THE LEGAL PROTECTION OF IDEAS

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Abstract

Ideas are purely abstract elements. They pre-exist to creations, are grounded on them, however no one in any field of creation does not have monopoly upon raw ideas. In order to prevent invoking some privative right upon them and, in order to make sure that they are remining no one's and to all in the same time, in order to prevent blocking the creative and research activity by their possible closeness, they are expressly excluded from protection. Romania makes an exception from this rule because by a law whose object of regulation is constituted by good conduct in scientific research, „introducing within your work texts, expressions, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works (...) of other authors without mentioning such fact and without indicating the original sources" constitutes plagiarism. And if you retrieve from your own works any idea, theory, or method without indicating such fact, it is called self-plagiarism.

Keywords: *idea, protectable intellectual creations, unfair competition, exclusion from the protection, know-how.*

1. The philosophical notion of idea

Text In philosophy, the idea is a fundamental concept. The etymology of the word is Greek originating from „*eida*" (*eidos*), which means „*I've seen*". Socrates[1] was the first philosopher conceived a theory of ideas (unfortunate idea, because they have found within reasons for sentencing him to death), theory which his disciple Plato[2] takes over and develops (however himself also was partially unsatisfied by it by the end of his life) and which Aristotle[3] the disciple of the second one has criticised it in his turn (it became Aristotle's habit to nit-pick his master all the time), without entirely disavowing it. However, we today know that Aristotle made a lot of mistakes himself, sometimes bad (i.e. Geocentrism theory, which is the worst of his mistakes), although his ideas have changed the European education for hundreds of years and still indebted till this day.

Socrates is the father of maieutic[4], the art of giving rise of ideas in the mind of people, a learning method that pursues bringing to light the thoughts and/or ideas by the means of reflexive dialog, of „midwifing ideas" that are already in there, like the child in the womb of his mother and do nothing else but to reborn following the persistent questioning and provoked answers. And we should underline that Socrates is the one who used the word *„to midwife"* with the meaning of bringing ideas to life, taking advantage of a family experience: his mother was a midwife, his father was a sculptor and by making a

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[1] Socrates (470-399 BC.). His works have not been preserved, however the didactic theses of the latter are made known by his most important discipol, Plato, who stood by him for 8 years and also by Xenofon. Socrates was phisically ugly (outraging the Atheniens, who belived that inner beauty comes from phisical beauty), inteligent, kind, modest, patient, cheerful, pleasant, simpe, brave, with a profound respect for laws. *„He did not write any single row, however it survived by the thoughts shared to others, by his way of life and not less by the way he died,to many authors of philosophical tomes scattered in the dust of the ages"*. D. Cosma, *Socrates, Bruno, Galilei*, Sport Turism Publishing, București, 1982, p. 11. His influence was so great that the ancient Greek philosophers are divided into Presocratic, the grata Socratics (Socrates, Plato, Aristotel) and post or small Socratic. Not few are those who compare its role and destiny with the ones of Jesus.

[2] Plato (427-347 BC.) was Socrate's pupil. He has established (toghether with Socrate and Aristotel) the basis of philosophy, politics and science. He had decisively influenced chrestian thinking through Saint Augustin, Nitzsche naming cristianity as being „Platoicism for the mases". Considered by Petre Țuțea the greatest thinker of Europe. Plato's theory of ideas is found in several of his works (Phaidon, the Republic, the Banquet and Phaidros).

[3] Aristotel (384-322 B.C.) was Plato's pupil and then teacher at his Academy, school to which he had been loial to as long as Plato lived. He left the Academuy after his death (previously naming, his nephew, Speusip, as ruler, for fear that Aristotle will not impose its own philosophy). Aristotel was Alexander the Great's teacher for seven years, his military skills and his triumf in wars is due also to the education received from Aristotle. Former pupil, becoming king, provided to its former teacher generous research funding, Aristotel becoming the first case in history of a scientist to whom research funding was provided. Of the 150 written books (145 by Diogenes Laertios) today only 47 are known. The most famous of his works is Metafizics (however the title was not given by Aristotel, but by Andronicus from Rhodos, the editor of all philosofer's works known today. The education in Europe was considered, especially in the 13th-17th centuries, as being aristotelic and is still tributary to the Aristotelian conception. The main University Centre of aristotelism was Padova University. The padovian Aristotelism was the curricular model of the first institutions of high education within Romanian Countries (Royal Academies in Bucharest and Iasi). Out of all great philosophers of Antiquity, for the Cristian Church the most dangerous was Aristotel, his ideea being the most compatible with Christian dogmas, his acceptance by Cristian Church was realised with the help of Thomas d`Aquino works, the theolog who is to Cristianity the same as Averoes is to muslims and Maimonide to Judaism.

[4] Maieutics is a method of reaching the truth. Maieutike, in Greek, is the skill to midwife children and Socrates considerd that he was *"midwifing"* ideas in order to show the people the truth. Socrates' technique represents a efficient modality to explore deeply ideeas and knoledge. The method cam be used sucessfully for learning, because it stimulated independent thinking and gives students the feeling of *"property"*, discovering themselves what they learn by this method. Socrates spent the last days of his life having dialogs with friends that did not leave him, urging them to think for themselves and ask difficult but essential questions.

comparison between bringing into this world of a new-born with the help of a midwife and bringing to light ideas in people's minds, work to which he had become a master.

Socrates has priority also in formulating the theory of ideas and, by imitating the philosopher's typical attitude, namely being ironical benevolent (even with their judges), we might say that we are fortunate that as there was no law to establish a privative right upon it, Plato and Aristotle were able to freely take over, develop (Plato), heavily revise it (Aristotle) and give it back to the descendants for the good of philosophy and law science, in order to understand what is knowledge, to understand why awareness upon ignorance is the first step to evolution, why you need to know yourself[5], which are the highest virtues, what is reason and many more philosophy concepts. As many acted and still do, philosophers pursuing them to this day. However, we shall see that the priority of formulating his theory, that cannot be challenged, could be exactly the solid argument for acknowledgement of ideas moral protection theory in favour of Socrates and for the resolution according to which the refusal of legal protection of ideas is justified.

What would be the theory of ideas today if Socrates would have had an exclusive right upon it? What would be the theory of Socrates, without the contributions of Plato and Aristotle, and of so many other philosophers and philosophical currents that are based on the thinking of the great Socrates?! And what would they have used this theory for and so many others that they have formulated, if such theories were untouchable by virtue of their exclusive and perpetually recognized right!

Pursuant to the theory formulated by Socrates for the common individual the senses are the meaning to reach knowledge, the object of knowledge being the one perceptible to senses and especially to the sense of vision or such knowledge is limited or even useless. That is why, in his famous dialogues, he sought to free the minds of his interlocutors from the hindrances of logical thinking, the power of seduction of the sensible, knowledge through the senses so that they could penetrate the world of ideas, a world of essences and abstractions.

To truly see, to *"see"* ideas, concepts that are things of the spirit, you must have *"the eyes of the mind"*, eyes that is nothing but reason, which has the quality of being the same in all people.

Reason is the one that allows us to make judgments and demonstrations, is what we should consult when looking for the good, the truth or the state of health of the mind or soul by virtue of which science is. The reason is joining spirits, unlike the senses and interests that divide people.

Socrates names such reason the voice of moral consciousness, the inner voice (his daemon), a voice that tells him what to do and what he does not do to the astonishment, distrust or hatred of those with whom he talks.

The non-conformist Socrates (walking barefoot with shabby clothes lacked any material means, though he could have earned much by teaching, was adored by many and hated by even more Athenians[6]), the lover of wisdom and self-knowledge, the seeker without rest of supreme virtues (good and truth), deplored those who believed that in order to become real, things must be palpable and said that people who see (only) with their eyes are, in fact, blind.

However, Socrates' theory that reality, the world of ideas, is not available to those who, being narrow minded, use only their senses to understand, his ironic dialogues[7], as well as the *"discussions"* he had with his daemon who questioned everything and who no one else besides him heard, not only failed to free the minds of everyone, but, on the contrary, hurt the pride of many who he made enemies of (among those being his three denouncers[8]), and caused the fury of the Athenians, adding to the (political, religious, and philosophical) reasons for which, misunderstood being, he ended up condemned to death by poisoning[9].

Sentence that executed it without crunching, refusing the support of friends who wanted to save him, not to create a precedent that would question the law. In fact, these key words of the philosopher: "the only thing I know is that I do not know anything" sounded less self-irony and more mockery in the ears of those who literally interpreted them, since they came from the one proclaimed by The Oracle of Delphi *"the freest, the most righteous and the wisest of the people"*, few were those who have understood the profound meaning of the statement and its philosophy.

Among them, Cicero who said that Socrates *"lowered the philosophy from heaven, placed it in the city and even in the houses of men"*, an appreciation that is more suggestive, more meaningful and more successful than that of modern philosophers, who considers it *"the most important figure of the history of*

[5] Knowing yourself is the slogan of the Seven Wise Men of Greece. The motto is the creation of Thales of Milet, one of the seven.

[6] Sentenced to death (according to some sources 280/222, 280/278 after another) he refused to be rescued, and at his death theaters were closed in sign of national mourning, an exceptional measure for the time.

