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COMPARATIVE PERSPECTIVES ON AUTHORS' RIGHTS

- PhD Thesis Summary -

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INTRODUCTION

The research topic „Comparative perspectives on authors' rights" is a comparative-historical study, focusing on the moral and patrimonial rights of authors. The vertical axis will follow the model of diachronic analysis - the evolution of the foundations of literary and artistic property - and the horizontal axis will emphasize the „comparable elements and reasoning"[1] of the legal norms incidental to the protection of creations of the spirit in continental and common law[2]. In this sense, due to the two tendencies, comparative and historical, the work is constructed so as to cover the necessary premises for the comparative study of author right. The study aims to highlight the main differences and evolutions of the two protection systems of author right.

Regarding the structure of the paper, it consists of three chapters, preceded by an introductory part, and the end point contains the conclusions of the comparative research on author right.

The first chapter, entitled „Prolegomena. The historical and philosophical evolution of droit d'auteur and copyright", is intended to examine, on the vertical axis, the philosophical and historical evolution of author right, from the roots of intellectual property law, with particular references to Rome and Ancient Greece, going through the adoption of the first law on author right - the Statute of Anne - and up to the modern regulations.

In the second and third chapters, entitled „Author right in the continental European system: Romanian law and French law" and „Copyright in the common law system: Anglo-American law", we propose a foray into the realm of legal regulations of author right in the two legal systems, in which we will focus on the aspects of comparative law.

Using the comparative method we will analyze different national protection regimes (Romanian law, French law, English law and American law) and we will confront the two major families of law (*civil law* and *common law*) to identify the differences and similarities between the *droit d'auteur* system and the copyright system.

The French legal regime, to which we will refer when we initiate the comparison with Anglo-American law, have an influential position in the spectrum of national protection regimes due to the recognition of the author's moral rights. The French conception of the 19th century significantly influenced the principles of the Berne Convention, representing an inspiration for Romanian law as well. The copyright system comprises, in order to protect the creations of the spirit, two important types of national regimes, that of the United States and that of the United Kingdom.

The opposition between the two systems, *droit d'auteur* and copyright, is still maintained today due to a different perception of the legal institution.

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[1] Valeriu M. Ciucă, *Lecții de drept privat comparat*, vol. I, AXIS Academic Foundation Publishing House, Iași, 2003.

[2] From a terminological point of view, it should be noted that the term common law implies two meanings: first, it designates, in opposition to the continental civil law system, the Anglo-Saxon legal system, and secondly, in opposition to the law derived from the legislation (statute law) specific to continental law, designates the law derived from jurisprudence (case law).

On the one hand, *droit d'auteur* recognized in the continental system has a sacred character[3], especially from the perspective of moral law, and the literary and artistic work refers to the "genius of the artist"[4]. The sacralization of *droit d'auteur* comes from natural law and translates into respect for the moral component of this right. The continental approach starts from the idea that *droit d'auteur* is based on natural law and human rights, and is being difficult to accept by the Anglo-American tradition that starts from more pragmatic principles. On the other hand, the copyright system neglects the non-patrimonial side (but not entirely) of the work and the interests of the author, emphasizing the economic dimension.

Over time, various comments have developed around these two conceptions regarding the disagreement between them, with some authors appreciating that each regime has its merits: Anglo-Saxons tend to be rational and logical, concerned with the practical side, while the French are revolutionary, emotional and attached to idealistic principles[5].

CHAPTER I PROLEGOMENA. THE HISTORICAL AND PHILOSOPHICAL EVOLUTION OF *DROIT D'AUTEUR* AND COPYRIGHT

In ancient Greece, writers were not considered the real authors of the text and therefore could not be granted ownership of the creation. Ideas were transmitted from divinity and the claim of a right over ideas could not be accepted. Therefore, a property right over an intangible thing cannot be called into question.

However, during this period, moral rights were recognized in favor of creators and referred, in particular, by moral rules and sanctions, to the right to authorship, plagiarism being "sanctioned" by literary criticism.

Although the prudent Romans, under the influence of the Stoic philosophical current, developed the concept of incorporeal property[6], recognizing an interest in ownership over an intangible thing, they did not develop the author's notion of interest in the result of artistic or literary work. In other words, they did not recognize the right to exclude other people as a result of their artistic or literary endeavor. Therefore, in ancient Rome, the notion of ownership of the work itself never existed.

Roman jurisprudence recognized the ownership of a literary or artistic work only in terms of the physical medium in which the work was inscribed, thus distinguishing between the intangible work, on the one hand, and the material form (tangible thing) in which the work was expressed, on the other hand. However, they did not recognize a right of ownership over the intangible work[7]. Roman jurisprudence became interested only in the situation in which the author's creation was incorporated in a material medium belonging to another person.

