

COPYRIGHT AND DESIGN PROTECTION FOR UGLY THINGS UNDER THE ROMANIAN LAW WITHIN THE EUROPEAN UNION FRAMEWORK

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Abstract

The Berne Convention from 1886 and the Romanian copyright law do not use the word ugly as an impediment for copyright protection. We analyze the validity criteria, especially originality, in order to discover if an ugly literary, artistic or scientific work can be protected by law. Could ugliness have an influence on the concept of originality in terms of imposing a series of restrictions?

Designs or works of applied art represent ornamental elements which are framed as beautiful. If these are ugly, will novelty and individual character be fulfilled? The answer lies in the law articles and in their interpretation.

We will study the questions mentioned above through a comparative analysis of Romanian legislation, international conventions and European Union directives regarding copyright and designs, in order to discover if ugly things may be protected as Intellectual property law objects.

Keywords: *Private law, Intellectual property law, Copyright, Designs, ugliness.*

1. A few considerations about beautiful and ugly in literary and artistic works

In the beginning of the article, we would like to present a case about Gustave Klimt's faculty paintings. In 1891, two Viennese artists, Gustave Klimt and Franz Matsch were commissioned to paint the ceiling of the great hall from the University of Vienna. The oil paintings had to present the four faculties of the university. Gustave Klimt created three paintings: Philosophy, Medicine and Jurisprudence. In 1900, the Philosophy painting was presented at the seventh Vienna Secession exhibition. A huge scandal bursts and Klimt painting was criticised by the public, press and specialists from his own country. The critic remarks extended to his other two faculty paintings: Medicine and Jurisprudence. One of the main issues from the observations was the ugliness of the bodies. An important number of professors from the University of Vienna signed a petition against Gustave Klimt's Philosophy painting, in which it was

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mentioned the “*aesthetic failure*” of the author. On the other hand, the painting was awarded with a golden medal at the World International Exhibition in Paris in 1900. Also, Klimt's faculty paintings were defended by foreigners. In 1945, Gustave Klimt faculty paintings were destroyed, but there are black and white photos with these three contested paintings¹. From a juridical point of view, the main question is if Gustave Klimt faculty paintings were a work of art which can be protected by copyright? Can the ugliness from a work of art be protected by copyright?

If nature created beautiful and ugly things, should artworks portray only the beautiful ones? “*Aesthetic is the science of beauty, but it's an imprecise one*”². Science works with objective notions, while aesthetics performs with subjective elements that have an imprecise nature. Aristotle and Kant said that ugly things can be expressed in a beautiful way in artworks³. Though, natural ugly things can be portrayed in art within a beautiful way. Such works of art are a poetic trope, because an ugly subject is embodied in beautiful artworks.

In order to continue our analysis, we would like to explain the meaning of “*beauty*” and “*ugly*”. The Oxford English Dictionary discloses us that *beauty* is a combination of qualities that pleases the aesthetic senses, while *ugly* refers to things that are unpleasant or repulsive to see or hear⁴.

We would like to emphasize the supremacy of the ideal beauty in ancient Greece. Plato mentioned that beauty refers to beautiful human body, soul, habits, thoughts, knowledge and Cicero said that beauty refers to moral goodness⁵. Also, beauty refers to something gracious, sublime, wonderful, etc. The relationship between beauty and art started in the old ages, because artists, musicians, poets narrated in a beautiful way the events of life or their own imaginary ideas⁶.

On the other hand, Plotin identified ugliness with the material world, while Plato said that ugliness lacks harmony because it is in contrast with the kindness of the soul. Nevertheless, ugliness was part of literary and artistic works in

¹ See details, Kathryn Simpson, *Viennese art, ugliness, and the Vienna school of art history: the vicissitudes of theory and practice*, in *Journal of Art Historiography* Issue 3 December 2010, p. 1-5, the article is available at the following internet page: http://arthistoriography.files.wordpress.com/2011/02/media_183175_en.pdf; Also, information and black and white photos with Gustave Klimt's faculty paintings are available at the following internet page: http://en.wikipedia.org/wiki/Klimt_University_of_Vienna_Ceiling_Paintings.

² See, Stephen Bayley, *Ugly: The Aesthetic of Everything*, Goodman Fiell, London, 2012, p. 13.

³ See, Heath Spong, *Individuality and freedom: from aesthetic individualism to a modern approach*, in *New York University Journal of Law & Liberty*, vol. 6, no. 1/2011, p. 11-12; http://www.law.nyu.edu/sites/default/files/ECM_PRO_069127.pdf

⁴ See, Jonathan Metcalf, Della Thompson, *Oxford English Dictionary*, Oxford University Press, 2003, p. 77, 900.

