

ROMANIA

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1. Introduction

Law no. 8 of 14 March 1996 on Copyright and Related Rights¹ (hereinafter “Romanian Copyright Law”) provides for exceptions and limitations to copyright in chapter VI, marginally entitled “limitations to the exercise of copyright”, in part I, entitled “general provisions”, of title I, which is dedicated to copyright, of the law. The chapter includes 6 articles, numbered from 33 to 38, with article 36 having been repealed by Law no. 285 of 23 June 2004 for the Modification and Amendment of the Romanian Copyright Law.²

The provisions of chapter VI do not apply in respect of software, such application being excluded by the provisions of art. 81 of the Romanian Copyright Law. In what software is concerned, art. 80 indicates that, subject to there being no prejudice to the author or to the normal exploitation of the software, the author’s consent is not mandatory for the reproduction and translation of the code for the purpose of insuring interoperability, provided that the additional conditions established by art. 78 and 79 are also met.

Article 33 provides for a list of exceptions and limitations under par. (1) and then, specifically as exceptions and limitations to the right of reproduction, distribution, broadcasting and communication to the public, an additional list under par. (2). In order for any use to qualify for the exceptions and limitations provided under par. (2), an additional condition to those provided under par. (1) must be met – that the use be without direct or indirect commercial or economic advantage. Par. (3) of article 33 carves out of the scope of the reproduction right some temporary acts of reproduction that are transient or incidental to other activities while par. (4) requires that in order to qualify for almost every one of the exceptions or limitations under par. (1) or for any under par. (2) the user must give proper attribution whenever possible.

Article 34 deals with the private copy exception and provides, in par. (2), for a remuneration to be paid in consideration of such. The following article allows the transformation of the work, without the author’s consent and without payment of any remuneration, in four given cases: where it is a private transformation, for parody or caricature, where necessary for use permitted by the author and in case of a summary of works for teaching. Proper attribution is required in the last case mentioned.

Article 36 was repealed and article 37 provides that certain reproductions and communications to the public may be allowed for, and only as needed for, testing of the functioning of the products on manufacture or sale. Par. (2) allows collective management societies to monitor by any means the use of their catalogue, without the authorization or compensation of users and may also demand that public institutions provide them with information of public interest.

The final article of the chapter confers, in par. (1), an implicit license to broadcasting organizations in order to record a work, only once and only for the purpose of making the broadcast. This license is deemed granted upon assignment or license of the broadcasting right for the work to the broadcasting organization. Authorization of the author is needed for any additional broadcast of the recorded work and such authorization needs to be paid, such right to consideration being unwaivable by law. Such authorization is to be sought within at most 6 months from the making of the recording, otherwise the recording needs to be destroyed. Par. (2) of the article allows “conservation in official archives” of

¹ Law on Copyright and Related Rights, Monitorul Oficial 1996 60.

² Law for the Modification and Amendment of the Law on Copyright and Related Rights, Monitorul Oficial 2004 587.

temporary recordings of works made by radio or television broadcasting organizations for their own shows but only where such recordings would have “a special documentary value”.

2. The triple test in Romanian Copyright Law

The provisions in chapter VI include a “triple test” provision as a complement to the closed list of exceptions and limitations provided for in article 33 and as a complement to the private copy exception provided for in article 34.

Article 33 par. (1) of the law thus reads: “The following uses of a work previously made known to the public shall be permitted without the author's consent and without payment of a remuneration, on condition that these are in accordance with good practice, do not affect the normal exploitation of the work, and do not prejudice the author or the holders of the exploitation rights”.

The other provision expressly making use of the “triple test” is Article 34 par. (1) of the law which reads: “The reproduction of a work without the author's consent, for personal use or for the normal family circle, shall not be an infringement of copyright, for the purposes of the present law, on condition that the work had previously been made known to the public, that the reproduction does not affect the normal exploitation of the work and does not prejudice the author or the holders of the exploitation rights”.

In practice, the Romanian courts have generally used the triple test as a supplementary test to confirm the application of the exceptions and limitations provided by articles 33 and 34 of the Romanian Copyright Law where the type of use would appear, *per se*, to fall in the scope of the “special cases” provided therein.³

The High Court of Cassation and Justice (hereinafter “High Court”) has established that use of a protected work “in accordance with article 33 par. (1) [of the Romanian Copyright Law] is subject to multiple conditions, such use not being allowed in all circumstances (of the type that would fall under the exceptions provided at letters a) – i); these conditions are the following: that the work was made public beforehand, and that the use be one in accordance with good practice, does not affect the normal exploitation of the work and does not prejudice the author or the holders of the exploitation rights. [...] it is by a correct application of the law that the Court of Appeals has dismissed the defendants’ arguments referring to the application of art. 33 par. (1) letters a) and e), because the legal conditions set by the premise of art. 33 par. (1), which would have allowed use of the work without the author’s consent and without payment of remuneration, were not met and therefore such provisions were inapplicable to the case, as was shown”.⁴

Thus the triple test appears to serve as a confirmation test for situations where the special cases in which use of the work without the consent of the author and without payment would appear to apply and it is, in fact, so used by the Romanian courts.

The Bucharest Court of Appeals has indicated that each of the four general conditions provided by par. (1) needs to be met in order for any limitation provided therein to apply in addition to the special conditions required to qualify under any of the “special cases” specifically indicated by law.⁵ The Bucharest Tribunal has held that these special conditions “take into account the type of use of the work, the category of protected work concerned and the place where such use is made, all which impose mentioning the source and author of the work”.⁶ In practice, the courts have tended to verify the meeting of the special conditions first and, where satisfied, verify whether the general conditions are also cumulatively met.

In a case concerning the use of an identical short fragment from a book on the Romanian Civil Code, by the Government, in the Explanatory Memorandum for the Proposal of a New Civil Code, without attribution and without proper identification of the fragment as a quote, the courts have analysed whether such use qualifies as permitted

³ Cf. R. Pârnu and C. R. Romițan, *Dreptul de autor și drepturile conexe*, All Beck 2005, p. 77.

⁴ ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, www.scj.ro. Accessed 25 May 2017.

⁵ Bucharest Court of Appeals, s. IX civ., Decision no. 67A of 25 February 2014, www.rolii.ro. Accessed 25 May 2017.

⁶ Bucharest Tribunal, s. IV civ., Decision no. 841 of 8 May 2008, www.rolii.ro. Accessed 25 May 2017.

under the exception provided by art. 33 par. (1) letter a) of the Romanian Copyright Law by verifying whether such use satisfies the conditions of the triple test.⁷

The Bucharest Tribunal has indicated that the notion of “good practice” is to be analysed by reference to the actual type of reproduction and the purpose of such, and therefore “reproduction of short fragments is allowed, “short” being subject to the court’s appreciation by reference to the length and complexity of the allegedly counterfeit work. Such condition is satisfied where, as in the present case, the length of the attacked phrases is very reduced (8 lines), being insignificant by reference to both the Explanatory Memorandum (a public document of approximately 30 pages) and the claimant’s work (1052 pages). Moreover, there is no ground for holding that by copying these introductory fragments there was a copying of essential passages that concerned the main part of the claimant’s work, such as to prejudice him by and abusive exploitation of his work, the purpose of the reproduction being the public interest i.e. to inform the public of the need of the legislative amendments brought by the new Civil Code, without any direct or indirect commercial advantage. The reproduction of the attacked text does not prejudice the claimant in any way since the purpose of the citation was solely the information of the public and not the usurpation of the authorship in the claimant’s work”.⁸

On appeal,⁹ the court upheld the Tribunal’s decision and in doing so has emphasized the fact that the use was in accordance with good practice since the purpose of the copying was not personal but the satisfaction of the public interest and the need to fulfil the requirements for an Explanatory Memorandum, as provided by Law no. 24 of 27 March 2000 concerning the Norms of Legislative Technique for the Drafting of Statutes.¹⁰ The appeals court also pointed to the lack of a commercial purpose, the sole purpose being the information of the public, to the reduced length of the copied fragment, and to the fact that the passages were included in the Explanatory Memorandum, held to be a general presentation of the Civil Code, a delineation of its purpose, thus indicating that the copying did not aim to appropriate the ideas or passages of the claimant’s work but to inform the public, as elements that confirmed that the use was in accordance with good practice. Still in reference to the “good practice” criterion, the appeals court held that the condition was met also on account of the fact that “the originality of the claimant’s work can’t be affected by the copying of some passages, insignificant in number by reference to the length of the claimant’s work, more so since the “philosophy” of this code, as presented by the claimant, contains general statements, not by reference to a given statute but to the general notion of “code””. The Court of Appeals has also linked the effect on the “normal exploitation of the work” to the “important practical effects that this copying could have” and has concluded, without further argument, that there were no such effects in this case. Interestingly, the appeals court has established the lack of any prejudice to the author or to the holders of exploitation rights by reference to the fact that the inclusion of the fragments in the Explanatory Memorandum has not generated copyright for another.

The High Court,¹¹ in affirming the Court of Appeal’s decision, has clarified that the limitation provided by law was instituted on account of the “need to protect some general interests, of public order, such as the information of the public with respect to the importance and relevance of legislative intervention in the Civil Code”. The court has concluded that, given the justification of the limitation, the existence of a commercial purpose is irrelevant, in the given case such purpose being excluded “given the initiative and the justification for the creation of the work wherein the attacked reproduction is found”. The High Court has also indicated that the quantitative evaluation of the copying was not required for the fulfilment of the conditions provided by the “special case” at hand but was used by the lower courts in their evaluation of the use being in accordance with good practice, as was the evaluation of the essentiality of the copied fragment to the original work.

With reference to a claim for copyright infringement by use of an excerpt of a press article on the website of a regional newspaper, the Galați Tribunal held that the exception provided for by art. 33 par. (1) letter b) of the Romanian Copyright Law is applicable since the respondent “copied only a short excerpt [of the original article] (11 lines), for

⁷ ICCJ, s. I civ., Decision no. 889 of 18 March 2014, www.scj.ro. Accessed 25 May 2017.

⁸ Bucharest Tribunal, s. IV civ., Decision no. 1173 of 29 May 2012, www.rolii.ro. Accessed 25 May 2017.

⁹ Bucharest Court of Appeals, s. IX civ., Decision no. 108A of 30 May 2013, www.rolii.ro. Accessed 25 May 2017.

¹⁰ Law concerning the Norms of Legislative Technique for the Drafting of Statutes, Monitorul Oficial 2000 139.

¹¹ ICCJ, s. I civ., Decision no. 889 of 18 March 2014, www.scj.ro. Accessed 25 May 2017.

illustration, and that the length of the quote is justified on account of the intent to get the reader's attention and determine him to look for the rest of the article, but on the original website (of Tango magazine), and not on the respondent's [and therefore] has not prejudiced the author (but on the contrary, has benefitted her, by determining readers of the Ziua de Constanța publication to also read Tango magazine)".¹²

There were also cases where the courts have found that the use complained of did not meet the conditions required by the triple test and, therefore, such use was not permitted under the limitations and exceptions provided by law. Such a case involved the making available of a book on terrorism, which had been previously edited in print by the Ministry of Interior's Publishing House, by the same publisher, on-line, in full, in its Virtual Library. The respondent tried to defend this use by claiming that it was a reproduction "specific to those made by libraries accessible to the public" or a reproduction "for purposes of public safety".

The Court of Appeals found that the use could not qualify under either of the limitations given that the use prejudiced the author.¹³ In order to so hold, the court has referred to the "wide accessibility to the work that publishing it online allows, both in terms of territory (the place where the users are) and in terms of the lack of any substantial impediment to the use of the work by third parties. Practically, the publishing of the claimant's work online deprives of purpose any possible attempt by the author to republish his work, since such has become accessible to any interested party".

In affirming,¹⁴ the High Court has held that the fact that the use prevented any possible attempt by the author to republish his work means that the condition that the use does not affect the normal exploitation of the work is also not met, in addition to the condition that the use does not prejudice the author. In addition, the court has established that "the online publishing of the whole work, with unlimited access for the public, voids of all content and suppresses any eventual intention of the author or of the right holder to republish the work, which is the equivalent of an exclusive assignment of the right to reproduce the work [...] and, consequently, of the definitive removal of this right from the patrimony of the author or of the right holder, without any agreement to such effect and without the work having fallen in the public domain and the economic rights having been extinguished (at the expiry of the legal duration of protection)".

