ORIGINALITY - CONDITION FOR PROTECTION OF SCIENTIFIC WORKS

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Abstract

The Doctrine defines originality as a combination of fancy, audacity, individuality and novelty. This ensemble of ideas meant to define originality appeals to the patents/ certificates Law for which novelty/ innovation is not enough. It shall be accompanied by inventive activity.

The aim of the paper below is to clarify the question of the scientific works originality, by referring to the two appearantly contradictory norms and to their consequences over counterfeit/ imitation.

Keywords: *protection conditions, scientific work, originality, counterfeit, standard vocabulary*

1. Introduction

Originality is the essential and - according to some authors - the unique solution meant to protect the works (scientific works included) by copyright. Before being enforced by law, the originality of the works was consecrated by jurisprudence and doctrine. Yet - whatever originality means, whatever its mesurement unit is and whatever its limits are - they, all together, stand for matters which will probably never meet a unanimous opinion.

According to Petre Ţuţea, "***it is God alone who is really true and original***." According to "**The Ecclesiast**", "***then***, ***when there might have appeared something about which one could say***, **<<** ***look***, ***here is finally something new!*****>>**, ***that thing might have appeared and existed long before our centuries***" and, according to Terentius[1] Afer - the ancient poet and playwright - who deeply rooted his inspiration in his forerunners' works, and whose own works were - in their turn - a source of inspiration for the famous French playwrights, among whom Molière, "***nothing was ever said that had not been said before***." According to those authors, there is no originality or, this originality is not accessible to mortals.

Other authors - quite many in number - are confident with the original aspect of the works yet they also say that originality is aleatory and is to be found exclusively at the level of the wording.

Who is right and who is wrong?

The first category shall be rendered justice, unconditionally because the Bible can be neither denied nor contradicted! But who else, except Petre Ţuţea, defends the rightfulness of the Ecclesiast?

The other category is right because, according to the copyright Law, ideas are excluded from protection, and a non-original work is not simply called a work and is not

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[1] Who had even taken the name of his master - Terentius Lucanus - the one who had been training him - as being deeply impressed by his intelligence - and he who, ultimately, freed him from slavery.

suitable (if admitting that one's own creation can or shall be suitable) and protectable. In the standard vocabulary, the word "work" means an original work of art, a scientific work[2], etc. In the mind/mentality of the people the idea that there cannot be called a work without being the result of an original creative activity is deeply rooted and it appeared very long ago. In other words, a lacking originality work, is not considered to be a work at all. However, the copyright Law protects and supports both the writers and their works, but in no way those works lacking a minimal personal creative participation, neither those who cannot be original at all.

The last category is right because, according to the Law on good conduct applied to scintific research, technological development and innovation, ideas are protected. Yet, starting from this solution offered by the Law, certain authors extend the area from "objects"[3] to ideas.

The Law on copyright and on other related rights excludes ideas from protection, so that the two laws and their possible interpretations generate conflicts of ideas and among ideas: are ideas protected or not? How can ideas be protected by one Law and excluded from protection by another law? How can this conflict be settled?

The above mentioned opinions are, as one can easily notice, hard to be settled.

Ever since writers and art-consumers have appeared, the creators have been required to be original in order that both themselves and their works be protected. The lack of originality can find an explanation in the common, banal phrasing resulted from the creator's incapacity to be original (a benign form of lack of originality) or, from plagiarism/ literary theft, which is practically a malign, culapable form expressing lack of originality.

If speaking about scientific works, the ethics concerned with scientific research imposes the research-authors a loyal and correct behaviour with regard to their fellow writers whom they are supposed to recognize the paternity of their works and/ or the priority of their ideas, theories, data, hypotheses, scientific methods - briefly, the paternity of what Law no 8/1996 on copyrights and of the related rights excludes from protection. Whether, from the point of view of Law no. 8/1996, a counterfeit can be applied only to phrasing, to formal elements of creation bearing the mark of the creator's originality, from the point of Law no. 26/2004 on the good conduct in the scientific research, couterfeit, in the form of literary theft, can be applied not only to phrasing but also to ideas extracted from the works belonging to other authors whose names and works have not been mentioned.

2. On the originality of intellectual creations in general

In a very extensive sense, to be original means to be always yourself, irrespective of circumstances. In the domain under discussion - that is in a restricted meaning - to be original means to imitate no one, to copy no one then when you create and invoke the protection of your authorship by copyright! This means to have personality, style, individuality, personal way of speaking, of writing and of clothing the ideas into proper and adequate words. It means not to be common and trivial. The question is whether we can all be original or not. Can we be original in everything?

Each of us has his/her bit of originality arising for the uniqueness of his/her nature. This is, in fact, called personality, which is more or less shaped, more or less visible or identifiable! We resemble, to a certain extent, with one another, yet we are, in a way, different from one another - a perfect identification with one another is excluded. On the other hand we

[2] See DEX according to which work/ creation = original literary or artistic production.

[3] Intellectual creations are - as well-known - immaterial. That is why to speak about the intellectual creation as about an "object" seems somehow vulgar or inadequate as reported to the immaterial nature of the intellecual creation.

have a common and very large vocabulary (fund of words), knowledge, needs, pleasures but we also have rules that standardize our behaviour and reactions.

When stepping over the patterns we can be driven to isolation (either voluntary or forced!). Originality for originality sake or excessive originality is synonymous with bizarrerie, with extravagance or weirdness and they can make us fall into the ridicule. If - willingly or unwillingly - we try to conform ourselves to patters, we can also be turned into beings lacking - as we like to say - style or personality. The lack of any trace of originality is synonymous with no personality, with the commonplace. There shall be a golden mean in everything, in absolutely everything! A way of expressing oneself should characterize anybody, a way in which every person's personality should fully manifest itself without jeopardizing the others.