[7] Dialogues that he himself provoked, entering into dialogue anytime, anywhere, on any problem, with anyone no matter of their status and not few were those who, following the discussions with him, were leaving despaired, finding that they do not know anymore what they previously thought they knew, and this attitude, through which he managed to upset many, proved to be ultimately imprudent.

[8] Of these, one was also sentenced to death (Meletos, obscure poet) and the other two Lycon, an obscure orator and Anytos, a tanner who Socrates reproached that he did not educate his son and who remained in history and as one who in another process was acquitted because he bribed all the judges, were later punished to exile.

[9] Hated by the narrow-minded spirits, Socrates was accused with the crime of not recognizing the gods acknoledged by the city (atheism), introducing new divinities (his own daemon) and corrupting young people, being condemned to death by poisoning, after provoking once again the wrath of those who judged him, telling them that for the good he had done, he should be living on public expense.

Greek thinking and from which all the later trends of philosophy derive" (woody language!). As it is easy to see, the appreciation of Socrates is about the same but ... dressed in another form of expression.

The methodical Plato, starting from the opposition between the senses and reason, between the reality and the knowledge that Socrates has made, resumed the theory of ideas and developed it in several papers. Plato made a categorical distinction between the world (existence) and sensitive world (existence) intelligible. The first (sensitive existence) is the world that our senses offer us, the world that is accessible to knowledge through senses. The sensible world, says Plato, is the only one in which the narrow-minded and the uneducated[10] believe and have access to, is the world of bodily and natural phenomena, a changing, transient, continually moving and transforming world, a world of contradictions.

In opposition to the sensitive existence, the intelligible existence is accessible to rational type of knowledge, it is the metaphysical world of essential reality, the world of Ideas, a world invisible to our corporeal eyes. For Plato, only the world of ideas is true reality, this being the only immutable, eternal, constant. It is a world that does not exist as a result of our intelligence (which is just a window to this world), but is above it, a world that exists in the spirit of every human before his birth.

The sensible world (of beings, objects) is but a pale, imperfect copy of the perfect world of ideas, physical bodies having no reality unless they participate in ideas as prototypes. By the way of the senses we cannot reach the knowledge of the intelligible world of essences.

According to Plato, the term "**idea**" designates and represents **the essence of things**, which remains **stable and permanent in reality. The idea is the model, the prototype, the primordial form of all beings and all the things in the world and of abstract concepts, among which the highest are the good, the virtue, the truth, the beautiful.** Essence is what makes one thing to be what it is, is that something without which one thing cannot even be conceived. **Ideas are characterized by the fact that they are simple, they exist in themselves and by themselves, they represent an eternal existence (like the immortal soul), universal, unchangeable (immutable) and universal**.

For Aristotle, a disciple of Plato and with whom he was, not often, in disagreement, between the senses and reason there is a continuous relationship, a connection that never disappears, making the senses and reason inseparable. According to Aristotle, the act of knowledge starts with sensations, without them, reason being unable to reach an objective knowledge. But while **senses cannot exceed the limits of perception, reason, overcomes perception, abstracts and formulates concepts**.

And yet, Aristotle also speaks of **imagination, which is independent of senses**, opinions that are products of imagination, imagery provided by imagination, and which are appreciated by the intellect as true or false, as good or bad, and distinguish between immobile substances, known only by reason (divine realities, for example) and moving substances, which belong to the physical world and are perceptible by the senses.

Does Aristotle contradict Plato's theory of ideas? Yes and no! We have previously shown that Plato himself, in his old age, declared himself unsatisfied with his theory and subjected to revision (the Parmenides dialogue contains a critique of the theory of ideas, but not a waiver of it, because abandoning it seemed to him not only inadmissible, but also to create greater difficulties than accepting it). But even if Aristotle was almost ruthless with his master, whom he criticized whenever he thought he was wrong[11], he was not totally disagreeing with Plato as to the theory of ideas, and Plato's merit, that of addressing the problem, is above all criticism.

2. The concept of "idea" in law

Does our incursion in the history of philosophy of ideas help us with our approach? For pragmatists in the world we live in, it is hard to understand how a wise man like Socrates, who could have lived as a Sybarite if he had capitalized his knowledge into money, chose, as he himself said, *"neither to take money to speak, nor to be silent if he does not take money"*. In their eyes, Socrates probably deserved his sentence to death (recent facts show: re-judged after 2400 years in Chicago and Athens, the jurors pronounced contradictory verdicts, the first guilty and innocence, the others[12]) and with him the theory of ideas developed by him should have died. Because the pragmatists among whom we live or the pragmatists who live among us (we do not know which are more) are two kinds: some for which intellectual ideas and creations should be free to use, and for this, intellectual property rights must be abrogated. The others are for whom

[10] To initiate is the action of bringing someone into the science of things they did not know. Initiates are those who have reached a level of evolution far superior to that of an ordinary man. Those whose shared and accumulated teachings allow them to enter the world of concepts concealed by the fine veil of the world of senses. They are the ones who distinguish between illusion and reality.

[11] Aristotle was only paraphrased by Ammonius Saccas who in his work *"Aristotle's Life"*, said: *"Amicus Palton, sed magis amica veritas"*. In fact, in his work *"Nicomahic Ethics"*, Aristotle said: *"Even if friendship and truth are our dear ones, it is proper to give preference to the truth"*. The idea is the same for them both: theory must be based on truth not on the authority of the formulator, but the form of expression is different.

[12] He was acquitted in an organized trial in Athens in 2012 by a court of 10 known judges from several countries. But in another trial in Chicago, a jury of 1,000 people found him guilty. The truth is, the judge said, that the punishment he would have applied was just a fine, but admitting that Socrates was an eccentric, influenced the young people of Athens and contradicted the gods who have memory and are grudge-bearing.

ideas and creations should be the object of holy property right!

What is the purpose for philosophers' discussions about ideas, since they make a theory of ideas without defining the idea or at least without defining it in the meaning of those who, by misconception, out of grudge, because it revealed an unpleasant truth about them and out of envy for his science, even sent to death one of the philosophers?

First of all, we find that the theory of ideas not only out survived the one who "midwifed it", but also that it was resumed and debated by others and that it is either warmly embraced by some or criticized by others (with respect and goodwill, the discussions between the philosophers being more temperate, and the disagreements between them acknowledged as it should in science and not just because they are generating new queries or arguments), or enriched in arguments by those who have been irremediably captivated by the philosopher who lived his life in poverty and died refusing to save himself in order to save a principle of law and a principle of life: the one of law supremacy and the one who says that to die for your ideas is the only way to be above them[13].

Then, because the theory of ideas, although it does not provide solutions to the delicate problem of the appropriate legal regime, helps to identify it. Because, despite the difficulties of understanding the theory of ideas, or the lack of interest in profoundness and even the criticisms formulated by Aristotle for it, this theory, except for being forever gained in philosophy, in the science of law, really offers an argument, extracted from what is essential in it, for refusing legal protection of ideas. Thus, its useful to law and to the solution adopted regarding their regime in all legal systems (except for the Romanian one), the idea that the ideas (the repetition is voluntary, it seems necessary) **are part of the inner world of people**, in opposition to the outside world of things perceived by our senses. That idea is an "image" that exists (only) in the mind of the one who is "midwifing" it, or of the one who resumes it or of those who resume it, believing in it. That idea is a mental representation without its own existence outside the mind of its believer (and outside of which it cannot exist), but which is not dependent on the mind of the one who thinks it.

That ideas are something above thoughts and are more than our thoughts[14]. That ideas have an objective-ontological status, while thoughts have subjective-psychological status. And we would add that, all ideas have the right to be contemplated by contemporaries and history (again Socratics are an example: remember the critique of Plato's theories often made by his disciple Aristotle), at least to know which are good and which can do the evil in front of which we must react to prevent it, when it is possible (remember, of course, that the idea of the pure race has begun the Holocaust).

And for this they must be free. Besides, we say, and we do it instinctively, that we have discovered an idea, not that we have formulated an idea! But, discovering is not one and the same thing as creating, because creating means doing, by intellectual activity, something that did not exist before, meaning to change reality in an original way.

Last but not least, because it is not the least important of the arguments, it must be said that all those who formulated, resumed, developed and give us the theory of ideas (and not only) could be a good example for us: Socratics dominate all philosophical systems. But they have not accused each other and they are not accused either nor the post-Socratics of having stolen the ideas of others, or of stealing one another's ideas. It is true, they did not escape of plagiarism accusations either, but it is even more true that the plagiarists of that time did not make the distinction between ideas and works.

In usual language of today, the **term "idea" is used to designate what the mind conceives or what it may conceive, which is represented in spirit. But also, to generically designate different forms of logical knowledge, such as: general principles, abstract rules, conceptions, theses (broad, fundamental), theories, concepts or scientific discoveries; methods (accounting, education, etc.) or algorithms (based on which computer programs are written), thinking, how to see, opinions, suggestions, solutions, plans, projects, etc**[15].