In another dispute that concerned the use of a 10-second sequence from a movie within a 30-second television commercial advertising a charitable campaign, the Bucharest Court of Appeals held that the exceptions strictly and exhaustively provided for by art. 33 par. (1) only apply where certain conditions are met, among them being that the use is in accordance with good practice and that it does not affect the normal exploitation of the work. The court found that the use was a separation of a fragment (sequence) from a cinematographic work, its transformation so as to send a different message than the one sent by the original work and its communication for a purpose with no connection to that of the original work, and therefore caused the two conditions mentioned not to be met in the given case. The appeals court stated that "it is inconceivable that, in what concerns a work of intellectual creation, generating specific intellectual property rights for its authors, acts of copying and transformation of a part of the work for the purpose of satisfying needs of third parties upon whom an obligation [...] to abstain from any act such as to infringe on the moral rights of the authors is incumbent, could be held to be in accordance with good practices and/or the normal exploitation of the work".¹⁵

In a yet different case, the Dolj Tribunal seems to have taken the stance that the copying in full of a work would contravene the provisions of the law relating to the triple test.¹⁶ This was a claim, grounded on the provisions of the

¹² Galați Tribunal, s. I civ., Decision no. 959 of 12 April 2013, www.rolii.ro. Accessed 25 May 2017.

¹³ Bucharest Court of Appeals, s. IX civ., Decision no. 67A of 25 February 2014, www.rolii.ro. Accessed 25 May 2017.

¹⁴ ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, www.scj.ro. Accessed 25 May 2017.

¹⁵ Bucharest Court of Appeals, s. IX civ., Decision no. 51A of 26 February 2009, *Buletinul jurisprudenței* 2009. Curtea de Apel București, *Universul Juridic* 2011, p. 492.

¹⁶ Dolj Tribunal, s. cont. adm., Decision no. 896 of 19 April 2011, www.rolii.ro. Accessed 25 May 2017, confirmed by Craiova Court of Appeals, s. cont. adm., Decision no. 2853 of 13 October 2011, www.rolii.ro. Accessed 25 May 2017.

Law no. 544 of 12 October 2001 concerning Free Access to Information of Public Interest¹⁷ and on the provisions concerning the limitations and exceptions to copyright in the Romanian Copyright Law, against the University of Craiova's Faculty of Mathematics and Informatics, the plaintiff requesting that he be sent a copy of a dissertation that had been authored by a third party in a master's program organized by the faculty. The University declined, among others, on account of the fact that making such a copy would infringe the author's copyright in the dissertation. The claimant rebutted this arguing that such copy would qualify as permitted under the limitations and exceptions provided by articles 33 (without indicating which special case would apply and apparently suggesting that any use that meets the conditions of the triple test ought to be allowed) and 34 of the Romanian Copyright Law. The court dismissed the claim holding that, *inter alia*, no matter which exception or limitation of the two was claimed under, none would apply since the triple test was not satisfied.

The Arad Tribunal also held in one case, concerning a request for a preliminary injunction against the owner of a website which provided links to other sites (scribd.ro, zippyshare.com) inviting visitors to read and download books in pdf format by clicking those links, that such use did not comply with the general conditions provided by art. 33 of the Romanian Copyright Law in that "Internet users are allowed to access the works free of charge, thereby discouraging the classic manner of acquiring the works in print, at a price".¹⁸

3. The closed list of exceptions under Romanian Copyright Law

As indicated above, the Romanian Copyright Law provides for a closed list of exceptions in articles 33-35 and 37 of the law, article 38 par. (1) concerning in fact an implied license and not an exception to copyright *per se*. While the exceptions provided for by articles 33 par. (3), 34, 35 and 37 were listed above, we will hereunder only list the exceptions provided for by articles 33 par. (1) and (2).

Par. (1) of art. 33 allows, subject to the conditions of the triple test being met (other than the "special case" condition, evaluated by the use falling within the specific situations provided in the closed list), the following uses:

- a) the reproduction of a work in connection with judicial, parliamentary, or administrative proceedings, or for the purpose of public safety;
- b) the use of brief quotations from a work for the purpose of analysis, commentary or criticism, or for illustration, to the extent such use justifies the length of the quote;
- c) the use of isolated articles or brief excerpts from works in publications, television or radio broadcasts, or sound or audio-visual recordings, exclusively intended for teaching purposes and also the reproduction for teaching purposes, within the public education or social welfare institutions, of isolated articles or brief extracts from works, to the extent justified by the intended purpose;
- d) the reproduction of brief excerpts from works, for the purpose of information or research, by not-for-profit libraries, museums, film archives, sound archives, archives of cultural or scientific public institutions; the complete reproduction of the support of a work is allowed for the replacement of the sole copy in the permanent collection of a library or archive in the event of the destruction, serious deterioration or loss of thereof;
- e) specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
- f) the reproduction, with the exclusion of any means involving direct contact with the work, distribution or communication to the public of the image of an architectural work, work of plastic art, photographic work or work of applied art, permanently located in a public place, except where the image of the work is the main subject of such reproduction, distribution or communication, and if it is used for commercial purposes;
- g) the representation and execution of a work as part of the activities of educational establishments, exclusively for specific purposes and provided that both the representation or execution, and the public's access are free of charge;

¹⁷ Law concerning Free Access to Information of Public Interest, Monitorul Oficial 2001 663.

¹⁸ Arad Tribunal, s. I civ., Decision no. 9 of 12 January 2015, www.rolii.ro. Accessed 25 May 2017, confirmed by Timișoara Court of Appeals, s. I civ., Decision no. 33 of 25 February 2015 in Curtea de apel Timișoara, Decizii relevante. Secția I civilă. Trimestrul I – 2015 (2015), pp. 32-37.

- h) use of works during religious celebrations or official ceremonies organized by a public authority;
- i) use for the purpose of advertising, of the images of works presented at exhibitions with public access or sale, of fairs, public auctions of works of art, as a means to promote the event, excluding any commercial use.

With the observance of the conditions provided by the triple test, other than the “special case” condition, as was the case for par. (1), and of the additional condition that the use be without direct or indirect commercial or economic advantage, par. (2) provides for an additional closed list of exceptions where the reproduction, distribution, broadcasting, or communication to the public of the work are allowed without the author’s consent and without any payment. These additional “special cases” refer to the reproduction, distribution, broadcasting, or communication to the public:

- a) of brief excerpts from press articles and radio or televised reports, for the purpose of informing on current events, with the exception for those for which such a use is expressly reserved;
- b) of brief excerpts from lectures, addresses, pleadings and other similar works that have been orally expressed in public, provided that these uses to have the sole purpose of informing on current events;
- c) of brief excerpts from works, within information on current events, to the extent justified by the purpose of information;
- d) of works, where used exclusively for illustration in teaching or scientific research;
- e) of works, for the benefit of people with disabilities, which are directly related to that disability and to the extent required by the specific disability.

Moreover, as indicated above, proper attribution is required, except where impossible, in order to benefit from any of the exceptions provided by art. 33 par. (2) or the ones provided by art. 33 par. (1) letters b), c), e), f) or i). In addition to the requirement for attribution, for works of plastic art, photographic works and works of architecture the place where the original of the work is found must also be indicated.

The list of exceptions thus provided by law is a closed one, meaning that, in order for any exception to apply, the use must fall within the ones on the list, any other use being subject to the authorization of the author and/or right holder. Specifically, the High Court has expressly indicated¹⁹, in a case concerning an infringement of copyright in a book on Romanian Geography by the publishing of a nearly identical book for use as a course manual and for sale to the students of a university, that “art. 33 of the [Romanian Copyright Law] to which reference is made in the grounds for final appeal, expressly and exhaustively regulates certain limitations to the exercise of the economic prerogatives of the author, i.e. the exercise of the exclusive economic right to decide if, how and when his work is used, including to consent to use of the work by others [cit. omitted], of the right to authorize or forbid use in any of the forms provided by art. 13 of the law, and of the right to an equitable remuneration, when and under the conditions expressly provided by law”. The court thus confirms that the closed list of exceptions is in fact an exhaustive list, no other exceptions or limitations being allowed.²⁰ In another case mentioned above,²¹ the High Court confirmed this approach and has held that “the appeals court correctly indicated the exceptional character of these provisions, as the rule of strict interpretation of such exceptional provisions, to the effect that the application of such can’t be extended, by means of interpretation, to other situations than those limited situations had in mind by the legislator upon their adoption”.

The Bucharest Court of Appeals has held²², in a case concerning the alleged infringement of copyright in a ballet choreography in a ballet show organized by the Bucharest National Opera, that “the fact that the show promoted the image of Romania is not an exception to the economic rights under copyright as it is not provided for by art. 33 of [the Romanian Copyright Law]”, therefore emphasizing the fact that the list of exceptions provided by law is closed

¹⁹ ICCJ, s. I civ., Decision no. 1067 of 28 March 2014, www.scj.ro. Accessed 25 May 2017.

²⁰ Other court decisions holding the same are the ones issued in the case concerning the use of a 10-second film sequence in a television commercial - Bucharest Tribunal, s. IV civ., Decision no. 841 of 8 May 2008, www.rolii.ro. Accessed 25 May 2017, affirmed by Bucharest Court of Appeals, s. IX civ., Decision no. 51A of 26 February 2009, *Buletinul jurisprudenței* 2009. Curtea de Apel București, *Universul Juridic* 2011, p. 492.

²¹ ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, www.scj.ro. Accessed 25 May 2017.

²² Bucharest Court of Appeals, s. IX civ., Decision no. 190A of 11 November 2013, www.rolii.ro. Accessed 25 May 2017.

and can't be extended without legislative intervention. Similarly, the same court has held that the "humanitarian purpose of the event for the promotion of which the video containing the ball sequence from the movie "A Dream of January" was created, and the absence of any economic advantage" to the persons involved are not able to place the use outside the remit of infringement as such can only be achieved by cumulatively satisfying the conditions laid out by art. 33 of the Romanian Copyright Law.²³

As indicated above, there seems to have been one court decision where the possibility of a use not expressly provided for in the closed list of "special cases" might have been considered as potentially allowed under the general condition that it meet the triple case test.²⁴ However, the court did not expressly consider this as it merely acknowledged that the triple test was not satisfied and therefore no exception was held to be applicable.

4. Fundamental Rights as a basis for creating the exceptions and limitations

As also mentioned above, the High Court has held that the exception provided by art. 33 par. (1) letter a) of the Romanian Copyright Law was instituted as necessary on account of the "need to protect some general interests, of public order, such as the information of the public with respect to the importance and relevance of legislative intervention in the Civil Code".²⁵

However, in another case mentioned above,²⁶ the High Court has held that in evaluating the exceptions to copyright in light of the purpose for their establishment, it is the immediate and direct purpose that was to be attained by the exception that is to be had in mind. Thus the court held that "the appeals court correctly established that the immediate, direct purpose of the online publishing of the work on the Internet, on the publisher's website/Virtual Library was to insure the instruction of the specialized personnel with legal attributions pertaining to the insuring of public safety or of the ones tending to obtain such professional qualification (school children, students, people enrolled in courses for continuous learning etc.), while the mediate and only eventual purpose was the public safety, as only authorities vested by law with such attributions can insure public safety, in the limits set by law". On appeal, in the same case, the Bucharest Court of Appeals had indicated that the fulfilling of the purpose envisaged by the legislature upon instituting the exception needs to be proven "beyond the limits of a simple supposition".²⁷

In a case concerning the reproduction, on a blog, of some photographs from calendars made by a business magazine featuring their female employees, for the purpose of a satirical article, was held by the 4th District Court of Bucharest to fall within the exception provided by art. 33 par. (1) letter b) of the Romanian Copyright Law but also to have been made "within the defendant professional journalist's right to freedom of expression guaranteed by art. 30 of the Romanian Constitution and art. 10 of the European Convention on Human Rights, being also guaranteed by art. 31 of the Romanian Constitution and the right to access to public information".²⁸

The Bucharest Court of Appeals has held,²⁹ in a case concerning the making available of football matches highlights on the website of a sports newspaper, on a claim of copyright infringement made by the broadcaster having acquired exclusive rights in the broadcast of those matches, that the exception established by art. 33 par. (2) letter c) of the Romanian copyright law was so provided for the purpose of informing the public, as results from the specific

²³ Bucharest Court of Appeals, s. IX civ., Decision no. 51A of 26 February 2009, Buletinul jurisprudenței 2009. Curtea de Apel București, *Universul Juridic* 2011, p. 492.

