ARTISTIC CREATIONS. ORIGINALITY, INSPIRATION, IMITATION AND ARTIFICIAL INTELLIGENCE

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Abstract

Despite an evolution in the harmonization of intellectual property laws, the current EU framework has not created yet a unitary concept of work, originality or authorship.

As far as the originality concept is concerned, an artistic creation always has the mark of its author, and originality is „rarely denied to (...) an artistic creation" as the fathers of French intellectual property stated. The author must avoid any external source of inspiration in order to create an original work of genius, because originality, born spontaneously, from the „vital root of genius" means that the imitator must share his crown with the object of his imitation. But the concept has been refined over time, and today originality has been redefined, taking into account the classic imprint of the author's personality as well as his intellectual contribution.

In these last few years, with the exponential development of artificial intelligence, Pandora's box of copyright issues has been opened. From a simple tool that helped the artist, it has led to original works created without human involvement. There are plenty of such spectacular examples. But can artistic works, created with AI, benefit from copyright protection? Can they be considered related rights? Do they qualify as co-authored works? It hasn't been very long since „non-traditional" art creations raised similar questions. Cubism, abstract art, Dadaism, conceptual art or digital art, have triggered similar reactions to those produced today by AI art creations. Even if at this moment we cannot offer concrete solutions to protect creations made only by artificial intelligence, without the human factor taking any credit in the creative stages, we will see what the not too distant future will offer.

Keywords: *originality of the works, artistic creations, imitation, plagiarism, Artificial Intelligence.*

1. Introduction. The originality of the works and the need to harmonise the concept

„A primary idea, transformed into a first phase in the composition, after which the expression is reached, that is the final form. In terms of art, there are difficulties in distinguishing between the first two phases, idea and composition"[1]. From the artist's idea to the form, we find his creative effort, thus, a work of art bears the imprint of the author, of the artist.

Starting from the words of Petre Țuțea, *„only God is original",* we try to outline, however, using the writings of renowned authors in the field, both from domestic and international law, some criteria for defining the concept of originality.

A work is original only if it is the creation of the claimed author, and not a mere copy of an earlier work. [2]

The originality of a work involves both novelty and intellectual creative activity. [3]

Originality is rarely denied to an (...) artistic creation[4].

Originality is essential in the field of copyright because it provides creators with exclusive rights to their original works, protecting their economic interests and stimulating them to create new works. Although it is an essential criterion, the originality of the work can be difficult to establish in practice.

It is desirable to adopt a standard in the interpretation of the originality of a work, especially since this is, as we stated previously, a condition in determining the protection of the work and the infringement of the copyright. A key concept in the field of copyright, equally controversial and widely debated, the criterion of originality separates the continental system from the common-law system at first glance.[5] Throughout history,

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[1] H. Desbois, *Le Droit d'auteur en France*, Dalloz, Paris, 1987, apud E.G. Olteanu, *Creația intelectuală protejată prin drepturi de autor*, in Revista de Științe Juridice no. 4 (Universitaria, 2006): 16.

[2] O. Spineanu-Matei, *Proprietate intelectuală (2). Practică judiciară 2006-2007*, Hamangiu Publishing House, Bucharest, 2007, pp. 245-250, HCCJ, civil and intellectual property section, dec. no. 6428 of June 30, 2006.

[3] A. Circa, *Reflecții privind originalitatea operei intelectuale*, in Dreptul no. 1/2003, pp. 131-140.

[4] C. Colombet, *Propriété littéraire et artistique et droits voisins*, 7e éd., Dalloz, Paris, 1994, p. 32.

[5] T.-E. Synodinou, *The Foundations of the Concept of Work in European Copyright Law*, in Codification of European Copyright, Challenges and perspectives, Synodinou, Kluwer Law International, 201, pp. 93-113.

originality has been viewed from a **subjective or objective approach**.[6]

Often mistaken for novelty, originality represents the deep connection between the author and the work, yet, lacking a uniform regulation of the criterion, opinions are sometimes even divergent and, in the same way, jurisprudential solutions are not unified. Some specialists[7] appreciate that *„novelty is a subjective component of originality,"* others emphasize the opposition between the subjective notion of originality and the objective notion of novelty, specific to industrial property. Although it has been stated[8] that the originality of a work involves both novelty and the activity of intellectual creation, or that there is no fortuitous similarity, the original intellectual creation being obligatorily new[9], the Romanian courts[10] established, referring to a case settled in the U.S.A., that *"originality does not mean novelty, thus a work can be original even if it closely resembles other works, as long as the similarity is fortuitous and not the result of copying."*

In the 18th century, it was stated that originality is born spontaneously, from the vital root of genius, the imitation being made from pre-existing materials that do not belong to those people[11]. The imitator must share his crown, if he has one, with the object of his imitation. Therefore, the author must avoid any source of external inspiration in order to create an original work of genius[12].

Originality is thus, in the **subjective conception** (specific to French law and the continental system, in general), *"a manifestation of the author's personality"*[13], because it reflects his emotions, his experiences - the manifestation of idealistic aesthetics. The work must be the result of a conscious artistic effort, there being no copyright over a pre-existing thing, in the absence of a creative act on the part of the person claiming authorship[14]. From the doctrinal architecture in our country emerges the majority conception of the notion of originality, which can be defined as *"the subjective approach of the author of a work to make personal choices."*[15]

In a plastic expression, it is stated that the creative act is not only toil, but above all the expression of the personality, of the begetting identity, this being the key to originality[16].

In **France**, the Intellectual Property Code does not expressly establish originality as a criterion that must be met for the protection of the work, yet the condition imposed by the doctrine is essential[17]. The work of the spirit, characterized by its originality, is the expression of the author's personality, a necessary and sufficient condition for the legal protection of copyright[18]. For example, the French Court of Cassation ruled in one case that the journalist *"transcribed the interviews in literary form [...] with transitions, to give the oral expression an elaborate written form, the result of an intellectual investment."* [19] The Court of Appeal of Versailles accepted the protection of an advertising slogan, provided that it contained *"an idea which, by its originality, bears the mark of a work of the spirit".* It is actually about originality in expression (juxtaposition of words, arrangement of phrases), not about the idea itself[20]. In French jurisprudence, *"le choix - the choice"* was expressly confirmed as a criterion of originality. The choice is part of the creation process of the work thus it does not matter whether there are pre-existing elements or not. The combination of these elements reveals the creative activity of the

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[6] A.-M. Drăgan, *Originalitatea, condiție fundamentală pentru protecția dreptului de autor*, in RRDPI no. 3/2019, p. 20.

[7] N.R. Dominte, *Originalitatea într-o dimensiune juridică şi non-juridică*, in Analele ştiinţifice ale Universităţii „Alexandru Ioan Cuza" din Iaşi tom LXVI/I, Ştiinţe juridice, Iaşi, 2020, p. 57.

[8] Circa, *op. cit., loc. cit.*, p. 131-140.

[9] A. Speriusi-Vlad, *Protecția creațiilor intelectuale. Mecanisme de drept privat*, C.H. Beck Publishing House, Bucharest, 2015, p. 220.

[10] HCCJ, Case Law Bulletin. Collection of decisions for 2015, p. 382.

[11] E. Young, *Conjectures on Original Composition, 1759*, *https://rpo.library.utoronto.ca/content/conjectures-original-composition-1759*, accessed on 29.08.2022.

[12] N.R. Dominte, *Originalitatea(…) op. cit.*, p. 52.

[13] V. Roș, *Dreptul proprietății intelectuale. vol. 1. Dreptul de autor, drepturile conexe și drepturile sui generis*, C.H. Beck Publishing House, Bucharest, 2016, p. 207.

[14] The archaeologists who discovered the prehistoric paintings in the Chauvet cave requested to benefit from the legal provisions in the field of copyright regarding posthumous works, the court (C.A. Nimes) rejected this request. See C. Le Henaff, *Memoire - Les criteres juridiques de l'œuvre à l'epreuve de l'art conceptuel*, Université de Poitiers, Faculté de droit, 9, *http://www.legalbiznext.com/droit/IMG/pdf/Memoire_les_criteres_juridiques_de_l_oeuvre_a_l_epreuve_de_l_art_conceptuel.pdf*, accessed on 06.09.2022.

[15] Gh. Gheorghiu, *Examinarea originalității operelor litigioase*, in RRDPI no. 1/2019, p. 13.

[16] S.C. Avarvarei, *Metamorfozele originalității în arhitectura constructului auctorial*, in *Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România*, coord. V. Roș, C.R. Romițan, Hamangiu, Publishing House, Bucharest, 2022, p. 324.

[17] However, there is a reference to this effect in art. L112-4 of the French ICC which provides that „the title of a work of the mind, as soon as it has an original character, is protected as the work itself".

[18] Cour de Cassation, Chambre civile 1, 11.02.1997, 95-13.176, publié au bulletin, available online at *https://www.legifrance.gouv.fr/juri/id/JURITEXT000007037807/*, accessed on 06.09.2022.

[19] Cour de cassation, civile, Chambre civile 2, 30.01.2014, 12-24.145, Publié au bulletin, available online at *https://www.legifrance.gouv.fr/juri/id/JURITEXT000028547600/*, accessed on 14.02.2023.

[20] C.A. Versailles, 12ème et 13ème ch. réunies, 17.05.1994, apud P.-Y. Ardoy, *La notion de création intellectuelle* (thèse pour l'obtention du grade de docteur en droit, Université de Pau et des Pays de l'Adour, 2006), p. 137, *https://hal-univ-pau.archives-ouvertes.fr/tel-03189135/document*, accessed on 07.09.2022.

artist, therefore the originality of his work.