⁵ See, Steve Cahn, Aaron Meskin, *Aesthetics: A comprehensive anthology*, Blackwell Publishing, 2008, p. 4.

⁶ See details, Umberto Eco, *Istoria frumuseții*, Rao Publishing house, București, 2012, p. 9-12.

ancient Greece, because it played an important part in the harmony of the universe. The adjective *ugly* is synonymous with repugnant, hideous, dirty, monstrous, indecent, obscene etc. Therefore, ugliness awakes a reaction of disgust, repulsion or fear⁷. Within this context, ugliness was described in literary and artistic works as recognition of the high qualities of ideal beauty. How can people appreciate beauty, if they do not know the features of its antonym?

"Beauty in things exists merely in the mind which contemplates them", said David Hume. Is it possible for the author of a literary, artistic and scientific work to obtain juridical protection irrespective of the aesthetic value of his/her creation? Is the aesthetic value of an intellectual creation an essential criterion to obtaining copyright?

Theodor Lipps, a German philosopher contemporary with Gustave Klimt, said that "*aesthetics is the science of beauty and ugliness, implicitly.*" The concept of ugly aesthetic becomes relevant within the framework of the above mentioned questions. The expression *ugly aesthetic* is an art paradox which turns into an argumentative subject for copyright protection. It was said that "*Art enables the existence of ugliness only in combination with beauty;...*", but ugliness in art possesses a subsidiary origin because it cannot stand on the same level with beauty⁸. From a chronological point of view, ugliness goes back in time, reaching the works of art of the Middle Age, when the ideal beauty as conceived by the Greek artists started to fade⁹.

On the other hand, "*A sculpture be it beautiful or ugly created by a famous artist or a lesser known amateur artist falls within the category of sculptural work*"¹⁰. This sentence reveals that an ugly sculpture could be a work of art protected by copyright law.

Immanuel Kant mentioned that "*aesthetic judgement is free from concepts*" and that aesthetic standards have nothing to do with morality, utility or pleasure¹¹. These philosophical judgements bolster up the idea that beauty and ugliness should not influence copyright protection.

On the 20th August, 1857 a French court decided that six poems from the volume "*Les Fleurs de mal*" by Charles Baudelaire, published in June 1857, will be eliminated on moral grounds. The volume was a success and the first edition

⁷ See details, Umberto Ecco, *Istoria urâtului*, Rao Publishing house, București, 2008, pp. 16 -31.

⁸ Karl Rosenkranz, *O estetică a urâtului*, Meridian Publishing house, Sibiu, 1984, p. 61, 62-63.

⁹ Karl Rosenkranz, *O estetică a urâtului*, Meridian Publishing house, Sibiu, 1984, Preface by Victor Ernest Mașek, p.11.

¹⁰ Yves Moreau, *Preservation and conservation of expressions of folklore: the experience of North America*, UNESCO-WIPO World Forum on the protection of folklore, Phuket, Thailand, April 8 to 10,1997, p. 8, http://www.wipo.int/mdocsarchives/UNESCO_OMPI_FOLK_PKT_97/UNESCO_OMPI_FOLK_PKT_97_11_E.pdf

¹¹ Encyclopædia Britannica, <http://www.britannica.com/EBchecked/topic/7484/aesthetics/11709/Taste-criticism-and-judgment#ref306457> and <http://www.britannica.com/EBchecked/topic/7474/Aestheticism>

sold out. The third edition of the volume "*Les Fleurs de mal*" was published in December, 1868 without the six poems censored by the French court. The six 'doomed' poems were "*The Jewels*", "*Lethe*", "*To she who is to gay*", "*Lesbos*", "*Women Doomed (In the pale glimmer...)*" and "*The Vampire Methamorphoses*". It was only in 1949 when the ban for their publication was lifted. Thus, six poems signed by Baudelaire could not be published in France, for almost a century, because they were framed as "*an insult to public decency*"¹². Indecent is a synonym for *imoral* and *vulgar*. Umberto Ecco said that *ugly* is synonym with *indecent* in art¹³, which allows us to say that Baudelaire's poems were banned for having been judged to be ugly.

This French court decision from the XIXth century contradicts Kant's philosophical judgements and indicates that the aesthetic value of a poem is a criterion for legal protection. With this perspective in mind, we would like to inquire into present legislation and jurisprudence to find out if adjectives as *beauty* and *ugly* can become criteria for copyright protection.