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[3] In France, Le Chapelier regarded, in his report on the law of 13 and 19 January 1791, the work, the fruit of a writer's thought, as „the most sacred, the most legitimate (…) and the most personal of all properties".

[4] In France, Lakanal, in the report of the law of July 19 and 24, 1793, considered the work to be „a production of genius".

[5] R. Monta, „The concept of *Copyright* versus the *Droit d'auteur*", in *Southern California L. Rev.*, 1959, 32, p. 185, *apud* Alain Strowel, *Droit d'auteur et copyright. Divergences et convergences. Etude de droit comparé,* Bruylant- L.G.D.J., 1993, p. 8.

[6] Justinian, *Institutionum sev elementorum*, 2.2.

[7] Brian Fitzgerard, John Gilchrist (eds.), *Copyright Perspectiv: Past, Present and Prospect*, Springer

However, the recognition of a relationship between the author and the form of his text was not ruled out. The recognition of the individual in the literary field was based on the principle according to which the ideas conveyed belonged to the public, but their expression was specific to the author. Thus, unlike Greece, Rome gave way to the creative individual and his uniqueness.

In conclusion, in ancient Rome, literary creation was valued and the authorship of the author was recognized and could be *de facto* claimed. The literary work was considered the fruit of the author's work and copying a text that belonged to another person was perceived as a morally repressive act. Both Seneca and Justinian emphasize in their texts a conceptual distinction between physical medium (*corpus mechanicum*) and the work itself (*corpus mysticum*). The existence of the author recognized as such and the *de facto* rights he exercises over his work is different from the medium in which the work is incorporated. However, it cannot be a question of a legal recognition of the author right on his work for two reasons: the non-existence of an intangible object in the sense of abstract form and the authorship of the work was not perceived as an exclusive property of the owner, because the work or the idea then represented a common good by its nature. Therefore, the recognition of author right in a work could not be achieved in Roman law.

In the Middle Ages, Pierre Abélard believed that the human author could translate the expression of the divine message into a text that bore the imprint of his personality. This idea was essential for the emergence of intellectual property, and, implicitly, for the birth of author right. Abélard's thesis made possible the distinction between the work as a creation of the spirit (*corpus mysticum*) and its material medium (*corpus mechanicum*), generating the idea of claiming rights over the created work.

A notable evolution for the emergence of intellectual property is the development of the idea of a human property on one's own person and, implicitly, on the fruits of human activity. This thesis will be substantiated by Thomas Hobbes, through the idea of *jus in omnia* (the unlimited right of appropriation), and John Locke, the author of the theory of ownership over the fruits of labor (*jure laboris* or *jure creationis*).

Thus, with the appearance of the distinction between *corpus mechanicum* and *corpus mysticum*, the individual who creates an immaterial good is entitled, due to his personal imprint or his effort, to have an exclusive right over this good. Locke argues that this can only be a property right that gives the creator of the work the *usus*, *fructus* and *abusus* attributes.

John Locke's theory greatly influenced American society – at least in the beginning –, with several federal laws recognizing copyright as a natural right. However, later, positive law wins over natural law, with copyright becoming more of a legal monopoly than a property right. U.S. court case law is subject to the constraints of interpretation of the Supreme Court, which, as a whole, respects the monopolistic (positivist) view of copyright adopted by Congress. The utilitarian theory, according to which copyright is a regulated monopoly, has in the foreground the idea of reward: the author creates intellectual works for society. This, in turn, rewards him for his creative effort, referring especially to a material reward.

International Publishing, 2015, pp. 20-21.

The utilitarian conception, inspired by the economic vision[8] of copyright, is opposed to jusnaturalist theories which consider that the works of the spirit naturally belong to human beings, the mere fact of their existence gives the author a right of ownership.

The jusnaturalist conception is still found in French and Romanian doctrine, which see author right as a natural right and, therefore, a human right.

Jusnaturalism, inherited from the philosophy of the Enlightenment, considers author right as a natural right[9], a right that results from the nature of things, in other words, from the act of creation and from the author's connection with his work, and which positive law only recognizes it and gives it efficiency.

The divergence between *jusnaturalism* and *juspositivism* is reinforced by the fact that in the American system the legislator creates rights for the author, while in the French system author right is born from the simple creation of the work. In fact, in reality, the mere fact of creating the work gives the author a right only by the will of the legislator.

