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Artículos Científicos

El plagio: la dicotomía entre la idea y la expresión de la idea

Plagiarism: The Dichotomy Between the Idea and the Expression of the Idea

Plágio: a dicotomia entre a ideia e a expressão da ideia

Elba López Fernández

Universidad de Granada, España

elba.2719@gmail.com

<https://orcid.org/0000-0001-5739-7094>

Resumen

Este artículo surge a partir de la idea de que no resulta fácil determinar la frontera entre plagio y creación original. En principio, el plagio trata de una apropiación del esfuerzo ajeno. La cuestión es, sin embargo, si siempre se está ante un fraude o si a veces es un acto inevitable de cometer: la inspiración o la influencia recíproca entre dos obras irrumpen en la discusión. ¿Cómo saber qué es lo que se puede o no se puede hacer y dónde está el límite entre lo legítimo y lo ilegítimo? El objetivo aquí fue determinar el alcance y los límites de la figura del plagio. Y para ello se analizaron ciertas ambigüedades lingüísticas implícitas en su definición. Las fuentes consultadas ayudaron a determinar que, a pesar de que las leyes argumentan que las ideas en sí mismas no son protegibles, a efectos prácticos esta realidad no está tan clara. La metodología usada en este artículo fue descriptiva. Como instrumento se recurrió a la investigación documental. Entre los resultados se pudo establecer, a través del análisis de *lookalikes*, que las ideas pueden estar protegidas incluso en su sentido abstracto, ya que aunque queden definidas por su expresión pueden ser expresadas de formas diferentes. Se concluye que en realidad la desprotección absoluta de las ideas no es un axioma, a pesar de que este último constituye uno de los principios doctrinales del derecho de autor, ya que la idea, al ser materializada y compartida, queda ligada a un modo de expresión e



indirectamente protegida por este. La propiedad intelectual, en principio, tampoco protege las técnicas artísticas o creativas ni los estilos ni los temas; pero la protección de la obra, aunque trate de excluir lo que se expone, esto es: la idea, el método, el estilo y la técnica, no siempre puede hacerlo, incurriendo en una contradicción que olvida que la creación es en parte imitación.

Palabras clave: derechos de autor, estilo, imitación, originalidad, técnica.

Abstract

This article emerges from the idea that is not easy to determine the border between plagiarism and original creation. In principle, the plagiarism is an appropriation of the effort of others. The question, however, is whether it is always a fraud or sometimes it is inevitable of committing: the inspiration or reciprocal influence between two works break into the discussion. How to know what can or cannot be done, where is the line between the legitimate and the illegitimate? The objective here it was to determine the scope and limits of the figure of plagiarism. For this, certain linguistic ambiguities implicit in its definition were analyzed. The sources consulted helped to determine that, although the laws argue that the ideas themselves are not protectable, for practical purposes this reality is not so clear. The methodology used was descriptive; as an instrument was resorted to documentary research. As a result, it could be established, through the analysis of *lookalikes*, that ideas can be protected even in their abstract sense, namely, the primary ideas that are in the mind and not only in the form that it has adopted when expressing itself, since the idea is defined by its expression, the same idea can be expressed in different ways. It is concluded that, in reality, the absolute lack of protection of ideas is not an axiom, despite the latter constitutes one of the doctrinal principles of copyright, since the idea to be materialized and shared is linked to a mode of expression and indirectly protected by this. Intellectual property, in principle, does not protect artistic or creative techniques neither styles nor themes; but the protection of the work, although it tries to exclude what is exposed, namely: the idea, the method, the style and the technique, cannot always do it, incurring a contradiction that forgets that the creation is partly imitation.

Keywords: copyright, style, imitation, originality, technique.