Still, what is the meaning of intellectual creation and what does it mean to create a work? From a lay point of view "***to create***" means to do something that did not exist before; the word "***creation***" defines the act (of creation) and its result, that is the result of creative activity in its various ways of expression (literary, artistical scientific works, inventions, drawings, models, etc.); the meaning is somehow closer to the Biblical term as, by "creation" it is understood the act God created the world alongside with space and time **out of nothing/*creatio ex nihilo*.**

For man, creativity manifested itself according to various stages of evolution, since ever: for the man who was to assure his living as a hunter or a reaper - in an economy based on agriculture, in the industrial revolution (which he practically unleashed), in the era of the intellectual property of our times - which is even more revolutionary than the preceding one - if we take into account the speed with changes are taking place.[4]

Real creators - in the sense given by the Law of intellectual property - are very few because men - equal before the law - are no more equal from birth/by nature: some are strong, some a feeble, some are endowed with an intelligence that was refused by mother nature to others, some are suspicious, some other indifferent or mere meditative, some are rulers and some submit to their rulers, some are inventive, some others indulge in reproducing the others' inventions, some are endowed with an imagination they use to write literature, music or to invent things, others are happy with only looking, listening, reading or making use of what the others have done and invented, some have the calling for a creative activity, others for the pleasure of consuming, etc. Yet, none of them can live alone separated from the others, because the creative activity makes sense and value only in the presence of consumers.

In their turn, the consumers feel the many benefits of the creative activity! Life might also go on in a world without creators/ makers of creative activities. We can certainly imagine a world with no weapons and wars but, just try to imagine a world with no writings, wheels, computers, telephones, cars and planes, with no radios and TVs and with no medicine. Just try to imagine that you should live in such a world!

The works - that are the product of man's spiritual activity - are the result of a conscious effort which is considered to be a common denominator concerned with any act of creation. The conscious act of creation is specific to any man endowed with the sense of proportions, with harmonious sounds pleasing the ear, to any man who is responsive to beauty, to a man who has the ability to investigate and invent, to deal with theoretical concepts, to understand the phenomena around, to a man whose capacity and strength can make nature serve him, briefly, to a man endowed with intelligence.

One of the meanings generally met with in the ordinary vocabulary and used to characterize ideas, theories or works is the word *original* that means - according to the DEX

[4]25-30 years ago it was believed that the amount of medical knowledge doubled every 10 years, while today, a period of 5 years seems to be too long. There are authors who say that the amounts double even sooner than 2-3 years. For more see Horia Cristian, on http.//horia-cristian.blogspot.ro.

(Explanatory Dictionary of the Romanian Language) - "*something that is particular and characteristic to a person or to an author; something that can be imitated by no one; something that is personal, new, and original*;" yet, when the same word is used to characterize an artist, a writer or a man of science it means "*the one who creates something new and personal without appealing to someone else's pattern*." But, to be original, does also mean "*that which is egregious, remarkable, weird, eccentric, extravagant*."[5]

In as far as the copyright is concerned, to be original in a work means to lay down one's own personality, to transpose one's own imagination into letters, to design the ego in the manner one chooses to express his/ her own ideas - and, all these for the final conclusion: to simply enjoy the Law of copyright for the sake of creation proper even if the work has not been made known to public. Consequently, originality can be regarded as an extension of each and every creator's uniqueness and personality, because whatever the copyright protects is the very personality of the creator manifested in his/ her work by means of his/ her own originality. Two writers describing the same place, two poets writing verses on the same theme, two sculptors carving the same bird will produce different original works, for it is the expression itself that marks their personal style and ego transposed in the work.

Originality shall be mirrored according to every man's uniqueness - an art creator in fact - and a definition of originality liable to exceed any explanation given in a dictionary or any legal significance of a norm will be - in my opinion - doomed to failure if pretending to be exhaustive and have a generally available character. That is why originality shall be regarded by reporting it to whatever we - people - are: a sum of infinite and different experiences and feelings.

The copyright protects creation in conformity with its originality which, depending on the law system, is considered to be objective or subjective. **From an objective point of view**, a work is considered to be original if, when compared with other previous works, the results prove that it is not copied (but that it brings in a certain novelty) and that it demonstrates a minimum intellectual effort. The objective criterion in appreciating originality is specific to the American, Anglo-Saxon and German copyright systems. **From a subjective point of view,** a work is considered to be original then when it bears the mark of its author's personality; this manner of interpreting originality is particularly specific to the Continental Law - French and Belgian - which has the longest tradition when considering originality in such a way.

The Romanian Jurisprudence and Doctrine have consented to define originality from a subjective point of view even before the Law no, 8/1996 on copyright and other related rights was approved.

The legislator himself approved the efficiency of the jurisprudence and doctrinarian solutions with respect to originality, attaching a special importance to the author's moral rights and emphasizing on the relationship between the author and his work: art 10, letter d) of Law no. 8/ 1996 protects the author's personality expressed in his own creation, and acknowledges him the moral right in respecting the integrity of his work, a right in whose basis **the creator/author has the right to object against any modification/alteration/change or to cause any damage to it as to be detrimental to his honor or reputation.** The Law defends this sound connection between creator and his work - a conclusive proof concerning the respect granted to integrity, for the fact that the work will outlive the author and that it will be transmitted to his legal successors - for an unlimited period of time - in agreement with the civil legislation (art. 11).

