne Convention, it is nevertheless obliged, under Article 1(4) of the WIPO Copyright Treaty, to which it is a party and which Directive 2001/29 is intended to implement, to comply with Articles 1 to 21 of the Berne Convention (judgment of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:899, paragraph 38 and the case-law cited).

64. In the light of the foregoing, the High Court of Cassation and Justice considered it necessary to refer the matter to the Court of Justice for an interpretation of Article 2(a) of Directive 2001/29/EC as regards the status of a critical edition, taking the view that the correct application of EU law is not so obvious as to leave no scope for any reasonable doubt (within the meaning of the judgment of 6 October 1982, *CILFIT* v *Ministry of Health*, 283/81, EU:C:1982:335).

ON THOSE GROUNDS,

IN THE NAME OF THE LAW,

ORDERS AS FOLLOWS:

Grants the request for a reference to be made to the Court of Justice of the European Union by the G. Călinescu Institute of History and Literary Theory, the appellant in the appeal on a point of law, appellant on appeal and defendant at first instance.

Pursuant to Article 267 TFEU, the following question is referred to the Court of Justice of the European Union for a preliminary ruling:

'Must Article 2(a) of Directive 2001/29/EC be interpreted as meaning that a critical edition of a work, the purpose of which is to produce an authoritative version of the text of an original work, by consulting the manuscript, accompanied

by comments and the requisite critical apparatus, may be regarded as a work protected by copyright?’

[...]

[procedure, signatures]