NOVELTY AND ORIGINALITY

Alin Speriusi-Vlad, Assist. Prof., PhD, Postdoc Researcher, West University of Timișoara

Abstract: Currently in all legal systems, both in the continental ones and in the legal system of the United Kingdom after the Football DataCo v. Yahoo UK Ltd. case law and in the American legal system after the Feist Publications, Inc. v. Rural Telephone Service Co. case law, the notion of originality has a homogeneous content, being understood and applied in the same way. No legal system has questioned the objective side of originality afforded by novelty to the protected intellectual creation. The divergent element is represented by the subjective element, which consists of the author's personal contribution. The existence of this element has never been, also, denied, even by the most reluctant to the originality concept, as it was understood in the continental legal system. The divergence between the continental system and the common law one carried on the criteria for evaluation of this personal contribution of the author. The continental system considered the direct connection with the author's personality, respectively his intellectual creation activity, thus embracing a personal vision of this condition of legal protection. On the other hand the common law embraces an impersonal vision, trying to assess this subjective condition the most objectively possible, in relation to the effort made to create the work. This view was abandoned in the United States of America and later in the United Kingdom, when those legal systems were confronted with the problem of determining the legal protection of alleged databases, when they fully embraced the view of the continental system on creativity.

Keywords: intellectual property law, copyright, intellectual creativity, plagiarism, piracy, counterfeit.

Regardless of the substantiation of the intellectual property on natural law or on the utilitarian theory, no scholar questions the originality condition of copyright works[1], the novelty conditions of the utility creations The whole doctrine agrees that legal protection mechanisms in the intellectual property field[2] applies for the new intellectual creations. In common language "*to create*" means to make something that was not there before[3]. Even those who challenge the intellectual property system are doing it for ensuring the free access to what did not exist yet, to what is recently created.

[1] see A. Circa (2013) - *Reflections on the originality of intellectual work,* Law no. 1, p. 128 "*comparative analysis of the legislations reveals that the concept of originality is a quasi-universal and essential condition of copyright protection, despite some nuances or assessments*."

[2] for a comprehensive study regarding the theories and their authors, the supporters and opponents of intellectual property see N.S. Kinsella (2001) - *Against Intellectual Property*, Journal of Libertarian Studies, Ludwig von Mises Institute, p. 1-53.

[3] to deepen the definition of the creative notion see V. Ros A. Livadariu (2014) - *The condition of originality in scientific works*, Romanian Journal of intellectual property law, no. 2, p. 11-13.

The notion of originality in the context of a comparative analysis with the industrial property seems to be different from the novelty condition. Thus, a certain work may bear the distinguishable sign of the author's personality and be original without necessarily being new. As an example to illustrate the presence of originality and lack of novelty the situation when two painters, independently from each other, paint the same scene, one after the other, concluding that the second painting would not be new, but it would be original. This example is provided as is, without any further explanation, even if it is difficult to understand why the second painting would not be new. It is hard to believe that it would not be new only because it illustrates the same landscape. It could be lacking in novelty, only if it were a "*photocopy*" of the first picture, respectively a perfect reproduction, but in this case how could it still be original. This argument often raised in the doctrine is suggestive to my conclusions, at the end of the paper. The example of the French doctrine is also repeated by our scholars, when it is stated that "*anteriority does not exclude originality*" so that "*two very similar creations can be protected if they both illustrate their author's personality*" giving as an example "*dictionaries or travel guides*"[4].Even if will I return to this example also, after a simple reading it can be easily seen that it is not judicious to apply the concept of anteriority from the industrial property field to the field of copyright, without any adaptation.

If in the copyright, the lack of anteriority means the absence of a previous identical work as the one on which the right is claimed, in the industrial property field anteriority has a broader sense, referring to not only identical intellectual creations but also to the similar ones, the extent that this similarity leads to lack of inventive activity on the part of author of the utilitarian creation, another condition to be met in the field of industrial property, likely of not being fulfilled, including on the realm of copyright[5].