Originality shall not be discussed only by reporting it to the personality of the creator but it has to be appreciated from the point of view of the type of work (literary, scientific,

[5] *Explanatory Dictionary of the Romanian Language*, (Bucharest: Universul enciclopedic Printing House, 1998), 728;

dramatic, cinematographic, etc.) which lends originality its own characteristics. Written works shall be analyzed within the triptych idea-composition-external form - for these are the steps of any process of creation -, while with the fine arts works the idea is replaced by image (as the artist renders his ideas into images)[6] and with the musical works the idea takes the form of sounds.

Although, originality is an extension of the creator's personality into his own creation - a fact that leads to the conclusion that originality is the creator's monopoly - there are situations in which the author's own creation limits his capacity of being original. Such is the case of the scientific works when, "compelled" by the standardized vocabulary, the author can be less original when presenting the results of his research activity.

Under these circumstances, originality is not only a condition meant to protect the author's copyright but, at the same time, a situation permitting counterfeit. A work lacking originality will never be accused of being counterfeited. The border between counterfeit and lack of originality is liable to arise confusions; so, when the scales incline in one sense or another, it is necessary to take into account the fact that the scientific works are characterized by a standardized vocabulary, by a quite rigid way of expressing ideas and, the more technical the idea is the more reduced the granted juridical protection is.

3. Originality - a unique condition for protecting works by copyright

The Bern Convention on the Protection of Literary and Artistic Works, whose dispositions are applied in the countries of the European Union - as a recommendation but impossible to be directly imposed in the internal law - does not deliberately stipulate originality as a protecting condition by copyright. It should not be astonishing, because as it was stipulated in the French doctrine, the settlement of the protective conditions of works by copyright differ from one legislation to another: some mention originality without any further definition, some others do not mention it but, like in France, it is **implicit and indisputable**.[7]

Thus, the Convention makes reference to originality in order to establish the fact that the *derivated works are protected as being considered original works* (art. 2(2), or that *the cinematographic work is protected the same as the original work* without causing damages to the copyright of whatever work that could have been adapted or reproduced (art.14 bis, paragraph 1), or to establish that in case of *the original works and manuscripts of writers and composers, their authors profit by the inalienable right of being involved in the selling activities of his work*, after the first concluded assignment (art. 14 third, paragraph 1), speaking about the original work as if the the criterion of protecting originality were implied. Yet, art 2 paragraph 2 establishes that signatory countries of the Bern Convention can decide over their own legislation so that the literary or artistic works, or one/several shall not be protected, in as far as they have not been soundly justified.

Similarly, the French Code of Intellectual Property, does not explicitely stipulate that originality should be a necessary condition for the protection of the intellectrual works by copyright. The only reference to originality is the one about the title of the works which, "*as far as they have an original character, they are protected as the works themselves*"[8].

The French doctrine explained why they did not stipulate in the Law the protection conditions of the works by copyright, the problem of originality implicitely, by the fact that notions

[6] Yolanda Eminescu, *The Copyright*, (Buharest: Lumina Lex Printing House, 1994), 43.
[7] Fréderic Pollaud-Dulian, *Le Droit d'auteur* (Paris: Economica Printing House, 2005), 99.
[8] Art. L112-4 Code de la Propriété Intelectuelle (of 1992) available at http://www.legifrance.gouv.fr/affichCode?cidTexte=LEGITEXT000006069414)

specific to copyright - as for instance "works of spirit" and "originality" appeared - in the course of time - in a clear and systematized way by help of jurisprudence and doctrine.[9]

The silence of the French legislator in 1957 - when the first codification of the copyright took place in France - is justified by the fact that the Law of Intellectual Property intended to codify only certain framework-notions, and not to reinstate and transpose in a juridical norm, the principles settled by jurisprudence and doctrine.[10]

Neither the Romanian Law on Press of 1862 nor Law no 126 of June 28, 1923, on the literary and artistic property do not enumerate or explain the conditions for the protection of the works by copyright. Nevertheless, in the old doctrine, the question "*Is it legitimate the protection granted by the legislator to the literary and artisctic works*?" the following answer was given: "*Undeniably yes, because the author has to have the propriety over his work, **a work that bears the seal of his personality** because this right of property is based on the intellectual creation **whose origin is his inetelligence, talent and inspiration** because a literary and artistic work is, ultimately, **the product of the personal efforts of the author, without which the work would not have existed.*** So, what other manner is it to experss "the seal of peresonality**", "inteligence", "talent", "inspiration" or "personal efforts"!**[11]

Decree no. 321/18.06.1956 on copyright, follows the tradition of the previous norms, stipulating nothing with regard to originality that should be a condition for protecting works by copyright, but settled, in art 2, that "*the copyright comes into being the moment the work takes the form of a manuscript, sketch/ short story, theme, painting or any other concrete form*." Even so, the specialized doctrine enumerated three conditions for the protection of the copyright: to be the result of the author's creative activity, to appear into a concrete form, to be perceived by human senses and to be liable to be shared with the public; it was recognized that although the norm makes no reference to originality, the condition resides from the fact that "*the creative activity is a process in which a work is conceived and in which talent, fancy and the author's knowledge play a main role*"[12] and that "*the essential element of the intellectual creation is the very originality of the work itself*".[13]

Although Law no. 8/ 1996 establishes originality to be an express condition for the author's right to be protected by copyright (art. 7: *only the **original** works can make the object of copyright*), many authors keep saying that alongside with originality - in order for a work to be protected - it has to fulfill two more conditions: to have a concrete from of expression and to be able to share it with the public.[14] Yet, is it really the concret form of expression and the sensitiveness of a work to be shared with the public enough to protect the literary, scientific and artistic works?