Jurists influenced by the ideas of natural law[10], consider that the author's right over his creation is characterized as a *property right*. This model is considered to apply to any kind of property and to any category of property, including intellectual creations goods (intangible assets). However, it is considered that author right cannot be assimilated to ownership in its entirety, as it does not have all the prerogatives and advantages of a property (*exempli gratia*, the temporary nature of author right).

Compared to French law[11], which recognizes works of the spirit as intangible assets, assigning them a property right, Romanian law does not recognize intellectual creation as an intangible asset, but recognizes certain patrimonial rights in favor of authors (art. 12 and art. 13). The argument offered by the specialized doctrine[12] consists in the fact that the literary and artistic works, after the expiration of the legal protection, belong to the public domain. Including the work in the universal cultural heritage, the author no longer has a property right over it, because one of the essential elements of ownership over an intangible asset is missing - *animus sibi habendi*. Thus, the existence of the public domain is proof that the law does not recognize intellectual creation as an intangible asset, because it cannot exist in the absence of

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[8] The economic dimension of *droit d'auteur* has always existed. In France, the Act No. 57-298 of 1957 was enacted in light of the economic challenges of enforcing that right. This is highlighted in particular by the presumption of assignment of the exclusive exploitation rights of the audiovisual works for the benefit of the producer. Provision that we still find in article L132-24 of the CPI.

[9] See, to that effect, A. Lucas, «Le rapport Le Chapelier: retour vers la conception jusnaturaliste du droit d'auteur *français»*, *Mélanges G. Bonet*, Litec, 2010, p. 341; A. Zollinger, *Droit d'auteur et droits de l'homme*, thèse, L.G.D.J., 2008; A. Zollinger, «Droit d'auteur et liberté d'expression: le discours de la méthode», *Com.-com.-élec.*, May 2013.

[10] The illustrious civilist Jean Carbonnier considers property as a guarantee of freedom, representing the external sphere of freedom. See, J. Carbonnier, *La propriété, garantie des libertés*, in G. Farjat et B. Remiche (eds.), *Liberté et droit economique*, Bruxelles, De Boeck, 1992, pp. 63-68.

[11] Art. L111-1 CPI: L'auteur d'une oeuvre de l'esprit jouit sur cette oeuvre, du seul fait de sa création, d'un droit de propriété **incorporelle** exclusif et opposable à tous.

[12] See, Alin Speriusi-Vlad, *Protejarea creațiilor intelectuale. Mecanisme de drept privat.*, Editura C.H.Beck, București, 2015, pp. 86-89.

a holder of the right that bears on him. In conclusion, the Romanian legislator recognizes rights over intellectual creation, and not the intellectual creation itself[13].

The jusnaturalist conception was accentuated by the personalist theory according to which the personality of the creator is mirrored through the work. According to the romantic vision of French law, in antithesis to the utilitarian vision of the Anglo-Saxon countries, the author, when creating, enters a process in which his whole being participates in creation. This creative intellectual process must involve the person of the author. The product of intellectual work must express the personality of the author. Thus, since the work of the spirit is an emanation of the author's personality, this implies that the work is of the same legal nature as the person who performs it[14]. This personal conception of the work of the spirit is adopted both in the French Intellectual Property Code[15] and in the Romanian law on author right and related rights[16]. However, continental doctrine tends to reject this thinking in order to make room for other theories (for example, social contract theory, which is closely related to utilitarian theory - the work is a service that the author brings to society in exchange for a reward).

At the same time, the work can benefit from protection only if it exists in its original form. Therefore, originality is what can show whether or not an intellectual work is creative, in other words, whether the author, through his work, expresses his personality.

From a dualistic perspective, the right to intellectual creation is a non-patrimonial personal right that also gives rise to patrimonial rights. There is a dependence of patrimonial prerogatives on the exercise of non-patrimonial ones. More specifically, the existence of the right to exploit depends on the author exercising the right of disclosure and authorizing the public to use his work. If the author decides not to bring his work to the attention of the public, the patrimonial right cannot arise.

CHAPTER II AUTHOR RIGHT IN THE CONTINENTAL EUROPEAN SYSTEM: ROMANIAN LAW AND FRENCH LAW

In the Romanian and French conception, all works are protected by author right, insofar as they are original, in other words if they express the personality of their author. Moreover, the author has no obligation to complete any formality in order to obtain protection, since his right arises from the act of creation. In principle, the right belongs *ab initio* to the creator of the work, who must be an individual. Thus, the act of creation is the one that justifies the initial assignment of the intellectual property right[17].

The law protects the personal component, the moral law, which precedes and conditions the entry of the work into the economic circuit and, at the same time, often reacts to property rights and exploitation contracts. The author can decide whether or not to disclose

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[13] Ibidem.