The originality of works, novelty of utilitarian creations are considering the same purpose, namely to legally protect the uniqueness of intellectual creation through the rules of intellectual property law. Regardless the intellectual property basis in the utilitarian theory[6], in Hegel's personality theory[7] or in Locke's natural right theory[8], all are considering primarily the protection of new intellectual creations, namely of those who are unique at the time of their creation or at the time the legal protection is established. A utilitarian would say that only new creations contribute to the development and progress of society, and these should be protected to encourage their continued occurrence, an advocate of the personality theory would say that as far as the individual is interested to acquire new intellectual creations, society is required to establish a legal system for trading, respectively of acquiring

[4]see A. Circa (2013) - *Reflections on the originality of intellectual work*, Law no. 1, p. 134.
[5] See A. Circa (2013) - *Reflections on the originality of intellectual work*, Law no. 1, p. 131 *"in terms of patent it speaks of novelty and inventive activity, while in the copyright originality encompasses both"* and p. 140 *"within a work we can find a method that can be patented. In this case: - the conditions of protection relate to the novelty and creative activity, while originality incorporates both* "
[6] for description, in depth and more references on this theory see N.S. Kinsella (2001) - *Against Intellectual Property*, Journal of Libertarian Studies, Ludwig von Mises Institute, p. 12-15.
[7] for description, in depth and more references on this theory see J. L. Schroeder (2004) - *Unnatural Rights: Hegel and Intellectual Property*, Cardozo Law, Legal Studies Research Paper No. 80, p. 1-48.
[8] for description, in depth and more references on this theory see A.D. Moore (2012) - *A Lockean Theory of Intellectual Property Revisited*, San Diego Law Review, Vol. 50, p. 1-44 și N.S. Kinsella (2001) – *Against intellectual property*, Journal of Libertarian Studies, Ludwig von Mises Institute, pp. 9-10.

of rights over them, and according to the theory of natural right, to every author of an intellectual creation is recognized his right over it, right acquired as a result of its creation, intellectual creation not existing without the work of the author. Even opponents of intellectual property[9] base their concept on the fact that free movement of new creations should not be restricted, all potential users must have access to them. In one form or another all these theories have in mind new intellectual creations, which do not already exists and over which economic and moral rights are to be recognized.

Returning to the originality binome - novelty, the biggest problem is raised by the idea that in some specific situations the two concepts can be contradictory, and the fact that there are specific cases where an intellectual creation even if it is not new, however, is original. Are these two concepts so far apart or they come to such a different meaning? Certainly even a particular situation where this example would be true, would only certify that the two concepts cannot be adjacent, not even for the purpose of a comparative analysis, so this hypothesis deserves to be fully clarified.

Originality and novelty are not as different as they seem according to some theorists. Most authors argue that originality incorporates not only novelty but also inventive activity, conditions which in the case of utility creations are different[10]. However, I dare say that the resemblance is much higher than you might think. The best argument is offered by the legal provisions of copyright in Romania, provisions which are in line with other international and national legal systems. More specifically ***art. 1 para. (2) and art. 7 of Law 8/1996 of copyright and related rights[11] talk not only about original works, but also of the "work of intellectual creation".*** This phrase cannot be interpreted otherwise than that copyright legislation refers to works resulting from an activity of intellectual creation, which is the product of it. Here thus that we find in the field of copyright a condition similar to the inventive activity which has to be satisfied in the case of utility creations. In a grammatical interpretation reported to the current doctrine, meaning that originality compared to novelty also includes the equivalent from copyright of inventive activity means that when the legislator uses the phrase "*original works of intellectual creation"* expresses wrongly, through pleonasm, which is obviously unthinkable. In fact by using this phrase the law establishes two conditions for the protection of a work through the mechanisms of copyright, meaning its originality and the intellectual creation activity whose product must this work. Interesting is the fact that the doctrine leaned heavily on the conditions of copyright protection, speaking of

[9] for description, in depth and more references on this theory see N.S. Kinsella (2001) – *Against intellectual property*, Journal of Libertarian Studies, Ludwig von Mises Institute, pp. 15-53.