²⁴ Dolj Tribunal, s. cont. adm., Decision no. 896 of 19 April 2011, www.rolii.ro. Accessed 25 May 2017, confirmed by Craiova Court of Appeals, s. cont. adm., Decision no. 2853 of 13 October 2011, www.rolii.ro. Accessed 25 May 2017.

²⁵ ICCJ, s. I civ., Decision no. 889 of 18 March 2014, www.scj.ro. Accessed 25 May 2017.

²⁶ ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, www.scj.ro. Accessed 25 May 2017.

²⁷ Bucharest Court of Appeals, s. IX civ., Decision no. 67A of 25 February 2014, www.rolii.ro. Accessed 25 May 2017.

²⁸ 4th District Court of Bucharest, s. civ., Decision no. 1314 of 4 February 2016, www.rolii.ro. Accessed 25 May 2017, confirmed by Bucharest Tribunal, s. III civ., Decision no. 3859 of 14 October 2016, www.rolii.ro. Accessed 25 May 2017.

²⁹ Bucharest Court of Appeals, s. IX civ., Decision no. 178A of 4 December 2012, www.rolii.ro. Accessed 25 May 2017.

restriction of the extent of the use to that justified by the purpose of so informing the public. The court further held that maintaining the excerpt available to the public for a long period of time has overstepped the limit imposed by the purpose of informing the public of a sporting event. Relatedly, in a different case the same court held that, in order for such limitation to apply, the information must concern current events related to the work itself so the legal conditions are not met where the work is used to create a new work which, in its turn, has the purpose of promoting a current event.³⁰

The exceptions and limitations are therefore generally assumed to have been enshrined pursuant to the need to insure a proper balancing of copyright with the exercise of other rights, most relevant being the freedom of expression, the right to information, the right to education etc. However, the economic justifications for the implementation of such exceptions and, even more, for properly delimiting their scope, have also been brought up in the literature.³¹

5. Exceptions and limitations to copyright need to be interpreted narrowly

The courts and literature have indicated that these exceptions and limitations must be narrowly interpreted and applied restrictively due, first and foremost, to their qualifications as exceptional situations carved out of the scope of the generally applicable copyright protection. The need to insure a high level of protection of copyright coupled with the grating of copyright protection upon the work fulfilling the minimal criteria provided by law have delimited these situations, exhaustively provided for by law, as “special cases” within the meaning of the “triple test” and have therefore imposed, as a rule, a very strict application of the criteria provided for benefitting of such exceptions and limitations.

In one case, concerning the unauthorized use of panoramic photographs of the city of Braşov on billboards by a retailer, the High Court has held that the provisions of art. 33 par. (4) need to be abided by in all cases provided therein, therefore in order to qualify for the panorama exception to copyright the user would have needed to give proper attribution and indicate the place where the original is found.³² The fact that the respondent did not know, at the time of selecting the photographs by using Google – a fact that was also disproved – was also deemed irrelevant by the court, therefore emphasizing the strictness applied by the courts when dealing with the exceptions to copyright. Such strict approach is also warranted by the qualification of these provisions as exceptions, a fact that requires all interpretations of such to be strict, an approach that has been also confirmed by the High Court in two cases discussed above³³. The need to interpret the exceptions restrictively has also determined the Bucharest Court of Appeals to hold that “the four general conditions provided by the first thesis of [art. 33 par. (1) of the Romanian Copyright Law] are cumulative, therefore not meeting any of them makes the exception inapplicable. Beyond these general conditions, any of the special conditions provided by letters a) – i) must be additionally met, as it is in consideration of those that the limitations to the economic rights were instituted”.³⁴ In the same decision the court has concluded that the fact that a single condition is not fulfilled is sufficient to make the exception inapplicable and the copyright to be infringed.³⁵

In one of these cases mentioned above, the High Court has additionally held³⁶ that a defence to a claim of copyright infringement by reference to the Government Decision no. 1676 of 10 December 2008 concerning the approval of the

³⁰ Bucharest Court of Appeals, s. IX civ., Decision no. 51A of 26 February 2009, *Buletinul jurisprudenței* 2009. Curtea de Apel Bucureşti, *Universul Juridic* 2011, p. 492.

³¹ P. G. Buta and A. Muşat, *Limitările în exercițiul dreptului de autor. Condițiile în care intervin*, *Revista Română de Dreptul Proprietății Intelectuale* 2007(2), pp. 107-119; P. G. Buta, *Despre limitările și excepțiile dreptului de autor. După 10 ani*, *Revista Română de Dreptul Proprietății Intelectuale* (forthcoming).

³² ICCJ, s. I civ., Decision no. 651 of 12 February 2013, www.scj.ro. Accessed 25 May 2017.

³³ ICCJ, s. I civ., Decision no. 1067 of 28 March 2014, www.scj.ro. Accessed 25 May 2017 and ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, www.rolii.ro. Accessed 25 May 2017.

³⁴ Bucharest Court of Appeals, s. IX civ., Decision no. 67A of 25 February 2014, www.rolii.ro. Accessed 25 May 2017.

³⁵ Also held in Bucharest Court of Appeals, s. IX civ., Decision no. 51A of 26 February 2009, *Buletinul jurisprudenței* 2009. Curtea de Apel Bucureşti, *Universul Juridic* 2011, p. 492.

³⁶ ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, www.scj.ro. Accessed 25 May 2017.

National Program for the Digitization of National Cultural Resources and the creation of Romania's Digital Library³⁷ can't succeed on account of the fact that all limitations to the exercise of economic rights pertaining to copyright are provided for by chapter VI of the Romanian Copyright Law and these can't be supplemented except by means of a statute of equal normative value or by amendment to the Romanian Copyright Law. Moreover it has also indicated that the Government Decision can't be taken to mean that the digitization process can be made by infringement of copyright but that such process is to take place in full observance of the rights granted by the Romanian Copyright Law.

In the case concerning the geography book mentioned above, the Bucharest Tribunal also held that the use complained of could not fall under the scope of the exception provided by art. 33 par. (1) letter g) of the Romanian Copyright Law since that provision relates solely to the communication to the public of certain works, susceptible of being made public by representation and execution.³⁸ Moreover the court held that neither the exception provided by art. 33 par. (2) letter d) of the Romanian Copyright Law can be deemed applicable since the use complained of was not made for illustration purposes, as in such case only fragments of the work would have been used to provide ground for the respondent's own arguments and proper attribution given. In affirming, the Bucharest Court of Appeals also indicated that the fact that the respondent gave attribution in respect of some of the fragments copied did not make any exception applicable since all conditions provided by law need to be met cumulatively and the fact that the respondent copied all of the plaintiff's work for the purpose of distributing the infringing work at a profit causes the exception not to apply.³⁹ The reverse was also held to be insufficient, as the Bucharest Tribunal held that, even if the use did fall in a specific special case provided by art. 33 of the law, lack of proper attribution made the provision inapplicable⁴⁰.

The Neamț Tribunal has held, in a claim for infringement by use of a photograph of a painting in an electoral booklet, without attribution, without the author's consent and with no payment, that such use is not excepted by the provisions of art. 33 par. (1) letter f) of the Romanian Copyright Law since it is contrary to good practice, it was made without giving attribution and without indicating the location of the original, these conditions being expressly provided for by law.⁴¹ With a similar restrictive interpretation of the panorama exception, the Bucharest Tribunal held that the posting of a photograph on-line is not equivalent to having the work "located in a public place", the provision being limited to "works specifically created for that purpose: to be a part of the public landscape" whereas in the given case the photograph was posted to the claimant's own website with an express reservation as to its use.⁴²

However, in some instances, some courts have allowed some flexibility in their reading of these exceptions and limitations. In a dispute concerning, inter alia, the alleged infringement of copyright in personal photographs inserted in a published biography by the use of such in a historical TV show about the biography's subject, the Bucharest Tribunal has held that even though the exception provided by art. 33 par. (1) letter b) of the Romanian Copyright Law refers to "short quotations from a work", the provision can also be extended, by analogy, to the photographs published in the biographical book.⁴³ The findings of the first instance were upheld on appeal by the Bucharest Court of Appeals although it had previously held, in a different case, that "the Court is of the opinion that there can be no equivalence between the concept of film sequence and that of quote – the quote being by definition a fragment of a written work, identically reproduced".⁴⁴ On final appeal in the case concerning the use of the personal photographs, the High Court eluded the direct question in holding that since the copyright claimed under was a copyright in the biographical book

³⁷ Government Decision concerning the approval of the National Program for the Digitization of National Cultural Resources and the creation of Romania's Digital Library, Monitorul Oficial 2008 855.

³⁸ Bucharest Tribunal, s. IV civ., Decision no. 1997 of 15 November 2011, www.rolii.ro. Accessed 25 May 2017.

³⁹ Bucharest Court of Appeals, s. IX civ., Decision no. 158 of 30 October 2012, www.rolii.ro. Accessed 25 May 2017.

⁴⁰ Bucharest Tribunal, s. IV civ., Decision no. 841 of 8 May 2008, www.rolii.ro. Accessed 25 May 2017.

⁴¹ Neamț Tribunal, s. I. civ., Decision no. 463/C of 8 April 2013, www.rolii.ro. Accessed 25 May 2017.

⁴² Bucharest Tribunal, s. V civ., Decision no. 553 of 28 April 2014, www.rolii.ro. Accessed 25 May 2017.

⁴³ Bucharest Tribunal, s. III civ., Decision no. 1686 of 1 October 2013, www.rolii.ro. Accessed 25 May 2017.

⁴⁴ Bucharest Court of Appeals, s. IX civ., Decision no. 51A of 26 February 2009, *Buletinul jurisprudenței* 2009. *Curtea de Apel București, Universul Juridic* 2011, p. 492.

(a compilation which included the photographs), use of some of the photographs was merely use of a fragment of such mixed work and thus it was similar to a quote made exclusively from a written work.⁴⁵

In contraventional law, the courts have held that the burden of proof is reversed, therefore the sanctioning authority needs to prove, beyond any reasonable doubt, that the alleged offender is guilty. To this effect, the Iași District Court held that, since the sanctioning authority did not prove, beyond any reasonable doubt, that the exception provided for by art. 37 par. (1) of the Romanian Copyright Law did not apply, in the sense that the contravenient did not play background music but simply tested the products he offered to his customers, the minutes by which the sanction was imposed were annulled.⁴⁶

6. Relevance of non-commercial purpose and use by an individual

As courts tend to follow the rule of narrow interpretation and strict application of the provisions concerning exceptions and limitations, the weight placed on whether the use is commercial or not and whether the use is made by an individual or a legal person is also dependent on whether the criteria provided by the Romanian Copyright Law make such differentiation or not. The focus therefore lies on the cumulative meeting of the conditions provided by law, with the courts relying on additional considerations only in cases where they have found that the “basic” conditions are, or appear to be, met.

In denying that the two of the limitations provided for education were applicable in the case concerning the geography manual mentioned above, the Bucharest Tribunal held that the limitation under art. 33 par. (1) letter g) requires that the communication to the public of the works provided for needs to be free whereas the copying of the claimant’s work was made in view of the publishing and distribution for profit.⁴⁷ Moreover, the court held that neither the limitation under art. 33 par. (2) letter d) was applicable since the use was made for economic advantage since “publishing, by university professors, of a number of scientific papers confers upon them a series of advantages, including economic ones”. In affirming, the Bucharest Court of Appeals has additionally held that, since the reproduction was not made by a library or an archive of a not-for-profit public or scientific institution but in the respondent’s work and subsequently by publishing the infringing work with the purpose of distributing it at a price to the students of a private university, the use could not qualify as permitted under the art. 33 par. (1) letter d) of the Romanian Copyright Law and the lack of any money being paid to the respondent does not affect such finding.⁴⁸ The appeals court also indicated that the fact that the respondent copied all of plaintiff’s work for the purpose of distributing the infringing work at a profit causes the exception not to apply.