Encyclopaedic dictionaries identify over 12 meanings of the term, which are the domains in which the notion is used (philosophy, religion, medicine, psychology). In law in general and in intellectual property law in particular, the notion of idea, which has a special importance, is not far away from the philosophical one, the view that the idea is essence, is a spiritual representation of all things and beings, a representation of something, whether that something exists outside, or that it has a purely intellectual existence. It is different from thought and above thoughts. It is essence, imagination, symbol, vision, faith.

And it seems useful for our approach to remind that ideas, both in the science of law and in philosophy, are characterized by the fact that they are simple, that they exist in themselves and by themselves, that they exist in all of us and for all of us, that they are precursors to the mind who revealed them, that they by themselves do not change reality, that ideas represent an everlasting universal existence (like the immortal soul), unchangeable (immutable), or that no one can be stopped to *"midwife"* the ideas, nor to disclose them, because they are equally available to all people, and all the aforementioned make the ideas un-appropriable.

[13] It's a pity that Albert Camus said it before.
[14] Thoughts, says Nitzsche, are just the shadows of our sensations.
[15] The Explanatory Dictionary of Romanian Language.

When and how do ideas become work, protectable intellectual creations?

Ideas (we are talking about the good ones, of course) are the raw material of progress[16], the engine of development in all areas of human activity.

The bad ones, which have not been few, not a few times, have made our lives an inferno. Ideas are found in all areas of knowledge, scientific research, and in all genres of artistic creation. Ideas are everywhere and are just waiting to be discovered.

The Copyright Law does not define either the work or the idea. The lack of definitions is most likely a deliberate gap of the legislator who had deliberately refused to obey those who interpret it and apply it, by defining these complex notions, to certain constraints. It is just that to regulate by special law access to a special protection regime and with such significant consequences, given the rights conferred and the fact that this regime deviates a lot from the common law of goods, obligations, contracts and persons, without defining these notions and leave it to the judges, seems to us, nevertheless, a paradox. The Copyright Law offers, however, the elements by which the notion of work (not the one of idea) can be defined. We are talking about the legal references made to individuals who perform intellectual activity, to their intellectual creations, the legal reality of creation and intellectual activity. The law does not use the word *"spirit"* or derivative of it, but as it is synonymous (partly because it has other meanings, see DEX) with *"intellectual"*, we will also use it to avoid some repetitions, but also because it seems to us in some expressions to be more suggestive.

The notions creation and individuals (creator) cannot be dissociated, because the creator cannot be but a natural person. Only the human being (alone or together with others, independently or in relation of dependence with an employer), as endowed with the power of observing, spying, working with theoretical concepts, understanding and judging, making nature work for the benefit of people, with artistic sense and power to create, can change the environment. Only the creator, physical person, can add to what is already in the world around him, using his mind, his hand and/or tools. This is obvious (at least in the current state of knowledge), and per a contrario interpretation makes it possible to define creation.

The legal entities have no creative capacity, but they can be intellectual property rights transferees and are among the most important and wealthiest in the world of patrimonial rights holders on creations of all kinds. It is true that in the case of collective works, through a legal fiction, they are original holders of rights to creations (made by their initiative, under their coordination and material support), however not even in these cases, legal persons cannot be the authors.

As regards the *"creations"* made by animals, the latter (the animals) are *"goods"*, *"things"* in the sense of common law, objects of the right of property of man, and consequently cannot be *"creators"* in the sense of intellectual property rights. There are animals that *"create"* works and are the subject of transactions, but only the human intervention on them can transform these creations into protectable works. In the case of *"creations"* that are the consequence of natural phenomena such as boreal auras, soil erosion that changes landscape, the form of rocks or cliffs (see *"Babele"*) etc. cannot be protected creations, because they lack what creation is about, the deliberate, conscious change for creative purpose. But it is no less true that such incidents could be the source of intellectual creations made by artists. A well-known Romanian lawyer, Virgil Popovici, a talented plastic artist, was transforming creatively roots of trees (obviously, there are many artists doing that), making exceptional works of them (but not only such works were created by late Virgil Popovici). Not even in the case of "creations" made by machines, things are not different: machines are things and they cannot "create spiritually". No less true is that some of them are the tools by which creators perform works. For example, the photography camera or the filming camera, but in these cases, what gives the outcome a creation status is the man's sufficiently important intervention to make out of a mechanical operation a work of art. In the case of computer-assisted works, it is obvious that human intervention, if any, will confer the outcome the status of protectable work. If there is no such human creative intervention, the outcome produced by the computer will not be protectable.

Human conscious activity, performed with the will to create, to add something new to what exists, and this is a necessary condition for us to find ourselves in front of a creation of the spirit, an intellectual creation. In a certain way, creative work still has the biblical meaning, in which **"Creation"** means the act by which God **created the world, with space and time, from nothing, through His word and will**.

Mutatis mutandis, for people, **"to create"** means to do something that did not exist before, and the word **"creation"** designates the action (of creation) and its outcome, namely the product of creative work, in its various forms of expression (literary works, artistic work, scientific, computer software, architectural works, plastic art, artistic photographs, inventions, utility models, designs, models etc.). God has left much to man to make life more enjoyable, lighter, safer.

Human activity, to be creative in the above-mentioned meaning, cannot be the fruit of hazard, of chance, even if it cannot be completely excluded from the creative process and sometimes plays a very important role. The case of penicillin discovered by Alexander Fleming in 1928 is a proof, but this is not the

[16] Surely the same thing has been said by many others before us. We have identified among them for example, Bertie Charles Forbes (1880-1954), the founder of Forbes magasine, who said that *"ideas are the raw material of progress"*. http://www.intelepciune.ro /citate_celebre_maxime_cugetari_despre_Idee_224.html

only case in which the hazard played a decisive role, and we remind that even in the case of penicillin, from the discovery of the antibacterial properties of the blue mold and the idea that this could be useful for the treatment of certain illness until the achievement of the drug that saved millions of lives, the road was long: 12 years of research and testing were necessary for the discovery and the idea to materialize in a miraculous pharmaceutical product[17]. And it is obvious that what changed reality was the creative activity following the discovery of the antibacterial properties of blue mold, and not the discovery itself, which happened anyway by chance.

Spontaneous realization, the one lacking creative activity, lacking will to create and conscious creative process, cannot be considered as intellectual creation and cannot be protected. For example, simple conversations between people, no matter how intelligent they are, no matter how full of substance, dialogues in television shows on different themes (not those in which roles are interpreted from works, of course), the movements of athletes in an arena (not those of circus performers), not following a creative process, will not be protected. Some improvisations may, however, have the status of intellectual creation. For example, an artist on stage who forgets his role and starts to improvise. But in the case of the ones without discernment, the issue seems more delicate. If the person creates in moments of lucidity with the will to create, the outcome will be a protectable creation. If he created in moments when the discernment is lacking, it is difficult to admit that the result is a work of his spirit[18].

The same goes for those who, in various ways, bring to public knowledge, raw historical facts, information, data from any field, songs, customs, words used in various places, etc., if these people did not perform creative activity and not have done nothing but reveal what existed before their discovery, communicating to the public simple data and facts that do not alter reality by their intervention. Historical information provided to the public in specialized papers are also not protected, susceptible to protection being merely the personal way of expressing it (if any). For example, the fact that Mrs. Clara, the wife of Basarab I and mother of Vlaicu Vodă was a Catholic bigot and who wanted to Catholicize Wallachia, are historical facts. These were processed by Alexandru Davila in the play "Vlaicu Vodă" (1902), but also in many other historical works, such as Constantin Gane - *"Past lives of ladies and gentlemen"* (1941), which are truly intellectual creations and the theme can be taken by anyone who wants it and does it differently than others. Historical works are, of course, full of such data, and writers often process them in their own way of expressing, without branching the rights of historians.

We can, in relation to the above, define the protective intellectual creation (the work) as the product of the spiritual activity carried out with the will to achieve something that did not exist before, to modify the existing reality, the product of that activity from which a creation of spirit is born, in a more general sense, to include technical creations in its definition, an object upon which the creator is recognized with an intellectual property right. What is protected by the laws of intellectual property is the form of expression, the form in which the idea was put into the work, the form of original expression. The idea is put into value in an original creation (not through the idea or ideas underlying it) or in a new creation, useful and applicable in industry repeatedly and with the same result, but the idea itself is not protected. Form must exist and be perceptible to the senses. The idea does not! Form should not be mistaken, it should not be mistaken with the merits in the case of copyrighted creations. In the case of new and useful works in the industry, the form is of interest only to the extent that it helps the merits to be understood, clear, reproducible by the specialist without any creative activity.

Ideas...! In the activity of intellectual creation, ideas are the ones from which the works are born and give substance to the works, but our conception on the role of ideas in works and of the idea-work or work-idea dichotomy has evolved much in the last two centuries of intellectual property history. And I am reminding, the French Revolutionaries of 1791, for example, did not make the distinction that we are doing today, since the work and the idea were one and the same to them. This follows from the statement made on January 7, 1791, by Stanislas de Boufflers in his Report on the Law of Inventions: "If there is a real property for man, this is his thought; It is the least susceptible to alter, it is personal, it is independent, it precedes any transaction; Neither the tree that grows in the field is not so indisputable own by the owner of the land **as the idea that is produced by the spirit of man and belongs to the author.**" Citing to the right value the contribution of the said revolutionary (which proved to be not exactly original[19]), we can only say that the distinction between ideas and works was natural and necessary, as well as the distinction between the work and the support the work is placed.