In **Germany**, Goethe recognized that *genius* and *creativity* have little to do with originality and stated: *"People always talk about originality, but what do they mean? As soon as we are born, the world begins to work on us and continues until the end. What can we call ours but energy, strength and will? If I could give an account of all that I owe to great predecessors and contemporaries, it would be but a small balance in my favor"*[21]. Answering the criticism of Faust, the same great writer pointed out that *„Walter Scott used a scene from my Egmont, and had a right to do so; and because he did it well, he deserves praise. He also copied the character of Mignon in one of his novels; but whether he did it with the same judgment is another question." «My Mephistopheles sings a song from Shakespeare, and why should he not? Why bother to invent one of my own when this one said exactly what was wanted. If, too, the prologue to my „Faust" is anything like the beginning of Job, it is again quite correct, and I should rather be praised than censured»*[22], said the great Goethe. Thus, inspiration is not reprehensible if the author's personality is what creates originality in the new work. The German legislation is thus based on the principle of creativity, finding in the work a minimum creative effort of the author[23]. Immanuel Kant is another German philosopher who stated that the author has rights over his work due to the intangible connection between the work and his personality.

In this way, the concept is born according to which it does not matter if the work is based on a previous creation, as long as we find the author's imprint, his sensitivity, his intelligence, his style. For example, in order to grant protection to an animal painter's drawings, the court noted that the author did not simply make a copy of nature, even though he tried to reproduce the animals as accurately as possible, but on the contrary, he made *„arbitrary choices that it reveals its personality"* by selecting the attitude of the animals, their colors, their morphological representation.

The traditional definition of originality has lost its echo over time, this being interpreted many times in jurisprudence as the result of a creative effort or even an intellectual *effort*, only if it can constitute a somewhat innovative contribution[24].

An original idea is rare, as a result the new forms of artistic manifestation make us direct our attention to an **objective approach to the concept of originality**, characteristic especially of the copyright system. A work will be protected if it has not been copied from another, being the creation of its author, important this time are the choice, the selection, the arrangements, not the personality of the author.

The absence of copying is found in the **United Kingdom**, where *„skill and labor"* or „sweat of the brow", the effort and investment of money or time, lead to protection[25]. The requirement of creativity becomes unnecessary, the work of the author being essential. This doctrine was first adopted in the United Kingdom in 1900 in the case of *Walter v. Lane*[26], in which oral speeches were reproduced in a newspaper, the Court holding that the work was protected by copyright. In the United Kingdom the condition of originality is expressly stipulated by the rules as a prerequisite for the protection of the work[27].

In a landmark decision[28], *University of London Press v. University Tutorial Press* in 1916, the Court found that originality in copyright law does not refer to originality of idea or thought, but to the expression of such an idea or thoughts. The law does not require that the expression be in an original form, but that this expression is not copied from another work - the essential thing is that it comes from the author. *„What is worth copying is prima facie worth protecting,"* said Judge J. Peterson. Thus, objective originality is comparable to novelty.

Originality becomes the direct link between the idea and the resulting work. The author creates property and obtains protection by directly recognizing and protecting the property he has created[29]. After the 2009 CJEU

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[21] J.W. Von Goethe, J.P. Eckermann, *Conversations of Goethe with Johann Peter Eckermann*, Da Capo Press, 1998, p. 115.

[22] *Ibidem*, p. 82-83.

[23] A. Speriusi-Vlad, *Despre originalitate, noutate, prioritate și despre plagiat*, in RRDPI no. 3/2014, p. 36.

[24] C. Le Henaff, *op. cit.*, p. 73.

[25] It is shown that *common law* countries, England for example, have moved away from the spirit of the Berne Convention because works which required time, labor or money to produce but which are not truly artistic or literary intellectual creations, benefit from copyright protection: S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986,* London, Centre for Commercial Law Studies, Queen Mary College/Kluwer, 1987, p. 901.

[26] *Walter v. Lane* [1900] AC 539, judgment of the House of Lords on the question of authorship under the Copyright Act 1842. The effort, skill and time which The Times reporters put into transcribing speeches to which they added corrections and punctuation, were enough to make them original.

[27] P. Buta, *O perspectivă istorică asupra condițiilor de protecție a unei opere prin dreptul de autor,* in *Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România*, coord. V. Roș and C.R. Romițan, Hamangiu Publishing House, Bucharest, 2022, p. 355.

[28] *University of London Press v. University Tutorial Press*, 1916, [1916] 2 Ch 601, *https://www.cipil.law.cam.ac.uk/virtual-museum/university-london-press-v-university-tutorial-1916-2-ch-601*, accessed on 20.02.2022.

[29] A. Rahmatian, *Copyright and creativity. The making of property rights in creative works*, Cheltenham: Edward Elgar, 2011, p. 16, apud A. Rahmatian*, Originality in UK Copyright Law: The Old „Skill and Labour" Doctrine Under Pressure*, IIC International Review of

decision in the *Infopaq*[30] case (which made a significant contribution to the evaluation of originality and in which the Court considers that the originality of the work can be expressed through the choice, combination of elements, arrangement of non-original content), or the 2012 decision in case of *Football DataCo*[31], in the United Kingdom the traditional conception of originality is changing, but remains quite different from the European conception of copyright[32]. The statement of Judge J. Pumfrey in the recent case *Shazam Productions v. Only Fools the Dining Experience*[33] is also suggestive: *„it is not enough to say that the purpose of the law is to protect skill and original work."*

In **Canada**, originality, which is not legally defined, is tied to the author, the work having to be his creation, the product of his talent and judgment, but also not a copy of another work[34]. The requirement of originality must apply to the expressive element of the work and not to the idea.[35] Yet Canadian jurisprudence has also stated that the work itself should not substantiate a finding of originality.

Surprisingly, in some American decisions the same fact is specified: the approach based on „sweat of the brow" is not consistent with the principles underlying copyright[36]. The work itself cannot substantiate an establishment of originality, "sweat of the brow" being too low a standard. The copyright law of the **United States** [17 US C. §102(a).] grants protection to original works of authorship. It is necessary for the work not to be copied from other sources, to be different from what has been done before, but to show the artistic contribution of the author in the work. An original work of authorship is a work created independently by a person requiring at least a minimal degree of creativity. Thus, compared to the UK, in the US the originality requirement is linked to a minimum degree of creativity. In the case of *Feist Publications, Inc. v. Rural Telephone Service Co*.[37], US Supreme Court argued that to be original a work must not only have been the product of independent creation, but must also exhibit a „minimum of creativity". However, the standard of creativity does not have to be very high for the work to benefit from protection. A work can satisfy the independent creation criterion - requirement even if it closely resembles other works, as long as the similarity is fortuitous, not the result of copying, The Compendium of US Copyright Office Practices states.[38]

Analysing the jurisprudence of the CJEU on the issue of originality, it was indicated that it is not necessarily the personal imprint that must be present in the resulting work, but rather the idea that the author "exercises his free and creative choices." [39]

An attempt to harmonize the standard of originality was made by creating a *European Copyright Code (Wittem*[40]*)*, whose purpose was to adopt originality standards for different categories of works, known as *„originalité à géometrie variable"*[41]. At the European level, at least for three specific categories of works (which in principle have no artistic value), such as computer programs, databases and (non-artistic) photographs, an

Intellectual Property and Competition Law no. 44, Max Planck Institute for Innovation and Competition, 2013, p. 13, *https://doi.org/10.1007/s40319-012-0003-4*.

[30] *Infopaq International A/S v. Danske Dagblades Forening*, case C-5/08, Judgment of 16.07.2009.

[31] *Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others*, case C-604/10, Judgment of 01.03.2012.

[32] A. Rahmatian, *Originality (…), op. cit.*, p. 5.

[33] *Shazam Productions v. Only Fools The Dining Experience* [2022] EWHC 1379 IPEC, para. 80, *https://8newsquare.co.uk/wp-content/uploads/Shazan-v-Only-Fools-the-Dining-Experience-Ltd-2022-EWHC-1379-IPEC-FINAL-FOR-HAND-DOWN.pdf*, accessed on 28.02.2023.

[34] For a work to be „original" within the meaning of the Copyright Act, it must be more than a simple copy of another work. At the same time, it does not have to be creative in the sense of being new or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment, the Supreme Court judge says in the resolution of this case. *CCH Canadian Ltd. v. Law Society of Upper Canada*, Supreme Court Judgments, 2004 SCC 13 (nr. 29320), 04.03.2004, *https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2125/index.do*, accessed on 06.09.2022.

[35] S. Handa, *Copyright Law in Canada*, LexisNexis Canada, 2002, p. 209.

[36] *CCH Canadian Ltd. v. Law Society of Upper Canada*, Supreme Court Judgments, 2004 SCC 13 (no. 29320), 04.03.2004, point 22.

[37] *Feist Publications Inc. v. Rural Telephone Service Co.*, no. 89-1909, 499 US 340 (1991), *https://supreme.justia.com/cases/federal/us/499/340/*, accessed on 14.02.2023.

[38] Compendium of the US Copyright Office Practice, 3rd ed., 2021, 21, *https://www.copyright.gov/comp3/docs/compendium.pdf*, accessed on 15.02.2023.

[39] P. Bernt Hugenholtz, J.P. Quintais, *Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?*, in IIC - International Review of Intellectual Property and Competition Law, vol. 52, Max Planck Institute for Innovation and Competition, 2021, p. 1198, *https://doi.org/10.1007/s40319-021-01115-0*.

[40] A group of European academics formed the Wittem Group and launched a project on a European copyright code, published on 26.04.2010. This was not implemented. See *https://www.ivir.nl/copyrightcode/european-copyright-code/*, accessed on 13.02.2022.

[41] T.-E. Synodinou, *op. cit.*, p. 99.

attempt was made to harmonize the criterion of originality. [42] We could also add Directive (EU) 2019/790[43] (CDSM Directive), regarding works of visual art in the public domain.

