MAIN DIFFERENCES BETWEEN THE CONTINENTAL LAW SYSTEM AND THE COPYRIGHT SYSTEM IN THE FIELD OF COPYRIGHT PROTECTION

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This article tries to emphasize the main differences between the system of continental law and the system of copyright in the field of copyright royalties.

The rights of the authors of intellectual creations are protected by law in most of the countries. The reason of this protection is given by the necessity that the results of the creativity be more broadly available.

Although the differences between the two systems are starting to fade, especially after the USA acceded in 1989 to the Convention of Bern, still they continue to exist and are worth emphasized. Thus, a first difference between the continental system and the copyright system is found in the legal nature of the copyright royalties. Also, in the continental system the work is protected regardless of the genre it belongs to: literary, musical or plastic art and regardless of the way of expression. Only the achievement of the work, even if not complete and independent of its status known to the public, suffices that the work be protected. On the other hand, in the copyright system the protection is conditioned by the accomplishment of some formalities that make clear the intention of the author to protect his work and his will to prevent that the work became public. Another important difference that we identify between the two systems is represented by the distinct content of the copyright royalty. In conclusion, we appreciate that the protection in the copyright system is characterized by the fact that this regards, exclusively, the pecuniary rights of the authors and does not have in view the moral rights also. In this system the right originates in the existence of a copy, of an object in itself, while in the continental system of the copyright royalty, the right originates in the intellectual effort, in the activity developed by a creator. It can be said, as many doctrinarians have said, that the continental system has in the center of protection the author, while the copyright system has the work in the center of protection.

Copyright protection constitutes one of ways of promoting, enriching and disseminating the national cultural heritage. The development of a country largely depends on the creativity of the inhabitants thereof, and encouraging the national creativity represents a *sine qua non* condition of progress. Copyright is the vital element of the development process. Experience demonstrated that enriching the cultural heritage depends directly on the level of protection granted to literary and artistic works[1]. Copyright granted to the authors of intellectual creations are protected by law in most of the countries. The rationale of this protection is based on the necessity to facilitate the availability of the results of creativity by means of large scale dissemination.

Speciality literature[2] defines the legal institution represented by copyright as the set of legal

[1] World Intellectual Property Organization, "Introducere în proprietatea intelectuală", translation performed by Rodica Pârvu, Laura Oprea, Magda Dinescu, Rosetti Publishing House, Bucharest, 2001, p. 142

[2] St. D. Cărpenaru, "Drept civil. Drepturile de creație intelectuală", *Civil Law. Intellectual Creation Rights*.

rules that regulate the social relationships that arise from the creation, publication and valuation of literary, scientific and artistic works. The just thing would be to talk about *copyrights* in order to designate the entire set of prerogatives that the authors enjoy, with respect to the created works and that include the moral rights as well, and about the institution represented by copyright in order to construe it as being the protective instrument of creators and creations thereof.[3]

The fundamental premises that make up the basis of copyright are found in the fundamental human rights, set forth by the provisions of article 27 of the Universal Declaration of Human Rights: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits" (article 27 paragraph1) and, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

From these premises result the two rationales that lead to the creation of copyright in modern society. First, copyright aims at allowing the author to remain the holder of the use designated to his creation and at allowing him to claim remuneration. Secondly, it aims at allowing the society to have access to the creation of the author.

Doctrine[4] expresses several theories regarding the legal nature of copyright. Thus, copyright was qualified to be the ownership right, the client right, the right over immaterial goods, a right belonging to personality, but each of these theories was criticised.

The theory according to which copyright constitutes an ownership right, criticisable for not being able to justify the protection of non-patrimonial rights of authors of works, lead to the division of protection solutions adopted and they followed two separate guiding lines: the one corresponding to the continental right, where the moral rights of authors are seen as taking precedence, and the one corresponding to the copyright system, the Anglo-Saxon system, where copyright is deemed to be an ownership right, as the author has the property at his disposal and has the possibility to negotiate the transfer of his right to others.[5] Consequently, the first difference that becomes obvious, separating the continental from the copyright system often resides with the legal nature of copyright.

Although the differences between the two systems tend to fade away, especially after the United States of America's adhesion to the Berne Convention in 1989, they still persist and deserve being rendered evident.