[10] as quoted above see A. Circa (2013) - *Reflections on the originality of intellectual work*, Law no. 1, p. 131 "*regarding the patent it talks avout novelty and inventive activity, while in copyright originality includes them both*" and p. 140 "*within a work can find a process that can be patented. In this case: - the protection conditions relate to novelty and creative activity, while originality incorporates them* both. "

[11] Law 8/1996 regarding copyright and related rights was published in the Official Gazette, Part I, no. 60 of 26 March 1996 and subsequently amended by Law no. 146 of 24 July 1997, Law no. 285 of June 23, 2004, Emergency Ordinance no. 123 of September 1, 2005, Emergency Ordinance no. 190 of 21 November 2005, Law no. 329 of 14 July 2006, the Decision of the Constitutional Court of Romania no. 571 of April 29, 2010, Law no. 202 of 25 October 2010, Law no. 71 of June 3, 2011, Emergency Ordinance no. 71 of 31 August 2011, Law no. 76 of 24 May 2012, Law no. 187 of 24 October 2012 and Law no. 255 of 19 July 2013.

necessary conditions, indifferent conditions[12], of three general conditions for the protection of intellectual works or only two conditions[13] and not least that originality is the only protection condition of copyright works[14]. Despite this intense study of the conditions of copyright protection, the doctrine did not notice the legislator's express condition that the protected work must be an intellectual creation, meaning to be the result of an intellectual creation activity. Omitting this condition, expressly provided by law, from any doctrinal analysis, had the effect of establishing a different content of the concept of originality compared to that of novelty, so different that it was claimed that the work which is not new, can be original, the two concepts can thus be even opposite[15].

European Directives on copyright should be interpreted in the same direction, namely that they equally require the novelty condition and the condition of intellectual creation activity. Only in this way can be understood the diametrically opposed conclusions of the doctrine on the choice made by community law to an objective conception of originality or, conversely, to the subjective conception[16]. Community law puts on the same footing both the

[12] see A. Circa (2013) - *Reflections on the originality of intellectual work*, Law no. 1, p. 127 *"Protection of works of spirit, object of intellectual property rights is conditional upon certain requirements. These requirements arise, on one hand from art. 7 of the LDA according to which protection is provided: a. – to works which are part of the copyright field if they are original; b. – the works will be protected regardless of the creation method - "regardless of"; c. - works will be protected regardless of the expression form - " regardless of "; d. - works will be protected irrespective of their value; e. – works will be protected irrespective also of their destination. The first condition is necessary, while we can consider the following as indifferent qualities."*

[13] See A. Circa (2013) - *Reflections on the originality of intellectual work*, Law no. 1, p. 128 "*The first thesis supported by most authors extracts out of the entire assembly applicable legal provisions, three general conditions for the protection of intellectual works, namely: - the work to be original, the result of intellectual creation activity; work to put a concrete form of expression, perceptible to the senses; - the work to be susceptible to be made public: the emphasis is on the fact that works state their utility only through their expression, they fulfill their purpose only through their distribution and from here comes their attribute of being susceptible to reproduction. The justification of the latest requirement takes into account: either the idea of reproduction (objective, material fact) or the subjective purpose of creating the work, that of being communicated to the public (...) The second thesis supports it is necessary and sufficient for a work to claim legal protection only two conditions: - the work to be original; - the work to be made, to have a particular form of expression, which makes it objectively perceptible* ".

[14] see V. Ros A. Livadariu (2014) - *The condition of originality in scientific works*, Romanian Journal of intellectual property law, no. 2, p. 15-17 "*many authors argue that along with originality, to be protected by copyright, a work must (...) meet another two conditions: to have a particular form of expression and to be susceptible to be brought to the public's attention. (...) The specific form of expression and susceptibility to be brought to the public's attention are, in fact, "absorbed" by the condition of originality: we cannot talk about a "work", about its original character, thus about the calling of the work to benefit from protection, only when it has been actually done. What has not taken on a specific form of expression does not exist and cannot be protected, and for the work to exist, it is necessary for the idea to take shape outside the author's consciousness therefore be susceptible to be brought to the public's attention. (...) the condition os originality absorbs the othe two conditions, it being understood that we cannot make any judgment about something that has no form of expression, thus about something that is not perceptible to the human senses. It is however true that there are works for which being fixed on a support is indispensable (without this mean that the fixation represents a condition of copyright protection), and these works include the visual, photographic, fine art ones ".*

[15] see A. Circa (2013) - *Reflections on the originality of intellectual work*, Law no. 1, p. 134 "*one of the classic points of analysis consists in the opposition between originality and novelty*."