The question is legitimate and the answer is negative - in our opinion. The concrete form of expression and the sensitiveness of a work to be shared with the public are, in fact, "melted" in the condition of originality: one cannot speak about a "work" and about the calling of the work before it has been really finished. Whatever has not taken a concrete form, does not exist and, consequently, it cannot be protected; but, for a work to exist, it is

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[9] Frédéric Pollaud-Dulian, *quoted works.*, p. 81. In the decision *Haddad c. Monnier*, The French Court of Cassation/ Appeal issued a statement of principle that "the dispositions of this Code shall protect the copyrights of all the works of spirit, irrespective of their genre, value or destination, with the sole condition that these works must be original", *ibidem* p. *82.* This jursprudencial decsion settles that originality is the fundamental criterion meant to be protected by copyright, the sole effficeint and necessary means by which a work can be protected.

[10] *Ibidem*, 81.

[11] Constantin Gr. C. Zotta, *The Literary and Artistic Copytight,* (Bucharest: Curentul Românesc Printing House, 1939), 38.

[12] Stanciu D. Cărpenaru, *Civil Right. Rights of the Intellectual Creation.Successions* (Bucharest: Didactic and Pedagogic Printing House, 1971), 38.

[13] Ibidem.

[14] Yolanda Eminescu, *quoted works*, 41-44; Ioan Macovei, *Treaty on the Right of Intellectual Property*, (Bucharest: C.H. Beck Printing House, 2010), 43; Ciprian Raul Romiţan "Originality - A Main Condition for the Protection of the Intellectual Creations in the Literary, Artistic and Scientific Domains" in *"The Law"* no. 7 (2008), 73.

necessary that the idea should take shape outside the conscience of the author, so that to be able to be brought to the knowledge of the public.[15]

Consequently, we believe that **the condition of originality "absorbs" the other two conditions, because it stands to reason that no appreciation can be made about something that has no form of expression, that is about something that is not perceived by human senses.** It is true that there are works that shall be indispensably[16] fixed on a support (without being necessarily understood that the support is a protection condition by copyright); among these works are: audiovisual, photography, fine arts. A work that exists in the author's imagination only, cannot be protected. To be able to say that a work is original or not, the work has to have a perceivable form of expression and the sensitiveness to be shared with the publlic. This the reason why the condition of originality is sufficient to make a work benefit by the protection of the law.

4. Why are ideas excluded from the copyright protection?

The term "idea" is used in a general manner**, for various forms of logical knowledge, but its meanings are many.** Such senses are of interest for the theme under discussion: general principles, abstract rules, concepts, theses (comprehensive, basic), theories, scientific discoveries and concepts; methods (accounting, education, etc.) or algorithms (on which computer applications are made), thinking, way of interpreting, opinions, suggestions, solutions, plans, projects, etc.

Ideas belong, by definition, to the domain of knowledge/cognition and are asimilated - by the law of copyright and other related rights - to theories and discoveries. They slip from any attempt of approach, as they have the privilge of being eternally free, of permanently being on "no one's land" but of everybody's, at the same time. Their are part of a common fund, made up of whatever created and transmitted humanity in time (knowledge in the domain of science, morals, religion, etc.) a sound enough reason to exclude them - in their rough aspect - from any kind of protection. Such assertions as "the more you insist on your idea, the more you are persuades that it belongs to another", or "all our ideas belong, practically, to others" are almost accepted as laws of the creative work.

A general principle stipulated in the Copyright Law excludes the idea from protection; the copyright does not protect ideas, but the manner they are expressed.

Ideas, theories, concepts and discoveries contained by a work - no matter of the way of their being taken over, written, explained or experssed - cannot benefit by the legal protection of the copyright and are not protected by the copyright proper, when **taking into consideration the dramatic consequences such a protection might have for the evolution of science and culture.** As reported to the work, **the idea is the raw material**, the source of inspiration. There is no personal idea to be protected by the copyright, but only personal treatment of ideas, themes, subjects/ topics. It is only the power to give ideas a concrete, personal form, to spread them in an original manner, then the act of creation becomes protective. This means that - once an idea expressed by somebody - can be taken over; the one who uttered it first has no monopoly/ exclusiveness on it. Yet, a justified/ explicit idea is its very expression, and it is this expression that makes the object of the copytight.

The exclusion of ideas from protection, by copyright, is based on the fact that they are susceptible to be approached and on the fact that the recognition of a privative right of ideas would hinder any activity of creation. For André Gide "spirit does not advance but on the

[15] Viorel Roş. Octavian Spineanu-Matei, Dragoş Bogdan, *The Copyright and the Related Rights*, (Bucharest: All Beck Printing House, 2005), 99.
[16] *Ibidem,* 95.

corpse of ideas". As a rule, any idea can be expressed in different ways, but to protect the idea which was at the foundation of a work would create a monopoly to be used by the author over an entire genre of works, not only over one specific work. The problem is even harder to be solved when the idea and the form in which it appears are difficult to be separated from one another, as it always happens with arrangements or interviews.

In France, not having a legal consecration, the principle was concluded by the doctrine according to which: "***Thinking, in itself, slips from any form of approach; it remains in the sacred domain of ideas, whose privilege is to eternally be free***." Unlike the French Law, the Romanian Law deliberately consecrates this principle, by stipulating in art 9 that: "There will not benefit by the legal protection of the copyright (...) ideas, theories, scientific discoveries, proceedings, means of functioning or mathematic concepts as such and inventions contained by a work, no matter of the way of their being taken over, written, explained or expressed." Even if the ideas are not protected by copyright, this does not mean they do not benifit by any protection at all. Under certain circumstances, the appraoch/ the nearness of an idea belonging to another person can be sanctioned within an action of unloyal competition or for the violation of certain pre-contractual obligations. The researchers are quite peremptory when saying that "men and ideas are expensive."