Why does this very important concept not have a definition and why does no European instrument achieve harmonization in this regard? Probably, it depends on the differences in traditions and culture specific to each member state. It is certain that originality must be defined and redefined according to these traditions, taking into account the classic imprint of the author's personality, but also the author's intellectual contribution. And if we are still talking about the harmonization of legislation in the matter of copyright, this is probably also a step towards the fulfilment of the desideratum: a merger between the subjective and objective conceptions, in order to have a flexibility of the notion of originality. A convergence of the two concepts can be seen, in both continental and copyright systems, at least if we look at certain categories of works.

We can notice that the traditional interpretation of originality, as reflecting the author's personality, is no longer so current in the contemporary period, the intellectual effort being important, which has made some authors consider that a tendency to move from the protection of the author's person to that of creation is being born[44].

2. The standard of originality in artistic creations

Paraphrasing a renowned author in the field, t*he artist does not imitate, but creates new forms of expression*.[45]

In the Romanian copyright law, Law no. 8/1996, art. 7 provides[46]: *„original works of intellectual creation in the literary, artistic or scientific field, whatever the mode of creation, mode or form of expression and independent of their value and destination [...] constitute the object of copyright."* The legislation does not define the work of plastic art, limiting itself to mentioning in its content terms such as *works of plastic or graphic art*. The same art. 7 of Law no. 8/1996 enumerates within the scope of copyright, *„photographic works, as well as any other works expressed through a process analogous to photography, works of graphic or plastic art, such as: works of sculpture*[47]*, painting*[48]*, engraving*[49]*, lithography*[50]*, monumental art*[51]*, scenography*[52]*, tapestry*[53]*, ceramics*[54]*, plastic glass and metal*[55]*, drawings*[56], design[57], *as well as other works of art applied*[58] *to products intended for practical use, architectural works*[59]*, including plans, models and graphic works that form architectural projects,*

[42] Directive 2009/24/EC of the European Parliament and of the Council of 23.04.2009 on the legal protection of computer programs, OJEU L111/16 of 5 May 2009, Directive (EU) 2019/790 of the European Parliament and of the Council of 17.04.2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, OJEU L 130/92 of 17.05.2019, Directive 2006/116/EC of the European Parliament and of the Council of 12.12.2006 regarding the duration of protection of copyright and certain related rights, OJEU L 372/12, 27.12.2016.

[43] Directive (EU) 2019/790 of the European Parliament and of the Council of 17.04.2019 on copyright and related rights in the digital single market sector and amending Directives 96/9/EC and 2001/29/EC.

[44] P.-Y. Ardoy, *op. cit.,* p. 335.

[45] N.R. Dominte, *Dreptul la calitatea de autor în compas juridico-literar*, in *Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România*, coord. V. Roș and C.R. Romițan, Hamangiu Publishing House, Bucharest, 2022, p. 295.

[46] Article L.112-2 of the French Intellectual Property Code is limited to providing a non-exhaustive list of creations that can constitute intellectual works, including works of art, with fragmented exemplification of several types of works. Professor Pierre-Yves Gautier thus proposes to define works of art „as productions of the spirit, essentially appealing to forms and aesthetics", in P.-Y. Gautier, *Propriété littéraire et artistique*, 5th ed., PUF, Paris, 2004, p. 117.

[47] Branch of fine arts that aims to create artistic images in three dimensions, by carving or modelling a material, *https://dexonline.ro*.

[48] Branch of plastic arts that interprets reality in visual images, through colored, two-dimensional forms, spread out on a flat surface, *https://dexonline.ro*.

[49] Genre of graphics in which the artistic image is obtained by reproducing from a plate on the surface of which the design has been drawn or engraved, in depth or in relief, *https://dexonline.ro*.

[50] Method of reproducing and multiplying on paper texts, drawings, figures, etc., by using negatives printed or drawn on a special calcareous stone, *https://dexonline.ro*.

[51] Mosaic, fresco painting and stained glass.

[52] The art of making sets, costumes, etc. for a show, The art of painting scenes for the theatre, *https://dexonline.ro*.

[53] The technique and art of fabric execution. Decorative fabric of wool or silk depicting various subjects or allegorical themes, worked by hand or for war and used especially for decorating walls or furniture, *https://dexonline.ro*.

[54] The technique and art of processing clays, in order to obtain, through the homogenization of the plastic mixture, its modelling, decoration, glazing, drying and firing, various objects, *https://dexonline.ro*.

[55] It represents a kind of plastic art made by modelling, in three-dimensional forms, the two materials. Plastic works of glass can be clear, opaque, or can incorporate colors, obtained from various pigments, in M. Olariu, *Noțiunea juridică a operei de artă plastică din perspectiva legislației europene și românești și importanța valorii operei*, in RRDPI no. 2/2018, p. 76.

[56] Graphic representation of an object, a figure, a landscape on a flat or curved surface, through lines, points, spots, symbols, etc. The art or technique of drawing, *https://dexonline.ro*.

[57] Modern industrial aesthetics. Discipline that seeks to combine the beautiful with the useful in industry, *https://dexonline.ro*.

[58] They are intended to individualize, through aesthetic elements specific to plastic art, utilitarian products, industrially made, in M. Olariu, *Noțiunea (…), op. cit.*, p. 77.

[59] The science and art of designing and constructing buildings, *https://dexonline.ro*.

plastic works, maps and drawings in the field of topography, geography and science in general".

As Law no. 8/1996 does not define originality, although it addresses the notion in several articles, it is important to state that originality is one of the essential conditions that must be met for an artistic creation to be considered a work[60] for the purpose of being protected.

With regard to the right of succession, within the meaning of Directive no. 2001/84/EC on the resale right for the benefit of the author of an original work of art, *„original work of art means works of plastic or graphic art, such as paintings, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramic or glass objects and photographs, provided that they were made by the artist himself or are copies considered original works of art."* [art. 2 para. (1)].

In the context of the protection of these works, their value is not of interest, but neither is their immoral character, considering the subjective interpretation from the eyes of the viewer and sometimes even the specialists. Some creations considered worthless at one point in history, proved highly valued decades later. The originality of the work is presumed therefore the defendant must provide evidence to prove the contrary. Originality rests with the sovereign judgment of the court, which, in the case of a dispute related to plagiarism, will have to decide, without reference to the merit or economic value of the work[61].

Although in some cases the Court has shown that originality does not depend on artistic quality (computer programs), in others, it has established that regardless of whether the aesthetic effect is demonstrated, it does not mean that the work in question will be protected by copyright[62].

Just like the notions of a work of art or art itself, which have evolved over time and the concepts of **originality and protection of the work of art** have reshaped: from the perfection of the classical work, to the romantic work, to the modern one or to the „non-masterpieces" of our times. Some artworks may approach a different style, even giving birth to new styles. Yet, as we have said before, new does not necessarily mean creativity.

European courts have determined that in order to benefit from copyright protection, a work must have a certain degree of originality, and this threshold is **higher for artistic works than for other types of works.** In the landmark *Infopaq International v. Danske Dagblades Forening* case, the CJEU determined that newspaper articles must be a „distinctive" intellectual creation in order to benefit from copyright protection. Even more so, this higher standard applies to works of art.

As contemporary works of art *„do not seek to describe a situation or a feeling and have no representational function in themselves"*[63], we ask whether or not they are original and who is in a position to decide whether a creation is a work of art? It is enough to evoke the *Brâncuși case (Bird in space)*[64], in which the court specifies that the modern art school develops over time, and *„regardless of whether it sympathizes or not with the idea of the avant-garde, it must take into account facts that exist and influence the world of art"*[65].

In the press of the time, journalists gave the example of Picasso's last paintings which, like Brâncuși's art, did not fit into the customs of the times. Thus, Brâncusi's victory was the victory of modern art.

Originality must focus on the free-creative process of the artist. The work becomes „an extension of the artist", which has led many to say that we are facing an objectification of certain categories of works.

The emotions conveyed, the complexity, the style, the innovative character? What are the criteria we refer to in the case of these works?

In a study it is shown that *„beauty or related concepts, such as attractiveness, are far from being the most influential for the appreciation and processing of art"*[66].

Cubism (initiated by the French Georges Braque - *Case la L'Estaque*, 1908[67], followed by the Spanish Pablo Picasso - *Ma Jolie*, 1911 or Marcel Duschamp - *Nu descendant un escalier n° 2*, 1912), abstract art or „very concrete" art as it has been called (by Wassily Kandinsky - *Improvisation 7*, 1910 or by Piet Mondrian - *Composition with Large Red Plane, Yellow, Black, Gray and Blue*, 1921), Dadaism (by Marcel Duchamp - *Fountain*,

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[60] T. Bodoaşcă, A. Murgu, *Opinii privind semnificația juridică a plagiatului*, in RRDPI no. 4/2016, p. 81; V. Roș, A. Livădariu, *Condiția originalității în operele științifice*, in RRDPI no. 2/2014, p. 9.

[61] P.-Y. Gautier, *Propriété littéraire et artistique,* PUF, Paris, 1991, p. 792 apud Gh. Gheorghiu, I. Lisnic, *Unele considerații cu privire la contrafacere și plagiat*, in RRDPI no. 3/2012, p. 118-131.

[62] Case Cofemel, C-683/17, para. 54.

[63] N. Walravens, *La notion d'originalité et les œuvres d'art contemporaines*, in RIDA no. 181/1999, Neuilly-sur-Seine, p. 103.

[64] The judges indicated that *„we have the evidence that it is the original product of a professional sculptor and that it is, in fact, a sculpture and a work of art (…) we uphold the protest and decide that it has the right to enter the country without being subject to customs duties".* For details, see Al. Șerban, *Brâncuși împotriva Statelor Unite ale Americii: „Dacă aceasta este o pasăre, împușcați-o!"*, in Historia, 2018, *https://www.historia.ro/*, accessed on 29.08.2022.