[16] given the presentment of reasons of the proposal for a directive regarding the protection of software ("*The only criterion for granting the benefit of protection is that of originality, meaning that the work must not be copied*") and the opinion of the Economic and Social Council of October 18, 1989 ("*A program should be recognized as original and protected to the extent that it was not copied starting from another program* ") the community law tends to establish the concept of originality in its objective sense, that of lack of copying, even

novelty condition and the condition of creative intellectual activity. The relationship between these conditions varies for certain categories of works protected by copyright. If most or the condition of creative intellectual activity is analyzed starting from the premises to the condition of novelty, in the sense that it is based on new and studied to what extent this is due to the work of intellectual creation or other factors in some cases, if certain categories of works that claimed more than a novelty character (computer programs and databases) the relationship is reversed. Specifically in the case of these works protected by copyright, which are essentially functional in nature, thus making it possible in the light of the function they perform to present many similarities to other works in the same category which have the same function, the community legislator sets the novelty condition only after making sure that we are in the presence of creative intellectual activity on the part of the author of the work, also starting from the premise that the uniqueness of the being[17] certifies the existence of new intellectual creations. Surely the phrase used in Directive 91/250 / CE regarding juridical protection of software in meaning that *"software shall be protected if it is original, in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection*"[18], community law did not wish to exclude novelty as a condition for legal protection, but sought to tie it indissolubly to the intellectual creation activity. This phrase can be interpreted in the meaning that novelty exists when we have evidence of the author's intellectual creation activity.

At the risk of broadening to much the open parenthesis to incidentally treat matters which do not form the subject of this paper, it is important to emphasize this aspect, because ***currently in all legal systems, both in the continental ones and in the legal system of the United Kingdom after the Football DataCo v. Yahoo UK Ltd. case law[19] and in the***

though contradictory positions can still be reported. Thus, in paragraph 17 of the preamble to Directive no. 93/98 / EEC on harmonization of the term of protection of copyright and related rights states that "*considering the fact that a photographic work within the meaning of the Berne Convention will be considered original if it is the author's own intellectual creation reflecting his personality.* " In terms of platic works of art, considering the importance personal execution has, Directive no. 2001/84 / EC on the resale right for the benefit of artists of original artworks from September 27, 2007, provides in Article . 2 (entitled artwork covered by the resale right): "*1. For the purposes of this Directive, <<original work of art>> means works of graphic or plastic art such as paintings, collages, drawings, engravings, lithographs, sculptures, ceramics, and photographs, if they are made by the artist himself or are copies considered to be original works of art. 2 The copies of works of art contained in this Directive, which have been made in a limited number by the artist himself or under his authority, are considered original works of art for the purposes of this Directive. Such copies are basically numbered, signed or otherwise properly authorized by the artist*." see V. Ros, D. Bogdan, O. Spineanu-Matei (2005) - Copyright and related rights. Treaty, All Beck Publishing House, Bucharest, p. 107. On the other hand another author believes that community law has adopted the subjective dimension of originality: see A. Circa (2013) - *Reflections on the originality of intellectual work,* Law no. 1, p. 127 "*even if the expression is inserted in some categories of works that seem to claim more of a novelty nature, it seems that is desired to conserve the subjective dimension and originality, by reference to its own creation, the author's personal."*

[17] see V. Ros, A. Livadariu (2014) - *The condition of originality in scientific works*, Romanian Journal of intellectual property law, no. 2, p. 11 *"A dose of originality we each have within us, this being given by the uniqueness of our being. It has personality, which is more or less visible and identifiable! We resemble, more or less with each other, but we also distinguish from each other, the resemblance to the extent of identity being excluded.* "

[18] see A. Circa (2013) - *Reflections on the originality of intellectual work,* Law no. 1, p.126.