Besides, not even the opinion according to which ideas are not protectable is not unanimous. **There are authors who, in the name of equity, consider that ideas should be protected -** especially in those cases when the artitic idea is transmitted to a third in order to be accomplished. Concretely, it is about advertizing ideas or creations; the domain of computer applications or the TV programs are confronted with similar problems. Publicity is the object of activity for certain private persons or trading companies who do not restrict their activity to only publicity, posters, press, radio and TV programs, etc. With this aim in view there are created original works (literary, artistic, musical) able to vouchsafe the creators' copyrights. The idea - according to the adepts who protect it - cannot be taken over, given a form and used by other people, unless the person whose idea was first pretended a compensation, which will be inequitable. As for the TV programs they say that "everybody copies eveybody" and that "the great Americam television companies copy each other shamelessly", so the ideas-theft accusations are very frequent.

As for the Romanian Law, this opinion cannot find any support in it, **because it excludes from protection ideas, both implicitely - when it grants protection to those works having a concrete from of expression and explicitely - when it stipulates the fact that ideas cannot be a matter concerning the copyright.**

On the other hand, if it is correct to say that ideas are not given protection by copyright, it is not correct to maintain that they are not given any protection at all; protection can be obtained in other ways. More particularly, ideas can be protected in action, against an unloyal competition (such a case may appear only when the usage of the idea derives from a competitor who makes this contrary to any loyal and honest customs).

In practice it is often difficult to settle a frontier between the unprotected idea and its protective expression. The difficulty is even greater then when it is accepted the fact that protection by copyright extends over the composition of the work, that is over the concatenation of ideas that leads to the scenario and the texture of the work - the intrinsic form - without limiting itself to the exterior form, only - that is the expression/ manifestation. The French jurisprudence and doctrine considered that: 1) the history of the breaking up of the relationship in a couple is a free usage; 2) the simple idea of a TV broadcast on film stars is not protected by copytight; 3) in publicity, the idea to compare the ordinary bleaching by help of a detergent is not approachable; 4) but, the producer who transmits a thrid person the idea from where a melody was composed, committed a punishable offence.

In practice, in Romania, there is a tendency to also include in the sphere of plagiarism/ literary theft the appropriation of ideas and arguments belonging to another author. Consequently, the definition given by the Editorial Committee of the Europolis Magazine of the Faculty of Political and Administrative Sciences within the Babeş-Bolyai, Cluj Napoca, is: "Plagiarism is the presentation - as if one's own work - of the words, ideas and arguments belonging to another person, without a correct recognition of the sources, by quotations, references or notes. Consequently, one can speak about plagiarism then when the words of a certain person are reproduced as such, with no mention of the source, but also then when another person's ideas or arguments are paraphrased in such a way that the reader may believe that they belong to the author of the text." The men of letters do not embrace such an extremely severe vision about plagiarism that oversteps even the limits of the legal protection.

The copyright does not protect ideas. This general principle has two meanings, according to the significance given to the word (idea). If 'idea' means the content, the essence of a work - that is whatever it is attempted to be transmitted by the respective work - than the principle decides that the object of protection should be the form, the materialization of the idea and not the idea itself; in such a case the form becomes the object of protection. If, by idea, it is understood 'pure thinking' non-exteriorized (mental activity), than the above mentioned principle demands that the work should take a form perceivable by senses; in such a case the form appears to be a protective condition.

Acccording to art. 9 letter a) of Law no 8/1996, the ideas contained in a work cannot benefit by the copyright legal protection. This article illustrates the first meaning of the above stated principle. But, if the ideas already materialized, rendered and used within the content of a work cannot be legally protected, much more than this is this aspect of protection excluded when it is about non-exteriorized ideas. Consequently, an indispensable condition of protection refers to the fact that ideas should be exteriorized in the form of an intellectual creative work, in order to benefit by protection.

It is not always easy to make a distinction between idea and expression. Once an idea expressed it bears the mark of the personality of he who had formulated it, yet it does not make it protectable. The exclusion of ideas from protection is based on the fact that they are not approachable, because the recognition of a privative law on ideas will hinder any creative activity. The use of ideas from a pre-existent work is licit, because the ideas are not protected, but if the taking-over extends to the form that clothes the idea, this is a counterfeit already. Ultimately, it is a problem of appreciating the barrier - which once crossed over - places us on the ground of illicitely use of a pre-existent work or of the counterfeit.

5. Originality of the scientific works and the apparent law/legal conflict over the protection of ideas

If originality is manifested differently in conformity with the capacity of the creator to express - in a more or less elevated or more or less sensitive way- his own ego and his own feelings, the manifestation of originality can be, at the same time, censored by the category of works his creation belongs to. The scientific works protected by copyright belong to a category of creation which deserves a careful analysis within the bounds an author can be original, from this point of view.