In a criminal case concerning the usurpation of authorship by copying 90% of a book on the methodology of scientific research and providing the infringing work as a distance learning course and publishing it in print, the Bucharest Court of Appeals has held that the fact that the defendants were not paid any money by the publishing house has no effect neither has any bearing in respect of the application of the exception to copyright provided by art. 33 par. (1) letter c) of the Romanian Copyright Law nor on the fulfilment of the conditions for applying the sanction for the crime provided by art. 141 of the Romanian Copyright Law.⁴⁹

The High Court has also held that the use of panoramic photographs on billboards by a retailer can’t qualify under the panorama exception to copyright since the purpose of the use was clearly commercial. The court held that “even if an intention to have pursued another purpose – tourism – had existed, such would be irrelevant in respect of the respondent’s line of business – a company that, in the given hypermarket, only offers products to its customers and no other services”.⁵⁰

In the football matches excerpt case mentioned above, the Bucharest Court of Appeals has indicated that “the phrase “without any direct or indirect commercial or economic advantage” refers to whether access to the particular news

⁴⁵ ICCJ, s. I civ., Decision no. 104 of 22 January 2016, www.scj.ro. Accessed 25 May 2017.

⁴⁶ Iași District Court, s. civ., Decision no. 16245 of 22 December 2014, www.rolii.ro. Accessed 25 May 2017.

⁴⁷ Bucharest Tribunal, s. IV civ., Decision no. 1997 of 15 November 2011, www.rolii.ro. Accessed 25 May 2017.

⁴⁸ Bucharest Court of Appeals, s. IX civ., Decision no. 158 of 30 October 2012, www.rolii.ro. Accessed 25 May 2017.

⁴⁹ Bucharest Court of Appeals, s. II pen., Decision no. 136/F of 7 March 2014, www.rolii.ro. Accessed 25 May 2017.

⁵⁰ ICCJ, s. I civ., Decision no. 651 of 12 February 2013, www.scj.ro. Accessed 25 May 2017.

item was conditioned upon payment of a sum of money and not to whether the activity of the respondent is not-for-profit”.⁵¹

Where a hotel is playing background music, it can't benefit from the provisions of the private copy exception to copyright since these provisions are to be strictly interpreted as referring solely to private users who make copies for their own personal use or for the normal family circle, the Bucharest Tribunal has held.⁵²

7. The mandatory character of the exceptions

Under Romanian Copyright Law, all the exceptions provided therein are mandatory and can't be ruled out by contract. This stems from the fact that the provisions of the law are imperative and binding on every subject while the contractual provisions bind only the contracting parties. As to the possibility that a user contracts away the benefit of the exceptions provided by law, although no decision specifically addressed this question the answer appears to be in the negative since the High Court held that “the limitation applies and produces full effects for as long as the legal provision confirming it is in force, the validity of such legal provision exceeding the possible scope of current proceedings”.⁵³ Although the specific case concerned the exception provided by art. 33 par. (1) letter a) of the Romanian Copyright Law, the same principle should apply equally to all other exceptions as well.

Further confirmation of such conclusion comes by way of a decision by the Bucharest Court of Appeals in a claim for the modification of a methodology for collective management established by means of arbitration within the framework of the Romanian Copyright Office.⁵⁴ One of the issues under discussion was that the methodology as approved by the arbitrators provided that the collective management societies can monitor the use of their catalogue and, in order to do so, can use audio and/or video recorders wherever musical works are being used, with the user's consent. The Court of Appeals held, upon the collective management societies' claim, that such provision is “evidently contrary” to the provisions of art. 37 par. (2) of the Romanian Copyright Law and replaced “with the user's consent” by “with no authorization from the users being necessary and without any payment”.

The courts have indicated on several occasions that no distinction is to be made between online and offline uses, except where the law provides for such. The 4th District Court of Bucharest made no such distinction when dealing with what it held was a permitted quotation on an online blog of some photographs from calendars issued by a different publication, such calendars being also available on the latter's website.⁵⁵ The Bucharest Court of Appeals specifically indicated that the fact that the excerpts of football matches were communicated online in no way affected the court's decision to withhold application of the exception provided by art. 33 par. (2) letter c) of the Romanian Copyright Law.⁵⁶ The High Court also made no distinction as to the fact that the unauthorized use was made by means of a digital library in denying application of the exceptions provided by law.⁵⁷

8. The rights covered by the exceptions and limitations

As indicated above, the High Court has stated that “art. 33 of the [Romanian Copyright Law] [...], expressly and exhaustively regulates certain limitations to the exercise of the economic prerogatives of the author, i.e. the exercise of the exclusive economic right to decide if, how and when his work is used, including to consent to use of the work

⁵¹ Bucharest Court of Appeals, s. IX civ., Decision no. 178A of 4 December 2012, www.rolii.ro. Accessed 25 May 2017.

⁵² Bucharest Tribunal, s. V civ., Decision no. 1130 of 9 June 2011, www.rolii.ro. Accessed 25 May 2017.

⁵³ ICCJ, s. I civ., Decision no. 889 of 18 March 2014, www.scj.ro. Accessed 25 May 2017.

⁵⁴ Bucharest Court of Appeals, s. IX civ., Decision no. 139A of 3 May 2011, Monitorul Oficial 2011 420.

⁵⁵ 4th District Court of Bucharest, s. civ., Decision no. 1314 of 4 February 2016, www.rolii.ro. Accessed 25 May 2017, confirmed by Bucharest Tribunal, s. III civ., Decision no. 3859 of 14 October 2016, www.rolii.ro. Accessed 25 May 2017.

⁵⁶ Bucharest Court of Appeals, s. IX civ., Decision no. 178A of 4 December 2012, www.rolii.ro. Accessed 25 May 2017.

⁵⁷ ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, www.scj.ro. Accessed 25 May 2017.

by others [cit. omitted], of the right to authorize or forbid use in any of the forms provided by art. 13 of the law, and of the right to an equitable remuneration, when and under the conditions expressly provided by law”.⁵⁸

The decision of the High Court would seem to indicate that all rights provided by law under the general exclusive right of use would be subject to the limitations provided by the law. These rights refer to the reproduction, distribution, importation, rental, lending, communication to the public (including the making available), broadcasting, retransmission by cable and making of derivative works.

In fact, art. 33 par. (1) specifically mentions that the rights in respect of which exceptions are provided refer to: the right of reproduction in respect of the limitations provided for by letters a), d), and f); the right of distribution in respect of the limitation provided for by letter f); the right of communication to the public in respect of the limitations provided for by letters f) and g). The limitations provided by letters b), c), h), and i) refer to the general notion of “use” and therefore should be considered as covering limitations to all rights derived from the general right of use.

In what the limitations provided by par. (2) of art. 33, the law expressly indicates that these limitations cover the reproduction, distribution, broadcasting and communication to the public rights while par. (3) clearly provides an exception to the right of reproduction.

The limitations provided by art. 34 and 35 primarily refer to the right of reproduction and the making of derivative works, respectively. However, given the purpose of those limitations, they are to be taken to refer also to use of the private copy thus made and use of the derivative work thus made, a contrary overly restrictive interpretation voiding of content the limitations themselves.

Par. (1) of art. 37 expressly refers to reproduction and presentation of works, with the latter being taken to refer to the communication to the public while par. (2) refers to “monitoring” which could be taken to cover reproduction, distribution and maybe also communication to the public.

Interestingly, in the football matches excerpts case mentioned above, the Bucharest Court of Appeals has held that the online posting of the match excerpts on the newspaper’s website is an act of communication to the public (by making available) and that there was no possibility provided for the users to copy the content since in order to do so they would have had to undertake several actions that required an advance knowledge of informatics, there being no download button on the website.⁵⁹ The court’s holding is interesting because it is unclear whether the court has analysed this under the conditions for the application of the exception provided by art. 33 par. (2) letter c) of the Romanian Copyright Law, which expressly concerned the reproduction, distribution and communication to the public of the work (so the distinction would not have made an apparent difference), or whether it made the distinction in light of the fact that it would hold that the exception would not apply and that, at first instance, the Bucharest Tribunal had held⁶⁰ that the respondent had infringed both the communication to the public right (by making available the excerpts) and the distribution right (by allowing the download of the excerpts by the website visitors).

In consonance with the restrictive interpretation of these exceptions and limitations, the courts have paid attention not to extend the scope of application of these exceptions in respect of the specific rights these relate to. The Bucharest Court of Appeals held that the exceptions provided by art. 33 par. (2) of the law exclude uses “aimed at the transformation of the sequence to which claimant holds the moral rights”, such activities being related to the making of derivative works, a right that “evidently” exceeds the scope of the provisions of art. 33 par. (2) of the Romanian Copyright Law.⁶¹

9. Relationship with moral rights

⁵⁸ ICCJ, s. I civ., Decision no. 1067 of 28 March 2014, www.scj.ro. Accessed 25 May 2017.

⁵⁹ Bucharest Court of Appeals, s. IX civ., Decision no. 178A of 4 December 2012, www.rolii.ro. Accessed 25 May 2017.

⁶⁰ Bucharest Tribunal, s. III civ., Decision no. 1165 of 13 June 2012, www.rolii.ro. Accessed 25 May 2017.

⁶¹ Bucharest Court of Appeals, s. IX civ., Decision no. 51A of 26 February 2009, *Buletinul jurisprudenței* 2009. *Curtea de Apel București, Universul Juridic* 2011, p. 492.

The Romanian Copyright Law provides expressly and unequivocally that moral rights are unwaivable and unassignable (art. 11 par. (1) of the law). Moral rights are linked to the person of the author and inseparable from it. Only the exercise of three of those rights (authorship, right to determine the name under which the work is made public and right to integrity of the work) is inherited in perpetuity.

The Romanian High court has indicated, in clear terms, that “however, the limitations provided by art.33 [of the Romanian Copyright Law] do not also concern the moral prerogatives provided by art. 10 of the law, among which the right to claim authorship of the work, the infringement of which was established in this case by both lower courts. Therefore, even if the appellant’s arguments on the applicability of the limitations provided by art. 33 par. (1) letters d) and g) were upheld, this would still not affect the respondent’s liability for infringing the claimant’s moral rights”.⁶²

However, the same court had indicated, only 10 days prior to the above decision, that since art. 33 par. (4) excludes from its scope the exception provided by art. 33 par. (1) letter a), as was the case with both exceptions referred to above – i.e. provided by art. 33 par. (1) letters d) and g), there was no obligation on the beneficiary of the exception to give proper attribution.⁶³ However, although the aspect of infringement of the moral right to authorship was mentioned on appeal, the High Court did not expressly rule on whether the moral rights of the author had been infringed even where the exception to copyright was applicable.

The above decisions of the High Court show that it is unclear whether the exceptions to copyright affect the moral rights of the author or not. The clear wording of the 28 March decision would appear to have more force and would therefore suggest that moral rights are not impacted by the exceptions but that would make the exclusion of the need to give proper attribution in the case of some limitations completely meaningless since, even though the exception would apply, the moral rights of the author would still be infringed and, consequently, the author might have any such use enjoined and the benefit of the exception lost.

We therefore believe that the provisions of art. 33 par. (4) ought to be read as implicit limitations or exceptions to the moral right of authorship for the limitations excluded from its scope – i.e. under letters a), d), g), and h). This would also be supported by a decision of the Bucharest Court of Appeals which held that “[i]t is in this context, of the respecting of the [moral] right of authorship, that the obligation to indicate the author in the case of quotations and use of short excerpts was imposed, when such acts of use are permitted without the author’s consent”.⁶⁴ This appears to have been the position of the courts in the past as well, the same court having held that “the right to authorship implies an obligation to indicate the author where quoting or using short excerpts, when such uses are permitted without the author’s consent”.⁶⁵

10. Technological protection measures and the benefit of the exceptions and limitations

Art. 138⁵ par. (4) of the Romanian Copyright Law provides that “the right holders having instituted technical protection measures have the obligation to provide the beneficiaries of the exceptions provided by art. 33 par. (1) letters a), c), and e), art. 33 par. (2) letters d) and e), and art. 38 the necessary means to legally access the work or any other protected object. Nevertheless they have the right to limit the number of copies made in the conditions mentioned above”. Par. (1) of the same article indicated the “right holders” referred to as being “the author of a work, the performing artist, the producer of phonograms or audio-visual recordings, the radio or television broadcasting organization, and the maker of the data base”.