[19] ss mentioned and quoted above the courts of the United Kingdom, supported by the decision of the Court of Justice of the European Union, given in the preliminary ruling procedure, have adopted the view of the Supreme Court of the United States of America in the case of *Feist Publications, Inc. v. Rural Telephone Service*,

American legal system after the Feist Publications, Inc. v. Rural Telephone Service Co. case law [20], the notion of originality has a homogeneous content, being understood and applied in the same way. No legal system has questioned the objective side of originality afforded by novelty to the protected intellectual creation. The divergent element is represented by the subjective element, which consists of the author's personal contribution. The existence of this element has never been, also, denied, even by the most reluctant to the originality concept as it was understood in the continental legal system. The divergence between the continental system and the common law one carried on the criteria for evaluation of this personal contribution of the author. The continental system considered the direct connection with the author's personality, respectively his intellectual creation activity, thus embracing a personal vision of this condition of legal protection. On the other hand the common law embraces an impersonal vision, trying to assess this subjective condition the most objectively possible, in relation to the effort made to create the work. This view was abandoned in the United States of America and later in the United Kingdom, when those legal systems were confronted with the problem of determining the legal protection of alleged databases, when they fully embraced the view of the continental system on creativity. In essence, the courts of these two national legal systems have realized that the existence of a new creation, resulting from a sustained intellectual effort of its author's, it is not enough to protect it through copyright. Anticipating a future study on this issue, I would say, to close this parenthesis, that each of us, since we wake up until we falls asleep, make a continuous intellectual effort, not only a physical effort, and as a result of this effort result new elements. However ***these new elements, produced by an intellectual effort, not a physical effort, do not make us, each of us, authors of intellectual works.*** New elements whose protection is desired must result from an intellectual creative activity, and not just after an effort which is not physical, but intellectual. The mere intellectual effort, without creativity does not make us the authors of protected works by intellectual property law.

After proving the lack of any anteriority or on the contrary the existence of anteriority, it may be established a simple presumption of originality in favor of the oldest intellectual creation of the author. His opponent in a judicial proceeding if he alleges that the

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establishing that: the intellectual effort and contribution, the know-how are irrelevant if they don't imply any originality: see C.J.U.E. rulling of March 1, 2012 "Directive 96/9 / CE - Legal protection of databases - Copyright – The calendar of the championships games" in case C-604/10, having as a subject a preliminary ruling request made under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom)
http://curia.europa.eu/juris/document/document.jsf?text=&docid=119904&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=531066

[20] just as quoted above see Supreme Court of the United States of America rulling in tha case of *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991), *"Originality does not mean novelty; a work can be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. The mere fact that a work is protected does not mean that every element of the work may be protected. Facts, either alone or as part of a compilation, are not original and therefore may not be protected by copyright. A factual compilation is intended to be protected by copyright if it has an original selection or arrangement of the original facts, but the copyright is limited to that selection or said arrangement. Copyright rewards originality, not effort* "
http://scholar.google.ro/scholar_case?case=11953362696980563l5&q=Rural+Tel.+Service+Co.,+499+U.S.+340+(1991)+499+U.S.+340&hl=en&as_sdt=2006