The cases presented are from past centuries, but the questions may be defended with an enquiry argument. Considering the legislation from the XXI century, is it possible to revive such decisions based on the perception of ugly elements from a literary, artistic or scientific work? We are asking this question, because nowadays Polish artists are encouraged to use "*ugly graphic forms*"¹⁴ and a British writer and journalist inquires "*Why contemporary art worships ugliness*"¹⁵.

2. Should copyright protect ugly literary, artistic and scientific works?

In this article, copyright protection for ugly things will be presented as comparative analysis of Romanian copyright legislation, Berne Convention from 1886 and European Union directives with respect to the criteria of protection.

The juridical research begins with Law no. 8/1996, which legislates copyright and related rights protection in Romania¹⁶. The object of copyright protection is

¹² See, Viorel Roş, Dragoş Bogdan, Octavia Spineanu-Matei, *Dreptul de autor și drepturile conexe*, C.H. Beck Publishing house, Bucureşti, 2005, p. 91; http://en.wikipedia.org/wiki/Les_Fleurs_du_mal; For information and text of the six illegal poems of Charles Baudelaire: <http://fleursdumal.org/1857-table-of-contents>

¹³ Umberto Ecco, *Istoria urâtului*, Rao Publishing house, Bucureşti, 2008, p. 16.

¹⁴ See, Lidia Pańków, *Noviki culture*, September 2013; the text of this article can be read at the following internet page: <http://culture.pl/en/artist/noviki>

¹⁵ See, Harry Mount, *Why contemporary art worships ugliness?*, The Telegraph, October 12th, 2012; the text of this article can be read at the following internet page: <http://blogs.telegraph.co.uk/culture/harrymount/100066835/why-modern-art-worships-ugliness/>

¹⁶ Law no. 8/1996 on Copyright and Related Rights that includes the subsequent amendments provided by Law no. 285/2004 on the modification and completion of Law no. 8/1996 (the Official Gazette of Romania no. 587/30.06.2004), GEO no. 123/2005 on the modification and completion of Law no. 8/1996 (the Official Gazette of Romania no. 843/19.09.2005), Law no. 329/2006 (the Official Gazette of Romania no. 657/31.07.2006), Law no. 202/2010 (the Official Gazette of Romania

written in Article 7 of Law no. 8/1996, which mentions that “*the subject matter of copyright shall be original works of intellectual creation in the literary, artistic, or scientific field, regardless of their manner of creation, specific form or mode of expression and independently of their merit and purpose, such as [...]*”. Also, Article 1 (2) stipulates that “*A work of intellectual creation shall be acknowledged and protected, independently of its disclosure to the public, simply by virtue of its creation, even though in an unfinished form.*” Nevertheless, the legislator enacts clearly that originality is the only criterion for copyright protection.

On the other hand, Romanian doctrine¹⁷ acknowledges that are three conditions for copyright protection:

- originality;
- intellectual act of creation;
- a form that allows communication to the public.

Originality implies intellectual creation, because it means the transposition of author personality in a literary, artistic or scientific work within an act of intellectual creation. In this way, we would like to point out that originality and intellectual act of creation form part of the same condition.

A literary, artistic and scientific work will be protected if it can be expressed in a form that allows communication to the public. This condition was acquainted by Romanian doctrine, because the economic rights are recognized when the work is communicated to the public. Article 1 (2) of Law no. 8/1996 will apply to moral rights, which are recognized even if the work was not disclosed to the public. We consider that this condition is equally fulfilled both by beautiful or ugly artistic creations.

Article 2 (1) of the Berne Convention for the Protection of Literary and Artistic Works from 1886 stipulates that “*The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as [...] works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works [...]*”. Additionally, Article 2 (6) mentions that “*The works mentioned in this Article shall enjoy protection in all countries of the Union.[...]*”.