[65] E.G. Olteanu, *Creația (…), op. cit.*, p. 16.

[66] M. Haertel, C.C. Carbon, *Is this a „Fettecke" or just a „greasy corner"? About the capability of laypersons to differentiate between art and non-art via object's originality*, in i-Perception 5(7), 2014, p. 602-610.

[67] In 1908 his canvases are rejected at the *„Autumn Salon".*

1917) or art conceptual (whose paths were opened by Duchamp - *Bicycle Wheel and Stool*, 1913, continued by Joseph Kosuth - *One and Three Chairs*, 1965), surrealism (of Salvador Dalí - *The Persistence of Memory*, 1931, or of Max Ernst, Joan Miró, Victor Brauner), abstract expressionism (by Jackson Pollock - *Number 1* 1950 (*Lavender Mist*) or by Maurizio Nannucci - *All Art Has Been Contemporary*, 1999, neon lights, Altes Museum, Berlin), graffiti art (Jean- Michel Basquiat - *Red Skull*, 1982) or digital art (John Whitney, since the 1960s), are some examples that reveal another side of art, moments in which it was sometimes appreciated that the substance of the work consists more in the idea than in the form. The idea is actually the work. The notion of a work of art was overturned by Duchamp's ready-mades. Ready-made creations[68] and conceptual art are based on the formal elements that convey the idea of the work, this being primordial.[69] Conceptual art refuses to adhere to the previous vision of art (forms, materials), being linked to other artistic currents such as Arte povera, Land art or Body art.

These categories of works can create emotions in our eyes. White on White or White Square on White, Russian painter Kazimir Malevich's 1918 painting (which followed the 1910 Black Square), rendering a geometric shape, and denoting at first glance a lack of colour and profundity, introduced another side to the work of art (although critics at the time claimed it was not actually a work of art). At a 1956 exhibition showing orange, yellow, red, pink and blue monochromes by painter Yves Klein, viewers considered them „bright, abstract interior decorations."

Consequently, the painter turned to an absolute monochrome, focusing only on one color, blue, which would become known as International Klein Blue[70].

Imitation or plagiarism?

„*Those who do not want to imitate anything, produce nothing*" - Salvador Dali, painter.

Inspiration or theft? Plagiarism in art is a real and serious problem, the consequences of which are often quantified in impressive sums of money.

The regulation of the concept of intellectual property in native lands appears with a rather large gap since the first modern copyright law, *Queen Anne's Statute* of 1709/1710.[71] Regarding the notion of plagiarism, neither the Press Law of 1862, nor the Law on Literary and Artistic Property, 126 of 1923, nor Decree no. 321 of 1956 regarding copyright or Law no. 8/1996 in its original and amended forms does not use this term. In the current form of the law on copyright and related rights, it is a crime *for the person who appropriates, without right, in whole or in part, the work of another author and presents it as his own intellectual creation* (art. 197 para. 1). The plagiarism of creations protected by copyright and related rights has generated many writings, comments and opinions, some disunited, the approach being complicated by the fact that there is a special law in the Romanian legislative repertoire that defines this term, Law no. 206/2004 on good conduct in scientific research, technological development and innovation. [72]

I believe, given the opinions of eminent specialists who have previously researched this topic[73], that plagiarism should be properly regulated in copyright and related rights law.

However, we will not analyse the provisions of Law no. 206/2004, preferring an approach directed towards

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[68] „Ready-made means found as such, taken, borrowed from the everyday universe and recontextualized, put in a new context, detached from the everyday universe and somehow elevated by this isolation from the everyday to the value of an art object"; see A. Gombos, *Marcel Duchamp; obiectul „ready made",* in Arta și artiști vizuali, year I, no. 2/07.12.2019, *https://artasiartistivizuali.ro/artisti/marcel-duchamp-obiectul-ready-made/*, accessed on 31.08.2022.

[69] N. Walravens-Mardarescu, *De l'art conceptuel comme création et sa protection par le droit d'auteur*, in RIDA no. 220/2009, Neuilly-sur-Seine, p. 13.

[70] Yves Klein, on *https://en.wikipedia.org/wiki/Yves_Klein*, accessed on 31.08.2022.

[71] Law known also as *Copyright Act 1710*, whose whole title was: *An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned*).

[72] Even the jurisprudence in our country has not given solutions that are based on plagiarism, but especially on the provisions of art. 139 (infringement action), respectively 197, in the situation where „texts, text fragments or expressions were taken over, without mentioning the fact of taking over and without referring to the source work (without citing or indicating the source, including of the author's name)". These actions could be interpreted as plagiarism in the context of appealing to the provisions of art. 4 para. (1) letter d) of Law no. 206/2004. For details see S. Florea, *Plagiatul și încălcarea drepturilor de autor. Studiu comparat de jurisprudență*, in Curierul Judiciar no. 9/2017, C.H. Beck Publishing House, Bucharest, 2017, p. 533.

[73] Among these, we mention: C.R. Romițan, *Originalitatea - condiție esențială de protecție a creațiilor intelectuale din domeniul literar, artistic sau științific*, in Dreptul no. 7/2008; Gh. Gheorgiu, I. Lisnic, *Unele considerații cu privire la contrafacere și plagiat*, in RRDPI no. 3/2012; V. Roș, A. Livădariu, *Condiția originalității în operele științifice*, in RRDPI no. 2/2014; A. Speriusi-Vlad, *Despre originalitate, noutate, prioritate și despre plagiat*, in RRDPI no. 3/2014; M. Dănilă, *Considerații privind plagiatul din perspectiva originalității operei și dreptului de citare. Autoplagiatul și protecția ideilor, pledoariilor și a predicilor*, in RRDPI no. 3/2015; V. Roș, *Plagiatul, plagiomania și deontologia*, in RRDPI no. 3/2016; A. Speriuși-Vlad, *Despre plagiat, dreptul de autor și protejarea ideilor sau o teorie coerentă a plagiatului*, in RRDPI no. 4/2016; T. Bodoaşcă, A. Murgu, *Opinii privind semnificația juridică a plagiatului*, in RRDPI no. 4/2016; S. Florea, *Plagiatul și încălcarea drepturilor de autor. Studiu comparat de jurisprudență*, in Curierul Judiciar no. 9/2017; Gh. Gheorghiu, *Examinarea originalității operelor litigioase*, in RRDPI no. 1/2019; N.R. Dominte, *Originalitatea într-o dimensiune juridică și non-juridică*, in Analele ştiinţifice ale Universităţii „Alexandru Ioan Cuza", Iași, tom LXVI/I, Ştiinţe juridice, 2020; Al. Dobrescu, *Corsarii minții - Istoria ilustrată a plagiatului la români*, vol. I, Emolis, Iași, 2007.

the artistic side of works protected by copyright[74], works that have been, are and will always be plagiarized.

„A person's act of appropriating, copying in whole or in part someone's ideas, works etc., presenting them as personal creations; to commit a literary, artistic or scientific theft", this is the definition that the Romanian language dictionary gives to plagiarism[75]. Webster's dictionary defines plagiarism as: „to steal and pass off (someone else's ideas or words) as one's own; to use (someone else's work) without acknowledging the source or to commit plagiarism: to present as new and original an idea or product derived from an existing source." [76]

The origin of the word comes, as the doctrine shows us[77], from the Latin *„plagiarius"* which means kidnapper of children or slaves, these being condemned on the basis of „Fabia plagiariis". Martial, the poet, takes the word and uses it in a poem to punish those who stole his poems. The specialized literature[78] also offers us another attempt to define plagiarism, *„the presentation as one's own work of another person's words, ideas, arguments without proper acknowledgment of the source by citation."*

Plagiarizing someone else's work means not allowing the artist to enjoy the fruits of his efforts, but also depriving art in general of new, valuable creations. It is very true that we all seek inspiration to evolve. A widespread concept is that of copying for learning purposes. Thus, many people at the beginning of their artistic career copy famous works in order to learn from the best. The initiator of the popular hashtag, #DrawThisInYourStyle on Instagram, said: *„I think everyone really enjoys seeing an idea through a thousand different lenses"*, in the context where some artists offer some of their art to others to copy it in their own way, changing the lines, colors and general style, yet at the same time mentioning the artist and the original work. The border though is very sensitive. However, past the desire and intention to learn, one can easily end up plagiarising.

In *„Le Roi du plagiat"* - The King of Plagiarism (play by Jean Fabre, contemporary Belgian artist), an angel - artist wants to become a human (man). The piece was considered an „ironic and comical reflection on the status of the artist"[79], „a mockery of vain originality"[80]. To create a brain, he uses „Steine" - stones, these are: Einstein (science), Gertrude Stein (writing), Wittgenstein (philosophy) and Frankenstein - the consciousness of modern man, medicine and the invention of artificial intelligence. Fabre makes his „plagiarist" a seducer, hoping the audience will respect, value and accept him, but is he just a manipulator? In front of a tribunal of talking monkeys – the people, he defends himself and justifies himself because he had to learn to „speak with other people's words", to plagiarize. Fabre believes that the source of originality is given by *the inability to repeat oneself identically*, in his last theatrical monologue-manifesto, entitled *The Kind of Plagiarism*, stating: *„you-are-unique-when-you-want-to-imitate-the-others-and-you-cannot-make-it".*[81] The conclusion is that the angel will have to remain original, the man will continue to imitate.