Resumo

Este artigo surge da ideia de que não é fácil determinar a fronteira entre plágio e criação original. Em princípio, o plágio é sobre uma apropriação do esforço de outros. A questão é, no entanto, se alguém sempre se depara com fraudes ou, às vezes, é um ato inevitável de cometer: inspiração ou influência recíproca entre duas obras entra em discussão. Como saber o que pode e o que não pode ser feito e onde está o limite entre o legítimo e o ilegítimo? O objetivo aqui era determinar o escopo e os limites da figura do plágio. E para isso, foram analisadas certas ambiguidades linguísticas implícitas em sua definição. As fontes consultadas ajudaram a determinar que, embora as leis argumentem que as idéias em si não são protegíveis, para fins práticos essa realidade não é tão clara. A metodologia utilizada neste artigo foi descritiva. A pesquisa documental foi utilizada como instrumento. Entre os resultados, foi possível estabelecer, através da análise de sócias, que as idéias podem ser protegidas mesmo em seu sentido abstrato, pois, embora sejam definidas por sua expressão, podem ser expressas de diferentes maneiras. Conclui-se que, na realidade, a absoluta falta de proteção das idéias não é um axioma, embora este último constitua um dos princípios doutrinários do direito autoral, uma vez que a idéia, materializada e compartilhada, está ligada a uma maneira de expressão e indiretamente protegido por ela. A propriedade intelectual, em princípio, também não protege técnicas, estilos ou temas artísticos ou criativos; mas a proteção do trabalho, embora tente excluir o que está exposto, ou seja: a idéia, o método, o estilo e a técnica, nem sempre pode fazê-lo, incorrendo em uma contradição que esquece que a criação é parcialmente imitação.

Palavras-chave: direitos autorais, estilo, imitação, originalidade, técnica.

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Introduction

Defining plagiarism is not easy. Following Richard Posner (2013), we could say that it is a misappropriation or theft; but it is not known what the theft consists of, which is limited to making a copy and which does not remove the original. Admittedly, using words like theft to talk about an unauthorized copy is confusing. Nor can it be said that it is borrowing because, in fact, it is never returned.

To define plagiarism literally, it is appropriate to consider the definition of the Dictionary of the Royal Spanish Academy (DRAE), which indicates that plagiarism comes from the Latin plagiarism and displays four entries. The first is surely the most adjusted to the contemporary: "Copy in substance the works of others giving them as their own." The second entry, with an obviously historical aspect, puts it in the following terms: "Among the ancient Romans, buy a free man knowing he was and keep him in bondage." As Francisco Reina (2012) expresses: blessed etymologies, because to them belongs the kingdom of the deepest truth of words. It is worth noting that this second entry refers to a practice in the underground world of publishing: commissioning a third party to write a work that you sign yourself, knowing that it is not your own (Reina, 2012, p. 19). In addition to this, it serves as a bridge between the first and the third, namely: "Among the ancient Romans, use a foreign servant as if it were their own", which aims to use the effort of others by posing as their own.

Ignacio Temiño (2015) differentiates its fragmentary or partial nature by proposing as plagiarism the following: "That activity that consists of copying or reworking, without any originality, totally or partially, a work by a third party, attributing the authorship of it or of the fraction copied, expressly or tacitly" (p. 13).

And indeed, the analysis is complicated if one thinks that it can be produced by the reproduction or unintended transformation of the work by adding the incidental reproduction or those fortuitous coincidences denoted through parody, the right of quotation, self-plagiarism or intertextualization.

Since the source of a work is not cited, a usurpation of paternity can take place, especially in some disciplines such as the plastic arts or music, in which an immediate mention of the citation cannot be made. In these cases, in order not to be accused of plagiarism, the paternity of the borrowed parties must be publicly stated. On the other hand, there is a general tendency to increasingly limit the right of appointment. Today the citation of the foreign work in the bibliography or the thanks to third parties in the introduction are not enough, and the fragment must be appropriate, that is, it must not

be significant within the whole of the work, neither by extension nor for its relevance (Temiño, 2015, p.156).