We cannot find the word “*original*” or “*originality*” in the text mentioned above. The interpretation of this article lies in the fact that, in the text of the Berne Convention, the concept of “*literary and artistic works*” is associated with the word “*author*”. In this case, only the works that are intellectual creations will have legal

no. 714/26.10.2010), Law no. 71/2011(the Official Gazette of Romania no. 409/10.06.2011) and GEO no. 71/2011(the Official Gazette of Romania no. 637/6.09.2011); the text of Law no. 8/1996 may be read at the following internet page:<http://www.orda.ro/default.aspx?pagina=650>

¹⁷ See details, Yolanda Eminescu, *Tratat de proprietate intelectuală*, volumul I, Academiei Publishing house, 1982, București, p. 72; Ioan Macovei, *Tratat de dreptul proprietatii intelectuale*, C.H. Beck Publishing house, 2010, pp. 431-432; Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *Dreptul de autor și drepturile conexe*, C.H. Beck Publishing house, București, 2005, pp. 81-93.

protection. But originality implies an act of intellectual creation, which means that the Berne Convention from 1886 legislates originality as a criterion for copyright¹⁸. Additionally, the expression “*intellectual creations*” is mentioned in Article 2 (5) of Berne Convention, which refers to derived works. *A fortiori*, literary and artistic works enumerated in Article 2 (1) of the Berne Convention should constitute intellectual creations, namely original works.

In accordance with Article 2 (7) of Berne Convention from 1886 “...it shall be a matter for legislation in the countries of the Union to determine... the conditions under which such works, designs and models shall be protected. ...”.

The Romanian Law on Copyright and Related Rights stipulates that copyright protection is awarded to original works from Article 7 and derived works from Article 8. The works enumeration from these two articles is not restrictive.

Originality is a criterion for the works enumerated in Article 7. Originality may be influenced by the formulation of author's ideas. Hereby, a technical idea will ensue a low level of originality¹⁹. *A fortiori*, a beautiful or ugly idea may be expressed in an original form, provided it is not technical.

A translation is protected by copyright as a derived work, if it is an original one. Originality may derive from a combination of certain words chosen by the translator that will express in an accurate manner all the ideas and feelings from the original work. The quality or value of the translation is not considered to be a condition for copyright protection under the Romanian law²⁰.

Originality represents an essential condition for the copyright protection. The adjective “*original*” is an attribute of intellectual creations, featured by genuine and unique value. The author is original in his act of creation when he creates something new and personal without using a previous work²¹.

On the other hand, originality is a criterion that has been legitimated by the Berne Convention since 1886. The semantic interpretation of this notion falls under the entire responsibility of the national doctrine of the member states²². For example, the originality of a work represents the reflection of author personality

¹⁸ See, Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties administered by WIPO and Glossary of Copyright and Related Rights terms*, published by WIPO, Geneva, 2003, p. 23.

¹⁹ Înalta Curte de Casație și Justiție, Secția civilă și de proprietate intelectuală, decizia nr. 8 din 11 ianuarie 2011, the text of this case may be read at the following internet page: <http://www.scj.ro/SC%20rezumate%202011/SC%20dec%20r%208%202011.htm>

²⁰ Înalta Curte de Casație și Justiție, Secția civilă și de proprietate intelectuală, decizia nr. 963 din 2 februarie 2007, the text of this case may be read at the following internet page: <http://www.scj.ro/SC%20rezumate%202007/SC%20r%20963%202007.htm>

²¹ See, Ion Coteanu, Luiza Seche, Mircea Seche și alții, *Dicționarul explicativ al limbii române*, Univers Enciclopedic Publishing house, București, 1998, p. 728.

²² Sam Ricketson, *Threshold requirements for copyright protection*, in *The WIPO Journal* no.1/2009, p. 56.

and creative talent²³. It appears that originality is a neutral concept, even if critics and public could frame the print of author personality in a literary, artistic and scientific work as beautiful or ugly, without the abridgement of the originality. In that direction, the adjective *beauty* or *ugly* do not have the goal to baulk copyright protection.

Are originality and aesthetic value connected? Under the Romanian law, original works can be protected „*independently of their value and purpose*” in accordance with Article 7 of Law no. 8/1996 on Copyright and Related Rights. Though, the neutrality of the law confers protection to literary, artistic and scientific works independently of the aesthetic value criterion. Nevertheless, we would like to find out if an ugly work might fulfil criteria for copyright protection.

We consider that beautiful or ugly artistic value is not a criterion for copyright protection. It is obvious that the law does not operate a clear distinguish, since words such as „*beauty*” and „*ugly*” could not be found in the above mentioned texts. Furthermore, the legislator does not refer to the artistic value of the work, which means that ugly literary, artistic and scientific works are protected by copyright if all the other criteria are fulfilled. As a literary argument, art must represent ugliness because reality should be depicted in all its elements, tragic or comic²⁴.

Nevertheless, “*The law does not judge literary, artistic and scientific works;...*”²⁵, which means that works will not be framed in two different categories. The talent of the author could be revealed within the framework of the aesthetics of beauty and ugliness under the law of copyright protection.

