

THE COPYRIGHT ON THE INTELLECTUAL PROPERTY EXPERT REPORT. CONSEQUENCES

Lecturer Eng. Raul Sorin FÂNTÂNĂ¹, PhD.

Abstract

Currently, according to the law, the expert is treated as a witness, and the expertise - presented as a report - is treated as a work implemented in support of justice only. Referring to the intellectual property, an expert report is often a research work with pronounced character of investigation. According to the copyright law, such a unique work should be cited even in the court device resolution, scientifically commented, as bibliographical source. The immediate consequence in support of the act of justice is that, unlike the jurisprudence - which in many countries is not a source of law, having an informative character only, a written report - especially the technical work - cannot be commented by any court. Evaluated as technical work, an expert report on the one hand should be treated as such - cited - by the courts of law and on the other hand implemented according to the rules imposed in the scientific works: documented, with a minimum number of references to and quotations from serious sources, including previous expert reports from completed files. We think that such an approach of the expert report would lead to a significant improvement of the justice act at least in Business Law.

Keywords: technical expert report, res interpreted, intellectual-industrial property, technical work, technical jurisprudence, standardization

JEL Classification: K20

1. Possible ways to avoid speculative interpretation in judicial common language

Harmonization of specific legislation for intellectual property was a necessity to ensure good functioning of EU internal market². For example before Directive 89/104/EEC entered into force the legislation applied to trade marks in the member states contained discrepancies which could restrict free circulation of goods and services and could alter competition in the common market.

Harmonization of EU member states legislation as a whole, including relating the intellectual property distinct valuable assets, governed by law, does not imply the obligation of identical legislation but “closeness to national regulations with the most direct impact upon internal market functioning.”³

Consequently in the law domain was necessary to find a way to reconcile the varied interpretations a notion, a phrase or an article from a national law might have with the interpretation given by an EU supreme forum. This way was named *preliminary procedure*⁴ and it “becomes a distinct but integrated evidence of the judicial systems of member states” regardless the contemporary law system⁵ functioning in the member state.

This competent forum to solve the incertitude regarding the interpretation of a communitarian normative in conflict with a national legal provision contributes to consolidate a modern principle according to which “the national judge is the communitarian civil judge.”^{6,7}

The preliminary transmission procedure represents an essential coordinate of the dialogue between the national courts of justice and the European Union Court of Justice⁸.

¹ Raul Sorin Fântână - Faculty of International Economic Relations, Christian University "Dimitrie Cantemir", Brasov, Romania, Intellectual/Industrial Property Expert, raul_fantana@yahoo.com

² Introduction, para. (2) to DIRECTIVE 2008/95/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2008 to approximate the laws of Member States relating to trade marks

³ Ibidem, par.(4)

⁴ According to the European Institute of Romania, the complete translation of the term is "action reference for a preliminary ruling."

⁵ Striblea M.S., *Teoria generală a dreptului*, Universitatea „Alexandru Ioan Cuza” Iași, Facultatea de Drept, 2008, pp. 26-31.

⁶ Case T-51/89, Tetra Pak, Intellectual Property judgment of July 10, 1990

⁷ Roșianu C., *Acțiunea în pronunțarea unei hotărâri preliminare*, THEMIS, Revistă a Institutului Național al Magistraturii nr.3/2005, p.1.

This modern mechanism's principles, closely observed, applied in the courts of justice in Romania, are in Romania law specialists⁹ focus. They analyze the preliminary transmissions originated by Romanian courts of justice, alongside elements found in relation with the preliminary transmission; the competencies distribution between the national courts and the Court of Justice; the wording of a request for a preliminary decision pronouncement and the minimum requirements to be met; the procedural act of the national court to decide the Court of Justice intimation; the rejection by the courts of justice of the request formulated by parties to intimate the Court of Justice; the suspension of an action in case of the Court of Justice intimation or in case there is a preliminary transmission filed with the Court of Justice with the same subject or a similar one; the maintenance, the modification or withdrawal of the preliminary transmission by the national court; the accelerated procedures to the Court of Justice; the procedure in front of the national court after receiving the response from the Court of Justice¹⁰.