A literary work appeals to **feelings and senses,** while the scientific work appeals to **intellect.** The role of the scientific work is not meant to produce and impress through aesthetic values, but to transmit information, knowledge and ideas in a most intelligible way. That is why the language of the scientific works is - to a certain extent -standardized and, in some cases (see the scientific works belonging to exact sciences) one can hardly speak about originality - in the common meaning of the word - within the framework of copyright. The

scientific works can be written or oral; the law, in art 7 letter b) enumerates among them: **communications/ dissertations, studies, university courses, manuals, scientific projects and documentations.**

This category of works made the object of long doctrinary disputes, because it was considered that a clear delimitation should be made between those **scientific works** that give rise to copyrights and the **scientific results emphasized by such a work** for which it would necessarily obtain a special protection. Those who objected against a scientific protection of the scientific discoveries appealed to two arguments in the defence of their position. The first refers to the insurmountable difficulties of organizing such a protection and, the second, to the fact that such a protection is alien to copyright. No wonder that the International Convention concluded in Geneva and having on its agenda the protection of the scientific discoveries, did not come into force, because it was not ratified by the necessary number of states, so, the problem on the protection of the scintific discoveries seemed to be forgotten until nowadays.[17]

In the disputes on the object of how to protect the scientific works, there are two **dominant opinions**; they can only confirm the particularities presented by the criterion of originality, with reference to this kind of works. The first considers that the object of protection could be the **scientific originality** not the oral or figurative way of expression. The second considers that originality of a scientific work is given by the extent in which the author - who is a man of science - succeeds to give his ideas a precise and exact phrasing.[18]

In the Romanian Copyright Law art 9 letter a) there are definitely excluded from protection ideas, theories, discoveries and inventions contained by a work. As all these are the very scientific originality of the work, we can but embrace the second opinion, according to which, whatever makes the object of protection in case of a scientific work is the form in which the author explained the results of his research activity. By a decision of the American Supreme Court (1978) the copyright protection was refused because of an accounting method. In the decision pronounced by the Court it was mentioned: "*the copyright for a work in mathematical sciences cannot give the author an exclusive right over the suggested method and solution*."[19]

Nevertheless, the analysis sould be continued in order to see which is the degree of protection granted to such a creation characterized by an abstract, arid, technical, difficult and rigid language. How does the degree of protection by copyright of such a work can appreciate the existance or the non-existance of a counterfeit? Is the condition of originality replaced by the condition of novelty as regarding the scientific works? Are the two opinions excluding each other or do they co-exist?

A deeper analysis is required if considering the fact that the scientific works benefit by the "privilege" of a more complex regulation; in their situation the following Laws are influencial: Law no 206/2004 on the good conduct in scientific research, technological development and innovation, Law no 319/2003 on the Statute of the research- development personnel and Law no 1/ 2011 on the national education that defends both the scientific work and the creator who makes an innovation and who makes efforts to research there where nobody did that before, and which sets up a protection for ideas.

Law no 8/1996 explains what does it mean the object of the copyright for the original intellectual creations in literature, arts and science, irrespective of the kind of creation, its manner of expression and of their value and destination (art 7). **From the point of view of the copyright Law, a scientific work benefits by protection if it is original;** in such a case,

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[17] In such countries as USSR, Bulgaria and Czechoslovakaia, the previous regulations definitely protected the scientific discoveries; the new Czech law stipulates that discoveries that achieved protection under the influence of the previous law are still protected.

[18] See Yolanda Eminescu, *quoted work*, 88-89.

[19] Jules Marc Boudel, *législation des Etats-Unis sur le droit d'auteur*, (Bruxelles: Ed. Bruylant, 1990), 51.

originality is appreciated in conformity with the specificity of the language, ideas and arguments contained by the work. But, because ideas must circulate freely, without becoming the object of a singular approach - as it is in the interst of the social, cultural and economic development that the humaneness fund should be made up of knowledge achieved and discovered along centuries and meant to be at the hand of whoever wants to build more on them - Law no. 8/1996 excludes from protection, among other things, "ideas, theories, concepts, scientific discoveries, procedures, means of working or mathematical concepts as such, as well as inventions containd by works, irrespective of the way they were taken-over, written, explained or expressed."(art 9 letter a).

If Law no. 8/1996, with no exception, deprives ideas of protection by copyright, another norm - that is **Law no 206/2004 on the good conduct in scientific research, technological development and innovation, stipulates - in art 4 paragraph 1 letter d) - *that the use - in a written work or in an oral communication* (*even if in electronic form*) - *of certain texts, expressions, ideas, demonstrations, data, hypotheses, results/ solutions or scientific methods extracted from the works of other authors, without mentioning the original sources*, is plagiarism.**

Under these conditions a natural question arises: whether these two legal provisions are in conflict with one another and should or might be reconciled.

Before finding an answer to it, mention shall be made that in the Romanian Law plagiarism is a manner of counterfeit specific to all written works and that Law no. 206/2004, that defines plagiarisn in art 4 paragraph , letter d) puts a sign of equality between counterfeit and plagiarism - plagiarism being, in essence, an un-authorized reproduction of someone else's creation.

As for the possible conflict between Law no. 8/1996 and Law no. 206/2004 on the exclusion of ideas from protection by copyright, it must be first noticed that the provisions of **Law no. 296/2004 address to categories of personnel belonging to social or private environment who benefit by public funds for research and development and who shall respect the aim of having a good, correct and loyal conduct in their research and development activity** (art 1 paragraph 4). Plagiarism, the way it was defined in art 4 paragraph 1 letter d, is considered a disregard for the norms of good conduct in the activity of communication, publication, dissemination and scientific populatization (art 2^{1} paragraph 2 reportedto art 2 letter b), the theft of the results or publications issued by other authors being considered serious violations[20] from the good conduct in the scientific research and the universitary activity (art 310 of the Law of National Education no 1/201).

