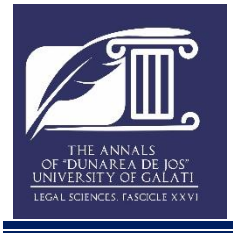

Authors and the Art Market – Confronting Doctrinary Paradigms and Jurisprudence

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Abstract: This paper examines the relationship between copyright doctrines and the development of the Romanian art market, focusing on the differences between Anglo-American and Continental European legal systems. Romanian law, rooted in the Continental tradition and influenced by French principles, emphasizes the moral and non-patrimonial nature of authorship, treating creative works as extensions of the creator's personality. Conversely, the Anglo-American approach views copyright as an economic construct focused on reproduction and utility, prioritizing labor, skill, and marketability over personal ties to the work. Despite Romanian law's Continental roots, the global dominance of Anglo-American norms has shaped perceptions among local practitioners, creating confusion and inefficiencies. This misalignment hinders the systemic development of the Romanian art market, complicating issues such as exhibition practices, monetization of works, and the transfer of rights. The study highlights the need for increased education on legal frameworks, greater professionalization through curatorial practices, and better integration of artist estates and succession-based rights management. By aligning legal principles with practical realities, the paper argues that Romanian art market can overcome its structural challenges and unlock the economic and cultural potential of its cultural market. This research contributes to understanding how law and art intersect to influence the growth of artistic and cultural market ecosystem.

Keywords: art market; creative industry; copyright; Anglo-American law; continental law

1. Introduction

Discussing the emergence of the Romanian art market without addressing the legal aspects tied to the trade of artistic works, artists' rights, and the widespread

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misunderstanding of terms like "copyright" or "author's rights" represents a perpetuation of the barriers preventing the development and consolidation of this segment within the cultural economy. Although significant strides have been made toward theorizing and solidifying these procedures—such as training and professionalizing stakeholders in the cultural scene and making these concepts more accessible to current or potential stakeholders (as exemplified by the series "Noii industriaşi, creativii" coordinated by Oana Năsui) (Năsui, 2021a)—copyright and the opportunities offered by Romanian jurisprudence still fail to garner interest or attention from most practitioners in the artistic field.

2. Literature Review and Preliminaries

Recent bibliographies reveal a plethora of studies and growing academic interest in the subject. These studies fall into two main categories: legal or economic research aimed at the professional sector; and research with an artistic, economic, and administrative profile targeting practitioners and representatives of the non-governmental, entrepreneurial or institutional sectors. Contrary to the mainstream direction of scientific research (Năsui, 2021a), discussions on art transactions (or related rights) should not be limited to procedural aspects (Păunescu, 2021, pp. 118-125), economic dimensions (Năsui, 2021b, pp. 10-53), historical phenomena (Năsui, 2021c, pp. 186-204), cultural entrepreneurship (Popeanu, 2021, pp. 230-238), or contemporary and future perspectives (Năsui, 2021, pp. 376-398) (Bujor, pp. 398-406). Instead, this paper is oriented toward the doctrinal paradigms of legal systems, underpinning the establishment and growth of the Romanian art market.

This article outlines the main doctrinal systems that engage with concepts such as "author's rights" and "copyright," as well as the ideological arguments underlying the two prevailing legal notions—the Anglo-American and Continental European systems. The working hypothesis of this comparative research is that Romanian law, despite being integrated into the Continental paradigm (French law), is often interpreted by practitioners through the lens of the more popular Anglo-American doctrine. This confusion and the lack of access for most artists or professionals to specialized consultancy led to logical inconsistencies, resulted from blending the two clusters of doctrinal rights. These inconsistencies alienate practitioners from systematically structuring the Romanian art market, impede the economic benefits derived from these structures, and hinder the unified and efficient development of the experiential economy phenomenon (Pinem & Gilmore, 2013), as well as profitability, cultural mediation, curatorship and marketing (Puşcaşu, 2020, pp. 34-36).

3. Copyright in Romania and the Continental Doctrine

As American law has been strongly influenced by John Locke's theories, the divergence in what exactly is intended to be protected under copyright has caused a split in interpretations, with French thought adopting Thomas Hobbes's theory. The predominant Anglo-American doctrine views the results pursued by an author in creating an artistic work as property, encompassing the "attributes of *usus*, *fructus*, and *abusus*" (Toma, 2022, p. 5). The administrative transformation of this doctrine materialized through a body of laws protecting creation based on the benefits it brings to society. Toma argues that the American system was influenced by utilitarian theory, incorporating elements of economic theory (copyright), which led to a departure—dating back to the Enlightenment—from moral or natural law considerations, which remain dominant in French (and, by extension, Romanian) thought (Toma, 2022, pp. 5-6).