The act of intellectual creation is expressed through a beauty or an ugly work of art. Waldemar Januszczak said that „*beauty today can be electronic or scientific; subtle and elusive. It can be found in the LCD sculptures of Tatsuo Miyajima or in the subtle light installations of James Turrell. Carl Andre discovers a stern modern beauty in squares of industrial materials dropped around a good yard.[...]*”²⁶. Critics, reviewers and public will appreciate the relativity of beauty and ugliness, but the law does not discriminate regarding these two words.

With a comparative perspective in mind, we would like to refer to Article L.112-1 of the French Intellectual Property Code which mentions that „*Les dispositions du présent code protègent les droits des auteurs sur toutes les œuvres de l'esprit, quels qu'en soient le genre, la forme d'expression, le mérite ou la destination.*” The act of intellectual creation is enacted by law and originality is introduced by the doctrine.

²³ See, P. Sirinelli, S. Durrande, A. Latreille, J. Daleau, *Code de la Propriété Intellectuelle Commenté*, 8^e edition, Dalloz, Paris, 2008, p.

²⁴ See, Karl Rosenkranz, *O estetică a urâtului*, Meridian Publishing house, Sibiu, 1984, p. 62 – 63.

²⁵ Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *Dreptul de autor și drepturile conexe*, C.H. Beck Publishing house, București, 2005, p. 90.

²⁶ <http://www.bbc.co.uk/programmes/b00p4g60>.

French jurisprudence has interpreted originality as the mark of author's personality and intelligence. As a conclusion, juridical literature acknowledges that originality is the opposite of ordinary²⁷. Nevertheless, „ordinary“ is not synonymous with „ugly“, though it is possible to find originality in works that can be enclosed in the ugly aesthetic matrix.

Also, the Appeal Court from Paris has established the meaning of perfume originality. It is original a combination of oils in certain amount which flavours reveals the creative contribution of the author²⁸. The Court did not mention if the perfume has to smell good or bad in order to be original.

Under the English law, originality is a criterion required for copyright protection. In the beginning of the XXth century, the English Courts applied the *sweat of the brow* doctrine that did not take into consideration the aesthetic value of the work. The *sweat of the brow* doctrine refers to the *skill and labour* of the author in creating a work of art. Originality became an important criterion for copyright under the British law for Copyright, Design and Patents Act from 1988. Under this law the word „original“ becomes an adjective in the description of works from Article 1. Though, the end of the XXth century marked an essential change in the United Kingdom copyright protection. Originality is a new criterion that did not replace entirely the *skill and labour* test²⁹.

Within this context, originality is not the only criteria for copyright protection on the European continent. In an attempt to harmonize the European national law, the project of European Copyright Code was drafted by the Wittem group established in 2002.³⁰ In Article 1 (1) it is written that „Copyright subsists in a work, that is to say, any expression within the field of literature, art or science in so far as it constitutes its author's own intellectual creation.“ From the interpretation of this article, the object of copyright is represented by any form of creation in the literary, artistic and scientific field, which belongs to a natural person. The main request refers to the creation act of the author.

The European Union directives on copyright were adopted with the aim of harmonizing the European national legislation. The criteria requested for legal protection were one of the objects in the process of harmonization. In the

²⁷ For further details, Michel Vivant, Jean-Michel Bruguière, *Droit d'auteur*, Dalloz Publishing house, Paris, 2009, pp. 165 - 169.

²⁸ Dr E. Derclaye, *One on the nose for Bellure: French appellate court confirms that perfumes are copyright protected*, in *Journal of Intellectual Property Law & Practice*, 2006, Vol. 1, No. 6, p. 378.

²⁹ See details, Jonathan Griffiths, *Dematerialization. Pragmatism and the European Copyright Revolution*, in *Oxford Journal of Legal Studies*, vol. 33, no. 4 (2013), p. 770 - 786; Steven M. James, Ruth Arkley, *European jurisprudence and its impact on copyright protection*, the article may be read at the following internet page: <http://www.lexology.com/library/detail.aspx?g=ecaa7aea-971c-4b54-b500-eccb75b20a43>; Tina Hart, Linda Fazzani & Simon Clark, *Intellectual Property Law*, Palgrave Macmillan, Great Britain, 2006, p. 167-172.

³⁰ The text can be studied at the following internet page: http://www.copyrightcode.eu/Wittem_European_copyright_code_21%20april%202010.pdf

subsequent analysis, the European Union text law and jurisprudence confirm that originality is the only criterion for copyright protection.