„The copy is evidence of impersonality. In art as well as in literature, the epigones sing the aria of the masters. The poem gives you the impression of hearing more, the prose - of reading, the painting - of seeing." Yet, „the atmosphere, the environment, the artistic process, the art in essence" put the seal of originality, even if "the subjects are limited and involuntarily likely to be plagiarized", wrote Cezar Petrescu in *Copie și plagiat (Copy and plagiarism – n.t.)*.[82]

The creative effort of the author of a work, the indissoluble link between the creator and the creation,

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[74] Plastic art (painting, graphics, sculpture, architecture), dramatic art (theatre, dance, choreography), music (vocal, instrumental), literature (epic, dramatic, lyrical genres). Compared to the Enlightenment period, the concept of art became comprehensive, cinematography, photography, applied art, being just a few examples.

The French legislation uses terms such as *graphic and plastic work* (French CPI in art. L112 2 provides a non-exhaustive list of creations that can constitute intellectual works: works of drawing, painting, architecture, sculpture, engraving, lithography; graphic and typographic works; photographic and those made using techniques similar to photography. In the French doctrine these works are defined as *„productions of the mind, appealing essentially to forms and aesthetics"*), and in the English or Canadian one, *artistic work*. US regulations use the notions of *graphic work, sculpture and painting*. For details see E.G. Olteanu, *Creația (…), op. cit.*, p. 16.

[75] *https://dexonline.ro/definitie/plagiat*, accessed on 26.08.2022.

[76] „Plagiarize". Merriam-Webster Online Dictionary. Merriam-Webster Online - „to plagiarize is „to steal and pass off (the ideas or words of another) as one's own: use (another's production) without crediting the source [... or] to commit literary theft: present as new and original an idea or product derived from an existing source." (*https://www.merriam-webster.com/dictionary/plagiarize*, accessed on 26.08.2022).

[77] E.G. Olteanu, *Considerații cu privire la conceptul de autoplagiat*, in RRDPI nr. 4/2009, p. 48-51; B. Florea, *Reflecții despre plagiat*, Hamangiu Publishing House, Bucharest, 2018, 23-24; Y. Eminescu, *Dreptul de autor*, Lumina Lex Publishing House, Bucharest, 1994, p. 16.

[78] Editorial board of Europolis magazine - Department of Political Sciences, Faculty of Political and Administrative Sciences, Babeş - Bolyai University, Cluj Napoca, in M. Dănilă, *Considerații privind plagiatul din perspectiva originalității operei și dreptului de citare. autoplagiatul și protecția ideilor, pledoariilor și a predicilor*, in RRDPI no. 3/2015, p. 65.

[79] *https://festival-avignon.com/fr/edition-2005/programmation/le-roi-du-plagiat-27209*, accessed on 26.08.2022.

[80] *https://www.journal-laterrasse.fr/focus/jan-fabre-au-theatre/*, accessed on 26.08.2022.

[81] S. Solakidi, *Let yourself be a Mirror' Consilience between Neurophysiology and Art in Jan Fabre's Film Performance 'Do we feel with our Brain and think with our Heart?*, in Antennae - The Journal of Nature in Visual Arts, issue 48, Chicago: AntennaeProject, 2019, p. 187.

[82] C. Petrescu, *Copie și plagiat (II)*, in Dreptatea, 25.01.1929, 2, apud M. Coloșenco, *Delictul literar. Imitație, copie, plagiat. Istoria negativă a literaturii române 1882-1937*, in Timpul, Iași, 2011, p. 25.

makes us condemn plagiarism, regardless of the intentions of the one who makes it.

Plagiarism in art is not new, over time artists have been influenced by the works of their predecessors, but with access to the digital world, it has become much harder to detect. The globalization of the art world is another challenge in the application of intellectual property protection, and with the use of digital technologies art is copied and distributed very easily, the application of protection being difficult to achieve once borders are crossed. The artist's inspiration is part of the creative process, but at some point, there must be a line of demarcation between inspiration and plagiarism. Art plagiarism is a serious problem because it affects the artist, his material means, the art world and art values and can create uncertainty in the art market [83].

Is copying the work the same as copying the style?

The originality of a painting can lie in how that subject is viewed. Two paintings dealing with the same subject, which can be painted in similar styles, even on the same type of support, can be original through the artist's own imprint who, through his imagination, chooses, adds, changes, composes. Thus, this painting becomes unique, the subject being rendered in an unexplored, original manner[84].

Yet, is the sunset the property of the first painter who painted it? [85]

The *reproductions*, which are numerous in the artistic field, pose certain problems. If it is a faithful reproduction, without showing the personality of the author, there is no originality. Some authors state that even in the preconception phase, the painting is imbued with the artist's personality[86].

The personal execution of the work of art is another criterion in the analysis of originality. The distinction between the idea (not protected by copyright) and the form, makes the creative effort have the expected finality only if a tangible result is reached. A work conceived by one artist but produced by another may have both co-authors if the creator of the idea still retains significant control over the work. The famous representative of impressionism, the painter Auguste Renoir, was recognized as the author of a sculpture, even if he did not participate in the material creation of the work. Richard Guino made sculptures designed by his master, Auguste Renoir, which the latter could no longer make himself because of the rheumatism he suffered from.[87] Instead, the court found that the French painter Victor Vasarely had no personal role in the production of the work and *„did no control of the execution and no retouching of the finished work.[88]"* He asked another painter to enlarge one of his paintings, indicating only that it should be done in black, white and gray, with variations from one to ten. He later claimed co-ownership, but, according to the court, the second painter had not blindly followed Vasarely's directions, giving the work *„a new dimension and a new tone".*

But what happens in the case of many works of art that are often made by workers employed by the artist? Therefore, this criterion needs careful interpretation on a case-by-case basis.

The restorations of works of art have also given rise to some discussion. The restorer restores, recreates the author's work, basically following his intentions and not his own values or personal notes. Even so, we find restorations protected as derivative works if the restored work differs from the original, if the creative spirit and personal contribution are noted[89].

On the other hand, we can ask whether or not originality is measurable. If only part of the work is original, or if the originality is „weak", is the criterion for protecting the work met? Commenting on the solution of a case

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[83] For these reasons, many art galleries and museums have established stricter conditions for acquisitions and exhibitions, requiring artists to prove the originality of their works.

[84] S. Bailin, *On originality*, in Interchange no. 16/1985, Springer, p. 6-13, *https://doi.org/10.1007/BF01187587*, accessed on 01.09.2022.

[85] D.I. Suchianu, Copie și plagiat (III), in Dreptatea, 26.01.1929, apud M. Coloșenco, *Delictul literar. Imitație, copie, plagiat. Istoria negativă a literaturii române 1882-1937*, in Timpul, Iași, 2011, p. 28.

[86] N. Walravens, „L'œuvre d'art en droit d'auteur, forme et originalité des œuvres d'art contemporaines", *Economica*, (Paris: Institut d'études supérieures des arts, 2005), 313.

[87] The French Court of Cassation, by its decision of November 13, 1973, considered the two artists as co-authors, since the idea was Renoir's, and Guino was the author of the work, since he also imprinted his own personality, even if he only followed his Renoir's instructions. Guino was considered to have retained his creative freedom, as he sometimes worked alone for hours, away from Renoir. The Court of Cassation did not rule on the reasons that make Renoir the author of the work, but only on the reasons why Guino could be considered the author, Cour de cassation, chambre civile 1, 13.11.1973, 71-14.469, Proprieté littéraire et artistique, *https://www.legifrance.gouv.fr/juri/id/JURITEXT000006991012/*, accessed on 31.08.2022.

[88] The Paris Court ruled that there is no co-authorship if the two authors do not work together at all, TGI Paris, 21.01.1983, in C. Le Henaff, *op. cit.*, p. 36.

[89] A. Rahmatian, *Originality (…), op. cit.*, p. 26. The author quotes the judgment *Sawkins, Hyperion Records Ltd v. Sawkins*, Court of Appeal [2005] EWCA Civ 565; [2005] 1 WLR 3281; [2005] EMLR 688, 19.05.2015. See the ruling on: *https://www.5rb.com/case/hyperion-records-ltd-v-sawkins/*, accessed on 08.09.2022. The object of the litigation was the copyright protection of some editions that the plaintiff made by restoring some musical works (the works of Lalande, composer from the courts of Louis XIV and Louis XV). The plaintiff recomposed the missing elements, in addition to the work of gathering the disparate materials. The court ruled that the element of choice played a role in assessing the originality of the intellectual contribution, sufficient to create an original work because it required a high degree of skill and labor, and was not mere slavish copying (the „skill and labor" doctrine but also the author's personal contribution, his distinct note, creative personality).

from French jurisprudence[90], the specialists state that: *„originality exists, however weak the imprint of the author's personality, and it cannot be measured"*.

The Belgian painter Luc Tuymans has been found guilty of plagiarism after using a photo of politician Jean-Marie Dedecker taken by Katrijn van Giel for the Belgian newspaper De Standaard. Although there are differences between photography and painting, the scale being different, the color as well, the similarities are obvious. The painter defended himself, citing that his painting is a parody and therefore does not infringe copyright. *"How can an artist question the world with his art if he cannot use images from that world?"* reads the painter's defense. However, the court did not find the painting funny or macabre enough to warrant parody. [91]

In France, Jakob Gautel's work *"Paradise"* was embodied in the form of a panel with hand-painted gold letters spelling out the word Paradise on the wall of an abandoned psychiatric hospital in Ville-Evrard in Paris (actually on the door of a toilet in a former bedroom for alcoholics). This panel, an *in situ* creation, was the subject of several photographs that were then included in another artist's work, a documentary about the famous photographer Bettina Rheims, embodying 3 women posing in front of that door *(„The New Eve")*. When Gautel invoked counterfeiting, the court showed that the artist's choices in creation are important: through the choice of colors, exposure, materials, the author's personality materialized in the work is reflected. In addition to personal choice, the author's intention is an integral part of the criteria to be considered for the originality of the work. Thus, originality no longer comes simply from the material reproduction of the artist's conception, but the whole work must be analysed as a whole. Bettina Rheims used as justification, the fact that Gautel's work is only an idea, the word *paradise* belongs to everyone and, therefore, the work cannot be protected in the field of copyright law, the writing being ordinary, not original. The Paris Court of Appeal thus recognized the application of the subjective notion of originality in the case of a conceptual work of art, finding in favour of Gautel.*[92]* The particular importance of the decision lies in the admission of the protection of a work of contemporary art, a work of conceptual art: *„the intellectualization of creation does not exclude its realization in an original form"*[93].