[14] Ibidem, p. 19. (our translation)

[15] Art. L121-1: „Ce droit est attaché à sa personne."

[16] Art. 1, para. 1, 2nd clause: "This right is related to the person of the author and involves moral and patrimonial attributes".

[17] See, art. L 111-1 para.1 CPI, art.1 para. 2 of the law no. 8/1996.

the work to the public, and if he accepts its dissemination, he can decide the means and the limit of this communication. At the same time, it has the right to authorize or prohibit third parties from a certain act of exploitation, to accept or refuse an assignment or license agreement. Therefore, the exclusive nature of the right is fundamental, as it guarantees the author the freedom to negotiate with users and, ultimately, to decide on the exploitation of his work.

French and Romanian law are, therefore, separated from the compulsory licensing systems in which the author cannot oppose the use of the work or the choice of the contractor. However, the difficulty, even the impossibility of enforcing exclusive literary and artistic property rights in certain situations (given technological developments and European directives), led the French and Romanian legislators to accept the compromise of the legal license and later the fair remuneration, in particular as regards related rights to phonograms when communicated to the public. Both Romanian and French law are conceived as a dualistic law that tends to protect two types of interests: the personality of the author, which is expressed through his work, and his patrimonial interests. So, the work, distinct from its material medium, is not only an economic right that we encounter in other legislations, but it expresses a part of the author's personality. However, there is also a cultural dimension[18] of *droit d'auteur*, even if the public interest and the dissemination of art and science is not its main function.

Finally, an original feature of French and Romanian law is the synthetic structure of the prerogatives granted to the author. Therefore, in the two systems we find only two general exploitation rights - the right of reproduction and the right of representation - to which is added a prerogative specific to the authors of fine arts - *droit de suite*. National legislation provides for some general enough prerogatives to be able to be adapted to any current or future form of use of the work, so that it is not necessary to wait for the intervention of the legislator to solve an unforeseen problem.

CHAPTER III COPYRIGHT IN THE COMMON LAW SYSTEM: ANGLO-AMERICAN LAW

Compared to the laws of continental law countries (considering France and Romania) which are "synthetic and often use abstract concepts"[19], English or American laws are quite cumbersome precisely to adapt the legal monopoly to different legal situations. In fact, this idea cannot be generalized, given that continental author right contains precise exceptions that the judge has in mind, and American copyright is based on the fair use clause which gives the judge considerable power. While in continental author right the prerogatives of the holder are quite flexible, in American copyright the rights of the holder are are narrowly defined and the judge, due to the fair use mechanism (and to a certain extent due to the fair dealing mechanism), may recognize certain rights to the user, thus also taking into account its

[18] See, A. Dietz, «Cultural diversity and copyright», *Mélanges Victor Nabhan* (Quebec), 2004, p. 109.
[19] Jean-Michel Bruguière, *Le droit du copyright anglo-américain*, Éditions Dalloz, 2017, p. 12. (our translation)

interests[20]. Therefore, we are faced with an opposition: the interests of the holder based on natural law, on the one hand, and the interests of the public arising from a constructed right, on the other hand[21].

On the other side of the ocean, the American legislator surprises us with a provision diametrically opposed to the jusnaturalist-continental approach: for the work to benefit from protection it must be fixed on a medium (a provision that we find in the United Kingdom, however, as a secondary condition). At the same time, the accession of the United States to the Berne Convention has so far not led the US legislature to completely waive the obligation of the owner of the work to complete certain formalities, which in particular condition the award of damages. American copyright also stands out by enshrining the fair use mechanism that is increasingly used in the context of the development of technology and digital culture.

At present, copyright is at the root of some developments in continental author right. As a general rule, in continental author right the protection is granted to the creator, while in the copyright system the protection can be granted to the employer (based on the work made for hire mechanism, for creations made by employees) or to the sponsor.

However, a principle similar to work made for hire applies in French and Romanian author right regarding the qualification of collective works. Certain categories of works - computer programs and databases - may be subject to an automatic assignment of the developer's property right for the benefit of the employer, subject to the right of paternity. In other words, the employer (who can be both a legal entity as well aș an individual) can be *ab initio* the owner of the works created by the employee. Both the French and the Romanian legislators, in the absence of a contrary agreement, assign the patrimonial rights over a software created by an employee in the exercise of his duties to the employer[22].

At the same time, as regards software, Article L. 121-7 of the French law expressly provides that, in the absence of a contractual provision, the author may not oppose the modification of a computer program by the transferee, provided that such modification does not prejudice his honor, nor his reputation.