However, we hear lately, and more often, statements such as: *"In such a work we have found no idea"*, or *"the thesis X lacks any personal idea"*, or *"the content of ideas of Y work is poor"* etc., which means that in our mind, there is a close connection between the ideas underlying a work and its value. And yet, in

[17] It was not until 1940 that the wonder medicine was obtained. In the experiment at that time, 50 mice were infested with deadly streptococci. Half of them were treated with penicillin and survived. The others died of septicemia.

[18] See Mihai Eminescu case.

[19] Pierre Recht said that *"revolutionary legislation has only plagiarized the form and substance of Louis d'Hericourt memoirs' and the Parisian librarians' lawyers of 1778"* (apod C. Colombet, op. Cit., P4). And A. Bertrand in *Droit d 'auteur*, troisième édition, Dalloz, 2010, p.8, “denounces” another rapporteur (Lakanal) to the reproductive right law adopted in 1793 to have been stolen from a certain Baudin.

copyright, the work is protected independently of its value[20]. It is not the same with the scientific and technical creations, in which the innovation contribution, which is objectively appreciated, is a condition of protection of creation, namely, the condition of release of the title. No less true is that valuable ideas generate valuable intellectual creations and, in the case of scientific works, the content of ideas is very important.

French theologian and writer (in English language), Ernest Dimnet, in a work written in 1928, "*The Art of Thinking*," the best-seller in his time, but almost forgotten today, said that ***"ideas are the roots of creation***[21]. Why did not the theologian-writer go forward with his idea? It may not have Socrates's knowledge of "midwifing" an idea at the end, or perhaps because he was a theologian, he was not as free of mind as the one who had the daemon in it. Because if we were to continue Dimnet's idea, then we could compare the result of creation to a tree, whose roots do not reveal to our sight at all, although they are the ones that support it and give it the sap of which it rises and they are one and the same. Except that beyond the roots of the tree there is the soil, the minerals, the water, the sun, without which the seeds would not fructify, could not feed. In other words, and continuing with Dimnet's idea, we believe that it can be said and argued that at the origins of any creation the idea is only a part (very important), because to it adds culture, reading, experience, grace, gift, power to be creative, the inspiration, the hand of God placed above us and giving us all or... nothing. And all these (and also others) might be arguments to ask with more humbleness the recognition of a right, its content, its extent and its duration when we do. Whatever the state we ask of.

Since ideas are things of the spirit as well as works, since ideas are the origin of intellectual creation and give substance to them, because they are introduced into work, ideas are part of it and are their very essence, how we identify the idea and how do we distinguish between idea and work that incorporates it, the work on which is based on? Because the demarcation line is thin, sometimes even very difficult to spot. Ideas in themselves do not imply a transformation of what previously existed. Creation activity, starting from an idea or from several ideas, involves such a transformation, it is supposed to do something that did not exist before. It assumes a form of personal, original expression, different from any other before the same idea.

Ideas act differently in the various forms of intellectual creations performance, depending on the mode of processing, the way they are perceived, the capacity of the person who processes it or wants to transmit it, but this it is already a problem of expression, putting ideas into work. For example, in a certain way - original - the idea will be expressed by a composer or by a dramatic author, whose creations will be protected by copyright and, in a different way the same idea will be expressed by performer or singing performers whose performances of the work will be protected by copyright-related rights, which in principle can not infringe copyright. There is a difference between specific ideas of scientific works, also among those there are different ideas depending on the domain to which they belong to, and the ideas in artistic works.

In the case of literary works - and here we include the scientific works - the creation process involves several steps, without which it cannot exist: the idea (the essence, what is transmitted through the work, the profound meaning of the work), the composition (the concretisation of idea or ideas, chaining the ideas of the work, internal organization structure, the subject, the intrigue, the action, the narrative, the characters) and the external form (the way the author expresses his ideas, presents them to his audience). In the case of scientific works, the content of ideas is important, the way of organizing and explaining ideas.

In the case of plastic art, the idea takes the form of the image (the artist translates his ideas into images), while in the case of musical works, the idea takes the form of sounds.

For Constantin Brâncuși, for example, **the idea behind the opera** is vital: "All those who regard my sculptures as abstract are madmen. What they believe is abstract is all that can be more realistic**, because the real does not mean the outer form of things, but the idea and essence of the phenomena**. "

And he added: "*I am neither surrealist nor baroque, nor cubist nor anything of this kind; I, with my new*, ***come from something that is ancient*** *...* ", suggesting, quite transparently, we believe, that ideas are not necessarily in him, that they do not belong to him, that they pre-exist and that he only gave them life in a personal form in his sculptures. The same Brâncuși another time said, telling how a bird entered his workshop and did not find the exit, hitting the window: ***"I do not create birds but flights"*** and in the same register, another famous sculptor, Henri Moore, said about him that ***"Brâncuşi was the one who gave our era the consciousness of pure form"***[22].

We do not know if Brâncuşi read Socrates and Plato, but what he says it does look too similar with what the great Socratics said about the sensible world and the intelligible world, of what we see with our eyes and what we see with the eyes of the mind, about the essence of things.

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[20] We do not agree entirely with the solution of Romanian legislator. How can there be "work" of no value?! In German law, for example, a minimum value is required. We even believe that the condition of a minimal value is implied, since we are talking about works that are, by definition, valuable.

[21] Ernest Dimnet (1866-1954), writer and French priest, established in the USA after the First World War, is the author of *"The Art of Tinking"*, published in 1928 in the US and in 1930 in French ("*L'Art de Penser*"). However we must mention the author of the idea every time we say the same thing?! Quote is available on www.citation-celebre.com.

[22] Henry Spencer Moore (1898-1986), the most important English sculptor of the twentieth century, one of the modern sculpture animators.

And if we think that Brâncuşi has freed the sculpture of the mechanical imitation of nature (the mimesis manifested in the plastic arts which was one of the reasons why Socrates and Plato were not at all friendly with the artists, considered by them as imitators), following the expression of the essence of things and the unity between the sensitive and the spiritual, his vision of the world of ideas resembles quite a lot with that of the Socratics. But if Brancusi did not study the parents of philosophy, it means that is true that the great spirits are still meeting somewhere sometime. We try to imagine a Brâncuşi in dialogue with Socrates[23] and Plato together! And we can now understand Valeriu Butulescu, who in the play "The Golden Bird" puts an interesting but not quite Orthodox line in Brancusi's mouth: ***"I make ideas from the matter, hitting the chisel! My ideas have a lot of weight. They have gender. Breathe"***. However, I remind that narrow-minded spirits (which, moreover, were also creators, intellectuals and Romanian academics) refused to accept the testament by which C. Brâncuşi left the Romanian State his workshop in Paris and 200 of his works (his sculptures having one of the highest market shares).

The idea of dressing bridges, trees, buildings or *"decorating"* hills with yellow umbrellas is simple and obviously does not involve creative effort. But putting it into work in a personal, original form is protected. A French artist of Bulgarian origin, Christo Javacheff, however more known in the US than in Europe, had the idea of wrapping in canvas a bridge in Paris (Pont Neuf).

Preparatory work lasted from 1976 until 1985 and cost 19 million French francs. The bridge (the oldest in Paris) as it was wrapped by him and which was presented to the public on September 22, 1985 (for 14 days) was an ephemeral artwork that transformed an architectural work into a work of art and is protected by copyright. It could not be photographed or filmed without his consent. One cannot decorate another bridge the same way without its consent. But his idea cannot be protected: anyone who wants to pack another bridge in a different way can do it without Christo's consent. Anyone who wants to decorate a bridge can do it without Christo's consent. He also packed the Reichstag building in Berlin, a field with yellow umbrellas, etc. A plastic artist of Tunisian origin, El Seed, after the Paris City Hall decided to cut off all the "locks of love" hanging on the Arts Bridge drawing the wrath of the Parisians, painted the bridge in graffiti, writing on its parapets in Arabic, stylized in pink colour, a quote from Balzac's Pere Goriot: *"Paris is actually an ocean; You can measure it, but you will never know its depths."*

No one can claim monopoly on any idea. Plastic artists will always be able to paint the blooming sunflower, even if Van Gogh wrote to a friend that "sunflower belongs to me in some way", they can paint iris, poppy fields, landscapes that have been painted before, models etc. without breaching anyone's rights. However, they cannot reproduce the paintings made by those before them! As anyone can write about love, about trying to get through guilty love, treason, war, without breaching the rights of Octav Dessila, Stendhal or Ernst Hemingway, etc.

Anyone can write a law paper in any field without violating the rights of those who have written on the same subject. Obviously, in all cases, the condition required to become a copyrighted work is the personal approach of the theme, the content of ideas that cannot be substantially different from that of the pre-existing works.