Richard Prince, an American artist was accused of plagiarism and found guilty of copyright infringement when he reproduced 41 photographs without the author's permission, making a series of artworks, paintings and collages, entitled *Canal Zone*. The court forbade him to sell his works, which were to be confiscated and destroyed.[94] Prince appealed in 2013 and argued that his works were transformative and constituted *fair use* of the original photographs. The court partially reversed the original ruling and ruled that most but 5 of Prince's artworks fell within the concept of fair use. The same artist was also accused of copyright infringement by the model Emily Ratajkowski, whose photo she posted on Instagram was used in one of the exhibitions of Prince's works. Ratajkowski photographed herself in front of Prince's painting and produced an NFT, suggestively titled „Buying Myself Back: A Model for Redistribution", which sold at Christie's for $175,000.

In 2016, the fashion brand Zara was accused of copying the designs of Tuesday Bassen, an independent artist from the USA. Zara cited *„the lack of distinctiveness of the alleged designs, which makes it very difficult to see how a significant portion of the population anywhere in the world would associate the marks with Tuesday Bassen".* Adam J. Kurtz, another designer, compiled an image comparing the work of 12 independent artists with nearly identical products on the Zara website under the title „Shop the Stolen Art" on his personal website[95].

3. The author quality of ai systems. can artistic creations made by or with the help of ai benefit from copyright protection?

„Why couldn't we distill the artistic DNA of a painter from his body of work and create a new work of art from it?" asked Bas Korsten.[96]

The last few years in which **artificial intelligence** has developed exponentially have opened Pandora's box

[90] Cour de cassation (1ère Ch. civ.- 13-15.517) – 30.04.2014 (Droit d'auteur: Reproduction de documents publicitaires – Image - Refus de protection par les juges du fond -Originalité [non] – Contradiction de motifs), in RIDA 244/04-2015.

[91] The ruling sets a fine of 500,000 euros if the author creates any more „reproductions" of Van Giel's work or if he exhibits the original painting, which now belongs to an American collector. In A. Searle, *Why Belgium's plagiarism verdict on Luc Tuymans is beyond parody*, in The Guardian, 21.01.2015, *https://www.theguardian.com/artanddesign/2015/jan/21/luc-tuysmans-katrijn-van-giel-dedecker-legal-case*, accessed on 27.02.2023.

[92] For details regarding the case, see Conference *Regards artistique et juridique sur l'affaire «Paradis»,* Faculté Jean Monnet, Université Paris Saclay, 03.01.2018, *http://master-ip-it-leblog.fr/compte-rendu-de-la-confe rence-du-8-decembre-2017-sur-laffaire-paradis/*, accessed on 31.08.2022.

[93] N. Walravens-Mardarescu, *De l'art (…), op. cit.*, p. 7.

[94] *Cariou v. Prince*, 784 F. Supp. 2d 337, 349 3 (S.D.N.Y. 2011) and *Cariou v. Prince*, 714 F.3 d 694 (2d Cir. 2013), *https://cases.justia.com/federal/appellate-courts/ca2/11-1197/11-1197-2013-04-25.pdf?ts=1410918739*, accessed on 27.02.2023.

[95] N. Puglise, *Fashion brand Zara accused of copying LA artist's designs*, in The Guardian, 21.07.2016, *https://www.theguardian.com/fashion/2016/jul/21/zara-accused-copying-artist-designs-fashion*, accessed on 28.02.2023.

[96] Executive Creative Director at J. Walter Thompson Amsterdam agency.

in terms of copyright issues. From a simple tool that helped the artist, we reached original works created without human involvement. The computers have thus become creators of art, with little or no human input.

The human creative process can be imitated by means of artificial neural networks[97] that are most often implemented as computer programs running on virtual machines, thus, the question of the possibility of their copyright protection can be raised (and on the grounds that artificial intelligence can choose, can make rational decisions following data analysis).

In an attempt to define Artificial Intelligence (AI) we can say that *„it is a discipline of computer science that aims to develop machines and systems that can perform tasks considered to require human intelligence, with limited or no human intervention"*[98]. AI has been defined by the European Commission as *„systems that exhibit intelligent behaviors by analysing their environment and take action - with some degree of autonomy - to achieve specific goals"*[99]. AI can also be defined as *„computer-based systems that are developed to mimic human behavior".*

Machine learning and deep learning are two subsets of AI. In recent years, with the development of new techniques and hardware for neural networks, AI is usually perceived as a synonym for *deep supervised machine learning.*

AI systems are complex and are represented by: GAN - Generative Adversarial Networks - two neural networks that work together to generate new content, CAN - Creative Adversarial Networks that analyse the machine's creativity in -an art generation system, without involving a human artist in the creative process, but still assuming human creative products in the learning process, VAE - Variational Autoencoders - similar to GAN, but focusing on creating content that resembles a training dataset, style transfer (which involves using an algorithm to apply the style of one image to another image, creating a new image that combines the content of one image with the style of another).

The complexity of the issue of how copyright law applies to works generated by artificial intelligence is very topical. Copyright law recognizes the human authorship behind creative works, and it is unclear how this concept will be applied to machine-generated works, because the author and his work have always been correlative.

One proposed approach is to assign copyright to the person or organization that created the artificial intelligence software that generated the work. „The computer was just a tool [...]. It is as unrealistic as suggesting that if you write your work with a pen, it is the pen that is the author of the work, rather than the person wielding the pen."[100]

Another option would be to qualify these works as common, however, in this case it must also be determined how the man and the machine contributed to the creation of the work (by concluding license contracts with clear terms that allow the use of these works).

Others argue that AI should be considered the author.

Another approach takes these works into the public domain, free of copyright, precisely taking into account the condition of human paternity[101], on the grounds that the algorithm does not have the intention to produce art as the human-artist is, and the machine is creative because of the human. Thus, they could be incorporated into creations made by artists, which would imbue them with their personal expression. It is also shown that, regardless of the lack of any connection between the thinking of the artist/programmer and the artistic production of the machine, the claim to authorship of the work of the former is not destroyed. The designer of the content-generating machine will meet the design condition required by copyright[102].

A study by the Publications Office of the European Union[103] states that „authorship shall be given to the person or persons who contributed creatively to the result". This will probably be the user of the system, not

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[97] They are a branch of the science of artificial intelligence that characterizes ensembles of simple, highly interconnected and parallel processing elements that aim to interact with their environment in a manner similar to biological brains and exhibit the ability to learn. See P.G. Buta, *Protecția rețelelor neurale prin drepturi de proprietate intelectuală*, in RRDPI no. 4/2019, p. 87.

[98] WIPO, *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence*, 21.05.2020, 3, *https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=499504*, accessed on 20.02.2023.

[99] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2018/237 final, 25.04.2018 („Artificial Intelligence for Europe").

[100] *Express Newspapers plc v Liverpool Daily Post & Echo plc* [1985] 1 WLR 1089, 1093, apud J. McCutcheon, *The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law,* Melbourne University Law Review 36(3)/2013, *http://classic.austlii.edu.au/au/journals/MelbULawRw/2013/4.html#fn160*, accessed on 20.02.2023.

[101] L. Paquette, *Artificial life imitating art imitating life: Copyright ownership in AI-generated works,* in Intellectual Property Journal, vol. 33, issue 2, Toronto, 2021, p. 212.

[102] J.C. Ginsburg, *Overview of Copyright Law*, in Oxford Handbook of Intellectual Property Law, Rochelle, Dreyfuss & Justice Pila, eds, Oxford University Press, 2018, p. 414, *https://scholarship.law.columbia.edu/faculty_scholarship/1990*, accessed on 20.02.2023.

[103] European Commission, Directorate-General for Communications Networks, Content and Technology, C. Hartmann, J. Allan, P. Bernt Hugenholtz *et al.*, *Trends and developments in artificial intelligence: challenges to the intellectual property rights framework: final report*, Publications Office, 2020, *https://data.europa.eu/doi/10.2759/683128*, accessed on 10 February 2023.

necessarily the creator of this system.

A number of authors advocate the introduction of special related rights to protect the results generated by authorless artificial intelligence against misappropriation[104]. Even in the EU documents it is stated that *„the lack of protection of creations generated by AI could leave the performers of such creations without rights, as the protection of the related rights system implies the existence of a copyright on the performed work"*[105]. Thus, it is proposed that the copyright be granted to the natural person who legally edits and publishes the work, to the extent that the author of the underlying technologies does not object.

It is very important to qualify these works, both for authors and for users who would like, for example, to integrate them into their own creations, without the risk of infringing copyright. Another issue is related to the data inputted for AI creation, data that could be copyrighted works ("machine learning" would infringe copyright in this case).