The author's right to integrity is also limited in the context of a collective work. By the nature of the collective work, the initiator has the right to make changes to the contributions of the authors, justified by the necessary harmonization of the work as a whole.

In the same vein, French law stipulates that the exploitation rights of the work carried out within a media entity / media institution („titre de presse”), regardless of the medium and the way in which it is broadcast (with the exception of audio-visual communication services), are assigned exclusively to the employer, unless there is a clause to the contrary in the individual employment contract. Consequently, once an article has been written on behalf of

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[20] “L’équilibrage entre fonction du législateur et du juge represente une donnée centrale de chacun des deux systèmes de protection qu’on ne peut négliger dans leur étude comparative.” Alain Strowel, *op. cit*., p. 148.

[21] M. Vivant, J.-M. Bruguière, *Droit d’auteur et droits voisins*, 4e édition, Dalloz, 2019, p. 40.

[22] Art. 75 of the Romanian law: "In the absence of a contrary clause, the patrimonial authors’ rights on computer programs, created by one or more employees in the exercise of their duties or according to the instructions of the employer, belong to the latter."

Art. L. 113-9, CPI: „Sauf dispositions statutaires ou stipulations contraires, les droits patrimoniaux sur les logiciels et leur documentation créés par un ou plusieurs employés dans l'exercice de leurs fonctions ou d'après les instructions de leur employeur sont dévolus à l'employeur qui est seul habilité à les exercer.”

an editor, the latter may use it on any medium (except audio-visual medium) belonging to the same entity, without having to pay any additional remuneration to the journalist-author, other than his salary.

With regard to the holder of the rights to cinematographic or audiovisual works, there is a difference between the copyright system and the continental European system. The French and Romanian legislators treat cinematographic works as collaborative works, while in the Anglo-Saxon system the producer is the sole author of the cinematographic work. However, Romanian and French law introduce a *juris tantum* presumption of assignment of copyright in favor of producers[23].

Created as a property right, later described as an intellectual property right, it seems that continental author right is now tending to become an economic right, accepting the concept of „French copyright" (or „continental copyright").

The French legislator uses the notion of „work of the spirit", and mentions that the author enjoys a right of incorporeal property by the mere fact of creating the work. Next, we deduce from Article L. 112-4, which states that the title of a work of the spirit is protected if it has an original character, that originality is a criterion of protection. Article L. 112-2 does not provide a list of original works, but a list of works of the spirit likely be protected regardless of genre, form of expression, merit or destination. The law does not provide a precise definition of a protected work, nor does it provide an exhaustive list of works that can be protected. Article L. 122-2 of the Intellectual Property Code, supplemented by Articles L. 112-3 and L. 112-4 of the same code, therefore contains an indicative list of protected works. Moreover, the applied category of works of art is very extensive, hence the protection can be applied to a wide variety of utilitarian creations.

Under copyright law, US law states that "original works of authorship" is protected. English law also specifies that there is a copyright in "original literary, dramatic, musical or artistic works", without providing a definition of "originality".

With regard to "works of authorship"[24] protected by American law, the doctrine argues that these categories are illustrative and do not limit the notion of "works of authorship", which allows some flexibility to be maintained[25]. Moreover, the definition of the term "literary work"[26] offers an extension of the object of protection in the field of information works.

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[23] Art. L. 132-24, CPI: „Le contrat qui lie le producteur aux auteurs d'une oeuvre audiovisuelle, autres que l'auteur de la composition musicale avec ou sans paroles, emporte, sauf clause contraire (…) cession au profit du producteur des droits exclusifs d'exploitation de l'oeuvre audiovisuelle."

[24] Art. 102 (a), *Copyright Act of the United States*: „Works of authorship include the following categories:(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."

[25] Alain Strowel, *op.cit.*, pp. 394-395.

[26] Art. 101, *Copyright Act of the United States*: „*Literary works* are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied."

Both the Romanian and French legislation, as well as the American legislation, offer an open protection system that authorizes the extension of the subject matter of author right, without the need for changes in the legislative texts. These laws provide a list of works likely be protected provided they are original.

Analyzing the French jurisprudence, compared to the American one, we find that the French judges granted protection to some utilitarian works. The protection of utilitarian works by author right has been influenced by the theory of the unity in art, widely accepted in France, but criticized by some authors for distorting the concept of literary and artistic work.

Another difference between the copyright system and the system of the *droit d'auteur* is the protection of sound recordings. The American legislator classifies the audio recordings in the category of copyright, while the French and Romanian legislator classify them, along with interpretations and shows, in the category of related rights.