If the doctrinary and jurisprudential interpretations of Law no. 8/1996 on the copyright and other related rights defined originality as a subjective criterion for the protection of creation, stressing on the importance given to the author's own mark on the expression he clothes his ideas in and whose monopoly is not hold by any other person, Law no. 206/2004 seems to be tributary to the *copyright* system according to whichh originality exists then when a minumum intellectual effort is made; this can be understood as the absence of a copy.

From the economy of the provisions of Law no. 206/2004 it resides that **the persons who work in researh and development activities are required to come up with novelties in their domain of activity, and the taking-over of ideas, expressions, texts, theory demonstrations should be recognized by their paternity and authorship.** This is a normal fact to be admited. Research means improvement of knowledge, investigation of new and not

[20] Law no. 206/2004 provides that all violations from the norms of goof conduct in the activity of research and development (plagisrism included) will be discussed and analysed within the institution where the violation was committed and, as a result of the report the discussions will extend to the National Council on Aethics (which can have their own motion) and they will write a report containing: an argued decision about the existence of one or more violations, the culpable person and the suggested sanctions. In other words, one cannot speak about plagiarism if it was not recognized as such by a decision of the National Council on Ethics.

totally known horizonts, searcing and finding answers to new, unknown, unapproached problems or enriching the older ones, it means competition but, at the same time, the recognition of the priority of those who, through their own efforts, research and investigations could reach new conclusions and answers, formulate hypotheses and solve problems that had no solutions. It was them who came with new ideas in their own domain of knowledge and research.

Consequently, scientific research presumes looking for the new, for innovation; but innovation shall be based on loyal values as: responsibility, correctness, honesty. These are the very values protected by Law no. 206/2004, Law no, 1/ 2911 on national education, Law no. 319/2003 on the status of the research and development personnel, which enumerate and punish unloyal conducts: plagiarism; self-plagiarism; inclusion in the aurthors' list one scientific publication belonging to one or several co-authors who have not significantly contributed to the publication; or exclusion of some co-authors who have significantly contributed to the publication; inclusion, in the list of authors, a scientific publication belonging to a person without his/ her consent; the authors' unauthorized publishing or dissemination of certain results, hypotheses, theories or unpublished scientific methods; introduction of false information in case of applications for grants and financing; in the candidature dossiers for the empowerment certificates; for university didactic positions or for positions in research and development (art. 2^1 of Law no. 206/2004).

The Law considers all these aspects violations of the norms of conduct and can be punished by one of the measures stipulated in art 14 of Law no. 206/2004: wtitten warning, withdrawal and / or correction of all the works published by violating the norms of good conduct, withdrawal of the title of a doctor, etc.

In the acception of Law no. 8/1996, which excludes idea from legal protection, its author cannot use - for the defence of his/ her own idea - the moral and patrimonial prerogatives conferred by copyright, not even to pretend the recognition of his/ her quality of an author (paternity of idea). While, according to Law no. 206/2004, the taking-over of an idea without indicating the source - name and work of the writer - is considered "plagiarism"; this means that by plagiarism it is violated loyalty against the creators who became a source of inspiration.

If the aim of the first norm is to protect, by copyright, the author's original creations, by establishing a specific juridical regime for this right, the second norm is meant to regulate the necessary framework for the development of a scientific research governed by academic probity, able to stimulate good personal results (that is why one of the basic rules is to indicate the sources).

Taking into account the various aims for which the two norms were edicted - according to the already drawn considerations - we believe that the two norms have not come into a conflict with each other[21], because the "idea" spoken about in Law no. 206/2004 has a different acception than the"idea" of Law no. 8/1996: **the idea forbidden to plagiarism** has the meaning of **opinion, solution or vison of a subject, expressed in the scientific reasearch activity, an activity which is encouraged to be innovatory.** The idea forbidden to plagiarism - and which, when is submitted to plagiarism, is protected by one of the sanctions stipulared in art 14 of Law no. 206/2004 - is that idea that has a character of novelty and which is visibly identified with the author's paternity, and so, it shall be protected as such.

[21] It was said, in the specialized literature that we find ourselves in face of two norms (Law no. 8/1996 and Law no. 206/2004) presenting apprantley contradictory dispositions which do not allow to make a distinction for which of the two plays the role of a special law. See Ligia Dănilă Cătuna "Works and Ideas, Plagiarism. Exception of Exceptions" in *Romanian Magazine on Law of Intellectual Property* 1 (2009), 57.

The idea excluded from protection is understood as an abstract concept, generally known, an undisputed and accepted as a universally available thesis, a theme of a work, sketch or of an yet unfinished project. **And because whatever the Law no. 206/2004 protects is the new idea, theory, the scientific method discovered by an author, the demonstration and conclusion to a question to which no answer has been found yet or to which another answer was expected, obtained by work, creativity, imagination and sacrifice - after having filtered through reason and soul and given the personal mark and novelty, but also because the protection insured to ideas and theories in such a way takes place in the context of the scienific research, development and innovation, between the two - Law no. 8/1996 and Law no. 206/2004 - the latter is the special norm in as far as the protection of ideas is concerned.**

Whatever Law no. 206/2004 tries to do when interdicting plagiarism, is to defend and protect the moral right of the author of a text, work, thesis, idea, demonstration, bringing in novelty obtained during the activity of scientific research.

Within the same context, art 141 of Law no. 8/1996 considers it a violation **punishable with prison from 3 months to 5 years or a fine from 2,500 lei to 50,000 lei the deed of a person who appropriates, without reason, the quality of being the author of a work.** The act of "committing plagiarism" (counterfeit) translated into the copyright Law means to appropriate, without reason, the quality of an author over his own creation; yet for appealing to penal responsibility, this deed must demonstrate the degree of social danger stipulated by Law (art 18-18[1] C. pen.), that it had been made deliberately, and that the creation itself should benefit by the protection of the Law; in other words, to be original, otherwise they become incidents to the disposition of Law no. 206/2004.