One can also note the concerns at the level of the European Union related to the importance of AI, but also to the problem that arises when intellectual property meets AI[106]. They insist on the need for the EU to provide an operational legal framework for the development of a European AI. Another important aspect is the need to evaluate all intellectual property rights in relation to the evolution of AI in the artistic or technical field, which must be a priority for this area of EU legislation, which serves the purpose of promoting an environment conducive to creativity and innovation by rewarding creators. In the European Parliament's Proposal for a Resolution of October 20, 2020, on intellectual property rights for the development of artificial intelligence technologies, 2020/2015 it is even stated that, *"it seems that we are moving towards the recognition that an AI-generated creation would could constitute a work of art if we consider the creative result rather than the creative process".*

In the **United Kingdom**, art. 9(3) of the 1998 Law on copyright, designs and models and patents provides: *In the case of a literary, dramatic, musical or artistic work generated on a computer, the author is considered to be the person who makes the necessary arrangements for the creation of the work.*

The producer of the work is considered its author, and the work benefits from a shorter period of legal protection - 50 years, compared to the usual lifetime of an author plus 70 years[107]. Art. 178 defines a *computer-generated work* as a work that is generated by a computer in circumstances where there is no human author of the work.

Similar rules are found in a few states, including Ireland or New Zealand.

In **Ireland**, art. 21(f) of the Copyright and Related Rights Act, 2000, states that the author, in the case of computer-generated works, is the person who took the necessary steps to create the work.

In **New Zealand**, art. 5(2)(a) of the Copyright Act, 1994, in the case of a literary, dramatic, musical or artistic work that is generated on a computer, the person who took the necessary steps to create the work is the author.

In **the US**, AI-generated works automatically enter the public domain once they are disclosed and cannot benefit from copyright protection.

In **Romania**, there is no legal framework for protecting creations made through AI. As I have shown above, art. 7 of Law no. 8/1996, stipulates: *the original works of intellectual creation in the literary, artistic or scientific field, regardless of the mode of creation, mode or form of expression and independent of their value and destination, constitute the object of copyright*. And creativity is, at least for the time being, related to the human being.[108] There are specialists who still offer solutions for the qualification of these works, within the legal texts

[104] P. Bernt Hugenholtz, J. Pedro Quintais, *Copyright (…), op. cit.*, p. 1191.

[105] Proposal for a European Parliament Resolution on intellectual property rights for the development of technologies in the field of artificial intelligence, 2020/2015 (INI), 02.10.2020.

[106] See: Proposal for a European Parliament Resolution on intellectual property rights for the development of technologies in the field of artificial intelligence, 2020/2015 (INI), 02.10.2020; **„**Report on intellectual property rights for the development of artificial intelligence technologies", 02.10.2020 (2020/2015(INI)), *https://www.europarl.europa.eu*, accessed on 10.02.2023.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions „Making the most of the EU's innovative potential. An intellectual property action plan to support the EU's recovery and resilience." COM/2020/760 final, *https://eur-lex.europa.eu/legal-content/*, accessed on 10.02.2023.

Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts COM/2021/206 final (hereafter AI Act proposal), Brussels, 21.04.2021, COM/2021/206 final, accessed on 10.02.2023.

European Commission, Directorate-General for Communications Networks, Content and Technology, C. Hartmann, J. Allan, P. Bernt Hugenholtz *et al.*, *Trends and developments in artificial intelligence: challenges to the intellectual property rights framework: final report*, Publications Office, 2020, *https://data.europa.eu/doi/10.2759/683128*, accessed on 10.02.2023.

[107] R. Abott, Chapter 1 „Intellectual property and artificial intelligence: an introduction", in Ryan Abbott edt., *Research handbook on intellectual property and artificial intelligence*, Edward Elgar Publishing, 2022, p. 14.

[108] E.G. Olteanu, *Inteligența artificială, „Ultima frontieră" pentru dreptul de autor*, in Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România, coord. V. Roș and C.R. Romițan, Hamangiu Publishing House, Bucharest, 2022, p. 126.

of the Romanian normative space, in the form of either collective works or common indivisible works[109].

4. AI in artistic creations

In the 1950s, Benjamin Francis Laposky, mathematician and artist, created the first computer graphics, using an oscilloscope as a creative medium for abstract art. „Electronic Abstractions" from 1953 was launched through a 50-image gallery exhibition at the Sanford Museum in Cherokee. In the 1960s, the first AI work was created by computer scientists at Bell Labs. In 1965, an image of randomly placed parallel black horizontal and vertical bars within a circle was created with the help of a computer to imitate a painting by Piet Mondrian.[110] Conceived in 2009, the e-David robot that used canvases and real colors was developed in Germany at the University of Konstanz. It calculated brushstrokes from an input image and then painted the image on a canvas[111].

However, the level of realism and creativity has improved significantly with the advent of deep learning techniques and neural networks. Thus, AI-generated art has become much more sophisticated.

AI algorithms can create abstract art as well as photorealistic paintings by analysing existing images and recognizing patterns, colors and shapes.

British artist Harold Cohen created a time-honed program - AARON - that was capable of producing art[112]. His works, located between artificial intelligence and art, have been exhibited in museums. Although the AARON program did not intend to create a work of art, it had the ability to create such a work in a personal way[113]. Harold Cohen stated during a conference that he refers to AARON as an apprentice, an assistant, rather than a fully autonomous artist. *„He's a remarkably capable and talented assistant, to be sure, but if he can't decide for himself what he wants to print, he can't achieve full autonomy."*

Rembrandt's painting *„The Night Watch"* - was originally made to an impressive size (3.63 meters by 4.37 meters, before restoration, the painting was about 4 meters high and 4.5 meters wide and weighed 337 kilograms) and was completed in three years, being commissioned by the civil guard in Amsterdam for a banquet hall at its headquarters, Kloveniersdoelen. Later, however, the edges were cut to be placed on the walls of the city hall in Amsterdam[114]. This was reconstructed with the help of AI. A team of restorers, researchers, scientists and photographers used a neural network to simulate the artist's palette and strokes, inspired by a reproduction of the original created by a painter in the 17th century.[115] Scans, X-rays and 12,500 high-resolution photographs were taken.

„The Next Rembrandt" project, created with the help of AI (deep learning algorithms and facial recognition techniques), is a 3D printed painting made exclusively from data obtained from Rembrandt's works - more than 300 paintings in the public domain. The authors of the work were many[116], from the company that created the algorithm, to the artists that were part of the team, to the computer that "created" the artwork. This work may be considered a reproduction, but could equally well qualify as a compilation or contribution to a collective work.

In this case, the question of creativity and originality arises. Is it original work, yet is it copyrightable? Can creativity be attributed to the computer as understood in copyright law? The work is not created by man, but it is created with the help of man. It is shown that an analogy can be made with the situation where a director gives directions to the cameraman. Depending on the human contribution, how significant it is compared to the work the computer is doing, copyright issues may arise. The difficulty in qualifying this work is also given by the fact that *The Next Rembrandt* is not a copy of a particular work to be called a reproduction, it is an ensemble made

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[109] *Ibidem*.

[110] A. Michael Noll, *Early Digital Computer Art at Bell Telephone Laboratories, Incorporated*, Leonardo, vol. 49 no. 1, Project MUSE, (The MIT Press, 2016), *60 muse.jhu.edu/article/608590*, accessed on 20 February 2023.

[111] A. Guadamuz, *Do Androids Dream of Electric Copyright? Comparative analysis of originality in artificial intelligence generated works* (June 5, 2020), in Intellectual Property Quarterly no 2 (Sweet & Maxwell, 2017), 1-24, *https://ssrn.com/abstract=2981304*, accessed on 20.02.2023.

[112] Originally used to create these works, the C language was considered by Cohen to be „too inflexible, too inexpressive, to deal with something as conceptually complex as color". See H. Cohen, *„A Sorcerer's Apprentice Talk" at the Tate Modern,* 20, *http://aaronshome.com/aaron/publications/index.html,* accessed on 15.02.2022.

[113] V. Constantinescu, *Potențiali subiecți ai drepturilor de autor asupra operelor de artă*, in RRDPI no. 3/2020, p. 30.

[114] The tumultuous history of this painting does not stop there. *The Night Watch* has been attacked three times: in 1911, a cook cut the canvas with a knife, and in 1975, a school principal, who wanted to destroy the painting because he thought it was God's will, and in 1990 a visitor threw sulfuric acid on the painting.

[115] C. Cojocaru, *Arta și inteligența artificială: cum una o ajută pe cealaltă*, 24.06.2021, *https://playtech.ro/2021/arta-si-inteligenta-artificiala-cum-una-o-ajuta-pe-cealalta/*, accessed on 19.02.2023.

[116] ING, J. Walter Thompson Agency of Amsterdam, Microsoft, TU Delft, Mauritshuis and Rembrandthuis, brought together a team of data scientists, engineers and art historians to analyse Rembrandt's painting techniques, style and subject matter and transfer that knowledge into software that could generate the new work using the latest 3D printing technology. In S. Schlackman, *Who holds the Copyright in AI Created Art?*, in Art Journal Antrepreneur, 29.09.2020, *https://artrepreneur.com/journal/the-next-rembrandt-who-holds-the-copyright-in-computer-generated-art/*, accessed on 08.09.2022.

up of male human typologies that Rembrandt painted in a certain period of time, thus, becoming unique and original.

Another example is the portrait-painting *„Edmond de Belamy"*, published in 2018 by Obvious Art, Paris (composed of 3 people, none of them artists[117]), signed with part of the code of the algorithm that created it[118]. An algorithm was used to create the painting that used 15,000 portraits from different periods, with the help of GAN - generative adversarial network[119]. In a recent article[120], an obvious problem is brought up. As the work was on the second resale through the auction house, it generated, according to the law, a resale right. Who is entitled to collect this quota? The 3 initiators, who declared that they did not make the painting, or the machine?

Artist Refik Anadol[121], also used artificial intelligence to interpret and transform over 200 years of art history, creating *„Unsupervised".* He has created digital artworks that change in real time, continuously generating new and otherworldly forms. The large-scale installation is powered by a sophisticated machine learning model to interpret publicly available data from the collection hosted by New York's Museum of Modern Art (MoMA)[122]. The ensemble consists of works encoded on the blockchain (over 138,000 images of individual works from MoMA's archives—including paintings, performance art, video games, and sculptures—in a machine learning model[123]).