The question that follows is what is significant, what is substantial. In principle, the essentiality of the work can be related to the main idea. But, in terms of intellectual property, ideas are not subject to appropriation, as stated in both the WIPO Copyright Treaty (WCT) (1996) and the Agreement on the Aspects of Trade Related Intellectual Property Rights (TRIPS) of the World Trade Organization [WTO] (1994). As Servet (2010) argues, intellectual property law "cannot go to the extreme of protecting an idea in itself, but the exact way in which it is embodied" (p. 51), since, if the opposite is claimed The possibilities that the same idea could manifest itself in other possible ways would be limited or nullified. It is necessary that the idea, as such, has been expressed in a relatively structured way in some means of non-formal expression. In this same sense, Richard Posner (2013, pp. 16-17) argues that indeed the law of intellectual property does not prohibit copying the ideas. And it goes even further by saying that it does not prohibit copying facts or numerous aspects of a creation, such as genre, structure or message; what it does prohibit is copying literal words or other style details (Posner, 2013, pp. 16-17).

And it is that the protection of ideas presumes the unjustified granting of an absolute right to people that would entail an evident blockage of cultural and artistic development (García, 2000, p. 100). Thus, the general interest in the development of culture must prevail to the detriment of the particular aspiration to protect the idea of a specific individual. But where is the border really between the world of ideas and the creations of spirit capable of protection?

According to LegArs (October 7, 2011), plagiarism can be seen in the simple existence of coincidences between the compared works. An example of this was evidenced in the controversial sentence issued by the Provincial Court of Madrid on April 8, 2011, which sentenced Pérez Reverte for his film *Gitano*. The writer was ordered to pay € 80,000 to the director of the film *Gitana*. Purple Hearts when considering that there were certain coincidences in the plot lines despite the fact that Pérez Reverte's work was enriched with other nuances (Agencia EFE, May 6, 2011).

This same source (LegArs, October 7, 2011) makes another observation that shows the complexity of the problem to be dealt with. When comparing the plagiarism of literary works against that of graphic works, he mentions that regarding the latter it is more difficult to determine what is substantial, since there is no plot or other narrative structures that are easier to compare. And he gives as an example the works of Jackson



Pollock made with his dripping technique, which, it should be mentioned, is not difficult to imitate. This will be another of the questions to be analyzed in the article: if someone using the same technique and obtaining a similar plastic result would incur plagiarism.

Justification

Future creations depend on the regulation of the concept of intellectual property: the right to copy will become the duty to copy, the duty to make the works accessible. Thus, today it is easy to suffer a plagiarism lawsuit. Although in principle copyright is inalienable, the reality is that it does not die with the author; the keys to the future of creation prevail within it.

This article analyzes the border between the underlying idea and its expression. It is undoubtedly one of the most complex and conflictive aspects in the study of plagiarism and, nevertheless, one of the most relevant, since in itself it is what determines the practice in question.

Objective

The main objective is to demonstrate that the union between the idea and its expression is indissoluble, which implies a certain degree of legal protection over the underlying idea. The secondary objective is to argue that the idea is only powerful and fruitful when it enters the domain of humanity.

Hypothesis

It is a mistake to consider the absolute separation between the idea and its expression despite being a foundational axiom of copyright. By denying the protection of the idea, alleging that only the expression is protected, a contradiction is incurred that is evident when declaring the intellectual property violated when the same work is transferred to a different genre from the one that was initially materialized. This creates a certain degree of legal insecurity for creators, who move in a certainly subjective field since it is never created from nothing.

Method

The article starts from a qualitative approach. It is part of a theoretical investigation that includes the stages of analysis, synthesis, comparison, abstraction and generalization of structured elements through logical-formal thinking, through the elaboration of an argumentative discourse, in this case deductive. The contribution lies in being a critical revision of the knowledge regulation system from a perspective that questions the organization of certain protection structures based on inconsistencies, such as the substantiality and originality of ideas.

The endorsement of the work of Ignacio Temiño (2015), the most complete and rigorous study on plagiarism published to date in Spanish, as well as the reflections of Richard Posner (2013), Lluís Peñuelas Reixach (2011) and Anatole France (2014).

The dichotomy between the idea and the expression of the idea

Much of Spanish and foreign doctrine (Bercovitz, 2001, p.117) says that the essence of a work groups together those elements that characterize and individualize it with respect to others of the same genre. But determining what that essence is is a difficult question; as the article progresses it will try to clarify.