Free by definition, the idea becomes a protectable creation when the author puts it in its own way in its own words that represents it, in its lines and colours, in its own harmony of musical sounds, in the way of using the lights, in its personal form of expression which confers to creation what we call originality or, where appropriate, when the idea materializes in a new technical creation, susceptible to being put into practice, to be industrially reproduced with the same result (invention, drawing, model). This means that the originality conferred by the personal touch in the case of aesthetic creations, of expression and transformation of the idea into a new and useful creation in the industry for new and useful creations that makes the difference between the raw and unprotected idea and what outcomes from the idea processed in a new, personal, original or new and useful form: protectable creation! And even if the attachment of a work on a support is not a copyright protection condition, in the case of technical creations this attachment on the support is a condition for granting the protection title (patent or registration certificate). However, in both cases ideas are present and constitute the starting point for the achievement of any creation, whatever its genre.

The idea remains, however, outside of any protection, the rule being provided by the law of copyright by a rule from which its imperative nature is deduced. Thus, according to art. 9 of Law no. 8/1996, *"The following can not benefit from the legal protection of copyright: a) ideas, theories, concepts, discoveries and inventions contained in a work, whatever the way of taking over, writing, explaining or expressing was(...) "*. And if that express provision was missing, then we would deduce it from the rule formulated in art. 7 and 8 from the Law that indicate the **form of expression** and **intellectual creative work** as those that **give the creations originality, a condition without which there can be no protectable work.**

3. Reason of excluding idea from protection

The theory that ideas are free and cannot belong exclusively to anyone, so they can not be protected by

[23] It is blind who sees only with the mind's eyes, Socrates said. My sculptures are even for the blind, Brâncuşi said.

intellectual property rights was formulated in the 19th century, at the end of the 18th century there were, as we have previously shown, confusions in the distinction between ideas and works. But even after 100 years since the intellectual property laws were adopted in France (in 1791-1793), even for the father of moral copyrights, the theory formulated by him in 1872, the distinction was missing. Thus, Andre Morillot has indeed argued to justify the theory of the personalist nature of copyright, and not with reference to the exclusion of ideas from protection, but the argument remains valid here also, that "***being the owner of an idea means being a person and good, subject and object of the same right, the holder of a legal relationship whose two terms will be the same person, in a word, be your own owner, which is legally impossible. "***

In the second half of the last century, this theory was developed by Professor Henri Desbois, his argument that ***"les idees sont de libre parcours"*** is considered a principle of copyright, in our laws the exclusion of ideas from protection is a settled legislative solution (Article 9 of Law No 8/1996). However, on Desbois' arguments, other authors have added over time their arguments in support of the same thesis, the exclusion of ideas from protection, and of course, others can be added. And we note that while the basic idea is that of excluding ideas from protection, the arguments and form of expression of this idea cannot be very different in all opinions formulated to support the thesis of exclusion from protection, the argument of society's interest being the most used.

Exclusion from the protection of ideas is a traditional principle in the law of intellectual property and in accordance with the interest of society.

1. Exclusion from the protection of ideas is a traditional principle in the law of intellectual property and in accordance with the interest of society. Henri Desbois[24] shows that ideas, even when touched by genius, are by their very nature and by their purpose free, and their protection would be contrary to their tradition and nature. Indeed, to recognize an exclusive right, a monopoly on an idea would be excessive, because such protection would lead to the recognition of an exclusive right over the creation fund protected by copyright. The monopoly on one or some ideas would paralyze the creative work, because it would mean that no one can process the idea in another form of expression, no one could do another work on the same subject, with the same message, for That it would be counterfeit. However, an idea can be exploited in different forms of expression, and freedom of expression can not be limited, because it would even mean limiting the freedom of creation. Therefore, the exclusion of ideas from protection was and is pursuant with the interest of society.

I remind that in the Constitution of Romania, in accordance with the Universal Declaration of Human Rights (Article 27), freedom of expression and freedom of creation of any kind are fundamental freedoms (Article 30), as well as the right to work (Article 40), and the kind of work is the right of free choice by everyone. Limiting creative work by monopoly on ideas would even limit the right to work and the right to choose the type of work.

2. **Ideas are not original, and originality is a condition for the protection of works by copyright.** We have detailed above the issue of idea-work binomial and the moment when the idea becomes work and we have shown that ideas are not works and are not protectable because they lack originality. We add to the arguments detailed the one's of Professor Andre Lucas that state *"in the case of ideas, intellectual effort does not justify protection for them (...) and this because the law recognizes privative rights, but subordinates this recognition to the fulfilment of certain conditions: for example, novelty, inventive activity and industrial applicability in the field of patents, originality in the field of literary and artistic property. Creations that do not meet these legal requirements are reputed to belong to public domain"*[25]. Later, Professor Lucas added to his arguments, pointing out that even since 1928 the French courts have stated that *"in the field of thought, ideas must remain eternally free, and they cannot be the subject of a private right"* and *"it has become a fundamental principle for copyright"*[26]. Ștefan Cazimir[27] says that for him **coming up with an idea is an inexplicable phenomenon, most often indebted to hazard,** and the distinguished philologist with a mind full of ideas, although he was also into politics, did not invoke any right on his political ideas. We remind, in context, that our politicians still accuse one another of theft of political ideas and that it was a time when accusations of political ideas theft were fashionable. But such allegations also meet elsewhere. For example, in France, a French presidential candidate in the 2012 elections, Nicolas Dupont Aignan, stated that he should receive money from other competitors because they took over his ideas on which he has copyright. He requested to Jerome Sujkowski, a young French attorney-at-law specialized in intellectual property law to comment on Aignan's statement in an article on protecting ideas in which he said, among other things, that "he cannot imagine that

[24] H. Desbois, *Le droit d`auteur en France*, Dalloz, 3e édition, 1978, p. 22.
[25] André Lucas, *Traité de propriété littéraire et artistique*, Litec, 2000, p. 28.
[26] André Lucas, Henri-Jacques Lucas, Agnès Lucas-Schloetter, *Traité de propriété littéraire et artistique*, LexisNexis, 4e édition, 2012, p. 38.
[27] Ștefan Cazimir, Critic and literary historian, professor of philology at the University of Bucharest, founder of the Free Trader Party, inspired by the play *"A Lost Letter"* by I. L. Caragiale, deputy in the Romanian Parliament in three successive legislatures.

N.D. Aignan would be "Null" in copyright, so he will start from the premise that he only tried to amuse his audience"[28].

3. **Exclusion from the protection of ideas is a solution stemming also from the principle of freedom of industry and trade.** It is a fundamental and general principle of today's world, and according to it, the individual is allowed anything that is not expressly forbidden by law (as opposed to the authority which is permitted only what the law expressly states). It is part of the broader and more general principle of freedom, which is the most important foundation of the legal order of modern states. Freedom exists in all human activities - **thinking, movement, expression** - and in all areas of law: public, penal, labour, economic. In the economic life, the principle of liberty takes the form of trade and industry freedom, by virtue of which every person has the right undertake, to participate in the life of another, to participate in business life and to compete with others.

The origins of this freedom are, in fact, much older and much deeper. They are found in the right to life of every human being, right emanating from an obligation, from the divine obligation of every human being to preserve their life and that can be assured by and through the freedom to undertake and to trade and to compete with others. This right to life implies also freedom of competition and freedom of competition implies the freedom to offer products and services identical to those available on the market, which means that these products and services can be freely copied, however such thing cannot be valid but for the perfect competition. The exclusive right of creators on their creations is, in fact, the opposite of competition (the perfect one, of course), but the extension of protection to ideas would have adverse effects, compromising the very idea of competition.

4. **Exclusion of ideas from protection is justified by the application of proportionality principle.** This principle has become the new star in law, being consecrated as such both by the European Court of Human Rights and by the Court of Justice of the European Union, which have consistently held within their jurisprudence that there must be proportionality between the aims pursued by legislators and the means used to achieve them.

In our country, the principle of proportionality has constitutional value, in art. 53 paragraph (2), is provided that the restriction of exercising of certain rights or freedoms may be ordered only if necessary and proportionate to the situation which determined it. However, applications of this principle are found in other matters, even in the Constitution. For example, the statutory system of taxation must ensure the correct setting of tax burdens (Article 56); The exercise of rights and freedoms cannot infringe the rights and freedoms of others (Article 57); Expropriation can only be done with just and prior compensation (Article 44), etc.

To recognize a monopoly over an idea or ideas would not only be contrary to the principles on which copyright is based (the form of expression, original, conscious and creative activity, having the purpose to change what exists and to achieve something new, which did not exist before), but also contrary to the general interest, and this interest justifies the solution of non-protection of ideas by intellectual property rights, sacrifice being necessary for the protection of a superior interest. And if the right to work and the choice of work, if the freedom to create and to express yourself is the rule, the limitation of these rights and freedoms can exceptionally take place in order to achieve a legitimate objective in a democratic society in a precise manner and proportionate to the objective pursued. In our case, legitimate limitation is achieved by excluding ideas from protection, from recognition of any privative right over ideas. The protection of ideas (purely abstract elements) would allow the holder monopoly over an idea preventing anyone from using this idea, thinking, creating, expressing, working, earning a living through intellectual work. Therefore, recognition of a monopoly over an idea or concept would not allow the principle of proportionality to be observed: limiting access to ideas that would emanate from the acknowledged / awarded monopoly would not be proportional with the objective pursued, that of raising collective good through innovation, through creative activity.