Another „artist" who did not attend any art school, Mario Klingemann[124], is considered a true pioneer in the use of computer learning in the arts. As part of the exhibition „The Garden of Earthly Delights", his work „The Garden of Ephemeral Details" gives us a contemporary perspective on Bosch's masterpiece[125]. It comprises 143 unique frames and uses a suite of algorithms, whereby it reinterprets the original as it is viewed. His works are developed using Generative Adversarial Networks (GAN) and presented as screen art or interactive installations.

„AICAN" is an algorithm („creative adversarial network") powered by 80,000 images from the last five centuries created by Rutgers University that uses deep learning to generate images in a variety of styles. The creators of the program state that it could be considered an almost autonomous artist that learned existing styles and aesthetics and can generate innovative images of its own. AICAN's pieces have been exhibited all over the world, and the work „St. George Killing the Dragon" was sold for $16,000 at an auction in New York in November 2017.[126] The algorithm is created by the scientist, but there is, according to him, no kind of control over what the machine will generate.

Helena Sarin, an American artist uses adversarial generative applications and reassembles them in intriguing ways, precisely because of the unpredictability of these algorithms. She is the founder of Neural Bricolage Studio, which promotes AI-assisted artwork. Since 2021, the artist has been making ceramic objects - #potteryGAN, using GAN/AI to design functional 3D objects[127].

The British researcher Simon Colton has created an exhibition of architectural projects imagined by AI. Two deep learning systems, neural models, one for generation and one for guidance (generative adversarial network) were used. Images can be a source of inspiration for architects.

Cristina Lazăr, graduate of UNArte, Romania, in the diploma project *„Smile Project - Deep Immersive Art with Realtime Human - AI Interaction"*, proposes the use of convolutional neural networks (CNN[128]) through the ability to detect movement and formulate responses through light and color, real time. The ensemble includes five works located in a semicircle, with fiber optic paths connected to a WIFI modem, each of which has connected colored LED sources. The centrally positioned painting contains a phone camera in the middle that captures the viewer's movements and expression. According to this input, the algorithm is able to create real-

[117] H. Caselles, G. Vernier, P. Fautrel. They stated that „Our brush is an algorithm developed on a computer."

[118] „min G max D x [log (D(x))] + z [log(1 -- D (G(z)))]]".

[119] It was the first artwork created with artificial intelligence to be featured in a Christie's auction, selling for $432,500.

[120] V. Roș, A. Livădariu, *Drepturile morale de autor în era inteligenței artificiale. De la inteligența naturală creatoare la inteligența artificială creatoare*, in *Provocările dreptului de autor la 160 de ani de la prima lor reglementare legală în România*, coord. V. Roș, C.R. Romițan, Hamangiu Publishing House, Bucharest, 2022, p. 65.

[121] He gave birth to the concept of „AI Data Painting and Sculpture".

[122] *https://www.moma.org/calendar/exhibitions/5535*, accessed on 19.02.2023.

[123] „Inteligența artificială, folosită pentru a interpreta 200 de ani de istorie a artei", available online at https://www.euronews.ro/articole/inteligenta-artificiala-folosita-pentru-a-interpreta-200-de-ani-de-istorie-a-arte, accessed on 19.02.2023.

[124] He stated in an interview that „Drawing or painting has never been my strong point because I've never been able to have the same control over my hand muscles as I do when writing code. So instead of fighting with my body to produce an image I had in my mind, I preferred to learn how to train machines to do so." In M. Dean, *Artist Mario Klingemann on Artificial Intelligence*, Technology and our Future, 25.02.2019, *https://www.sothebys.com/en/articles/artist-mario-klingemann-on-artificial-intelligence-art-tech-and-our-future*, accessed on 19.02.2023.

[125] Dutch painter who made fantastic works, for example, macabre representations of hell.

[126] „Meet AICAN, a machine that operates as an autonomous artist", 2018, https://theconversation.com/meet-aican-a-machine-that-operates-as-an-autonomous-artist-104381, accessed on 20.02.2023.

[127] „Neural Bricolage", *https://www.neuralbricolage.com/more-about*, accessed on 19.02.2023.

[128] *https://www.techtarget.com/searchenterpriseai/definition/convolutional-neural-network*, accessed on 19.02.2023.

time responses by lighting the LEDs in a rhythm similar to the movements performed by the one in front of the camera. Within this project, not only the use of new technology for artistic purposes is discussed, but also a collaboration between artificial intelligence and human creativity, the relationship between the two being this time one of coordination, not of subordination[129].

In the US, in 2018, Stephen Thaler[130] filed an application to register a copyright claim, the author of which was identified as „Creativity Machine. "A Recent Entrance to Paradise" was allegedly created autonomously by an algorithm running on a machine. The request was rejected, on the grounds that there is no human paternity. Thaler petitioned the Office to reconsider its initial refusal to register the work, arguing that „the human authorship requirement is unconstitutional and unsupported by either statute or case law". The response stated that Thaler had failed to prove sufficient contribution or intervention by a human author.

According to the US Copyright Office Compendium of Practice, the work must be created by a human being. The US Copyright Office will not register works produced by nature, animals or plants. Similarly, the Office will not register works produced by a machine or a mere mechanical process operating randomly or automatically, without any input or creative intervention on the part of a human author.

The Berne Convention does not define the *author* of a work, but leaves it up to the contracting parties to establish some criteria, yet we can unequivocally support, if we look at the period in which it was adopted, that no other variant than the human creator could be conceived. The CJEU in the *Painer* or *Cofemel* cases maintain this condition[131].

The work must be the author's own creation, as we also deduce from the *Funke Medien case*: *„the qualification as a work, within the meaning of Directive 2001/29, is limited to the elements that are the expression of such an intellectual creation".*[132] Directive 2009/24/EC on the legal protection of computer programs enshrines in art. 2 the general principle that the author is the natural person who created a work. However, the Member States are allowed to designate a legal person as the author of a computer program.

With all these developments and extraordinary results, for now the human factor is determined in the granting of copyright protection, regardless of the system we analyse. Essential is thus the symbiotic relationship between originality and paternity.[133]

5. Conclusions

The particular impact of AI in the creation of art is significant. Even if it is often seen as a threat to artists, to traditional art forms, AI can be interpreted as a new form of creativity. Complex and sophisticated works created by AI are selling for very high prices on the art market today. Machines generate works of art, independently or in conjunction with human artists, and their potential to create art that inspires and moves people remains a source of excitement and fascination. AI can be another possibility for artists that allows them to experiment with different styles and techniques and explore new artistic directions.

The human creator can produce a work even in years, unlike a machine that needs maybe a day. Thus, the commercial advantages are obvious. The financial aspects are one of the reasons why humans want to claim intellectual property of AI-created works.

Copyright and AI-made works will increasingly intersect as AI systems develop and become more creative. In the case of complex works, we will certainly find human intervention in several phases of the creation of the work with the help of AI, yet there may be simple works that require only minimal participation of the one who programs the machine. It is thus very important to identify the person behind the artificial intelligence, it all boils

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[129] T. Vindt, *Pictura inteligentă, https://revistaarta.ro/ro/pictura-inteligenta/*, accessed on 19.02.2023.

[130] „Re: Second Request for Reconsideration for Refusal to Register a Recent Entrance to Paradise", *https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf*, accessed on 20.02.2023.

Another application sought to recognize the authorship of a 6-year-old monkey, Naruto, who allegedly took a selfie with a camera belonging to a photographer. PETA tried to use this situation to set a legal precedent that animals should be copyright holders. Yet the court ruled that a monkey cannot hold copyright under the US law. But in relation to the copyright of the owner of the camera, the one who prepared the camera for photography, it was argued that this can be a justifiable claim if he „checked the angle of photography, configured the equipment to produce an image with specific effects of light and shadow, set the exposure or use filters or other special settings, the light and that everything that is needed is in the photo, and all the monkey contributed was to press the button.", *https://www.theregister.com/2015/09/24/peta_sues_photographer_macaque_selfie/*, accessed on 15.02.2023.

[131] CJEU, *Painer Case* C-145/10, *Cofemel Case*, C-683/17.

In France, intellectual property specialists have stated that the work can only be a creation of the author who is imperatively a human being, in A. Bertrand, *Le Droit d'auteur et les droits voisins*, 2e éd., Dalloz, 1999, p. 464.

Here too it was shown that „the emanation of a work of the mind necessarily takes its source from living components", in F.-M. Piriou, *Légitimité de l'auteur à la propriété intellectuelle*, Diogène, vol. 196, no. 4, PUF, 2001, p. 119-143, *https://doi.org/10.3917/dio.196.0119*, accessed on 27.02.2023.

[132] CJEU, *Funke Medien Case,* C-469/17, para. 20.

[133] L. Paquette, *Artificial (…), op. cit.*, p. 199

down to a question of responsibility. Who will be involved in a copyright infringement case? [134] Equally essential is the development of a legal framework to resolve this issue.

With all the positives[135], there are also challenges. Can AI replace human creativity? Can it evoke the same feelings and emotions as human-made art? For example, *„Stop AI stealing the show"*, a campaign by Equity[136] (a UK-based trade union of over 47,000 artists) claims that AI threatens artists and hurts their incomes, arguing that UK intellectual property law has failed to keep up step with AI. AI-generated works are only an imitation of human creativity, their originality coming from the intellectual efforts of human subjects[137].

Finally, I believe that the very foundation of copyright is the granting of authorship to man, and this foundation should not be lost. The link between the human author and the work cannot be destroyed by the evolution of science, globalization or economic development.

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