Contrasting this perspective, French law affirms the intangible quality of rights associated with "immaterial bodies" (referred to as incorporeal or spiritual in jurisprudence), defining them as inherently patrimonial rights (CPI, L.111-1). This view stems from the consequences of the expiration of copyright protection terms (70, 50, or 25 years, depending on the type of work), which dictate that works enter the public domain after the author's death. According to the doctrine, since works are made known to the public, they are directly addressed to society and thus involve it. Upon the author's death and the expiration of the legal protection period, intellectual works automatically become part of the public domain (Vlad, 2015, pp. 86-89).

Alin Vlad argues that intellectual property is not considered a type of intangible goods property in Romanian law, unlike in French law (Vlad, 2015, p. 89). There is a clear distinction between naturalist doctrinal approaches (*jusnaturalism*) and positivist approaches (*juspositivism*). The former considers intellectual property to be primarily a form of property, whereas the latter emphasizes moral provisions. The naturalist approach assumes the extension of bodily reasoning exclusively to spiritual or immaterial elements, akin to the mechanisms for protecting and managing tangible property. Legally, this translates to treating all property rights as intangible, regardless of their nature (Carbonier, 1992, pp. 63-68; Toma, 2022, p. 6).

Since ownership of an immaterial component cannot be exercised in the same manner as over tangible goods, Romanian intellectual property doctrine clearly distinguishes between the two (LDI, L8/1996; Vlad, 2015, p. 86). While certain patrimonial aspects are recognized—established by legislators in connection to the moment of a work's creation (the origin and the start of the protection period)—these are subject to being transferred to the public domain once their state-guaranteed temporal protection expires (Vlad, 2015, p. 19; Toma, pp. 6-7). In other

words, Romanian law acknowledges the right to ownership over creation but does not attribute the status of material, transferable, concrete, and inviolable goods to intellectual creations themselves (Vlad, 2015, pp. 86-89). Furthermore, Romanian law ties the creation to the person who produces it, with rights arising from the act of creation being indivisibly connected to the individual. This logic stems from a romantic view that art is an emanation of personal spirit, equating creative acts with personal rights, in contrast to the utilitarian approach (Anglo-American) (Vlad, 2015, p. 19). This is why the first article of the applicable Romanian legislation declares that the rights it encompasses are "tied to the author's person" and involve "moral and patrimonial attributes," with originality as the primary and fundamental condition (LDI, L8/1996-1).

Alexandru Toma highlights that Romanian law adopts a dual approach: intellectual property rights are non-patrimonial personal rights that can generate patrimonial rights. More concretely, the right to exploit a work depends on the exercise of the right of use by the author (through disclosure), which subsequently leads to an implicit patrimonial component (Toma, p. 7). Thus, Romanian legislation shows a close interdependence between patrimonial prerogatives, which emerge only through the exercise of non-patrimonial rights.

The condition of originality (present in both Romanian and French law) is the cornerstone of the personal (and particularly individualizing) status of being an author and holder of intellectual property rights. As described in Romanian law, Article 4, paragraph 1: "the person under whose name the work was first made public is presumed to be the author until proven otherwise" (LDI, L8/1996-1). This creates a particular consistency in the link between the work and its creator. Viorel Roș argues that under Romanian law, anyone who configures a work in material form through their activity can be considered an author (Roș, 2016, p. 160). However, it must be noted that specific actions related to creation do not generate legal acts but only material acts, even if they may later be subject to legal classification (ibid., p.160). From this, we deduce that "as soon as a work takes concrete form, even if unfinished, the creator acquires the status of author" (Olariu, 2021, pp. 12-13), even if it has not been disclosed to the public (for instance, a painting does not need to be exhibited to confer authorship to its painter).

This creates a differentiation: the person who creates a work is the author or the primary beneficiary of copyright, while someone who has acquired or holds the copyright to a creative work is defined as the copyright holder (Vlad, 2015, p. 13). The two may coincide in the same person or refer to different individuals, with the stipulation that the title of author is never transferable. Similarly, French law stipulates that author status is acquired solely through the act of generating meaningful (artistic) content (CPI, L111-1, cf. LDI, L8/1996-1). Given the many

similarities between Romanian and French law, these doctrines aim to protect both the individual and personal rights of the author (in moral terms) and the patrimonial right (as an accessory to the work). The system aspires to synthesize these, focusing primarily on the author's status (the work as an emanation of the person), while recognizing only two functional possibilities for rights holders other than the author: reproduction rights and representation rights (Toma, 2022, p. 8; Ursa, 1999, pp. 54-70). Additionally, two relevant aspects apply to visual artists: the *droit de suite* (ibid., p. 32) and the inheritance of copyrights via succession (Eminescu, 1994, p. 112).