Article 1 (3) from Directive 2009/24/EC on the legal protection of computer programs stipulates that “*A computer program 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*”. We would like to emphasize that European Union legislator is precise in enacting originality as the only condition for copyright protection.

In the light of this article, the European Court of Justice confirmed through a number of recent cases that originality is the only criterion for copyright. Originality is achieved when a literary, artistic or scientific work is the result of the author's intellectual creation. Also, originality is applied for computer programs and database. How may originality be accomplished? The European Court of Justice gave a straight answer to this question. An author may obtain originality “*...through the choice, sequence and combination of those words [...] in an original manner and achieve a result which is an intellectual creation*”³¹.

Furthermore, in paragraph (8) from the introductory part of Directive 2009/24/EC, it is written that no tests for qualitative or aesthetic merits of a computer program should be applied. Thereby, originality is not influenced by the qualitative or aesthetic merits, which may frame a computer as beautiful or ugly.

Article 6 from Directive 2006/116/EC on the term of protection of copyright and certain related rights mentions that photographs are protected if they “*are original in the sense that they are the author's own intellectual creation [...]. No other criteria shall be applied to determine their eligibility for protection. [...]*”. This text law is identical with Article 6 from Directive 93/98/EEC on harmonizing the term of protection of copyright and certain related rights. Actually, Directive 2006/116/EC entered into force, when Directive 93/98/EEC was repealed.

If “*the expression of those components is dictated by their technical function, the criterion of originality is not met*”³². In the above sentence, we are referring to the components of a graphic user interface. We underline the fact that the European Court of Justice did not take into consideration the beautiful or ugly elements of a graphic user interface.

Under the rules of the Berne Convention from 1886, a photographic work is original if it is an intellectual creation of the author reflecting his/her personality without taking into consideration other criteria, such as value or destination of

³¹ Case C-5/08, Infopaq International A/S v Danske Dagblades Forening, paragraph 45, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=72482&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7928167>.

³² Case C-393/09, Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury, paragraph 49, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0393:EN:HTML>

the work³³. This argument is mentioned in a decision of the European Court of Justice, known as Case C-145/10 Painer, and was taken over from paragraph 17³⁴ from the introductory part of Directive 93/98/EEC. In this case, judges decided that a photograph will be copyright protected only if it is the intellectual creation of an author and if it reflects his/her personality through free and creative choices in the act of photography³⁵. As one can notice, judges ascertained “*free and creative choices*” without referring to beautiful or ugly elements. *A fortiori*, judges used the words “*free...choices*” which means that the act of creation is not limited to the value of artworks components. Thus, an artist may create something original, be it beautiful or ugly. The value of the creation is not a criterion of protection.

As a conclusion, a work has to be the result of a creative activity. The quintessence of this condition is represented by the originality of the work³⁶, but the legislator does not restrict copyright protection by reference to *beauty* or *ugly things*.

Also, Article 1 (1) from Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art stipulates that “*Member States shall provide, for the benefit of the author of an original work of art, a resale right, [...]*”. In Article 2 (1) of Directive 2001/84/EC, one may read the definition of an original work of art. In view of this article an “*original work of art means works of graphic or plastic art such as pictures, collage, paintings, drawings,[...] made by the artist himself or are copies considered to be original works of art.*” It is obvious that the aesthetic value of the work is not a condition for the resale right of the author under the European Union directive.

On a different opinion, it is considered that copyright protection cannot be conferred independently of artistic value and author’s accomplishment. However, jurisprudence confirms that judges do take into consideration author’s contribution³⁷. We think that “*artistic creation value and author accomplishment*” should reverberate into the originality of the work. Though, the first place should be granted to artistic talent, which is reflected into literary, artistic and scientific works.

In British legal studies, it was affirmed that aesthetic quality is important in order to be a work of art. From this point of view, aesthetic value can not be excluded from the copyright protection, even if a judge can not appreciate the

³³ Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH&others, paragraph 15, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-145/10>

³⁴ The text from paragraph 17 of Directive 93/98/EEC is identical with paragraph 16 from Directive 2006/116/EC.

³⁵ Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH&others,

³⁶ For further details, Ioan Macovei, *Tratat de dreptul proprietății intelectuale*, C.H. Beck Publishing house, București, 2010, p. 432.

³⁷ See, Yolanda Eminescu, *Dreptul de autor*, Lumina Lex Publishing house, 1997, p. 80-83.

artistic value of a work. In the absence of aesthetic properties, a work can not be qualified as an artistic work. In this theory, the arguments refer only to aesthetic qualities without framing the artistic elements as beautiful or ugly³⁸.