Par. (5) of the article carves out of the scope of par. (4) “protected works, made available to the public in accordance with the contractual provisions agreed by the parties, so that any member of the public might have access to such in any place and at any moment, individually chosen by them”.

⁶² ICCJ, s. I civ., Decision no. 1067 of 28 March 2014, www.scj.ro. Accessed 25 May 2017.

⁶³ ICCJ, s. I civ., Decision no. 889 of 18 March 2014, www.scj.ro. Accessed 25 May 2017.

⁶⁴ Bucharest Court of Appeals, s. II pen., Decision no. 136/F of 7 March 2014, www.rolii.ro. Accessed 25 May 2017.

⁶⁵ Bucharest Court of Appeals, s. IX civ., Decision no. 51A of 26 February 2009, *Buletinul jurisprudenței* 2009. *Curtea de Apel București, Universul Juridic* 2011, p. 492.

The Romanian Copyright Law thus excludes from the scope of beneficiaries of exceptions who can demand access if such is blocked by means of technical measures those who would benefit from the exceptions relating to: use of short quotations (art. 33 par. (1) letter b)); reproduction of brief excerpts from works, for information or research, by not-for-profit libraries, museums, film archives, sound archives, archives of cultural or scientific public institutions, including replacement of the sole copy (art. 33 par. (1) letter d)); the panorama exception (art. 33 par. (1) letter f)); representation and execution of a work for specific purposes by educational establishments (art. 33 par. (1) letter g)); use of works during religious celebrations or official ceremonies (art. 33 par. (1) letter h)); use for advertising of images of works presented at exhibitions (art. 33 par. (1) letter i)); reproduction, distribution, broadcasting or communication to the public of brief excerpts for the purpose of informing on current events (art. 33 par. (2) letter a)); of brief excerpts from works orally expressed in public for informing on current events (art. 33 par. (2) letter b)); of brief excerpts from works, within information on current events (art. 33 par. (2) letter c)); the private copy exception (art. 34 par. (1)); all permitted transformations of a work (art. 35); certain reproductions and communications for testing of the functioning of the products on manufacture or sale (art. 37 par. (1)); and the monitoring by collective management societies of the use of their catalogue by any means (art. 34 par. (2)).

The long list of exceptions excluded from the scope of the right holder's obligation to provide the necessary access to the work blocked by technical protection measures is the result of the strict transposition, in the Romanian Copyright Law of the provisions of art. 6 par. (4) of the Directive 2001/29 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.⁶⁶ Although the Romanian Copyright Law does not provide any mechanism to insure that right holders allow private copying as per the limitation in art. 34 par. (1) of the Romanian Copyright Law, the Romanian legislator has not provided for this exception to be included in the scope of art. 138⁵ par. (4), as art. 6 par. (4) subparagraph (2) of Directive 2001/29 would have allowed.

The issue of whether an individual user of a work can claim under an exception has not been resolved by the Romanian courts. Providing an answer to this is even more complicated given the ambiguous nature of these exceptions or limitations. The ambiguity arises from the fact that the Romanian Copyright Law itself has included the provisions under the marginal title of "limitations to the exercise of copyright" while, in art. 138⁵ par. (4) it refers to the "beneficiaries of the exceptions". The courts have also termed these "exceptions", "limitations to copyright" or "limitations to the exercise of copyright". Moreover, the literature on the subject has also used all these notions⁶⁷, sometimes interchangeably. While some authors have suggested qualifying them as "restrictions to the exercise of

⁶⁶ Directive 2001/29 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, OJ 2001, L 167, p. 10.

⁶⁷ "limitations to the exercise of copyright" – A. Dietz, Dreptul de autor în România și armonizarea acestuia în baza normelor europene. Evoluție și situația actuală după aderarea României la Uniunea Europeană, *Revista Română de Dreptul Proprietății Intelectuale* 2009(4), p. 26; N. R. Dominte, Parodia, pastișa și caricatura – cele trei libertăți de expresie satirico-umoristice ale transformării unei opere originale, *Revista Română de Dreptul Proprietății Intelectuale* 2014(3), p. 106; "limitations and exceptions to the exercise of copyright" – L. Pop, Autorul între suveranitate și suzeranitate. Limitele exercitării dreptului de autor, *Revista Română de Dreptul Proprietății Intelectuale* 2009(2), p. 147; "limitations to copyright" – V. Roș, Dreptul de citare, *Revista Română de Dreptul Proprietății Intelectuale* 2009(3), p. 17; I. Macovei and N. R. Dominte, Hermeneutica copiei private în cadrul limitelor dreptului de autor, *Revista Română de Dreptul Proprietății Intelectuale* 2013(1), pp. 22-29; E. G. Olteanu, Copia privată, între interesele utilizatorilor și cele ale titularilor de drepturi, *Revista Română de Dreptul Proprietății Intelectuale* 2013(3), p. 13; M. Dănilă, Considerații privind plagiatul din perspectiva originalității operei și dreptului de citare. Autoplăgiatul și protecția ideilor, pledoariilor și a predicilor, *Revista Română de Dreptul Proprietății Intelectuale* 2015(3), p. 63; both "limitation of the exercise of copyright" and "limitation to copyright" – I. Macovei, *Tratat de dreptul proprietății intelectuale*, CH Beck 2010, p. 466; N. R. Dominte, Limitele exercitării dreptului de autor în statele membre ale Uniunii Europene, *Revista Română de Dreptul Proprietății Intelectuale* 2009(3), pp. 106-108; D. Chiroșca, Copia privată – o limită a exercitării dreptului de autor în legislația Republicii Moldova, *Revista Română de Dreptul Proprietății Intelectuale* 2007(3), pp. 15-16; M. Olariu, Dreptul de citare în cazul operelor de artă plastică și fotografică, *Revista Română de Dreptul Proprietății Intelectuale* 2014(1), p. 57.

copyright”,⁶⁸ we are of the opinion⁶⁹ that they are in fact limitations to copyright (art. 33 par. (1) and (2), art. 35, and art. 37) and exceptions to copyright (art. 33 par. (3), art. 34, and art. 38 par. (2)), with art. 38 par. (1) providing for merely an implicit limited assignment. The importance of correctly qualifying the nature of the provisions is manifold but most relevant to the issue at hand is the fact that an exception can only be raised as a defence without possibility of being claimed under, the existence or inexistence of a right, with reference to its exact limits and scope, can be the object of a declaratory action, while a limitation of the exercise of a right can only form, at most, the object of a negative declaratory judgment.

There is inconclusive evidence that the limitations can be directly claimed under since, in a case mentioned above, the Dolj Tribunal went on to analyse the merits of a claim that was, in part, grounded on the provisions of art. 33 of the Romanian Copyright Law.⁷⁰ However, since neither has the issue been raised, nor the claim granted, it would be farfetched to argue that the court has seriously considered the issue. Similarly, the Constanța Court of Appeals was vested with an administrative claim to issue an authorization allowing the claimant to “copy or make derivative works of national standards, as allowed by art. 33 par. (1) letters a), and g), par. (2) letter d), art. 34 par. (1), and art. 35 letter (a) of the Romanian Copyright Law”. However the claimant did not pursue the claim and the court simply acknowledged that it lapsed.⁷¹

11. No “catch-all” exception under Romanian Copyright Law

The Romanian Copyright Law contains a closed list of exceptions, with no alternative “catch all” provisions. As noted above, the courts have consistently held that the law provides no flexibility in the restrictive interpretation of such closed list of exceptions and that there can be no extensive reading of such nor an enlargement of their scope by means of interpretation.

12. Relationship with other fundamental rights

As mentioned above, in providing for the exceptions to copyright so as to also balance the exclusivity inherent to copyright protection with other fundamental rights (e.g. freedom of expression, right to information, right to education), the Romanian Copyright Law has excluded to a very large extent the situations where, outside the gambit of the exceptions so provided, a balancing exercise between copyright and other fundamental rights ought to be performed. Such possibility is further diminished by the practice of the Romanian courts, indicated above, whereby all situations where copyright is limited are construed against the background of the exceptions provided by the Romanian Copyright Law, with no extension thereof held possible, other than by legislative intervention either by means of another law or by means of an amendment to the Romanian Copyright Law itself.

Courts therefore seem to prefer giving voice to other fundamental rights within the scope of the existing exceptions and not against such. For example, the 4th District Court of Bucharest analysed the exception provided by art. 33 par. (1) letter b) of the Romanian Copyright Law together with “the defendant professional journalist’s right to freedom of expression guaranteed by art. 30 of the Romanian Constitution and art. 10 of the European Convention on Human Rights, being also guaranteed by art. 31 of the Romanian Constitution and the right to access to public information”.⁷²

⁶⁸ T. Bodoaşcă and A. Drăghici, *Contribuții la studiul reglementărilor legale referitoare la limitele exercitării dreptului de autor*, *Revista Română de Dreptul Proprietății Intelectuale* 2009(3), p. 75; T. Bodoaşcă and L. I. Tarnu, *Dreptul proprietății intelectuale*, ed. 3, *Universul Juridic* 2015, pp. 66-67.

⁶⁹ P. G. Buta and A. Mușat, *Limitările în exercițiul dreptului de autor. Condițiile în care intervin*, *Revista Română de Dreptul Proprietății Intelectuale* 2007(2), pp. 107-119; P. G. Buta, *Despre limitările și excepțiile dreptului de autor. După 10 ani*, *Revista Română de Dreptul Proprietății Intelectuale* (forthcoming).

⁷⁰ Dolj Tribunal, s. cont. adm., Decision no. 896 of 19 April 2011, www.rolii.ro. Accessed 25 May 2017, confirmed by Craiova Court of Appeals, s. cont. adm., Decision no. 2853 of 13 October 2011, www.rolii.ro. Accessed 25 May 2017.

⁷¹ Constanța Court of Appeals, s. II civ. și cont. adm., Decision no. 26/CA of 12 January 2012, www.rolii.ro. Accessed 25 May 2017.

⁷² 4th District Court of Bucharest, s. civ., Decision no. 1314 of 4 February 2016, www.rolii.ro. Accessed 25 May 2017, confirmed by Bucharest Tribunal, s. III civ., Decision no. 3859 of 14 October 2016, www.rolii.ro. Accessed 25 May 2017.

Similarly, the Bucharest Tribunal found, in a case concerning a request that the Ministry of Culture be obliged to give to the claimant NGO (whose purpose was the protection of the Roşia Montană site) the documentation filed by a third party gold-mining corporation in order to obtain a certificate of archaeological clearance for the site, that the existence of copyright in the documentation can't justify the refusal to supply such documentation since the reproduction and distribution of the work to the claimant is "justified under the general interest right to have free and unrestricted access to any information of public interest, which is a fundamental principle of the relationship between individuals and public authorities, according to the Romanian Constitution and the international documents ratified by the Romanian Parliament".⁷³ However the court also indicated that, where the documents are under the protection of copyright the additional conditions provided by art. 33 par. (1) letter a) of the Romanian Copyright Law need also be complied with.

One case where copyright was held to prevail over other fundamental rights claimed was the case concerning the online publishing of a book within the Ministry of Interior Publishing House's Virtual Library. In that particular case, the publishing house defended by claiming that the Government Decision approving the National Program for the Digitization of National Cultural Resources (pursuant to which the respondent claimed it had published the book online) was meant to insure the freedom of information, the universal access to information and the necessity of integrating national cultural resources in the European Digital Library – Europeana.eu. The High Court rejected such defence, as mentioned above, reiterating that all exceptions to copyright are provided for in the Romanian Copyright Law and these can't be supplemented other than by legislative intervention.⁷⁴

13. Compensation to copyright owner

In respect of the limitations provided by art. 33 par. (1) and (2), the law explicitly provides that these are not subject to payment of any remuneration. The same is true for the limitations provided by art. 35 and art. 37 par. (2).

Art. 34 par. (2) of the Romanian Copyright Law specifically provides for a "compensatory remuneration established by means of negotiation, according to the provisions of this law" in respect of the exception for private copying.