oldest work is not original, incorporating elements of the public domain, without any activity of intellectual creation, or that his work is also original independently from the originality of the older intellectual creation, he must prove it on the basis of the rule laid down in art. 243 of the New Code of Civil Procedure, regarding the burden of proof. Thus, as noted by one author[21], indeed the High Court of Cassation and Justice of Romania was wrong when it said that the absence of a previous copy means that the work is original. In fact, the absence of previous copies gives rise to a simple presumption of originality of the work, to the one to whom it is opposed having to overthrow by showing and to demonstrate that the work is original because it incorporates elements of the public domain, without any intellectual creative activity, situation in which the effects of simple originality presumption no longer subsist, the author having to prove the existence of intellectual creative activity in relation to the elements of the public domain, for example regarding their choice, at their arrangement, function or effect. At the same time, to the one to whom the mere presumption of originality is opposed, can invoke the fact that his work, even if subsequent, is original and the result of his own original intellectual creation activities, which materialized, incidentally, in a work identical to that in favor of which the simple presumption of originality operates. In this last case, which represents, as I will show below, a purely theoretical example, the simple presumption of originality is not overthrown by simply invoking a personal creative activity which would have, incidentally, led to an intellectual creation identical to the previous one, but when this personal creative activity is proven. But in this case, purely theoretically, ***the judge should explain in his judgment which he gives, in a credible way using the elements, criteria and objective data, how it is possible for two people, by their nature different one from the other, to create identical works. In any case, the judge cannot simply accept this "chance" or such a "coincidence" without clarifying it, because at that moment the whole legal protection system of intellectual property would be empty in content and meaningless,*** because immediately after such a view would be accepted by the jurisprudence, many "*coincidences*" like the one above would occur, all rights to intellectual creations would thus be paralyzed.

This last hypothesis is the best opportunity to clarify the alleged opposition between originality and novelty or how an intellectual creation even if it is not new is still original. Above, we have shown that the concept of originality, in the context of a comparative analysis with industrial property, appears to be different from the novelty condition. Thus, a certain work may bear the distinctive sign of the author's personality and be original without necessarily being new. An example is provided, to illustrate the present of originality and the lack of novelty, the situation in which two painters, independently of one another, paint same scene, one after the other, concluding that the second work would not be new, however, it would be original. This example is provided as is, without any further explanation, even if it is difficult to understand why the second painting would not be new. It is hard to believe that it would not be new only because it illustrates the same landscape. It could be lacking in novelty, only if it were be a "photocopy" of the first painting, meaning a perfect reproduction, but in this case how could it still be original. The example of the French doctrine is repeated

[21] see A. Circa (2013) – *Reflections on the intellectual originality of the work*, Law no. 1, p. 130

in our professional literature regarding "*the opposition between originality and novelty*" when it states that "*anteriority doe not exclude originality*" so that "*two very similar creations can receive protection if they both illustrate the personality of their author*" offering as examples" *dictionaries and travel guides* "[22]. To the same effect, are presented the identical creations identities of several authors from different eras. Thus, in the case of legislation in the inventions field, the second inventor will not enjoy the protection afforded by the laws of the invention field, because his invention cannot be considered new. In the case of copyright, the second author shall enjoy protection of the work created by him independently, provided that it is not the result of copying previous the work. Thus, the second work which contains an independent contribution of talent and work can enjoy copyright protection to the same extent that the first work can enjoy. Preliminary observations made on the examples given in the French doctrine are applicable to the United Kingdom of Great Britain. And here in one form or another it is highlighted that the work in the field of copyright while not new, it is protected to the extent that it meets the standards of originality. Showing the opposite, namely that the novelty never comes into conflict with originality and that an original intellectual creation is necessarily new, I will contribute with a new argument to thesis supported in this work, meaning that novelty is a general protection condition of any category of intellectual creations, no matter if it is in the field of copyright or industrial property.

The argument about differentiating originality from novelty, in the sense that the original work may not be new is a naive and dangerous one. Naïve considering that it is very difficult, even impossible, to get two identical works to be created independently one from the other. Such a case would be totally exceptional. The probability that a work which is not new, but rather identical to one already created, to be born solely from the work of another author's intellectual creation is as small as the probability that a monkey knocking over an inkwell, to reproduce the entire work of William Shakespeare's or at least Romeo and Juliet. Such an argument is also dangerous, because admitting the existence of such cases, destroys the whole system of legal protection of intellectual property, emptying it of content and purpose, by rising at the rank of the fundamental difference of a completely exceptional case. The legal protection mechanism of copyright cannot be analyzed in terms of purely theoretical examples, not likely to take place in everyday reality. If the doctrine chooses to do so, the result will not be other than to provide an excuse, a scientific justification for those who plagiarize.