The habitual language uses the term copyright that tends to replace the phrase right of authorship. As a matter of fact, the term copyright has different meaning and contents, while speciality doctrine acknowledges the fact that the term is impossible to translate.[6]

The copyright system developed in the countries that find themselves under British influence. In the states that signed the Berne Convention, including England and Ireland, copyright got closer to the continental protection system, while in the United States of America protection continues to be granted under the form of copyright even after the adhesion thereof to the Berne Convention.

In the United States of America, copyright was protected until 1790 by way of jurisprudence. The 1790 Constitution enshrined the fundamental principle of intellectual property right in the United State of America, and in the sphere thereof the industrial property right and the literary and artistic property right were also included.

A new Act, adopted in 1909 contains a list of works that are liable to benefit from copyright,

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Universitatea Publishing House, Bucharest, 1971, p. 7

[3] V. Roş, D. Bogdan, O. Spineanu Matei, "Dreptul de autor şi drepturile conexe", *Copyright and Related Rights*. All Beck Publishing House, Bucharest, 2005, p. 33

[4] For this purpose, see: T. Bodoaşcă, "Dreptul de proprietate intelectuală", *IntellectualProperty Right*. Beck Publishing House, Bucharest, 2007

[5] V. Roş, D. Bogdan, O. Spineanu Matei, works cited p. 36

[6] J-M. Baudel, "La Legislation ded Etats-Units sur le droit d'auteur", *The United States' Legislation on Copyright*. Bruylant Publishing House, 1990, p. 80, cited by V. Roş, D.Bogdan, O. Spineanu-Matei, works cited, p.551

adding the mention that the list does not aim at limiting the object of copyright, but American jurisprudence considered that the list of works is limitative. The 1976 Act tries to remove the inconveniences and defines the works liable to benefit from copyright, by classifying them into two separate categories: a category that includes musical works and a category that includes sound recordings. The seven categories of works protected according to the 1976 Act are the following: literary works, musical works, dramatic works, choreographic works and pantomimes, pictorial, graphic and sculptural works, motion pictures and audiovisual works, sound recordings.

The American copyright system is characterised by the fact that it is based on the concept of protection of the interests of its citizens and by the fact that it implemented a series of conditions that are compulsorily met.

Although the United States of America participated in the preparatory works, they never signed the 1886 Berne Convention. But by means of an Act passed in 1891, they established that foreign citizens may benefit in the United States from the protection of the authorship rights through copyright based on reciprocity or based on existing international agreements. In 1952, the United States of America signed the Universal Copyright Convention, adopted at Geneva and as a result of this ratification the 1909 Act was amended by extending the protection provided by the same in order to include the works published in member states of this Convention.

The sequence of Acts on the protection of copyright adopted in the United States of America emphasizes a tendency to come closer to the legislation of the European countries and to the member states of the Berne Convention. Despite this rapprochement tendency, the protection system implemented by the United States of America and the one implemented by the European countries continue to be separated by two major differences[7]:

a) the acknowledgement of copyright is subject to the performance of formalities: the All rights reserved assertion and, in order to be able to act in court, the registration and the deposit;

b) the absence from the author's profit of a proportional remuneration resulting from the benefits obtained following the use of the work.

Consequently, the continental system protects the work irrespective of the genre it belongs to: literary, musical or plastic arts and irrespective of the form of expression. The conditions required in order to protect the works within copyright sphere are not expressly regulated, neither does the Berne Convention set forth express regulations with respect to this issue.

According to some theoreticians[8], the only condition required in order to protect the work within the copyright sphere is the originality thereof.

Other doctrinarians[9] estimate that there are three requirements that condition the possibility of granting protection within the copyright sphere: the work must embody a concrete form of expression, it must be perceptible to the senses, it must be liable of becoming known to the public, it must be original, it must be the result of the author's creative activity.

Consequently, the continental system lacks any formality for the acknowledgement of copyright, the mere fact that the work was produced, even if it is was not completed and whether it became known to the public or not, is sufficient to protect the respective work. This liberal protection system of works in the absence of all formalities represents one of the major differences compared to the protection solution adopted by the copyright system implemented in the United States of America. According to the latter the protection is subject to the performance of formalities that make obvious the author's intention to protect his work and his wish to prevent the disclosed work from entering the public sphere.[10] One of the formalities, namely the manufacturing clause,

[7] V. Roş, D. Bogdan, O. Spineanu-Matei, works cited, p.553

[8] C. Colombet, „Propriete litteraire et artistique et droits voisins", *Literary Property and Related Rights*, eighth edition, Dalloz Publishing House, Paris, 1997, p. 27, cited by V. Roş, D. Bogdan, O. Spineanu-Matei, works cited p. 83