5. **It is unknown and it cannot be known to whom the idea "belongs" to, in order to award the exclusive right.** The impossibility of establishing the person who had the first idea seems to us to pertain to evidence based field. As with the evidence based field, it seems to us that a person can formulate the same idea without knowing that someone else has done it before. One and the same idea can be formulated by an infinite number of people. One and the same idea can be reached by an indefinite number of people by different means. To admit that one of them may have a privative right on the idea means denying the right to study, to research, to experiment, to reach the same conclusions, or, starting from the same idea, to reach different conclusions and different modalities to practically harness the idea.

We also believe that the recognition of an exclusive right over (certain) ideas would be contrary to the interests of the one who claims it too. It would limit the possibilities of that very person to have access to other ideas himself blocking his creative work also. To admit the acknowledgement of privative rights upon ideas it would mean to block the creative work of all, to generate chaos in the world of creators, a world on which overall development depends.

[28] Jerome Sujkowski, *„Les idées ne peuvent être protégées”*, http://www.unpeudedroit.fr/author/jerome-sujkowski/.

4. Criticism upon refusal to protect ideas by intellectual property rights

With reservations justified by the idea we support, that ideas are not protectable by copyright, we must mention, for the sake of truth, that the refusal to protect ideas by intellectual property rights is not considered a solution protected against criticism, and that there are many critics, bringing arguments that can put into question the fairness of the solution adopted by special laws.

The first criticism[29] upon the resolution that refuses to copyright[30] the ideas is that it is difficult to say when we are in the presence of an idea or a work, and even if the distinction can be made, then we must admit it is paradoxical to exclude valuable ideas from the field of copyright, while copyright protects even worthless creations (but we note that in the case of new and useful creations, industrial applicability virtually excludes protection upon worthless inventions, respectively without useful effects, invaluable for the economic activity).

A second argument is that denying the protection of ideas by copyright equates to the refusal to examine the originality of many creations of form. Here we must say that in the case of scientific works the concern for the form of expression is low (although the plagiarism charges are not few, they are related to take-overs in general, without distinguish between the unprotected and unprotected ideas and the form of expression). In scientific papers, language is otherwise standardized and is even more standardized and more constrained as the level of technicality is higher. On the other hand, scientific papers must communicate content, information, ideas. However, we believe that standardized language makes it difficult for the author and that, limiting the protection to the form of expression, the content of ideas cannot however be monopolized, anyone having the right to write papers on topics that have been previously dealt with. And if we compare scientific papers to what is happening in other areas of intellectual property, we can mention that in the case of weaker trademarks, protection is even weaker.

Finally, as soon as the idea has been formalized, as soon as the idea has acquired a form of personal expression that represents the true author, copyright must no longer be of interest but for the creation of form which resulted, thus, is also inappropriate to use the term "idea" anymore. Such a conception, we must admit, is not contradicted by art. 7 of the Law no. 8/1996, which protects all works, whatever their form of expression, so too in the case the work is summary. And it is to be noticed that according to art. 1 (2) of the Law no. 8/1996, the work is protected even unfinished, meaning somewhere between the stage of idea and the stage of work.

5. Exclusion from protection and protection of ideas by special law in Romania

We have not identified another system of law in which ideas are, at the same time, explicitly excluded from intellectual property rights (as the case in all legal systems) and protected by a special law, outside of Romania. We are (also) from this point of view, a special case, we are overly original, to speak in our matter's terms, because, contrary to the resolution with principial value, to exclude from the protection ideas through intellectual property rights, by a Law (No. 206/2004), whose object of regulation, according to its title, is *"good conduct in the scientific research, technological development and innovation activity"*, that the ideas are recognized as having appropriation vocation and legal protection, since their mere exposure into a written work or oral communication without indicating the author is considered plagiarism. However, this is a protection which the special laws of intellectual property expressly refuse, and the exclusion of ideas from protection is in line with the provisions of the international conventions to which Romania is a party and with the legislative solutions of other countries.

We are the only country in the world that has two categories of ideas, with a regime defined by special laws: some excluded from copyright protection, subject matter of which is the scientific work, others protected by a special law dedicated to ethics in the activity of Scientific research, a law that made plagiarism, which has no legal existence anywhere in the world, to have such an existence in Romania.

Following the model consecrated by international conventions in the field of intellectual property rights, our laws exclude ideas from protection in any areas of knowledge and / or creation. Thus:

According to art. 9 of the Law no. 8/1996 on copyright and related rights, cannot benefit from the legal protection of copyright (…): ***ideas, theories, concepts, scientific discoveries, processes, methods of operation or mathematical concepts (…), whatever the modality of taking over was, writing, explaining or expressing***.

According to art. 7 of the Law no. 64/1991, on invention patents are not considered inventions, especially: a) ***discoveries, scientific theories and mathematical methods***; (...); c) ***plans, principles and methods of exercising mental activities, gaming or economic activities*** (...) and (d) ***presenting information***. These provisions "***shall not exclude the patentability of the objects or activities referred to in***

[29] For details, see Christophe Caron, p. 72.

[30] In the case of creations useful to industry, the idea becomes invention, topography, design, model, brand and will be protected by the title of protection released, but it is protected as a materialized idea and in the form in which it has been materialized, and can be exploited by other creators as well.

this paragraph except to the extent that the patent application or the patent relates to such objects or activities considered per se". We note from the cited text that the exclusion of ideas is missing from listing. But any invention is an idea or a succession of finalized ideas, thus the exclusion of ideas is implicit. In formal terms, rendering an invention patent requires the formulation of the request, description, drawings and claims of the invention, or this means that it is understood that the simple idea (which precedes the invention) cannot be protected.

Likewise, in the case of utility models (minor inventions or to use one of our older terms, innovations), things are similar, by art. 1 of the Law no. 350/2007 being excluded from protection the same categories as in Art. 7 of the Law no. 64/1991. As with proprietary and patent-protectable inventions and inventions protectable by utility model (small inventions), it must be disclosed clearly enough and completely for a person specialised in the field to be able to achieve it, which means that the level of idea has also been surpassed and that the idea is not protectable.

Law no. 129/1992, with regard to models and designs, by art. 9, excludes from protection only designs and models contrary to public order or good morals, but the exclusion of ideas from the protection is implicit since for the registration of a design or model it is required that these should be described and represented graphically, which obviously requires surpassing the stage of a simple idea.

Law no. 16/1995 on the protection of topographies of semiconductor products also implies a rule of exclusion from protection of ideas in this field when, by art. 13 stipulates that for the registration of the topography it is necessary to establish the regular deposit, which is made up, among others, of the application containing the date of the first codification of the topography, the date of its first commercial exploitation (if applicable), as well as a technical documentation, graphs and texts containing sufficient information to enable the identification of the topography and to highlight the electronic function of the semiconductor product incorporating the topography and two copies of the semiconductor product if it has been produced and commercially exploited. However, this binding documentation for the valid constitution of the deposit also implies that the state of simple idea has been overcome.

And in the case of work secrets (know-how or savoire faire), things are about to be clarified, because on 8 June 2016, Directive (EU) No. 943/2016 on the protection of know-how and business confidential information (commercial secrets) against unauthorized acquisition, use and illegal disclosure, Member States are required to adopt the Acts binding as laws and necessary administrative acts to implement the Directive by June 9, 2018.

The Directive does not bring anything new in terms of definitions in relation to those formulated in the previous doctrine, but the Directive formulated will put an end to the disputes that still existed. According to art. 2 of the Directive, *"commercial secret"* means information that meets all the following requirements:

a) are secrets in the sense that they are not, as a whole, or as presented or articulated, elements of those, generally known or easily accessible to persons in circles normally dealing with the type of information in question;
b) have commercial value due to the fact that they are secrets;
c) have been the subject of certain reasonable measures, in the given circumstances, taken by the person that has legal control upon that information in order to be kept secret.

The only reference to ideas in the Directive is made in reason (3) and it refers to innovation as a catalyst for new ideas and to the fact that innovation allows ideas to appear on the market, thus confirming again the important role of ideas for creative work, and the fact that they must remain free.

Agreement on trade-related aspects of intellectual property rights (TRIPS[31] or ADPIC[32]), **it also refuses the idea of protecting ideas.** The agreement[33] is, as it is well known, the vivid proof of the commercialization of intellectual property rights, and if the ideas would have found a place of protection in any international convention, then this agreement would have been the right place. But the Agreement not only did not become the act of birth for the protection of ideas, but, on the contrary, it also represents the unequivocal manifestation of the international community to protect ideas through copyright. Thus, in art. 9.2. of the Agreement provides that *"copyright protection will extend to expressions,* ***not to ideas, procedures, methods of operation, or mathematical concepts as such."***

The same meaning is found in the provisions of art. 2 *("The extent of Copyright Protection")* of the World Intellectual Property Organization Treaty on copyright, concluded in 1966[34] that provides "copyright protection extends to expressions, not to ideas, processes, methods of functioning or mathematical concepts as such. "

Law no. 206/2004 on good conduct in scientific research, technological development and innovation

[31] *TRIP 'S i*s the acronym of English title of the agreement, respectively, *Trade Related Aspects of Intellectual Property*. It has 177 member states.
[32] *ADPIC* is the acronym of French title of the agreement, respectively, *Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce.*
[33] Approved on behalf of the European Community by Council Decision of 22 December 1994 concerning the conclusion, on behalf of the European Community, within its sphere of competence, of the agreements obtained at Multilateral Trade Negotiations in Runda Uruguay (1986 to 1994) (Decision No 94/800 /CE).
[34] Ratified by Romania through Law no. 205/2006.