Some confusion is hanging over plagiarism - which, ultimately is a form of counterfeit, specific to the written works, as very often plagiarism is also understood as the creation of a work lacking originality or as a quotation which is not conform with the academic norms (although the sourse of the take-over is indicated, the context does not clarify who is the real author). That is why we consider it necessary to give some explanations meant to clarify the diffrenece between the non-observance of the academic norms of quoting and counterfeit on one hand, and lack of originality and counterfeit, on the other.

6. The opinion of Professor Nae Ionescu on ideas and the position of his critics

In the period between the two World Wars, Nae Ionescu, professor at the Bucharest University, used to make full amphitheatres and always impress the audience. He did not have a wtitten course but notes, only, like Istrate Micescu.

Deliberately or accidentally, he insisted upon the problem of originality and of the limitations of this condition, saying that "***in philosophy originality cannot have another meaning than that of one's own effort of reasoning, of the genuineness of philosophizing. One lacks originality not because one says whatever had been said before, but because one accepts to take for free the others' sayings/ words (...) That is, without thinking" (...) do not tell me that these or those ideas are not mine; I can answer you that the father of an idea who did nothing more than to conceive it and than forgot about is not much more imporatnt than the one who adopted it, cleaned it, taught it and placed in the right place."***

Nowadays, the originality of his works was raised for discussion, the pros and cons opinions being impregnated with political arguments, as well, totally alien to the problem under discussion. The discussions were an occasion for the expression of extreme points of view. So, while Mr. Baconsky said that "***We do not write only because we have learned to read our predecessors***", Mr. Nicolae Manolescu considered that "***a confusion is made between filiation (which refers to ideas) and plagiarism (which refers to the text). Nobody***

contests that ideas circulate freely and that an absolute originality is impossible. But the theory of Mr Baconski, who started his speech by saying <<We do not write only because we have learned to read our predecessors >>, although true in content shifts the problem from the textual to the ideational field. Any man of science who writes has at his disposal two means to demonstrate that he had been reading his predecessors: the quotation marks and the mention of the source. If neither one nor the other appears in Nae Ionescu's course of metaphysics indubitably throws him in the sphere of plagiarism."[22]

7. Conclusions

- Originality is the only one condition meant to protect a work by copyright: **the condition of originality absorbs the other two conditions, standing to reason that no appreciation can be made about something that has no form of expression, that is, about something that is not perceptible by human senses.**
- In the acception of Law no. 8/1996 that excludes idea from legal protection, its author cannot use, in the defence of his own idea, the moral and patrimonial prerogatives conferred by the copyright, not even to ask for the recognition of his quality of the author of the idea (paternity of the idea). While, according to Law no. 206/2004, the take-over of the idea without indicating the source - name and work of the author - is considered to be "plagiarism". (as the moral right of the quality of an author was violated). Thus, we can say that **the idea is both excluded from protection and, at the same time, protected!** In the analysis of the so-called conflict between the two norms (Law no. 8/1996 - that excludes ideas from the copyright protection and Law no. 206/2004 - that defends the paternity of ideas) we have to take into account the different aims of the two mentioned norms: if the first protects the original creation , by copyright, by creating a juridical regime to this right, the aim of the second regulates the framework necessary for the development of the scientific research activity governed by academic probity, meant to stimulate the obtaing of personal results (one of the basic rules being that of mentioning the sources of research). Taking into account these different aims for which there have been edicted the two norms, they do not contradict each other; the more so as the "idea" mentioned in Law no.296/2004 has a different acception than the "idea" mentioned in Law no. 8/1996: the idea forbidden from plagiarism is considered opinion, solution, vision on a certain subject, while idea excluded from protection is considered to be an abstract concept, generally-known, undisputable and accepted thesis, universally available, subject of a work, sketch, unachieved project
- The restrictions of the copyright, the way they are regulated and stipulated by art 33 of Law no. 8/1996 have as corollary the right of a third person to reproduce, use, distribute, transform or make a private copy, without the consent and with no payment to the titular of the patrimonial rights, a right which, practically, is a breaking of the exclusive character of these prerogatives, legally recognized to be in favour of the titular of the copyright.
- The conditions to be fulfilled for a quotation to be licit are: the work the quotation is taken from to be brought to the public knowledge; the use of quotations to justify their length; their use shall be in conformity with the good manners; their usages should not be abusive; thier usages should not bring prejudices to neither the author nor to the titulars of the right to use.
- Before proceeding to the examination of a possible counterfeit, it has to be setteld if the text/ work submitted to analysis is original, as **originality represents a criterion that shall be taken into consideration when establishing the character of a protectable written work and when analysing the licit character of the copy, as well**
- Under the condition in which the originality of the scientific works appears more in the form in which the author chooses to present the results of his research - and less

[22] Literary Romania 6 (1995).

or not at all in the very content of the ideas that cannot be expressed otherwise, but in the form used by predecessors, because of the technical, specialized and uniformed language - the examination of a possible illicit copy is made by taking into account the form of the text, the succession of arguments, their distribution into sub-chapters and afferent sub-titles, as well as other elements connected with the expression of the text.

- One cannot speak about an illicit copy of a scientific work then when the one suspected to have committed a counterfeit act took insusceptible protective elements - as they belong to the public domain - neither then when there are inherent similitudes due to the form of the specific expression of the scientific work.

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