[9] Y. Eminescu, "Dreptul de autor", *Authorship Right*, Lumina Lex Publishing House, Bucharest, 1997, p. 72

[10] V. Roş, D. Bogdan, O. Spineanu-Matei, works cited, p. 83

that set forth the printing of the work in the United States in order to obtain copyright, was waived in 1986, but until 1909 obtaining copyright for unpublished work was still not possible. The 1909 Act allowed the obtaining of copyright for unpublished works as well, but the list of such works was limited (written conferences, dramatic works, musical works, musical and dramatic works, motion pictures, photographic works, the reproductions of art works, drawings and plastic art works).

The 1976 Act set forth the possibility to obtain copyright for all creations.

The term creation has a different meaning from the one we find in continental law, as creation symbolises the fixing of the work on material support. But in order for an action to be able to be taken for the purpose of protecting the right over the work it is necessary to perform a series of formalities, namely to register the work with the Copyright Office.

As far as the All rights reserved assertion is concerned, it was created in the United States of America by means of the 1802 Act and preserved by the laws that followed. The All rights reserved assertion constitutes the application on each copy of the published or marketed work of the word copyright, of the abbreviation thereof copr or of the symbol thereof, the letter c placed inside a circle. Initially, the absence of the All rights reserved assertion was harshly sanctioned, but later, under the influence of the Geneva Convention, this formality became more loose. The absence of the All rights reserved assertion may be covered within a 5-year period of time, during which the holder of the right is obliged to produce proof of the fact that he performed all possible procedures with a view to applying the All rights reserved assertion on all the distributed copies of the corresponding work. In addition, the absence of the date on which the work is first published and of the name of owner is equivalent to the omission of the All rights reserved assertion. The All rights reserved assertion is incompatible with the Berne Convention that offers protection without the obligation of performing any formality and the United States of America's adhesion to this convention had to take into account this aspect too, consequently for the works published after March 1st 1989 the All rights reserved assertion became optional.

Deposit and registration are separate formalities, but more often than not they are simultaneously performed. In the United States of America these formalities are performed before the Copyright Office that keeps for this purpose the Register of Copyrights. The deposit, that aims at enriching the Library of Congress is, in principle, compulsory, but the sanctions applied in case of failure to comply with this requirement are moderate.

As far as registration is concerned, it is optional and may be carried out, unlike the deposit requirement, at any moment during the protection period and may have as subject matter unpublished works as well or works that are published abroad. Registration does not affect in any way copyright validity, but it creates the presumption of valid copyright. The Law on the application of the Berne Convention removed the registration obligation of the work as prerequisite for the admissibility of some actions in court filed for the purpose of protecting rights, but only for the works published in other member states of the Convention.

According to the continental law, unlike the United States of America law, the obligation of constitution of legal deposit has no importance whatsoever as far as the granting of protection for intellectual creation works is concerned. Moreover, fixing the work on a support makes up a protection condition in the copyright system, while in the continental system works are protected irrespective of the fact that they are fixed on a material support or not, but the Berne Convention grants to member states of the Union the right to set forth, by means of national legislations, that the literary or artistic works are not protected as long as they are not fixed on a material support, provision that is indispensable; we may take as examples the following: photographic works, motion pictures, audiovisual works, plastic art works etc. In the continental system, the fixing of the work is deemed to be a probative condition at the most, not a protection condition.

As far as the originality is concerned, it undoubtedly represents a protection condition of the work within the copyright sphere. Although it is deemed to be a milestone regarding the copyright, the concept of originality remains a controversial issue, differently understood within various national law systems.

Within the copyright system, originality is understood as the absence of a copy and it implies that the work must include a minimal intellectual effort. In England the minimal intellectual effort is determined according to the so-called skill and labour test.[11]

The originality requirement corresponding to the work was added to the copyright law by means of the 1911 Act. The adjective is treated as designating one of the features of the skill, labour and judgement text – the feature according to which the work must come from the author and it must not be copied by the author by using another source.

In the United States of America the corresponding test sweat of the brow was abandoned and the question of the condition of creativity was raised. This conception may be found in the German system as well, where the emphasis is put on the existence of a minimal level of creativity.

The continental system gives a different meaning to the condition of originality. By originality in countries such as France, Belgium, the Netherlands, Switzerland it is understood the mark of the author's personality, namely originality is defined in a subjective manner, as an expression of the author's personality.