At the same time, in French and Romanian law we notice a cumulation of author right with the law of designs and models. As regards English law, we note that it differs from other regimes in that it provides protection for services of an industrial nature (broadcasting, cable programs, sound recordings and typographic presentations), placing them in the category of non-original works.

If we refer to the doctrinal discourse, we will see that there is a margin between the subjective conception encountered in the *droit d'auteur* system, which refers to the "imprint of the author's personality", and the criterion of "independent creation" provided in American law. However, looking at the case law, we can see a relativization of this difference: on the one hand, in the *Pachot* decision, the French Court of Cassation refers to "intellectual work", on the other hand, in the *Feist* decision, the U.S. Supreme Court emphasizes the element of personal creativity[27]. Therefore, the jurisprudence shows us that *droit d'auteur* is not limited to copyright for the reason that, in France or Romania, intellectual work cannot lead to the acquisition of the right.

Analyzing the American jurisprudence, we find that the personal dimension, which was not entirely absent from American law, is increasingly infiltrating the copyright regime. The same cannot be said of English case-law, which offers a poor definition of originality. British law does not provide for originality as a general condition of protection, this criterion being applied only to certain categories of works. In the specialized doctrine there is a tendency to consider that a work is original if it comes from the author and is not copied. Thus, there must be a minimum standard of effort on the part of the author[28]. In other words, copyright aims to reward the "skill, judgment and labor"[29] of the person claiming this right. W. Cornish lists three elements which constitute the criteria for granting protection: "labor", "skill" and "capital"[30].

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[27] André Bertrand, *Le droit d'auteur et les droits voisins*, Paris, Masson, 1991, p. 117.

[28] W. R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, London, Sweet & Maxwell, 2nd ed., 1989, p. 168.

[29] G. Dworkin, R. D. Taylor, *Blackstone's Guide to the Copyright, Designs and Patents Act 1988*, London, Blackstone Press, 1989, p. 21.

[30] W. R. Cornish, *op.cit.*, p. 268.

Despite this relative convergence, the criterion of originality is a rather sensitive point in European Union law. The determination of this criterion continues to appear „as a stumbling block between the continental and Anglo-Saxon countries”[31]. By way of example, Directive 2009/24/EC on the legal protection of computer programs provides that „a computer program shall be protected if it is original in the sense that it is the author's own intellectual creation”. Many experts believe that this definition of originality is closer to the classical and humanistic conception of French law, as it emphasizes the personal side[32].

The jurisprudence mentioned in this chapter shows that the meaning of originality varies from one national regime to another, precisely because *droit d'auteur* and copyright protect works of a different nature. Therefore, one could speak of „the influence of the nature of works on the criterion of originality”[33]. The notion of originality was shaped by the three areas of author right: literature, art and music. Moreover, in English law, originality is established differently for various works that are part of the same field, such as the artistic field. Currently, there are no major differences between the three areas, but the originality is nuanced according to three categories of works: works of art, factual works (which have an informative content, such as maps, databases, etc.) and functional works (computer programs, architectural plans, certain designs and models)[34].

The criterion of subjective originality applies to works of art. However, there are visual arts, such as photography, to which the criterion of originality applies differently[35]. The criterion of originality becomes difficult to establish in the case of utility works because external factors limit the possibilities of personal expression. *Exempli gratia*, maps, catalogs, codes, which must be presented in a logical and coherent form, do not allow the author to put his personality imprint on them.

Taking into account the principle that author right only protects the form, in the case of functional works the form will not be protected if it is separated from its function.

A peculiarity in establishing originality is found in the case of "factual" works, whose characteristic is the presentation of facts or the transmission of information. In this case, only the form can be protected, not the ideas.

The - timidly - belated recognition of moral rights by the United States marks the influence of natural law on the copyright system. Analyzing US case law, we find that moral rights are partially protected by contract law, provisions on infringement of personality rights, or unfair competition regulations.

In opposition to the French and the Romanian law, the author's moral prerogatives can be the subject of a contract waiver, which "reflects the supremacy of the contractual freedom principle in the Anglo-Saxon countries"[36]. *Exempli gratia*, the right to respect for the

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[31] Alain Strowel, *op.cit.*, p. 469.
[32] Ibidem.
[33] Henri Desbois, *Le droit d'auteur en France*, ed. 3, Dalloz, Paris, 1978, p. 11.
[34] See, to that effect, Alain Strowel, *op.cit.*, p. 472.
[35] Paul Goldstein, *Copyright Principles. Law and Practice*, Boston, Toronto, London, Little, Brown & Comp., 1989, vol. 1, pp. 64-65.
[36] Jules-Marc Baudel, „Le droit d'auteur français et le copyright américain: les enjeux”, in *Revue Française d'Études Américaines*, 1998, 78, p. 50.

work can be expressly as well as tacitly removed[37]. These points indicate that American law is approaching the continental view of the inalienability of moral rights.