(amended by Government Ordinance No. 28/2011 and GO 2/2016) deviates from the solutions established by international conventions and intellectual property laws of modern legal systems, this law declaring ideas to be protectable[35] and that the act of acquiring ideas is the deviation or, as the case may be, the plagiarism offense.[36]

In reasoning this law, it is shown that its adoption was necessary for several reasons:

1. Romania ratified by UGO no. 26/2002, Memorandum of Understanding between Romania and European Communities on the Association of Romania to the Framework Programs of the European Communities for research, technological development and demonstrative activities and the creation of Research and Development Innovation Area in the EU, agreed programs for the period 2002-2006.
2. Funding for research that contravenes ethical principles must be prevented, given that *"all that is scientifically and technologically possible is not necessarily desirable or admissible"*;
3. It is necessary to regulate issues of ethics, integrity, professionalism and honesty, by excluding dishonest actions, and for this purpose a National Ethics Council has to be set up, elaborate the Code of professional ethics and deontology for research-development personnel and establish the procedure in case of reporting deviations from good behaviour;
4. It is necessary to align with international regulations or those adopted in other countries, including the UNESCO Universal Declaration on Human Genome and Human Rights, the Charter of Fundamental Rights of the European Union, the Convention for the Protection of Human Rights and the Dignity of Human Beings, Directives 2001 / 20, 83/5/70, 86/609, 98/44, 90/219 /, French Law no. 94-654 on the donation and use of elements of the human body (...) and other normative acts from other countries on the same subject.

It is not of interest in the present work except for those provisions of Law no. 206/2004 regarding plagiarism, self-plagiarism and protection of ideas, demonstrations, data, hypotheses, theories or scientific methods that Law no. 8/1996 expressly excludes from protection. What was the reason for the legislator to render contradictory rules in this matter (protection of ideas and plagiarism)?[37].

First of all, we must note that the references in the Memorandum of reasons for Law no. 206/2004 to international, European and countries in Europe normative acts **is correct only to the extent that it concerns research having as object human beings and animals, none of the acts mentioned in the memorandum of reasons is not related to plagiarism, self-plagiarism or protection of ideas, data, methods, theories.** And what we need to discuss is not the need to regulate good conduct in the research activity, that seems to us to be obvious, but the solutions adopted by the legislator in one and the same matter and which is, in Law no. 206/2004, contrary to a traditional resolution in law and in all legal systems and contrary to the solutions established by at least two international conventions to which Romania is a party.

Secondly, the regulation of plagiarism, self-plagiarism and protection of ideas through Law no. 206/2004 is contrary to Law no. 24/2000 regarding the normative technical norms, art. 14 and art. 17 of this Law, which stipulate that regulations having the same object usually are comprise in a single normative act, that a normative act may contain regulations from other matters only in the extent they are indispensable to the achievement of the purpose pursued by it, and that contradictory normative acts are abrogated. The two laws cannot coexist in the part where they contradict and become inapplicable or at least are generating arbitrary solutions.

Third, if it were considered that Law no. 206/2004 is a derogatory law from Law no. 8/1996 (which sanctions the plagiarism of works in Article 141, without using this name for the incriminated act[38]), this should have resulted expressly from the regulation with a wording such as: *"By way of exception to the provisions of Art. 9 of the Law no. 8/1996, in scientific research, ideas, data, theories, methods ... are protected, and their appropriation constitutes plagiarism."*

It can be considered that Law no. 206/2004 is a special law? The answer is no, Law no. 206/2004 has as a matter of general regulation that is not subject to other regulation (Article 15 of Law 206/2004), being "special" only with reference to the contrary resolution to Law no. 8/1996, of excluding ideas from protection. And if the regulation contained in Law no. 206/2004 on the protection of ideas and their plagiarism would be considered special, then this regulation is contrary to certain international conventions to which Romania is a party (the TRIPS Agreement and the Treaty of Rome on Copyright, indicated above) and it cannot be applied, pursuant to art. 20 par. 2 of the Constitution (the priority application of international treaties). Because if a privative right is acknowledged upon ideas, by Law no. 206/2004, then they will have the

[35] Daniela Negrilă "Protection of ideas through copyright. Application in the field of Code for University Studies for Doctoral Studies", Romanian Journal of Intellectual Property Law no. 1/2017, pp. 26-33.

[36] For an extended analysis of the plagiarism provisions of Law no. 206/2004, see Sonia Florea, "Plagiarism and Copyright Infringement" in the Romanian Journal of Intellectual Property Law no. 4/2016, pp. 109-134.

[37] See Matei Dănilă, "Considerations on plagiarism from the point of view of the originality of the work and of the right to cite. Self-plagiarism and protection of ideas, pleadings and preaching" in the Romanian Journal of Intellectual Property Law no. 3/2015, pp. 55-75.

[38] Specialized papers and jurisprudence, even the Constitutional Court (see Directive No. 624/2016) use the term, but nowhere in Law no. 8/1996 (not even in French Intellectual Property Code) the word is not used, although Art. 141 of the Romanian Copyright Law incriminates it as an offence, that is what even in commune language we understand by plagiarism.

same regime as copyrighted works, the right upon them being considered to belong to the category of fundamental rights referred to in art. 22 par. 2 of the Constitution. Our legislator's resolution is also contradicted by art. 30 (freedom of expression) in the Romanian Constitution, but this worth a separate discussion.

We must, of course, make a point: that the scope of Law no. 206/2004 is limited to personnel carrying out research and development activities, provided by Law no. 319/2003 regarding the status of research development personnel, as well as by other categories of personnel, from public or private environment, benefiting public funding for research-development[39]. Obviously not, being discriminatory and cannot be said to be a positive and acceptable discrimination, since on the basis of independent scientific work, a person can access positions requiring relevant knowledge, experience and relevant outcome. This is not the issue that we have come to discuss here, but we do think that it cannot be ignored by the legislator who must intervene to eliminate the contradictions, being bound to this intervention by art. 15 of the Law no. 24/2000 regarding the rules of legislative technique.

We believe, of course, that the good conduct in the scientific research activity requires to respect the work of predecessors, the results of their work, the priorities in the formulation of ideas, theories, concepts, methods, etc. That is inexcusable even the mere silence of the names of those who, before us, have researched, wrote, enriched the knowledge we have today and from which we intellectually feed ourselves to understand and carry on our work further. That it is unacceptable to forge the results and promote on criteria other than fair competition. But we believe that regulating excessively and regulating in contradiction, regulating with disregard the traditional resolutions from other legal systems, resolutions adopted by international conventions, these are wrong measures, however moral / ethical the intended purpose is, and that the Romanian solution is exotic. If ideas are, forever and ever, a territory of everyone and of no one, if ideas are and must be free, if ideas are in the public domain, then they cannot be legally protected. We also believe that priorities must be recognized and that this attitude of recognition of predecessors' merits is a matter of good conduct, morality, and morality is far more than law[40].

6. And yet, ideas ... and unfair competition

On the idea that ideas (we could avoid repetition, but we would lose ... the idea!) cannot be protected by copyright we must give priority to Henri Desbois[41], in the specialized works being considered an adage (traditional principle) the statement made by him in the 70s of the last century: ***"les idées par essence et par destination sont de libre parcours".*** But in a work published in 1996, another great personality of intellectual property law in France, Professor Andre Françon[42], pointed out that the resolution excluding ideas from protection was not unanimously accepted in French case-law, awards admitting the protection being rendered by **commercial tribunals** since years 60s-70s of the last century. Before the Court of Cassation of France, First Advocate General Raymond Lindon[43], referring to that case-law, requested, in the name of equity, the acknowledgment of a protection for ideas. Professor Françon has shown that this issue is of practical importance especially in the case of advertising ideas and advertising creations, because they are the subject of lucrative activities performed by individuals or by specialized companies that are prosperous, and specialists are not confined to providing ideas, but also to mentally prepare campaigns, posters, radio and television broadcasts, etc., or the refusal to give them an indemnity for their ideas put into work is unfair. But, Professor Françon said, although there are arguments of fairness in favour of recognizing rights in favour of those who provide ideas to others, the protection of ideas by copyright is not possible because copyright laws protect the form of expression, which means that the exclusive right it is not attached to the idea, but to the form under which it is exposed.

Is there, however, a solution that satisfies the principle of equity and allows those who provide ideas to obtain a reward or be compensated for the use of their ideas without their consent? Life is always ahead of the law, and sometimes the distance is very great.