The procedures inside the First Instance Tribunal and the European Community Court of Justice – ECCJ – bring new meanings sometimes much wider, to notions of common law or even dictionary limited meaning.

As an example the notion of *court* – defined as “state body in charge of solving litigations between individuals or individuals and corporate bodies”¹¹ is given a multivalent meaning by the ECCJ: “autonomous body, un-tributary to the national law, including institution named as such by the internal law other bodies as well which, without being recognised as jurisdictions by the national judicial systems, have a series of characteristics which award them this quality: tribunal constituted by law, independent, ruling in accordance with the law and examining the case of a contradictory procedure, tribunal whose members are independent”¹².

According to the same principle these meanings should be introduced and used as such in the national specialist language.

One of the reasons is obviously to avoid speculations in court procedures, by speculations meaning that - in the act to administer justice - not only the use the meanings with negative connotations offered by the dictionary^{13,14} but the use of the loopholes in a case for the advantage of the party intimating the loopholes. Sometimes, not to be accused of bias or any other reasons, the court can make the judgment based on lacunar evidence even the resolution would be different using complete evidence.

Beside the “preliminary transmission” procedure whose finality is a definite response with “international res interpreted” possibly to be used in other cases, because it refers to the meaning of a term or a notion defective of the law subject, we believe another procedure, at all new, can receive a new value, as long the modern prescriptions of the law are applied. Generally we refer to the technical expert report and especially to the technical expert report in intellectual/industrial property, looked at as an act/creation/work on which the prescriptions of the copyright should be unreservedly applied.

⁸ Șandru Mihai, Banu Mihai, Calin Dragoș, *Procedura trimiterii preliminare. Principii de drept al Uniunii Europene și experiențe ale sistemului român de drept*, C.H. Beck Publishing House, 2013

⁹ Ibidem.

¹⁰ <http://iaduer.ro/?p=6>

¹¹ Dima E. (coord) a.o., *Dicționar Explicativ Ilustrat al Limbii Române* – DEXI, ARC and GUNIVAS Publishing Houses, Chișinău, 2007, ISBN 978-9975-61-155-8 (ARC), ISBN 978-9975-908-07-7 (GUNIVAS)

¹² Roșianu C., op. cit., p.2, referring to Case 283/81 Cilfit v. Ministry of Health, the ECJ Judgment of 6 October 1982 and Case 61/65 Vassen Gobbels, ECJ Judgment of 30 July 1966.

¹³ To speculate = 1. To use, profit of in order to gain personal advantage. 2. To gain unfair advantage of some favorable circumstances. 3. To deceive. 4. To make deductions formal theorizing unrelated to practice. Speculation = abstract theorizing about certain issues, metaphysics, detached from practice and experience. Profiteering = overexploitation of what can make a profit. Profit (illicit) achieved by this kind of operation. (Dima E., ș.a. – *Dicționar Explicativ Ilustrat al Limbii Române*, ARC and GUNIVAS Publishing Houses, Chișinău, 2007).

¹⁴ Speculation (Engl.) = guesses about why something has happened or what might happen. Speculative = 1. based on guesses or on a little information, not on facts; 2. Done in order to make a big profit, but with a high risk that money will be lost (Macmillan English Dictionary, Bloomsbury Publishing Plc 2002, Macmillan Publishers Ltd 2002).

2. Technical judicial expert report, subject of the copyright

In one of a reputable specialist' works upon the object of the copyright it shown that "a number of essential conditions on which the vocation to protection in copyright must be satisfied, namely: the work must be the result of a creative activity of the individual [to be original, a.n.]; to embrace a definite form of expression, perceivable to senses; to be susceptible to be notified to the public."¹⁵

The expert report – ER – generally speaking and the intellectual /industrial property in particular – IIPER – is a literary work in a broad meaning, a scientific and technical creation¹⁶, a "work [protected by law, a.n.] by which a technical explanation is presented"¹⁷, an "original form the author [the expert, a.n.] is dresses his thoughts"¹⁸.