4. Copyright in Romania and Anglo-American Doctrine

The American system differs from Continental doctrine principles in its rigidity, pragmatism, and rigor. The procedural dimension of intellectual property disputes highlights the extensive prerogatives of judges as well as the normative practices in American jurisprudence. Unlike the European orientation toward the author's individuality, shaped by specific historical and identity-based constructs (Wong, T.; Torsend, Fernandini, 2010, pp. 279-328), the American doctrine focuses more on recognizing legitimate interests and the potential courses of action available to a rights holder, making it far more pragmatic. Some authors describe this doctrine as creating a "synthetic system with frequent abstract applications" (Bruguiere, 2017, p.12; Toma, 2022, p.8). It is worth noting that the American system imposes certain mandatory formalities that must be fulfilled before intellectual property rights disputes can be brought before a court. This requirement is often detrimental to the cultural sector and its practitioners. Understandably, a professional artist would prefer their copyright to be guaranteed automatically, in line with a doctrine catering to their creative needs and desires, rather than being subjected to standardized norms and procedures whose ultimate purpose is economic utility or market value.

Nonetheless, American legislation does provide implicit protection for original creations (CAUS, 102-a), but only insofar as they fit into one of the formal categories established by law. The text of Article 102 explicitly lists these categories, including transitional ones that span multiple domains—for example, protecting song lyrics alongside musical compositions or protecting music alongside theatrical works (CAUS, 102-a).

One fundamental difference is the diminished role of the individual involved in the act of creation. Anglo-American doctrine does not necessarily or substantially emphasize the personal dimension and the protection of individuals (as *naturalistic law* logic would). Consequently, originality in American copyright law involves slightly nuanced interpretations. It classifies the recognizability or hierarchy of artistic works based on the similarity between objects with comparable attributes, focusing on how their utility (or potential for *usufruct*) overlaps. This distinguishes

it from the French paradigm, which prioritizes the author's personal manifestation through the created work. In the French system, copyright is not a patrimonial right *per se* but rather an emanation of personal rights.

In his thesis, Alexandru Toma explicitly concludes: "The English legal system provides a deficient definition of originality," even though it is presumed and explicitly mentioned only for certain types of creation (Toma, 2022, p.11). This leads to the inference that Anglo-American legislators have expanded the legal protection rationale for authors, deviating from its primary origins. The introduction of labor parameters aligns American copyright more closely with labor law principles and an implicitly contractual viewpoint on creation (Cornish, Llewelyn & Aplin, 2013, p. 168). Cornish, Llewelyn, and Aplin identify "effort," "skill," and "investment" as criteria defining originality in Anglo-American terms (Cornish, Llewelyn & Aplin, 2013, p. 168). Furthermore, jurisprudence literature on the subject discusses similar parameters while incorporating a unique individual-rights perspective: judgment. This provides a potential convergence point between the French and Anglo-American paradigms (Dworkin, Taylor, 1989, p. 21).

When attempting to understand the doctrinal complexities of "author's rights" and its English equivalent, "copyright," the optimal conclusion is that it is impossible to create a perfect equivalence between the systems or unify them. Alexandru Toma notes that although the two terms originate from the same taxonomic structure—intellectual property rights, which aim to describe phenomena potentially subject to legal protection—they refer to fundamentally different issues with varied priorities in practice (Toma, 2022, p. 12). Linguistically, the very etymology of the two terms points to their respective domains: the French "droit d'auteur" reflects a natural law approach, emphasizing the moral, individual, and personal aspects of artistic creation, whereas the American "copyright" pertains to the right to reproduce or copy a corpus for economic gain (Toma, 2022, pp. 13-14). Specialized literature identifies a potential intermediate domain in American jurisprudence equivalent to the French "droit d'auteur": "author's rights" (Toma, 2022, p. 14; Waldron, 1993, pp. 185-215), but I will not expand onto this subject in this paper.

5. Conclusions

Although most Romanian artists aspire to monetize their art through exhibitions and sales, only a limited number achieve this goal. Since the domestic cultural system benefits from social advantages and state subsidies, and because the local legal system aligns with French doctrine, introducing Anglo-American doctrine into the discourse proves counterproductive. Nevertheless, due to the influence of U.S. cultural marketing, many practitioners mistakenly believe this system reflects reality. The result of this perceptual hybridization of applicable legal norms in art

transactions leads to inconsistencies, complications, and headaches that artists are unwilling to endure. A potential solution lies in the emerging discipline of curatorial practice, which could assume responsibilities in this area (Puşcaşu, 2023). Moreover, the Romanian system lends itself to establishing "artist estates," where rights are inherited, although this phenomenon rarely occurs to local artists. The fundamental insight of this study is that for the Romanian art market to thrive, better integration of legal norms into exhibition practices, development of the representation sector (akin to cultural impresarios), and accessibility of these concepts for professional artists represent significant and worthy goals.

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