In reality, the issue must be put in a different manner. This example of the opposition between novelty and originality is given by the doctrine, not to provide a possible defense of those accused of plagiarism, but to highlight the difference between copyright and industrial property. Starting with the formalities for acquiring the rights in industrial property field, bring it is brought to the doctrine a substantive argument, namely that the two conditions for granting legal protection, originality and novelty, are different, not only in the sense that originality is something much more than novelty, but in the sense that they are different concepts because copyright would it, even in theory, the legal protection of two identical work, as long as the condition for intellectual creative activity is met, while within the

[22] see A. Circa (2013) – *Reflections on the intellectual originality of the work*, Law no. 1, p. 134.

industrial property such hypothesis would be completely excluded. Basically by this comparison is intended to show that industrial property excludes the possibility of legal protection of two intellectual creations authors in this field, which independently arrive at the same result, while copyright allows this.

Even if you could counter that example on copyright is purely theoretical, being found only in courses as authors who debated this issue and that the exclusion of the other author's intellectual creation identical industrial property comes as a consequence of this specific domain, where intellectual creations are intended for industrial use, so vary widely, imposing a greater degree of legal certainty, the certainty, which led to the establishment of the formal record of creation, system registration and advertising of industrial property rights resulting in the exclusion of the possibility that a person other than the holder of industrial creation have rights on it, these are the best arguments.

Even if you could argued against, that the example on copyright is purely theoretical, being found only in the courses of law authors who debated this issue and this exclusion of the other author's identical intellectual creation in the industrial property field it comes as a consequence of this specific domain, where intellectual creations are intended for industrial use, so vary widely, imposing a greater degree of legal security, security which has led to the establishment of the formal process of recording creations, the registration and advertising system of industrial property rights resulting in the exclusion of the possibility that a person other than the author of the industrial creation has rights on it, these are not the best arguments. This is because ***industrial property right recognizes the possibility of legal protection of two intellectual creations authors in this field who independently arrive at the same result, in the case of inventions.*** More specifically it is about a special provision[23] of Law 64/1991, similar to other national[24] or supranational regulations, which gives a person, the author of a utility creation identical to a utility creation already protected by patent, the right to use the invention even after the patent has been issued[25], but only in the quantity

[23] art. 37 letter b) of Law 64/1991 "*It is not a violation of the rights provided by art. 2, art. 34 para. 1 letter a) and b) and of art. 35: (...) b) the use of the invention by a person who has applied the invention or has taken effective and serious measures in view if its use in good faith in Romania, irrespective of the patent holder and before a deposit of national regulations is established or before the date at which start the period of recognized priority; in this case the invention may be used by that person, in the quantity existing at the date of the deposit of national regulations or of the recognized priority and the right of use can not be transmitted but only with the heritage of that person or with part of the heritage affected to invention operation*. "

[24] in this regard article. 35 para. (1) of the Swiss Federal Law on Invention Patents of 1954 as amended: *"The patent cannot be opposed to that which, being in good faith, prior to the deposit or the priority date, has used the invention in Switzerland in his profession or made special arrangements to this end"* quote L. Mihai (2002) - *Invention. Substantive conditions of patentability*. *Rights*, Univerul Juridic Publishing House, Bucharest, p. 146.

[25] the conditions that must be met cumulatively for a third party to invoke, in relation to the patent holder, this legal license: a) there is one and the same technical solution with absolute novelty in time and space, which was created independently by at least two persons; b) one of them patents as an invention that technical solution; c) the other person has applied the same solution or has taken effective and serious measures regarding its use in the state in which the patent was issued; d) this application or, where appropriate, taking such effective and serious measures were made prior to the regulating deposit by the person who became the holder of the patent or before the exceptional priority raised by this patent owner; e) activities described in subparagraph d) were made in good faith and independently from the patent holder. f) activities described in subparagraph d) were not public, not being an anteriority which would have removed to the substantive existence of novelty during the

existing at the deposit registration date or, where applicable, at the date of recognized exceptional priority[26], the rights conferred allowing personal use, and may not be transmitted only together with the whole property of that person or with a fraction of the property affected by the exploitation of that invention.