On our juridical research, we propose to discover TRIPS Agreement standards for copyright protection. „*In the area of copyright, the Berne Convention and the TRIPS Agreement form the overall framework for multilateral protection*”³⁹. Art. 9 (1) of TRIPS Agreement mentions that „*Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. [...]*” We notice that TRIPS Agreement incorporates the articles and copyright criteria protection as stipulated by the Berne Convention of 1886.

Ugly literary, artistic and scientific works can be original and copyright protection is the shield against infringement. We may not like ugly works, but they are the result of intellectual creation. The law protects the act of intellectual creation, not the beautiful or ugly characteristic of a literary, artistic and scientific work. Originality is the result of an act of intellectual creation, which may be frame as beauty or ugly. We would like to mention a few words from American jurisprudence “[...] *It may be more than doubted, for instance whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value, it would be bold to say they have not an aesthetic and educational value, and the taste of any public is not to be treated with contempt.[...]*”⁴⁰. With this view in mind, the law may not protect the perception of beautiful or ugly, which is submitted to subjective variations. The law refers to the objective act of intellectual creation that influences the originality of a literary, artistic and scientific work.

3. Arguments for the design protection of ugly things

„...*if a chair is in a furniture store, it cannot be severable and cannot be protected copyright-protected; if it is in a museum, and you cannot sit on it because the alarm would ring, it is an work of Art and you could have copyright protection*”⁴¹.

The works of applied art mentioned in Article 2 (1) of Berne Convention and Article 7 (g) of Law no. 8/1996 refer to designs when are protected by copyright.

³⁸ See details, Justine Pila, *Copyright and its categories of original works*, Oxford Journal of Legal Studies, vol. 30, no. 2 (2010), p. 240-242.

³⁹ Interpretation paragraph 88 regarding the text of Article 9 from TRIPS Agreement, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_01_e.htm#article9B

⁴⁰ United State Supreme Court, *Bleinstein v. Donaldson Lithographing Company*, 188US 239 (1903), information about this case can be read at the following internet page: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=188&page=239>; http://en.wikipedia.org/wiki/Bleistein_v._Donaldson_Lithographing_Company

⁴¹ See, Mario Franzosi, *Design protection Italian style*, in *Journal of Intellectual Property Law & Practice*, 2006, Vol. 1, No. 9, p. 600.

Article 17 from the Directive 98/71/EC on the legal protection of designs mentions that *“A design protected by a design right registered in or in respect of a Member State in accordance with this Directive shall also be eligible for protection under the law of copyright of that State as from the date on which the design was created or fixed in any form. The extent to which, and the conditions under which, such a protection is conferred, including the level of originality, shall be determined by each Member State”*.

In the light of Directive 98/71/EC, the European Court of Justice observed the revival of copyright protection for designs, which have entered the public domain, as a consequence of the fact that the protection resulting from registration has ceased. It is essential to mention that a design will have copyright protection if it may possess artistic value⁴². Nevertheless, the words beautiful or ugly are not conditional adjectives for the artistic value of any design.

Under the Romanian law, a design will have to fulfill the condition of originality in order to be copyright protected. This allegation is based on Article 7 of Law no. 8/1996. Also, the Romanian High Court of Cassation and Justice assert that a design will have copyright protection if it is original. Originality is defined as the print of author personality regardless the value of the work⁴³. Again, the words beautiful or ugly are not conditional adjectives for the artistic value of any design.

Therefore, we would like to reiterate the initial question -whether or not an author of a particular registered design can obtain protection as a result of the act of creation regardless of the aesthetic value of the work.

The juridical protection of a design is obtained through registration at national, community or international level. The main conditions for registration are novelty and individual character.

In accordance with article 6 (2) from Law no. 129/1992 on Protection of Designs *“A design shall be deemed to be new if no identical design was rendered available to the public prior to the date of filing the application for registration or, if the priority was claimed, before the priority date”*. Novelty is analysed on the basis of an objective criterion which does not imply questioning the aesthetic value of the design.

In accordance with article 6 (4) from Law no. 129/1992 *„A design shall be deemed to have individual character if the overall impression it produces on the informed user differs from the one produced on such a user by any design rendered available to the*

⁴² See, Case C-168/09, Flos SpA v Semeraro Casa e Famiglia SpA, <http://eur.lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0168:EN:HTML>

⁴³ Înalta Curte de Casație și Justiție, Secția I civilă, decizia nr. 886 din 10 februarie 2012, the text of this case may be read at the following internet page: <http://www.scj.ro/SC%20rezumate%202012/SC%201%20dec%20r%20886%202012.htm>

public before the date of filing the application for registration, or before the priority date, if the priority was claimed". Should the informed user take into consideration the beautiful or ugly nature of a design when he or she analyses the individual character?