By introducing moral rights, the British law of 1988 is influenced by the philosophical conception of natural law, but at the same time it has a different approach to the form of protection. In opposition to US federal law, British law establishes, in addition to the two prerogatives recognized by Article 6bis of the Berne Convention (the right to claim ownership of the work and the right to oppose any distortion, mutilation or modification), two other moral rights: the right to oppose an abusive assignment and the right not to disclose photos and films (right to privacy).

Moral rights are a point of reference in the comparative discourse between *droit d'auteur* and copyright. Although it has generally been argued that moral rights are not recognized by the common law system, recent developments in the copyright law show that this statement needs to be reviewed.

The right to integrity, one of the moral rights along with the right to disclosure, is the element that highlights the difference between copyright and author right (*droit d'auteur*): "The right to integrity has two functions: on the one hand, at the level of comparative analysis, it creates the gap between systems, on the other hand, at the level of evolutionary analysis, contribute to the birth of the moral right"[38]. The right to disclose is fundamental in the continental conception, because it is related to the personality rights that underlie the legal nature of author right.

In France and in Romania, a special importance is attached to the moral law, being qualified as perpetual, inalienable, indescribable and transmissible to the author's successors. The foundation of moral law is the protection of the work of the spirit and only the author of his work and successors can effectively ensure this protection. In principle, moral law cannot be subject to any exploitation or assignment to a third person. Any opposite convention is hit by absolute nullity. The moral law gives the author the opportunity to defend himself against any breach of his integrity.

CONCLUSIONS

The Continental-European author right (*droit d'auteur)* is often in contrast to Anglo-Saxon copyright[39], briefly defined as "the right to copy or reproduce". We note that the two expressions are not synonymous, because French doctrine and jurisprudence equate author right, at least morally, with a right of personality, derived from natural law (jusnaturalism), while copyright, especially American copyright, equates author right, same as the patent, with a monopoly granted "to promote the progress of science and useful arts, by securing for

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[37] In this regard, in a famous decision, the New York Court of Appeal refused to sanction the advertising breaks that interrupted the broadcasting of a film, stating that the assignment of the rights to the respective television station was made without restriction and that it has an implicit authorization to interrupt during the movie.

[38] Alain Strowel, *op.cit.*, p. 479. (our translation)

[39] See, to that effect, W.R. Cornish, „Moral rights under the 1988 Act", [1989] 12 *EIPR* 449; A. Dietz, „Les États-Unis et le droit moral: idiosyncrasie ou rapprochement?", in *RIDA* 1989, 142, p. 223; B. Edelman, „Entre copyright et droit d'auteur: l'intégrité de l'œuvre de l'esprit", *D.* 1990, chron. 295.

limited times to authors and inventors the exclusive right to their respective writings and discoveries"[40].

Although it is true that the nature of law differs in the two systems and that, by virtue of its character of personality rights, French and Romanian law have placed the author on a pedestal, granting him many rights, especially by recognizing moral rights as "imprescriptible and inalienable", we consider that it is not correct to say that the Anglo-Saxon law aims only to protect publishers.

This opposition between *droit d'auteur* and copyright is due to the fact that no contemporary legal system emphasizes the moral right of the creator, which we encounter in the continental system, especially in French and Romanian law. Although it encountered difficulties in maintaining the personalist vision, the continental European concept remained faithful to the tradition that requires respect for the rights of the author and the artist. On the other hand, because of this assimilation of copyright with a monopoly of exploitation granted to encourage art and science, American jurists often deny the protection of works in France by *droit d'auteur*, on the pretext that this monopoly would be contrary to the "public interest".

To the extent that *droit d'auteur* and copyright have the same purpose, namely to sanction the reproduction of works that infringe on rights of the authors, the opposition between civil law and common law must be as nuanced as in other areas. Following the evolution of the two systems, we notice that the spirit of the Enlightenment inspired both the American laws of the late eighteenth century and the French laws of the revolutionary era. Also, both French *droit d'auteur* and English copyright arose as a result of the conflict between the monopolist booksellers in the capital and the booksellers in the province. In England, as well as in the United States, copyright was not intended to protect publishers, but rather authors. Some commentators argue that Anne's Statute, as well as the Constitution of the United States, does not pursue a "copyright" but rather "author's rights"[41]. This is confirmed by Article 201 of the The Copyright Act of 1976, which provides, with a few exceptions, in particular in the case of a work made for hire, that "copyright in a work protected under this title vests initially in the author or authors of the work".