An archetype as such, one that evidences the essence of the work in an abstract way, can be extracted from imitations or lookalikes, which show that the underlying idea may be the same but expressed in different ways, or the opposite, that a similar materialization can express different ideas.

Figura 1. Ziploc: *Be fresh for a long time*



Fuente: Joe La Pompe (6 de octubre de 2017)

Figura 2. *Haier: Keep it fresher longer*

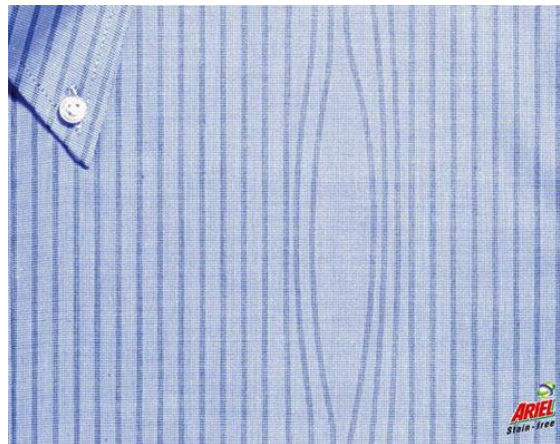


Fuente: Joe La Pompe (6 de octubre de 2017)

Analyzing Figures 1 and 2, it is evident that the idea is the same, applied to the concept of stopping expiration, and although the color is similar and the main element is also, the materialization is different. One belongs to a paper advertisement and the other to one of a refrigerator.

In the second example, Figures 3 and 4, the idea is also the same but visually the images are different. These are two ads for detergents, both of which play with the idea of stains trapped in bar cells (striped shirts). In the first case, the stain has already been released; in the second, the stain even has a way to hold onto the bars and is still caught.

Figura 3. *Ariel: Stain-Free*



Fuente: Joe La Pompe (8 de abril de 2009)

Figura 4. *Persil: Free the stain*



Fuente: Joe La Pompe (8 de abril de 2009)

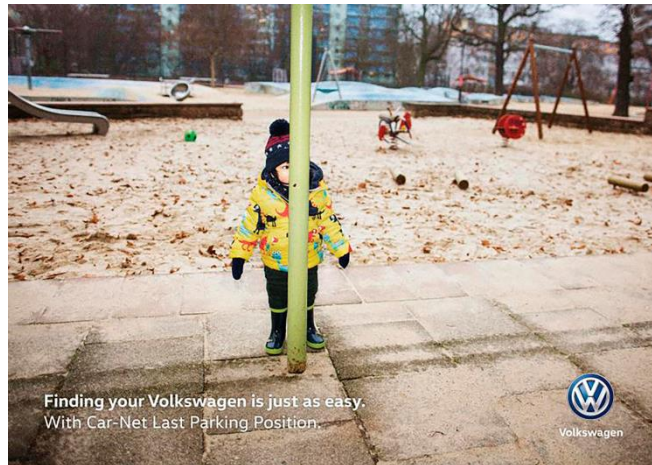
The opposite case supposes an almost identical materialization expressing different ideas, such as figures 5 and 6, which belong to an advertisement by Danone and one from Volkswagen, respectively. As you can see, the same visual idea was used but the essence is different: Danone shows a girl hiding so as not to share, the legend "Never share" in the lower right corner further clarifies the message, compared to Volkswagen, which communicates to some extent the opposite, that with Car-Net Last Parking Position it is very easy to know where the car was parked.

Figura 5. *Danette yogurt: Never Share*



Fuente: Joe La Pompe (26 de septiembre de 2017)

Figura 6. Volkswagen with Car-Net Last Parking Position: Finding your Volkswagen is just as easy



Fuente: Joe La Pompe (26 de septiembre de 2017)

In this same sense, the images of two political campaigns are revealing (see figures 7 and 8). The first appeared in South Korea after a corruption scandal that affected Park Geun-hye in 2015-2016 under the title "If you lie, your nose gets bigger" and visually plays on this part of the former president's face. ; while the second belongs to a German campaign in which, under the motto "Will he harass on his way to the White House?", the mouth of the biting US President Donald Trump is used eloquently. The materialization is almost identical, but the meaning is different.