In another more recent work it is shown that "the specialist literature argues our law [Law No. 8 of 1991, a.n.] assigns the principle of the true creator of the act or the principle of the true creator"¹⁹". From this point of view IIPER responds to all criteria stated.

Regarding the theme of the "Prospects of Business Law in the Third Millennium" conference we believe is useful to remind one low specialist's opinion who appreciates "the designations 'business law' and 'business criminal law' do not indicate the emergence of a new law branch but the main domains of action of an ample reforming process, initiated by international bodies and engages almost all world's legislations. We have to mention that on this occasion it is not about a sectoral reform (of the specific legislation of a certain segment of social activity) but a large scale reform, targeting the entirety of the norms protecting the economic-financial system, meaning the assembly of institutions and mechanisms for production, distribution, consumption and conservation (preservation) of goods and services at the foundation of a new just economic order. Or, because the norms assuring the protection of the economic-financial system are extremely numerous and belong to most varied law branches, it is understood that this process to reform envelops not only commercial, banking, financial, fiscal, transport, consumer, environment, employment laws but equally the criminal law ..."²⁰.

We consider that beside the norms above the norms in engineering end economics domains became subjects of law; as an example we refer to engineering standards, object of the intangible valuable assets in the productive companies' portfolios. Subject of two Romanian cases^{21,22} at least, engineering standard is not yet study subject in law domain. Following the explanations offered by the expert, in both case the court – with different wording – agreed that:

- i) Being a public document by the effect of internal norms the standard cannot have "confidential" character;
- ii) The use of this document as document to protect any copyrights is incorrect and illegal;
- iii) Once presented as standard this document becomes one subjected to evaluation, comparison, use, improvement etc. by any third interested party, certainly not a document with any restriction upon;
- iv) The standard's author should allow its common and repeated use, offering the possibility to correctly compare the information;
- v) The standard is a document established by consensus;

¹⁵Eminescu Yolanda, *Dreptul de autor, Legea nr.8 din 14 martie 1996 comentată*, Editura Lumina Lex, București, 1997, p.76,77.

¹⁶ Ibidem, p.88

¹⁷ Romițan R.C., *Protecția penală a proprietății intelectuale*, Editura C.H. Beck, București, 2006, p.73, with reference to the decision of 2 August 1870 Paris Court of Appeal, cited B.I. Scodăcescu et al.

¹⁸ Ibidem, with reference to the decision of 7 May 1928, the Paris Court of Appeal, the Gazette du Paris 1929, 264ff, cited B.I. Scodăcescu et al.

¹⁹ Calmuschi Otilia, *Dreptul proprietății intelectuale*, Editura Universității Titu Maiorescu, București, 2004, p.145.

²⁰ Guiu Mioara – Ketty, *Considerații privind dreptul penal al afacerilor*, articol apărut în revista Dreptul, nr.11 din 2005

²¹ File no.1020/Ap/C/2006 - Brasov Court of Appeal, Decision nr.3/Ap/C ICCJ certified. Case "Becker Acroma KB vs. LYRA Servcom Company Ltd

²² File no. 1790/102/2007, Targu Mures Court of Appeal, Criminal Division for cases involving minors and family; ICCJ certified decision.

vi) The standard is approved by an accredited body.

However, due not only to the Romanian judicial system, by which the ER belongs to the case where was used as an instrument, just the result offered only by the court resolution are recognized and not the technical motivation.

Another subject in the Romanian casuistry is that regarding disloyal competition regarding the confusion created by wrongful labeling.

“The Romanian justice applied as a world absolute premiere an important European legal principle in the disloyal competition matters. Thereby it was decided that goods showing genuine manufacturer’s labeling by which a certain company is designated as sole importer in Romania, cannot be purchased by other companies from EU countries and later re-sold in our country.”²³

Bucharest Court of Appeal – Commercial Section – has recently deliberated on an identical case, regarding the right of certain distributors to sell the soft drink ALOE VERA OKF – forcing Gala Trading Distribution to cease indefinitely the sales OKF products with the genuine label bearing the importer’s name.