Art. 38 par. (1), although it provides for an implicit limited license for the recording of the work needed for one act of broadcasting, provides that any subsequent broadcasting of the work thus recorded is subject to payment of a remuneration, which can't be waived. There is no guidance as to how such remuneration should be calculated but, given the fact that the provision concerns an implicit license within a contract, the additional remuneration could be either agreed by the parties to the contract or, in absence of such agreement, be determined by the court in accordance with the general provisions of the law regarding the assignment of copyright (art. 43 par. (2) of the Romanian Copyright Law).

The law is silent in this respect in what the exceptions and limitations under art. 33 par. (3), art. 37 par. (1) and art. 38 par. (2) are concerned.

With regard to the exception provided by art. 33 par. (3) of the Romanian Copyright Law, the Bucharest Court of Appeals has held that since these temporary acts of reproduction that are transient or incidental to the streaming of musical works online, the remuneration that is to be paid to the authors and right holders by means of the collective management societies is to be calculated in respect of the right of communication to the public only, and not also in respect of the right of reproduction, a higher remuneration being due solely in cases where the download of the works is also permitted.⁷⁵ It would appear therefore that the court has come to the conclusion that no separate compensation is due when the exception provided by art. 33 par. (3) is applicable.

In what the limitation provided by art. 37 par. (1) is concerned, some limited guidance can be taken from the decision of the Iaşi District Court, mentioned above, where the court has indicated that the sanctioning authority did not prove that the limitation concerned did not apply and did not provide any grounds on account of which the claimant ought

⁷³ Bucharest Tribunal, s. IX cont. adm., Decision no. 4222 of 9 December 2011, www.rolii.ro. Accessed 25 May 2017, reversed on different grounds by the Bucharest Court of Appeals, s. VIII cont. adm., Decision no. 3421 of 4 October 2012.

⁷⁴ ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, www.scj.ro. Accessed 25 May 2017.

⁷⁵ Bucharest Court of Appeals, s. IX civ., Decision no. 139A of 3 May 2011, *Monitorul Oficial* 2011 420.

to have obtained a license (authorization) from the relevant collective management societies.⁷⁶ Since it is only on the basis of such license agreement that any compensation could have been paid, we can infer from the decision that where the limitation provided by art. 37 par. (1) of the law is applicable, no compensation would be due to the author or right holders. This conclusion is supported by the literature on the subject.⁷⁷

Although there is no specific guidance concerning the application of the limitation provided by art. 38 par. (2) of the Romanian Copyright Law, we believe that no compensation would be due in such cases given the very limited scope of the provision: “conservation in official archives” only of temporary recordings of works made by radio or television broadcasting organizations for their own shows and only where such recordings would have “a special documentary value”.

The compensation for the private copy exception is exhaustively dealt with in the law at art. 107-110. Par. (1) of art. 107 confers upon the authors of works “susceptible of being reproduced, on any support, by means of sound or audio-visual recordings” and of works “susceptible of being reproduced on paper, directly or indirectly” as private copies, and upon the editors, producers, and performers, where the case the right to be compensated for the private copy exception. The right to such remuneration can’t be waived and the obligation to pay it rests with the manufacturers and/or importers of supports onto which such copies can be made and of devices meant for the making of such copies, irrespective of whether the process involved is analogic or digital. The list of supports and devices and the quantum of the remuneration can be subject to negotiation every 3 years in two commissions (one for sound and audio-visual copies and one for paper copies) made up of representatives from the relevant collective management societies and the associations representing the obligees of the obligation to pay the remuneration (who need to be registered with the Romanian Copyright Office in order to manufacture and/or import such products and/or devices). The negotiations follow the route provided by law for the negotiation of the methodologies for collective management.

The remuneration is calculated as a percentage of the customs value of the goods (for imports) or of the value of the goods upon placement on the market, without VAT (for manufactured supports and/or devices) and are currently at 0.1% for blank A4 paper, 3% for other supports and 0.5% for devices.

Art. 107¹ of the law provides that the remuneration is to be collected by a single collective management society for each of the two types of copy and then distributed to the other collective management societies and then to the beneficiaries of the compensation, according to clear rules, set by art. 107² of the Romanian Copyright Law.

There is no compensation due for blank audio, video, or digital supports wholesaled to phonogram or audio-visual producers, or to radio and television broadcasting organizations for their own shows or for supports and devices allowing the making of copies with no commercial purpose, imported in legally-permitted hand-luggage.

In theory, the fact that the remuneration is subject to negotiation between those who represent the paying parties and those who represent the beneficiaries, all within the rather strict framework of negotiation provided by law (and with a possible final jurisdictional review) should insure a proper balancing of the compensation. However, skewing is possible due to the fact that the two parties negotiate in light of the total quantity and value of the supports and devices and therefore it is possible that logrolling might cause individual instances of over/under compensation in respect of a given support or device. This risk is however remote given the fact that the remuneration is set on wide classes of supports and devices and therefore there would be little room for such discrimination.

However, sitting in appeal in a claim concerning the payment of remuneration due for private copying, the Bucharest Court of Appeals refused to allow the remuneration to be calculated in respect not of the value of a whole multi-functional device but solely in respect of the value of the sub-unit effectively allowing copying since the law is not to be read as allowing such distinction and, additionally, such distinction would allow an arbitrary determination of the value of the remuneration due (and a sub compensation of the right holders), given that there are no legal criteria or

⁷⁶ Iași District Court, s. civ., Decision no. 16245 of 22 December 2014, www.rolii.ro. Accessed 25 May 2017.

⁷⁷ V. Roș, D. Bogdan and O. S. Matei, *Dreptul de autor și drepturile conexe*. Tratat, All Beck 2005, p. 321.

provisions to establish which devices are simple and which complex, which sub-units effectively allow the making of copies and which don't.⁷⁸

14. Temporary acts of reproduction

As already indicated, art. 33 par. (3) of the Romanian Copyright Law provides that “Temporary acts of reproduction that are transient or incidental and which form an integral and essential part of a technical process and the sole purpose of which is to enable a transmission, in a network between third parties, by an intermediary, or the lawful use of a work or of another protected object and which have no independent economic significance, are exempted from the reproduction right”.

The Bucharest Court of Appeals has held that “the reproduction of musical works on a computer/server for the purpose of permitting streaming has a temporary character irrespective of the period of time for which such reproduction is made since, at any moment, it is possible that the respective musical work/works can be deleted. Moreover, the reproduction of the musical work on a computer/server for the purpose of permitting the subsequent streaming is incidental and an integral and essential part of a technical process. The purpose of this storage is to allow the lawful use of the musical work by streaming, and without such storage on the computer/server, the on-demand listening [of the work] by a third party would be impossible. Also, the reproduction of the musical work on a computer/server has no independent economic significance since mere storage, not followed by the making available of the work, would trigger application of the provisions [concerning the private copy exception]. Therefore storage does not gain economic significance unless regarded as an integral and essential part of the technical process by which the musical work is made available to the public for listening”.⁷⁹

By means of the same decision, the appeals court (sitting as final court) has also hinted that the exception is mandatory (as is its interpretation of it) when it dismissed the appellant's arguments that the exception (so interpreted) diverged from the European practice. The court stated that “the interpretation of the provisions of the Romanian law can't be made by reference to the European practice” and even if the Romanian Copyright Law provides that European practice is to be taken into account when negotiations take place, “negotiations can't concern the provisions of the law”.

The current interpretation of the limitation, as provided by the Bucharest Court of Appeals, seems permissive enough to allow most legitimate online activities, possibly even those activities based on a model of p2p distribution. For example, if, in order to optimize streaming (especially with regard to files requiring a very high use of bandwidth), the holder of the making available right would want to allow two of its lawful users (who share between them access to more bandwidth than each with the central server) to stream that file simultaneously, with the two users downloading alternative parts of the file from a central server and then sharing the missing parts among themselves (in order to benefit from the higher bandwidth they share), this would qualify under the current definition as a reproduction for the purpose of streaming and therefore could be allowed.

15. Exceptions and limitations to copyright and the freedom of expression

Although there is no exception or limitation in the Romanian Copyright Law specifically referring to the freedom of expression, the literature on the subject⁸⁰ has indicated that the limitations provided by art. 33 par. (1) letter b) – use of short quotations – and those provided by art. 35 letters a) and b) were enshrined, mainly, in order to insure that copyright does not unnecessarily stifle this right.

Art. 33 par. (1) letter b) reads: “The following uses of a work previously made known to the public shall be permitted without the author's consent and without payment of a remuneration, on condition that these are in accordance with good practice, do not affect the normal exploitation of the work, and do not prejudice the author or the holders of the

⁷⁸ Bucharest Court of Appeals, s. IX civ., Decision no. 382A of 8 November 2005, O. S. Matei, *Proprietate intelectuală. Practică judiciară*, Hamangiu 2006, p. 278.

⁷⁹ Bucharest Court of Appeals, s. IX civ., Decision no. 139A of 3 May 2011, *Monitorul Oficial* 2011 420.

⁸⁰ V. Roș, *Dreptul proprietății intelectuale. Vol. I. Dreptul de autor, drepturile conexe și drepturile sui-generis*, CH Beck 2016, pp. 371-372, 383.

exploitation rights: [...] b) the use of brief quotations from a work for the purpose of analysis, commentary or criticism, or for illustration, to the extent such use justifies the length of the quote”.

Art. 35 letters a) and b) of the Romanian Copyright Law provide that “The transformation of a work, without the author’s consent and without payment of a remuneration, is allowed in the following cases: a) if it is a private transformation, neither intended for nor made available to the public; b) if the result of the transformation is a parody or caricature, provided the result does not cause confusion as to the original work and the its author”.

In what the use of quotations is concerned, the special conditions expressly provided by law refer to the purpose of the use (which must be one of the four provided by the law) and the length of the quote, such quantitative condition requiring an evaluation by reference to what is necessary in respect of the purpose being pursued.

The literature on the subject⁸¹ has indicated that, in order for such use to fall within the limitation, the following conditions need to be met: that the work quoted had been made available to the public; that the fragment be reproduced identically; that the fragment be short by reference to both the work from which it is taken and the work where it is used; that the fragment be incidental to the new work; that the fragment be identifiable in the new work by use of inverted commas; that proper attribution is given; that the fragment be used for one of the purposes permitted by law, which would require that the new work has a critical, polemical, pedagogical, scientific, or informational character; and that the copying does not prejudice the author.

In respect of the transformation allowed by art. 35 letter a) the literature has indicated that two special conditions need to be cumulatively met: that the transformation needs to be made in private or individually by a natural or legal person; and that the transformation thus made must not be made available to the public, i.e. use of the transformation needs to be private as well.⁸²

In order for the limitation provided by art. 35 letter b) of the Romanian Copyright Law to apply, the literature indicates that the user ought to have obtained a satirical or caricatural effect, different from that of the original work and that the result must not create confusion as to the original work and its author.⁸³

The limitation for use of quotations was successfully applied in respect of the use of an excerpt of a press article on the website of a regional newspaper, the court having found that the copied passage was short (11 lines), was used for one of the purposes prescribed by law (illustration), and that “the length of the quote is justified on account of the intent to get the reader’s attention and determine him to look for the rest of the article, but on the original website (of Tango magazine), and not on the respondent’s [and therefore] has not prejudiced the author (but on the contrary, has benefitted her, by determining readers of the Ziua de Constanța publication to also read Tango magazine)”.⁸⁴

The 4th District Court of Bucharest also found lawful the use of a selection of 26 photographs from a series of 156 which had been used by a business publication in its yearly calendars and featured its female employees and had been made publicly available online on the latter publication’s website. In order to so find the court indicated that the photographs had been made available to the public on the claimant’s website, that they were part of 14 works – i.e. the 14 yearly calendars, with 12 photographs each – since they were meant to be used as such and not individually, that the 26 photographs were used by the respondent professional journalist in a satirical article she posted on her blog, that the respondent thus used a part of a photographic work and just for the purpose of being used in the respondent’s satirical article, that the article clearly indicated the source of the photographs and also provided a link to the original source and therefore the respondent never claimed authorship of the respective photographs.⁸⁵ The court

⁸¹ V. Roș, Dreptul de citare, *Revista Română de Dreptul Proprietății Intelectuale* 2009(3), pp. 19-22.

⁸² T. Bodoașcă and L. I. Tarnu, *Dreptul proprietății intelectuale*, ed. 3, Universul Juridic 2015, p. 89.