Our study shows that in both countries the authors enjoy, in all circumstances, a minimum of moral rights and, in particular, the right of paternity. States of California and New York have had specific legislation for many years that recognizes the right of authors to the integrity of their works. Following the enactment of the Visual Artists Rights Act of 1990, the 1976 Copyright Act was supplemented by section 106, which refers to rights of certain authors to attribution and integrity. The Copyright, Designs and Patents Act of 1988 (british law) contains a chapter entitled "Moral Rights", in which several articles are devoted to the copyright of the author.

However, the 1976 law protects certain aspects of the moral right - the right to disclosure or the right to object to exploitation of design derived from artistic work, to the extent that the author did not assign them by contract. Otherwise, the author may be the creator, employer or beneficiary of the order contract. As a result, the creator is often forced

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[40] Art. 1, section 8, clause 8 *Constitution of the United States*.

[41] R.F. Whale & J. Philips, *Whale on copyright*, ESC, Oxford 1983, p. 16.

to use various actions under common law to recognize his rights, such as: contract law, abuse of rights, legal personality, unfair competition. One of the peculiarities of the American regime concerns the works of the employees, the works made for hire rule transforms the employer into the author of the work and invests him with rights. On the other hand, there can be no question of a contrast between American law and French and Romanian law regarding the criterion of originality and protected works, the duration of protection and the presence of non-voluntary licenses.

Finally, a 20th of May 1988 Court of Appeals for the District of Columbia Circuit ruling[42] on the *copyright* on a sculpture, commissioned on the basis of a order contract, emphasizes the role of the author's personality and thus outline an evolution of American copyright toward a continental European "*droit d'auteur"*.

Beyond the convergent aspects, there are also differences between American copyright and continental *droit d'auteur* (French and Romanian), referring, for example, to the regime of cinematographic works from which result two characteristics of American law: the ownership of rights for the producer and the absence inalienable moral rights for the director.

In terms of the ownership of protected rights and works, English law takes advantage of the low influence of the Berne Convention on certain issues (for example, it does not provide a formal definition of authorship) and gives authorship to a number of entrepreneurs. In terms of moral rights, English law is in line with the provisions of the Berne Convention, which brings it closer to the continental view. However, this approach is timid given the conditions required for the exercise of these rights.

On the other hand, French and Romanian law have reduced the moral rights of certain authors, especially the creators of computer programs, databases and audiovisual works, thus emphasizing their proximity to the copyright system. In terms of *droit d'auteur* subject and object, French and Romanian law have made some trade-offs. For example, in the case of collective works, the authorship is recognized to legal persons. Also, the theory of unity in art allows the protection of productions, although the author's creative contribution is weak.

The differences between continental-European *droit d'auteur* and Anglo-Saxon copyright, which are rather philosophical in nature, have diminished as a result of the United States' accession to the Berne Convention and the harmonization of national laws within the European Union.

The important element of the divergence between continental European *droit d'auteur* and American copyright is not the opposition to the legal concepts as such and, in particular, to the moral rights of the authors, but the distribution of the proceeds from the exploitation of the rights.

Thus, although the Intellectual Property Code of France and the Copyright Act of the United States distinguish the status of "author", which gives rise to law, from that of "holder of rights", which allows the exercise of patrimonial prerogatives, French *droit d'auteur* has difficulty accepting this dichotomy and perceives the *droit d'auteur* as an object

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[42] *CCNV v. Reid,* 846 F 2d 1485, 6 USPQ 2d 1990 (DC Cir. 1988), in *RIDA* 1990, no.144, p.148.

of income redistribution that exceeds the provisions of the Labor Code and the Civil Code[43]. Thus, in France, *droit d'auteur* often appears as an excuse to justify the additional income that the employee or subcontractor is entitled to claim from the employer or the person ordering the work, in addition to his salary or fees. The "humanist" side of *droit d'auteur* "hides a specific objective, namely prohibiting companies from controlling the content of the creations made by their employees and to force these companies to redistribute the fruits of various exploitations"[44].

Copyright is primarily an economic logic, a right of exploitation, which protects those who invest in intellectual property (producers, employers, etc.), more than the creators of the work. On the contrary, continental European copyright is a right that primarily protects creators. However, we consider that the economic dimension cannot be radically distinguished from the moral one, because the economic component is inherent in *droit d'auteur* and, at the same time, this right is inseparable from the existence of a market.

[43] André Bertrand, *Droit d'auteur,* Dalloz, 2010.
[44] Ibidem.

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