The original work is the work where the author was able to express his sensitivity or at least his fantasy. In this respect, originality does not represent more than it represents in the copyright system states, rather it represents something different. This conception is also shared by the Romanian doctrine.[12]

If the law-making body hesitates regarding the meaning of the condition of originality, the fact that doctrine has not exhausted debates discussing this subject matter and that it does not have a uniform point of view must not come as a surprise. Still, it is our belief that we are the witnesses of efforts of harmonisation of the meaning given to the notion originality made by the continental system and the copyright system and that in the opinion of the Community law-making body the notion originality is increasingly understood in an objective manner, namely a work is original if it is a creation belonging to the person who claims to be the author, and if it is not a mere copy of a previous work. In order to create a work the performance of a minimum creative activity is required.[13]

Another major difference that we identify as separating the continental protection system and the copyright system resides with the different content of copyright.

In all European countries copyright is qualified as a complex right. The United States of America's adhesion to the Berne Convention in 1988 constitutes a great step towards the generalisation of this conception with respect to the nature of copyright that will lead to the decrease of differences between the two major protection systems of copyright: the continental system, according to which moral rights take precedence and the copyright system, where moral rights are not totally ignored but the meaning thereof is limited and this is not carried out by virtue of special legal provisions, but by applying the rules of common law in the field of personality rights[14]. According to the continental system, the original author of the work protected by copyright also benefits from moral rights, in addition to the patrimonial rights with economic character. The patrimonial authorship rights are subjective rights and the existence thereof is conditioned by the exertion by the author of the right to make his work available to the public and to use it to his own benefit and to the benefit of his successors. Into the category of patrimonial copyright falls the right

[11] V.R. Cornish, "Intellectual property: patents, copyright, trade marks and allied rights, third edition, London, 1996, p. 334, cited by V. Roş, D. Bogdan, O. Spineanu-Matei, works cited, p. 269
[12] V. Roş, D. Bogdan, O. Spineanu-Matei, works cited, p. 269
[13] Ibidem
[14] V. Roş, D. Bogdan, O. Spineanu-Matei, works cited, p. 269

to use the work, the resale right, the reproduction right, the distribution right, the right to import the work, the right to hire the work, the right to borrow the work, the right of public communication, work broadcasting, cable retransmission, the right to produce derivative works.

In the copyright system, the 1976 Act acknowledges to the benefit of the authors and of their successors in rights a time-limited exclusive right: the reproduction right of the work, the right to produce derivative works, the right of representation and public presentation of their work, the right of public distribution of copies of the corresponding work, by means of selling, hiring, borrowing.

As far as the moral rights are concerned, the Berne Convention requires the member states to grant authors: the right to be acknowledged the authorship and the right to oppose any modification, alteration, the right to oppose other modifications or derogatory actions undertaken with respect to his work, that would harm the honour or the reputation of the author. These rights must be independent from the usual patrimonial rights of the author and they must remain a prerogative of the author even after the transfer of his patrimonial rights is carried out.[15]

Despite the progress carried out, the 1976 Act passed in the United States of America does not acknowledge the moral rights of the authors. Jurisprudence made efforts in order to identify adequate means to protect the same before the United States of America's adhesion to the Berne Convention, believing that in practice the protection of these rights complies with the principles of the Convention and that, based on this aspect, the 1976 Act must not be modified. The United States of America's adhesion to the Berne Convention undoubtedly makes proof of the fact that a rapprochement is undertaken, a protection of works by copyright that is brought closer to the European copyright protection system and within this context it is expected that the moral rights of authors should be granted a lawful establishment, compared to a factual one.[16]

In conclusion our estimation points out that the protection implemented according to the copyright system is characterised by the fact that it refers exclusively to the financial rights of authors, without having in view the moral rights. According to this system the right results from the existence of a copy, of an object in itself, while according to the continental copyright system the right results from the intellectual effort, from the activity performed by a creator. One may consider, in conformity with the opinion expressed by many doctrinarians, that the continental system has at the core of the protection the author, while the copyright system has at the core of its protection the work.

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[15] *World Intellectual Property Organization, "Introducere în proprietatea intelectuală*", translation by Rodica Pârvu, Laura Oprea, Magda Dinescu, Rosetti Publishing House, Bucharest, 2001, pp. 147-148
[16] V. Roş, D. Bogdan, O. Spineanu-Matei, works cited, p. 557