⁸³ V. Roș, *Dreptul proprietății intelectuale. Vol. I. Dreptul de autor, drepturile conexe și drepturile sui-generis*, CH Beck 2016, p. 383.

⁸⁴ Galați Tribunal, s. I civ., Decision no. 959 of 12 April 2013, www.rolii.ro. Accessed 25 May 2017.

⁸⁵ 4th District Court of Bucharest, s. civ., Decision no. 1314 of 4 February 2016, www.rolii.ro. Accessed 25 May 2017, confirmed by Bucharest Tribunal, s. III civ., Decision no. 3859 of 14 October 2016, www.rolii.ro. Accessed 25 May 2017

also found that the use was one in accordance with good practice, did not affect the normal exploitation of the work and did not prejudice the author, even though in this case the claimant legal person was merely the right holder.

The Romanian courts have considered this limitation applicable also in the case concerning the use of personal photographs inserted in a published biography in a historical TV show about the biography's subject, with the High Court indicating that, given the fact that the claimant did not ground his claim on an infringement of the moral rights (but only on an infringement of economic rights), the fact that there was no proper attribution of the photographs can't be claimed by way of appeal and therefore this aspect can't make the limitation inapplicable.⁸⁶

However, the Bucharest Court of Appeals has found the limitation inapplicable in a case concerning the use of a 10-second sequence of a film for a television commercial on account of the fact that the use was not for one of the purposes indicated by the law and, as indicated above, because "the Court is of the opinion that there can be no equivalence between the concept of film sequence and that of quote – the quote being by definition a fragment of a written work, identically reproduced".⁸⁷

16. Content excluded from copyright protection

Art. 9 of the Romanian Copyright Law contains a list of types of content that is specifically excluded from copyright protection. The provisions reads as follows: "The following can't benefit from the legal protection of copyright: a) the ideas, theories, concepts, scientific discoveries, processes, methods of functioning or mathematical concepts as such and inventions, contained in a work, whatever the manner of the adoption, writing, explanation or expression thereof; b) official texts of a political, legislative, administrative or judicial nature and official translations thereof; c) official symbols of the State, of the public authorities and organizations, such as: the armorial bearings, the seal, the flag, the emblem, the coat of arms, the insignia, the badge and the medal; d) the means of payment; e) news and press information; f) simple facts and data".

As the list of content excluded from copyright protection is qualified as an exception to the general rule that all content meeting the criteria for protection is entitled to such protection⁸⁸, we can consider that the list provided by art. 9 of the Romanian Copyright Law is a closed list. Courts have sometimes struggled to shoehorn some particular content in some category of content provided for by art. 9.

In a case involving the posting online of an excerpt from a press article copied from the website of a magazine, the Galați Tribunal qualified this article (entitled "Adina Alberts and Viorel Cataramă have separated") as a simple news or press information. To do so the court has stated that the article contained no original element of intellectual creation, such as to allow the article to be qualified as a literary work on account of the fact that the message of the article is simply that the two former lovers had separated. The court also pointed to the disproportion, within the article, between the claimant's creation (quantified as 11 lines) and the pre-existing elements (18 lines that consisted in statements made by the two persons).⁸⁹

Even if the list of content specifically excluded from copyright protection is a closed list, we believe that it does not need to be extended since courts tend to use it as a complement to the basic criteria for protection of copyright. As seen from the case-law above, as courts have tended to anchor the justification of the inclusion, by the legislator, of different items on the list precisely by referring to such content inherently not meeting such conditions, the list tends to be merely a shortcut allowing courts, in specific cases, to bypass verifying the meeting of the criteria for protection anew.

17. Uses permitted in education

⁸⁶ ICCJ, s. I civ., Decision no. 104 of 22 January 2016, www.scj.ro. Accessed 25 May 2017

⁸⁷ Bucharest Court of Appeals, s. IX civ., Decision no. 51A of 26 February 2009, *Buletinul jurisprudenței* 2009. *Curtea de Apel București, Universul Juridic* 2011, p. 492

⁸⁸ V. Roș, *Dreptul proprietății intelectuale. Vol. I. Dreptul de autor, drepturile conexe și drepturile sui-generis*, CH Beck 2016, p. 184.

⁸⁹ Galați Tribunal, s. I civ., Decision no. 959 of 12 April 2013, www.rolii.ro. Accessed 25 May 2017

Art. 33 par. (1) provides that: “The following uses of a work previously made known to the public shall be permitted without the author's consent and without payment of a remuneration, on condition that these are in accordance with good practice, do not affect the normal exploitation of the work, and do not prejudice the author or the holders of the exploitation rights: [...] c) the use of isolated articles or brief excerpts from works in publications, television or radio broadcasts, or sound or audio-visual recordings, exclusively intended for teaching purposes and also the reproduction for teaching purposes, within the public education or social welfare institutions, of isolated articles or brief extracts from works, to the extent justified by the intended purpose; [...] e) specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage; [...] g) the representation and execution of a work as part of the activities of educational establishments, exclusively for specific purposes and provided that both the representation or execution, and the public's access are free of charge”.

Art. 33 par. (2) reads: “Subject to conditions provided for in paragraph (1), the reproduction, distribution, broadcasting or communication to the public, with neither direct nor indirect commercial or economic advantage, are allowed: [...] d) of works, where used exclusively for illustration in teaching or scientific research”.

Art. 35 of the Romanian Copyright Law provides that “The transformation of a work, without the author's consent and without payment of a remuneration, is allowed in the following cases: [...] d) if the result of the transformation is a short review of the works for teaching purposes, with the indication of the author”.

With regard to the limitation provided by art. 33 par. (2) letter d), in the geography manual case, mentioned above, the Bucharest Tribunal held that the conditions required for the limitation to apply were not met on account of the fact that the respondent had not used the work for illustration purposes, as in such case only fragments of the work would have been used, such as to provide ground for the respondent's own arguments, and proper attribution would have been given. Moreover, as indicated above, the court found that the use was made for economic advantage since “publishing, by university professors, of a number of scientific papers confers upon them a series of advantages, including economic ones”.⁹⁰

In respect of the limitation provided by art. 33 par. (1) letter c), in the criminal case concerning the usurpation of authorship in a book on the methodology of scientific research the Bucharest Court of Appeals has held that this limitation was not applicable on account of the fact that the use did not concern use for analysis, commentary or illustration, the use did not concern short excerpts but almost all of the original work (approximately 90%).⁹¹

The limitation provided by art. 33 par. (1) letter e) was found inapplicable by the High Court in the case concerning the unauthorized making available of a book in the digital library of the Ministry of the Interior. Even if it upheld the finding of the appeals court that the provision would not have been applied on account of the use affecting the normal exploitation of the work and prejudicing the author, the High Court also indicated that the use neither met one of the special conditions since neither the Ministry of the Interior nor its publishing house can qualify as publicly accessible libraries, even though the book was made publicly available online through a virtual library.⁹² This finding of the High Court disproves the argument made in the literature that the limitation was applicable if the purpose was met, irrespective of the person doing the reproduction.⁹³

Finally, the provisions of letter g) of art. 33 par. (1) were found inapplicable by the Bucharest Tribunal in the case concerning the geography manual, mentioned above, the court finding that the provision in question relates solely to the communication to the public of certain works, susceptible of being made public by representation and execution, therefore excluding books such as the one allegedly infringed, and that such communication to the public ought to be free while the copying of the claimant's work was made in view of the publishing and distribution for profit.⁹⁴

⁹⁰ Bucharest Tribunal, s. IV civ., Decision no. 1997 of 15 November 2011, www.rolii.ro. Accessed 25 May 2017

⁹¹ Bucharest Court of Appeals, s. II pen., Decision no. 136/F of 7 March 2014, www.rolii.ro. Accessed 25 May 2017

⁹² ICCJ, s. I civ., Decision no. 1109 of 24 April 2015, www.scj.ro. Accessed 25 May 2017

⁹³ T. Bodoaşcă and L. I. Tarnu, *Dreptul proprietății intelectuale*, ed. 3, Universul Juridic 2015, pp. 77.

⁹⁴ Bucharest Tribunal, s. IV civ., Decision no. 1997 of 15 November 2011, www.rolii.ro. Accessed 25 May 2017

We have identified two cases that would have a direct bearing on the functioning of distance-learning programs. The first one would be the case concerning the geography manual, indicated above, where the courts have held that no limitation was applicable and that the copyright had been infringed. In this case however there was gross copying of nearly all of the claimant's work, with attribution for only a small part of the copied text and the work was then distributed (for a fee) to the students of a private university (including those studying in a distance-learning program).

The second case concerns a claim by a collective management society for performers against the Timișoara Polytechnic University concerning the remuneration due to performers for use of phonograms in the television broadcasts made by the university's TV station, meant to inform the public on the academic and social life related to the University's activities, including distance learning. The High Court, sitting as final court, determined that the respondent university could not benefit from the limitation provided by art. 33 par. (1) letter c) of the Romanian Copyright Law on account of the fact that in order to have done so, the channel ought to have used only brief fragments of phonograms in its broadcasts and solely for educational purposes. The court has found that the university had not proven that only short excerpts were used and that, since the channel's program structure approved by the National Council for the Audio-Visual indicated that the channel also broadcasts movies, advertising and entertainment shows, the use was not exclusively for educational purposes.⁹⁵ The same decision also indicated that the Romanian Copyright Law makes no difference between public and private institutions, even though, as seen above, in other cases a private university was considered to have been under a presumption of commercial gain where its manuals and distance-learning materials were distributed to its students. It was unclear in that case whether the court considered that the distribution was subject to a special fee or just the fee for the educational program with which the students were enrolled.

18. Uses permitted in research

Art. 33 par. (1) letter d) reads: "The following uses of a work previously made known to the public shall be permitted without the author's consent and without payment of a remuneration, on condition that these are in accordance with good practice, do not affect the normal exploitation of the work, and do not prejudice the author or the holders of the exploitation rights: [...] d) the reproduction of brief excerpts from works, for the purpose of information or research, by not-for-profit libraries, museums, film archives, sound archives, archives of cultural or scientific public institutions; the complete reproduction of the support of a work is allowed for the replacement of the sole copy in the permanent collection of a library or archive in the event of the destruction, serious deterioration or loss of thereof".

Art. 33 par. (2) reads: "Subject to conditions provided for in paragraph (1), the reproduction, distribution, broadcasting or communication to the public, with neither direct nor indirect commercial or economic advantage, are allowed: [...] d) of works, where used exclusively for illustration in teaching or scientific research".

There is no limitation or exception to copyright to support big data related activities nor one that would concern "text and data mining", however art. 122³ par. (4) letters b) and c) allow the lawful user of a database to extract or reuse a substantial part of its content, without authorization from the maker of the database, provided that the database is made available to the public in any manner, that the extraction is made solely for use for the purpose of teaching or scientific research – in which case the amount of use must be justified in view of the non-commercial purpose and proper attribution given – or for the purpose of insuring public safety and national security, or in administrative or jurisdictional proceedings.

With respect to the limitation under art. 33 par. (1) letter d), the Bucharest Tribunal held, in the case concerning the infringement of copyright in the book on the Romanian geography, that said limitation was not applicable in the given case on account of the fact that the copying did not concern brief excerpts of the work but the work in its whole, was not made for information or research but for the distribution of the infringing work for a fee, and was not performed by a not-for-profit cultural or scientific public institution.⁹⁶ The High Court, in final appeal, additionally held, in respect of the latter point, that the Faculty of Geography of the private university concerned was not a scientific institution. While it acknowledged that universities may conduct scientific research, the court considered that such

⁹⁵ ICCJ, s. I civ., Decision no. 9699 of 27 November 2009, www.scj.ro. Accessed 25 May 2017

⁹⁶ Bucharest Tribunal, s. IV civ., Decision no. 1997 of 15 November 2011, www.rolii.ro. Accessed 25 May 2017

activities are conducted by means distinct components of the faculty or university, such as research institutes, and the fact that the work in question potentially represented scientific research (given the fact that it concerned materials for the distance-learning program) did not change the educational character of the faculty into a scientific one.⁹⁷ Moreover, the court indicated that the private university was not a “public” institution, although it was “of public utility”, since it was not dependent on the state or local budget, therefore it could not have in any event qualified under the limitation. In addition to this the court also held that the special conditions were not met since the reproduction did not take place for the archive of an institution but was published and copied in view of it being distributed to the students of the university, for a fee.

