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European Court of Human Rights rebukes Moldova for unauthorized and unremunerated use of artworks on commemorative coins

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In *AsDAV v Republic of Moldova* the Second Section of the European Court of Human Rights (ECtHR) held that the uncompensated use of works by a public authority constitutes a violation of Article 1 of Protocol No. 1 to the European Convention on



Human Rights (ECHR). The ECtHR found that the Moldovan Supreme Court had violated the right to property by finding that the works had fallen into the public domain when they were minted on commemorative coins although the Moldovan National Bank (MNB) had not obtained prior authorization from the authors.

Facts

The applicant is a Moldovan collecting society (AsDAV) entrusted with the exclusive exercise of the rights in relation to works created by two individuals, L.C. and O.C. Both individuals participated in a competition organized by the MNB for the design of four commemorative silver coins. After their designs had been selected as winners of the competition in February 2006, both concluded an agreement with the applicant, pursuant to which AsDAV has the exclusive right to grant licenses for the use of the works and is alone entitled to collect royalties and bring legal proceedings on behalf of its members. L.C. and O.C. claimed, on 24 May and 25 July 2006 respectively, remuneration for the use of their works, based on alleged contracts they had

concluded with the MNB. They also received, on 25 July, a confirmation from the State Agency for Intellectual Property that they are the owners of the relevant copyrights. Three coins were minted in July 2006, and a fourth in August of the same year, all displaying the works of L.C and O.C.

Subsequently, the applicant claimed 200,000 Moldovan Leu (ML), approximately 11,800 Euro, for material and moral damages for the illegal use of the works of L.C and O.C. as the MNB had neither obtained authorization for the use of the works, nor paid any remuneration. The MNB rejected these claims and the applicant brought legal proceedings before the Court of Appeal of Chişinău, which partially upheld the claim in March 2007, awarding the applicant 100,000 ML and ordering the restitution of the originals of the works. The MNB appealed, arguing, without disputing the authorship of L.C and O.C., that that works printed or minted on legal tender were not protected by copyright, therefore consent of L.C and O.C. was not necessary. In June 2007, the Supreme Court quashed the Court of Appeal's judgment, except in relation to the restitution of the works, confirming the reasoning of the MNB.

Analysis

In its application AsDAV claimed that the refusal of the Supreme Court to grant compensation constitutes a violation of the right to property of their members L.C. and O.C.

Admissibility

Standing for a claim under Article 1 of Protocol No. 1 requires that the applicant has some sort of possession. The Supreme Court had argued that such a possession did not exist. However, section 4(2) of Law no. 293 (the Moldovan copyright and related rights act) stipulates that the rights of authors stem automatically from the creation of the work. According to the Supreme Court, L.C. and O.C., by handing their works over to the MNB had accepted that their works would not be protected by copyright. However, it was undisputed that the State Agency for Intellectual Property had confirmed that copyright had subsisted at some point after the creation of the works and that L.C. and O.C. were the rightholders. Furthermore, the terms of the competition to which L.C. and O.C. submitted their works did not state that works submitted would be excluded from copyright protection. Having established that copyright had subsisted, the Court went on to find that AsDAV had itself a proprietary interest in relation to the exploitation because it was entitled by law to deduct a certain percentage of the royalties due to its members. As a result, AsDAV had standing as applicant because the refusal to award damages by the Supreme Court meant it could therefore be considered a victim within the meaning of Article 34 ECHR. Accordingly, the Court declared the application admissible.

Merits

The applicant argued that in the absence of any agreement with the MNB, the fact that L.C. and O.C. submitted their works to the competition could not be construed as consent to their unremunerated use. The subsequent use of the works on the minted silver coins removed the works from the scope of copyright protection and resulted in a de facto expropriation. The Moldovan Government argued that L.C. and O.C. were fully aware of the legal consequences when submitting their works to the competition and that the measure taken was not disproportionate.

The Court found that when the Supreme Court considered the works created by L.C. and O.C. as monetary signs it submitted the works to a legal regime that removed them from copyright

protection and prevented L.C. and O.C., as well as the applicant, from exploiting the works. This constitutes a significant restriction of the right to property. In the absence of an agreement between the MNB and L.C. and O.C., the Court further found that the Supreme Court's argument that the authors acted in full knowledge of the consequences when submitting their works to the competition could not be upheld. It found, as a result, that the removal of works from copyright protection constitutes an interference with the right to property.

According to the ECtHR's jurisprudence, a restriction of the right to property can be justified if it is provided for by law, serves a public (or general) interest and is proportionate in relation to the aim it pursues.

As to the legal basis, the Court observed that the only legal basis the Supreme Court relied on was Section 7 §1 b) of law no. 293, which provided that monetary signs cannot form the subject of copyright. However, the Supreme Court did not consider whether the conditions for the disposal of the right of an author had been met, which are provided for in Sections 19, 24 and 25 of the same law. These provisions require a written agreement, which the MNB failed to produce.

Although finding a lack of a legal basis would have been sufficient to find an unjustified interference with the right to property, the Court considered it necessary to continue its analysis because of grave concerns as to the proportionality of the measure. It noted critically that the uncompensated interference with the right to property could only be justified in extreme circumstances. The purpose of the interference, which the Moldovan Government did not specify, but was assumed to be monetary policy, did not justify a complete and uncompensated de facto expropriation to the extent that the authors and the applicant could not derive any further benefits from the works. In any case, there would have been less restrictive measure available, such as the use of other works or the conclusion of a contract with the authors of the works.

Comment

This is not the first case in which the Republic of Moldova has used the works of an author for official purposes and found itself before the Strasbourg court (see *Balan v Moldova*). In the present case, the ECtHR reiterated that the use of a work for official or public purposes still requires consent from the author. A legal rule that automatically removes works from the scope of protection of copyright and into the public domain once used on some sort of public document or other item, such as coins or other tenders, constitutes an interference with the right to property. Without the consent of the author, an unauthorized use can only be justified in extreme circumstances. Here, the ECtHR put additional emphasis on the proportionality assessment, which it had already outlined in *Balan v Moldova*. One interesting point to note is that the Court granted standing to a collecting society because the inability to exercise a right on behalf of an author, for which the collecting society would be entitled to retain a fee, also constitutes a proprietary interest.

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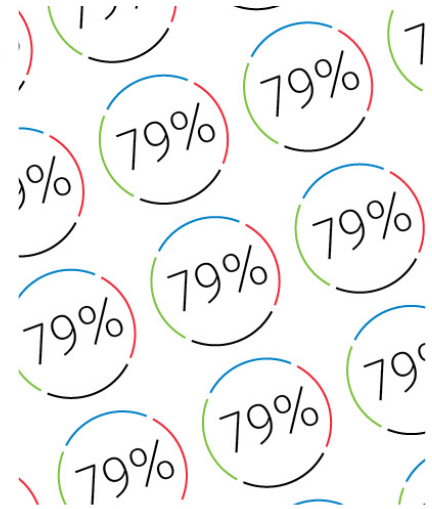
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