The existence of this example demonstrates that particular, atypical situations were considered both in the copyright and industrial property fields. For this reason difference between novelty and originality must not be sought, in the light occurred effects, because these effects can be produced as a result of specific intellectual creations protected or due to the specificity of the juridical protection system. For example, I was showing in an earlier study[27] that the existence of advertising systems of subjective rights, even if involves checking the existence of substantive and procedural conditions, does not affect the nature of the protected rights in this matter. I was referring to the rights of copyright and industrial property, given the existence of advertising systems which required the registration of rights of claim or of real rights in the Electronic Archive of Real Movable Guarantees or in the Land Registry, regardless of the period that their registration had or not constitutive effect. ***Novelty and originality must be analyzed in terms of the substantive conditions which they impose on the protected intellectual creations.*** From this perspective, novelty is a component of originality together with intellectual creative activity, condition expressly imposed by the laws of copyright, as already indicated above.

The sequence of events presented to the reader, the expression method and the figures of speech of the author's style differentiate between the novel "Robin Hood" written by Henry Gilbert[28] and the homonymous novel written by Alexandre Dumas[29], the interpretation, the melody, the rhythm, the vocal, orchestral and musical arrangement, make the difference between the song "I've got you under my skin" performed by Frank Sinatra[30] and the homonymous song performed by Louis Prima and Keely Smith[31], the material support, the colors, the tones, the different use of chiaroscuro, sfumato techniques and of atmospheric perspectives differentiate between the painting "Virgin between rocks" by Leonardo da Vinci displayed in the Louvre Museum in Paris[32] and the homonymous painting attributed also to Leonardo da Vinci or to Ambrogio of Predis, which would have painted it under the supervision of Leonardo da Vinci, displayed at the National Gallery[33]. The example from the plastic art is not unique, a very recent one being of the two artists

patenting of the solution by the person who became the owner of the patent see L. Mihai (2002)- *Invention. Substantive conditions of patentability*. *Rights*, Univerul Juridic Publishing House, Bucharest, p. 142-144.

[26] see L. Mihai (2002)- *Invention. Substantive conditions of patentability*. *Rights*, Univerul Juridic Publishing House, Bucharest, p. 146-147

[27] see A. Speriusi-Vlad (2010) - *Common law in the field of intellectual property field*, European Legal Studies and Research – volume International Conference of PhD Students in Law, organized by the Faculty of Law and Administration within the West University of Timişoara and The European Centre for Legal Studies and Research Timisoara, Wolters Kluwer Publishing House, Bucharest, p. 500-507

[28] see http://books.google.ro/books/about/Robin_Hood.html?id=kizxmUrxXJUC&redir_esc=y

[29] see http://www.goodreads.com/book/show/388223.Robin_Hood

[30] see https://www.youtube.com/watch?v=C1AHec7sfZ8

[31] see https://www.youtube.com/watch?v=6IjG3Bmxofs

[32] see http://www.louvre.fr/en/oeuvre-notices/virgin-rocks

[33] see http://www.nationalgallery.org.uk/paintings/leonardo-da-vinci-the-virgin-of-the-rocks

contemporary to us, Michael Luther[34] an artist from Berlin and Damien Hirst[35] renowned worldwide, who independently conducted two similar paintings with the inspiration from a photo of a person injured after a terrorist attack in Iraq[36].

The condition of intellectual creation activity has a different purpose in the intellectual property system, meaning not to grant legal protection to the trivial intangible elements that are part of the public domain. Otherwise said, the condition of intellectual creative activity as a general condition of legal protection in the intellectual property law prevents law subjects to appropriate an intellectual property which is not part of the civil circuit, but of the public domain of intellectual property. For this reason the condition never comes into conflict with the novelty, because together they tend to legally protect intellectual creations unique, different from the current state of knowledge and technology, consisting in turn of all already protected intellectual creations and the public.

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[34] see http://michael-luther.net/en/biography/
[35] see http://en.wikipedia.org/wiki/Damien_Hirst
[36] see http://www.artfacts.net/index.php/pageType/newsInfo/newsID/2359/lang/1