Article 6 (1) from Regulation no. 6/2002 on Community Designs „A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public [...]”.

One may easily detect the identity of article 6 (4) from Law no. 129/1992 and article 6 (1) from Regulation no. 6/2002. Also, we would like to mention that the same text can be found in Article 5 (1) from Directive 98/71/EC⁴⁴. The key words from these articles are *informed user* and *overall impression*.

Individual character may be viewed as a subjective condition with the informed user as a standard of appreciation. Impression is the subjective conviction of a natural person. On the other hand, it appears that overall impression is deployed of objective elements, since the informed user possesses all the necessary knowledge about designs regarding a certain product from the market⁴⁵. Nevertheless, the European national jurisprudence give a different interpretation of this concept in the direction that the informed user may be a specialist in that field, a 5-year old child or someone who bought and used a product for a certain period of time⁴⁶.

The law refers only to a different overall impression independently of any connection with beautiful or ugly elements of design. The informed user is not an art critic who analyses the positive or negative aesthetic value of the design. The informed user is described as a natural person acquainted with the designs from a certain field, in absentia of an ordinary definition. His role is to give an expert opinion regarding the resemblances and differences between two designs without any concern for the aesthetic value.

It was asseverated that the informed user must analyse the resemblances between inessential elements and differences between essential elements, under the Community jurisprudence⁴⁷. We estimate that essential elements may be *ugly*, but original. The concept of originality does not prohibit the presence of ugly elements in a literary, artistic or scientific work.

⁴⁴ The text of Directive 98/71/EC can be read at the following internet page: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0071:EN:HTML>

⁴⁵ See, Henning Hartwig, *The concept of reciprocity in European design law*, in *Journal of Intellectual Property Law & Practice*, 2010, Vol. 5, No. 3, p. 188.

⁴⁶ For details, David Stone, *Some clarity, some confusion: 12 P&G Reckitt Benckiser decisions help explain registered Community designs*, in *Journal of Intellectual Property Law & Practice*, 2008, Vol. 3, No. 6, pp. 380 - 381.

⁴⁷ See, José J.Izquierdo Peris, *Enforcement of Community Designs by Alicante Courts: a promising start*, in *Journal of Intellectual Property Law & Practice*, 2007, Vol. 2, No. 1, p. 46.

On a different opinion⁴⁸, ugly designs fail to stand for an individual character, since they are too prosaic. In this view, copyright protection might slow down the activity of creation and design by building walls and barriers difficult to surpass.

From a semantic point of view, the word "*prosaic*" refers to things that lack originality. Taking into consideration the juxtaposition between "*ugliness*" and "*prosaic*" explains the inappropriateness of such approach when it comes to designs and models, for jurisprudence reveals that originality is an important component of the novelty criterion that must be fulfilled for the registration of designs⁴⁹.

We consider that law does not distinguish between beautiful or ugly designs. Novelty and individual character may be equally fulfilled by an ugly design, if this design is the result of the author's creative act.

4. Conclusions

A work of art is beautiful if it is pleasant for the eye and human mind. The opposite of beauty is ugliness, something that is not liked by human senses. From a semantic point of view, „art” is a word that designates human activity which gave birth to pieces of work with aesthetic values, whereas ugliness is „... the opposite of beauty which covers a part of aesthetics”⁵⁰.

Since we cannot ignore ugly works or designs, should we protect them? The law does not give protection in accordance with the positive or negative artistic message that can be developed. When a design is contrary to the public order, it cannot be protected; nevertheless, not all ugly designs are contrary to the public order.

The main conclusion is that law does not differentiate between beautiful and ugly works and designs, which means that protection can be granted if validity criteria are fulfilled.

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⁴⁸ Mario Franzosi, *Design protection Italian style*, in *Journal of Intellectual Property Law & Practice*, 2006, Vol. 1, No. 9, p. 601.

⁴⁹ See, Nicoleta Rodica Dominte, *Originalitatea – privire comparativă între dreptul de autor și desene și modele*, in *Romanian Intellectual Property Law Review* no. 1/2012, pp. 129-133.

⁵⁰ Karl Rosenkranz, *O estetică a urâtului*, Editura Meridian, Sibiu, 1984, p. 26.

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