19. Exhaustion of copyright

Under Romanian law, the distribution right, an economic right under copyright, is exhausted, in respect of each material support, upon that support’s first sale or transfer of ownership, on the domestic market. In this respect, art. 14¹ par. (2) of the Romanian Copyright Law provides that “the distribution right is subject to exhaustion upon first sale or with the first transfer of ownership of the original or of the copies of a work, on the domestic market, by the right holder or with his consent”.

Distribution is defined by the law as meaning “the sale or any other manner of transmittal, for a consideration or free of charge, of the original or of copies of a work, as well as their offering to the public”.

Exhaustion does not occur in respect of the lending right (upon first sale or first assignment of ownership), irrespective if made or agreed by the right holder or with his consent and neither in respect of the right of communication to the public (upon any act of communication to the public or making available), irrespective if made with the right holder’s consent.

However, in respect of software, “the first sale of the copy of a computer program, on the domestic market, by the right holder or with his consent, shall exhaust the exclusive right for the authorization of the distribution of such copy on the domestic market”.

The Romanian law therefore expressly excludes exhaustion in respect of the making available right, which would apply to online situations where the work has been made available in a digital format.

Since the provisions of the law concerning exhaustion of rights are mandatory provisions, there can be no derogation from these provisions by means of contracts concluded between parties. However, given the fact that the exhaustion concerns solely the “domestic market”, which is to be interpreted as the internal market of the EU (including the EEA), parties can limit the exports of supports incorporating copyright-protected works outside the EEA but must also observe to this end the application of the provisions of Competition Law no 21 of 10 April 1996⁹⁸ as interpreted by the Romanian Competition Council in *Bayer*.⁹⁹ In that case, the Competition authority found that the contractual restriction of parallel exports outside the EEA can have significant effects on the trade between member states of the EU and therefore can constitute a hard-core infringement of EU and Romanian competition law.

20. The panorama-exception in Romanian Copyright Law

Art. 33 par. (1) letter f) reads: “The following uses of a work previously made known to the public shall be permitted without the author's consent and without payment of a remuneration, on condition that these are in accordance with good practice, do not affect the normal exploitation of the work, and do not prejudice the author or the holders of the

⁹⁷ ICCJ, s. I civ., Decision no. 1067 of 28 March 2014, www.scj.ro. Accessed 25 May 2017

⁹⁸ Competition Law, Monitorul Oficial 1996 88

⁹⁹ Consiliul Concurenței, Decision no. 98 of 27 December 2011 concerning the sanctioning of producers SC Bayer SRL and SC Sintofarm SA, and of the distributors SC Mediplus Exim SRL, SC Poliano SRL, SC Relad International SRL, SC Farmexim SA, SC Farmexpert DCI SA, SC Fildas Trading SRL, SC Montero SA, SC ADM Farm SRL, SC Dita Import Export SRL and SC PharmaFarm SA for the infringement of art. 5 par. (1) of Competition Law no. 21/1996, republished, as amended and modified and of art. 101 par. (1) TFEU, <http://www.consiliulconcurentei.ro>. Accessed 25 May 2017/uploads/docs/items/id7390/decizie_site.pdf.

exploitation rights: [...] f) the reproduction, with the exclusion of any means involving direct contact with the work, distribution or communication to the public of the image of an architectural work, work of plastic art, photographic work or work of applied art, permanently located in a public place, except where the image of the work is the main subject of such reproduction, distribution or communication, and if it is used for commercial purposes”.

The High Court found the limitation inapplicable in the case of the use of personal photographs taken from a biographical book and inserted in a historical TV short documentary about the subject of the book. In order to so hold the court has considered that copyright vested with the claimant only in the book (considered to be a compilation of materials) and not in the photographs themselves.¹⁰⁰

In the case concerning the use of a photograph of a painting in an electoral leaflet, the Neamț Tribunal took the strange view of considering that the special conditions required by the panorama exception were met on account of the fact that the photograph was not the main subject of the publication (i.e. of the use) as said leaflet instead referred to one of the public figures subject of the painting, one of whom was running for mayor.¹⁰¹ Although the court found the limitation ultimately inapplicable on account of the fact that the general conditions (i.e. imposed by the “triple test”) were not met, the court seems to have misinterpreted the special conditions as these refer to the content of the photograph and not the material where such photograph is used. Instead of asking whether the main subject of the photograph itself was the protected painting (in which case it should have found that the special conditions were not met), the court focused on whether the photograph of the protected painting constituted the main subject of the material where said photograph was used. Given the fact that the photograph was exclusively a photograph of the painting, the court’s decision on this point appears not to be correct.

Of interest for the application of this particular limitation is the decision of the Bucharest Tribunal in a case concerning the infringement of the copyright in a photograph taken during the June 1990 Mineriad. The photograph was used in a press article regarding the events which was published both in print and online on 29 July 2012. The publishing newspaper tried to defend the use by claiming that the panorama exception was applicable on account of the fact that the photograph in question had been made available online and was thus “located in a public space”. The court disagreed and held that the limitation only concerns “works specifically created for that purpose: to be a part of the public landscape” whereas in the given case the photograph was posted to the claimant’s own website with an express reservation as to its use.¹⁰²

Clearly the wording of art. 33 par. (1) letter f) excludes from the scope of its application any use that is made for commercial purposes. The purpose of the use can’t exclude non-commercial use by a for-profit entity, however the fact that the purpose of that entity is inherently commercial would normally mean that a presumption of commercial purpose would exist, the burden of proof resting with that entity (claiming under the limitation) to show that in the given particular instance the use was not for a commercial purpose.

21. The private copy exception

Art. 34 par. (1) of the Romanian Copyright Law provides that “[t]he reproduction of a work without the author’s consent, for personal use or for the normal family circle, shall not be an infringement of copyright, for the purposes of the present law, on condition that the work had previously been made known to the public, that the reproduction does not affect the normal exploitation of the work and does not prejudice the author or the holders of the exploitation rights”.

The literature on the subject has indicated that the exception is available if the following conditions are cumulatively met: the copy must be meant for private use, including herein the “family circle”; the work must have been previously been made known to the public; the copying must not affect the normal exploitation of the work; and the copying must

¹⁰⁰ ICCJ, s. I civ., Decision no. 104 of 22 January 2016, www.scj.ro. Accessed 25 May 2017

¹⁰¹ Neamț Tribunal, s. I. civ., Decision no. 463/C of 8 April 2013, www.rolii.ro. Accessed 25 May 2017

¹⁰² Bucharest Tribunal, s. V civ., Decision no. 553 of 28 April 2014, www.rolii.ro. Accessed 25 May 2017

not prejudice the author or the holder of the rights of use.¹⁰³ The condition of not prejudicing the author seems most problematic in the case of the private copy since, at least in theory, any such free and unauthorized copy is a lost sale of an authorized (and revenue-generating) copy. Some authors have argued that the private copy can only be made if the user owns an authorized copy and only if an authorized copy can't be acquired can a private copy be lawfully made without the user owning a copy himself¹⁰⁴

The Bucharest Tribunal has indicated, in *obiter*, in a case concerning a collecting society's claim for, *inter alia*, the communication of data for the distribution of sums collected as remuneration due for private copying, that "the private copy therefore concerns that fact that we, as users of a work, have the right to copy a work only if the right holder grants us such right by means of the license to which we adhere by using said work. If the license agreement "is silent" with respect to this, we refer back to the general rules, i.e. the ones in [the Romanian Copyright Law]. The provisions of art. 34 are of such nature as to impede a claim filed by the right holder when the conditions provided therein are fulfilled. The user's right to private copying is opposed by the correlative obligation, i.e. the remuneration imposed upon manufacturers and importers of supports and devices used to make a copy, and which is included in the final price of these products. Therefore the private copy is an exception to the right holders exclusive right to decide and authorize the means of use and reproduction of the work".¹⁰⁵ In relation to the comments above regarding the different qualifications of the limitations and exceptions to copyright, we also point to the fact that although in the decision just mentioned the court clearly qualified the private copy as an exception to copyright, only 6 months prior, a different section of the Bucharest Tribunal, in a similar case – a claim by a collecting society's claim for the payment of the remuneration due for private copying, the court qualified private copying as a limitation to copyright, mentioning nonetheless that it is compensated by means of the remuneration due for private copying.¹⁰⁶

Being an exception, the defence of lawful private copying is rigidly applied by the courts. A consequence is the need for the party claiming the benefit of the exception to prove that all conditions are cumulatively met. In the case in which the claimant asked that the respondent university send him a copy of a dissertation that had been authored by a third party in a master's program organized by the faculty, the Dolj Tribunal held that upon claiming under the exception, the claimant ought to have proven meeting all the conditions provided by law, including the fact that the work had been made known to the public and the envisaged purpose of the use.¹⁰⁷

The same is true in criminal matters, as a decision of the Bihor Tribunal, whereby a defendant was acquitted of infringing copyright by having reproduced phonograms as mp3s on the personal computer he was using in his office of a music club where unauthorized public communication of phonograms had taken place,¹⁰⁸ was vacated by the Oradea Court of Appeals finding that the exception was not applicable.¹⁰⁹

22. Overall assessment

The regime of exceptions and limitations to copyright under Romanian law is rigid by design and its qualification as an exception places the burden of proof on the user and only allows application of the defence where all conditions provided by law are cumulatively met. Due to the unclear legal qualification of these exceptions and limitations, users are also very limited in their possibilities to directly claim the benefit of these provisions where such would be blocked by the author or relevant right holder. Since such benefit can only be raised as a defence to a claim of copyright infringement and since claims of damages for copyright infringement are subject to a very small judicial stamp duty tax, irrespective of the amount claimed, users can only verify whether their reading of the law was correct when

¹⁰³ V. Roș, Dreptul proprietății intelectuale. Vol. I. Dreptul de autor, drepturile conexe și drepturile sui-generis, CH Beck 2016, p. 184.

¹⁰⁴ A. P. Seucan, Drepturile morale și drepturile patrimoniale de autor, ed. 2, Universul Juridic 2015, p. 77

¹⁰⁵ Bucharest Tribunal, s. IV civ., Decision no. 1689 of 11 October 2011, www.rolii.ro. Accessed 25 May 2017

¹⁰⁶ Bucharest Tribunal, s. V civ., Decision no. 610 of 24 March 2011, www.rolii.ro. Accessed 25 May 2017

¹⁰⁷ Dolj Tribunal, s. cont. adm., Decision no. 896 of 19 April 2011, www.rolii.ro. Accessed 25 May 2017, confirmed by Craiova Court of Appeals, s. cont. adm., Decision no. 2853 of 13 October 2011, www.rolii.ro. Accessed 25 May 2017

¹⁰⁸ Bihor Tribunal, s. pen., Decision no. 132/P of 31 May 2011, www.rolii.ro. Accessed 25 May 2017

¹⁰⁹ Oradea Court of Appeals, s. pen., Decision no. 9/A of 2 February 2012, www.rolii.ro. Accessed 25 May 2017

already named in a court claim for infringement, which could claim a very large sum of money as damages. For example, in the case concerning the use of the photograph of the June 1990 Mineriad, the author requested an award of damages in the sum of RON 80,000 (approximately EUR 17,750), while in the 10-second film sequence case the author asked for damages in the sum of EUR 100,000.

A possible solution to this problem would be to clarify the qualification of these provisions in such a way so as to grant standing to users in (at least) declaratory claims. Such claims would be subject to a similarly low judicial stamp duty tax and would allow users to have a judicial determination of their use before any damages are incurred by the author or right holder. On the other hand, an increase of claims with the Romanian courts would additionally burden a system that is already heavily burdened and could cause severe delays in the resolution of such claims.

The current status quo is reasonable because the Romanian courts (especially the courts in Bucharest which have specialized panels for Intellectual Property cases) have kept the balance between the interests of the authors and right holders and those of the users. However, given the fact that there is a tendency at administrative level to reduce the number of specialized panels for Intellectual Property cases and the specialized division of the Bucharest Court of Appeals was merged into a civil division, there could be more deviations from this balance and the increased uncertainty for the users will need to be addressed by means of statute.