Although the common law in the Romanian justice does not grant importance to this fact, it should be mentioned it was an IIPER in premiere.²⁴

Following this type of connection, at this moment in time:

- i) ER/IIPER are at the courts’ discretion, might be or might be not observed;
- ii) At the experts’ discretion ER/IIPER may offer contradictory conclusions, because they express “the experts’ opinion”;
- iii) According to interpretation and also the letter of the law, unfortunately, Romania law specialists with insufficient engineering training are nominated experts and perform IIPER judicial technical reports in inventions matters, offering conclusions referring to pure engineering elements, without possessing the technical engineering instrument by the nature of the university graduate or postgraduate studies.

3. Conclusions

Among the fundamental principles of the Business Law, beside the principle of the free trade, the principle of lawful competition, the principle of the judicial equality of the parties, the principle of the freedom of conventions, the principle establishing the low power between the contracting parties in international trade contracts there is also the principle of good-will which acts firstly in the domain of establishing and rolling international trade contracts and is of overwhelming importance. This principle requires any convention to be made by parties in good will and that contracting parties not to employ unlawful practices, showing unlawful competition. In international and internal commercial relations good will is assumed. In case bad will is established on one of the contracting parties, it will endure the law rigor, very strict in this respect.

Although is acting “first in the field of establishing and rolling international trade contracts”, the good will is acting in any author’s work/creation. No scientific, technical, economics etc. author is making assertions contrary to the truth. If he does, it means either the predecessor or himself is wrong or insufficiently trained or knowingly supports the untruth.

With reference to the judicial technical expert, his acceptance by the Ministry of Justice on his request to the Technical Judicial Experts Corp has a manifestly contractual character, as long the law prescribes reciprocal rights and responsibilities, payment of service and sanctions, including the exclusion of the expert from the Technical Judicial Experts Corp – similar to the cancellation of a contract.

In the procedure to perform the ER expert reports with opposite conclusions cannot exist unless one of the experts is mistaken or is insufficiently trained or – knowingly upholds an untruth.

²³ webRelease: Aloe Vera cu aroma de concurenta neloiala, de M.Ch., Vineri, 24 decembrie 2010, 13:44

²⁴ Fântână R.S., *Expertiza mărfurilor de import – export*, ProUniversitaria Publishing House, Bucharest, 2010, pp. 287 - 299

Generally speaking any scientific/technical/economics work brings to the public a set of ideas it supports, based on a sum of bibliography it makes reference to, which it can expand, which it contradicts with reasons or which it can complement.

From this point of view, as an author of a scientific work, the judicial technical expert performing an ER cannot be assessed by the court as a witness, as at present the law prescribes.

He should be:

- i) Treated as a scientific work author, cited in works, including the courts' resolutions;
- ii) Paid by the court or the Police Inspectorate (at this moment the tradition - but not the law – offers the option to force the party requesting the ER to pay). Even so the payment is made to the Local Expert Office tutored by the Court and the invoice produced by the expert does not mention the party to make the payment;
- iii) Contested, exposed to the public opprobrium and excluded as professional in case he incorrectly argues or he lies, because his action is shameful.

Therefore despite in some countries jurisprudence is not (yet) a source of law it should consider ERs as neutral data sources.

The same way previous ERs seriously contradicted by successive ERs to be publicly annulled.

Such work offers an extremely laborious published material, offering explanations to the last detail. Thereby with reference to the law applicable during court procedures²⁵ an ER dissertation as a work on which copyright legislation is applied would not be omitted just because it represents evidence in another case.

It remains to be seen who will get the rights ownership.

If we'll stay on the tradition we consider the lawful owner of the ER becomes the payer, meaning the party losing the case ...

If we take in consideration the real relationship between the expert and the court, we consider we should apply Art.44 of Law No.8/1991.

We consider these works could make the subject of a new domain – “Technical Jurisprudence” – which we respectfully propose.

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²⁵ See also Timoce M.C., *Statutul Curții Penale Internaționale și influența acestuia asupra jurisdicțiilor penale internaționale*, article published by the journal Law nr.11/2005.