Walt Disney, for example, bought ideas for his animated films (a common thing in cinematography), and even created a method (working technique?) (which cannot be protected by any intellectual property right) in which the first step was "midwifing" ideas (finding/ discovery/ identification) by a first category of his collaborators ("the dreamers"), the second step of

[39] For the analysis of the scope of Law no. 206/2004, see Alin Speriusi-Vlad, "About plagiarism, copyright and the protection of ideas or a coherent theory of plagiarism", in the *Romanian Journal of Intellectual Property Law* no. 4/2016, pp. 88-92.

[40] For a very interesting vision of Plagiarism and Doctorate, about Alexander Baumgarten "Can the History of Ideas Say Something About Doctorate and Plagiarism?", *Romanian Journal of Intellectual Property Law no. 1/2017*, pp.19-25

[41] Henri Desbois (1902-1985) was a professor at Pantheon-Assas University of Law, Economics and Social Sciences. The prestige enjoyed in France and in the world by this author and his works is immense. An intellectual property research institute, integrated in the Paris University II, bears its name. The third edition of his work *"Droit d'auteur en France"* was published in 1978, at a time when in this field, it was very little written about, and in this country. The originality condition was researched in jurisprudence by Henri Desbois in the 1950s, and the paternity of the theory is attributed to him, although studies later demonstrated that the notion of originality has been used in jurisprudence since the nineteenth century.

[42] Andre Françon (1926-2003), *Cours de propriété littéraire, artistique et industrielle*, Litec, p. 152.

[43] Raymond Lindon (1901-1992), former prosecutor appreciated by A. Françon, who speaks eloquently about him. After World War II, he was a prosecutor accused of lawsuits against French collaborators during the German occupation. He is the author of the *Le Secret de rois de France ou la véritable identité d`Arsène Lupin* (1949) and a work of judicial anecdotes: *Quand la justice s`en mêle* (1965).

developing them, putting ideas into work by other collaborators ("developers") and the third step was critique of ideas and form which were put into work by Disney himself. A method of work that he put into practice in a successful business with intellectual creations that delight the world. But at that time cinematography was already an industry with huge profits behind which, as for now, a huge number of ideas materialized in creations of all kinds: scenarios, specially created music, decors, costumes, lighting systems, fastening brackets for images and sounds, image and sound fixtures, imaging and sound processing techniques, computer software, artistic and technical countless creations.

On the Internet, there are today "business ideas" sites (and if they are "free" then they are most likely educational programs for which someone pays), others with business proposals (made by people who have ideas, but have no money, or do not want to risk their money). And it should be remembered that Disney himself knocked to the door of 301 banks before finding the bank willing to finance the greatest idea that the creative genius had, that of the Amusement Park opened on July 17, 1955 in California under the name Disneyland.

We paid little attention to the idea-work binomial so far, in earlier works, indicating only the possible discussion on author quality when the idea belongs to a person and the work is done by another person and we believe that the correct answer to this question is the one provided by Professor Françon, previously exposed: copyright protects the form of expression, not the idea, so the provider of the idea cannot be the co-author. But the question still remains: is it fair to do that? It is fair that the person who provided an idea that was put into work or whose idea was usurped should not benefit from his ideas, when they are of course valuable. Because, saying that ideas cannot be protected by a special right, such as intellectual property law, does not mean that valuable ideas cannot, however, be protected by the application of common law rules, action in civil liability (contractual or, as the case may be, tort) or the action in unfair competition.

If we admit that ideas are the engine of progress (Forbes has said and succeeded in life!), then there must be solutions to protect the providers of ideas, and life gives us such examples. It is true, the ideas we are talking about here are valuable ideas, ideas that can bring benefits to entrepreneurs (business models, distribution optimization, workspace design, or new distribution models - eMag, for example), but even those ideas that can be a raw material for intellectual creation, some of which can be valuable, but not valorised because time has not yet come for them[44], or the entrepreneur or creator who will put them to work is not there yet.

However, talking about valuable ideas, it is implied that we have other type of ideas also (invaluable, still ideas) and that seeking solutions only for the valuable ones presupposes that we already operate with a criterion which is discriminatory, or copyright does not even admit such a criterion for the creations it protects. In addition, it is possible that the value of an idea may be revealed later, or find the recipient willing to put it into practice so late that the one who "midwifed" the idea may not even be alive. But the law has never offered solutions to all problems, and the legislators have always taken care to let judges find the right solutions for unregulated assumptions (see Articles 3 and 4 of the 1864 Civil Code and Article 1 (2) Of the new Civil Code).

We do not see an impediment in concluding a contract between the seller / supplier of an idea and the one who has been given the idea, the principle of contractual freedom provided by art. 1169 of the new Civil Code, giving the parties the **freedom to conclude any contracts and to determine their content within the limits imposed by law, public order and good morals**. Maybe art. 12 of the new Civil Code, which provides that **anyone can dispose of his goods** and art. 1657 of the new Civil Code, which provides that **any good may be sold freely** if sale is **not prohibited or limited by law**, convention or testament, could be considered impediments, since the doctrine and case law are unanimous in the appreciation that ideas **are to all and to none at the same time, and that they cannot form the object of a privative right recognized by law**. However, we do not believe that by concluding a contract whose object is the supply / delivery of an idea, a rule of public order would be breached, since art. Art. 1169 The Civil Code leaves the parties the possibility to determine the content of the contract, and art. 1225-1226 of the Civil Code, concerning the subject matter of the contract and the object of the obligation, also are not imperative, as the parties can freely set the object of the obligation to which the debtor is engaged. And if we admit that a contract having as object providing / delivery of an idea can be concluded, we must admit that it is admissible also the action for contractual liability.

As regards the possibility of an extra-contractual (tort) civil action, based on the provisions of Art. 1349 and 1359 of the Civil Code, following the "appropriation" of another's idea, a principial value observation must be made. That a civil liability action for the “theft” of an idea implies the recognition of a privative right for idea on the basis of the law, or this is not possible because it cannot be recognized on the basis of common law what the special law expressly refuses to do. If it is accepted that the idea is in the public domain, then it is available to all and its use is free, it cannot be sanctioned if it is used by someone other than the one who claims to have a right over it. **However, it cannot be disputed that the "owner" of the idea may have the interest to harness it, either personally or through third parties, and that interest is legitimate and**

[44] You can resist the invasion of an army, but not an idea that has come its time, said Victor Hugo.

serious, and by the way in which it manifests it, creates the appearance of a subjective right (art.1359 New Civil Code). This seems to us the most delicate issue for engaging the liability of the usurper.

As to the proof of the priority on the idea, it could be evidence for the Claimant "envelope with ideas" filed with OSIM (see Article 66 letter f) of Law no. 64/1991 on Patents for Invention and Order no. 63/2008 of the General Manager of OSIM approving the instructions regarding the establishment of the "Envelope with Ideas" service), bringing to knowledge of the idea (ideas) by publishing in specialized papers or conferences, correspondence with the usurper for jointly carrying out a work on the idea that is the subject of the complaint, etc., although with the exception of the correspondence with the usurper of the idea and the negotiations with him for the joint performance of a work, based on a given idea, the others cannot prove the "theft" of the idea, but only of the possible priority.

It is an effective remedy for punishing the theft of ideas, action for unfair competition, action at the hands of competitors on the same market, **and sanctioning not a violation of a victim's privative right, but the wrong, unethical behaviour of the Respondent with respect to its competitor**, an action whose resources and possibilities **of sanctioning incorrect behaviours** are infinite. In this case, the Claimant shall have to prove that the conditions of tort liability are fulfilled in the condition requested by common law (the action for unfair competition being a species of the latter) and even if the evidence of the unfair act is not simple, it does not seem impossible to us. Of course, the action in unfair competition implies that the parties are competitors on the market, but the notion of competitor is interpreted in the case-law of the CJEU extensively, and the quality may also extend to individuals.

It is, however, paradoxical that intellectual property law (including industrial property here) to be so severe with ideas, and common law to be so generous with ideas. But we must not forget that the reason of intellectual rights is protection of creative activity in all its forms of manifestation and that creating means doing something that has not previously existed.

The paradox appears to be even greater if we consider that ideas find refuge and protection solutions in competition law, which is opposite to intellectual property rights, because intellectual rights generally give a monopoly of exploitation[45], and competition, by definition, fights monopoly. But there is also an answer here: Intellectual property rights are governed by special laws, applicable with priority to the matters they regulate. And by special laws, ideas are excluded from protection.

Altruism, disinterested action in favour of others is a virtue, but the businessman's peculiar is fierce competition, not the practice of virtues. Entrepreneurs seek profit-making, not providing knowledge or success recipes, unless they bring a benefit. But creators and researchers are also competitors, and for researchers, competition involves value, valuable ideas, valuable results. In the case of creators, although creations are protected independently of their value, whether they like it or not, the benefit is proportional to the value of creation. A value that is given by the idea behind it and which is not protected by the originality of creation.

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[45] See for this matter art. 40 within the Agreement on Trade-Related Aspects of Intellectual Property Rights according to which "members agree that certain practices or conditions relating to license concession with regard to intellectual property rights that limits competition may have prejudicial effects on trades and impedes the transfer and diffusion of technology."