Figura 7. Park Geun-Hye escándalo de corrupción: “Si mientes, tu nariz se hace más grande”



Fuente: Joe La Pompe (27 de octubre de 2017)

Figura 8. Periódico *Der Tagesspiegel*: “¿Acosará en su camino a la Casa Blanca?”



Fuente: Joe La Pompe (27 de octubre de 2017)

Ideas, when materialized and shared with others, are linked to a mode of expression. As Dewey (2004, p.153) explains, none can be transmitted as an idea to another person; once expressed and transmitted it becomes a fact.

The indissoluble union between the idea and its expression is the one that implies a certain degree of legal protection over the underlying idea. Because, as Temiño (2015, p. 85) points out, the separation can be done in relative terms, never absolute. Thus, it can be determined that plagiarism exists when there are coincidences in the materialization, fortuitous or not, even expressing different ideas; Or the opposite occurs, that is, that the Supreme Court of Spain continues to classify as plagiarism actions in which the expression has been altered but the essence, the idea remains copied, thereby contradicting one of the foundational axioms of copyright.

Protection of original ideas

Another relevant issue is that for an expressed and materialized idea to be protected and to be granted an exclusive and defensible copyright it is necessary that it provide originality and not be a mere covert copy. This principle is greatly reduced in works whose subject has been widely treated by other authors, such as the conception of a still life in a pictorial work. As this is a widely worked idea, it could never be considered essential, although a first still life had to exist. Museums show that throughout history themes have been absolutely recurring: mythology, religion, historical themes, portraits, landscapes and still lifes, among others.

The question that arises is whether, in our historical moment, a budding genre could have such a wide diffusion, since the protection that currently exists supposes that

when an idea is represented, if it were original, the author could have an exclusive right over it.

This problem of the protection of ideas related to originality or singularity also has another reading, especially in photographic works and plastic works, in which it is frequent that those accused or sued for plagiarism try to defend themselves demonstrating that the confronted works have drunk from the same sources of inspiration, thus justifying their coincidences, subtracting or denying the originality of the supposedly plagiarized work to diminish or even annul all legal protection of it.

The originality argument is recurrent. For example, the Provincial Court of Cuenca in a judgment of January 27, 2009 (Azcárate, 2012, pp. 138-139) indicated that the choice of a motif or drawn object does not enjoy protection because it is a mere idea whose monopoly would be completely unjustified. In this case, it refers to an originality related to the expression of the motives, the arrangement and the treatment of the elements, as they themselves lack originality.

As Azcárate (2012, pp. 138-139) exposes, in this judgment the judge gave as an example of the non-protection of the motives in the plastic works Leonardo Da Vinci's Last Supper, and concluded that if the motive had been protected it would have prevented the performance of later pictorial works on said scene. At the same time, he pointed out that copyright does protect the expression of that motif, so that if other creators represent The Last Supper they could not perform it in a very similar way since we would be faced with an assumption of plagiarism. Finally, to determine the similarity between two pictorial works, the court focuses on aspects such as framing, perspective, shaded areas and the dimensions of the object represented against the subject itself.

Regarding the legal protection of ideas, it is worth mentioning the so-called sequel right, a concept born from the figure of a derived work. From the doctrine it is said that the later versions abstractly incorporate the first. An example of this is provided by Terminiño (2015, pp. 88-89) when talking about the judgment in the Shark 3 case that the Spanish Supreme Court, on December 2, 1993, ruled in favor of the plaintiff, the producer of the films Shark and Shark 2. The defendant had produced and marketed the work Shark 3 without the corresponding permission and was obliged to reimburse all benefits, including damages, to the plaintiff.

One wonders if the lawsuit would have had the same resolution if the film had been titled differently; in any case, this concrete example demonstrates, as Manuel

Lobato (2008, p.114) argues, that the right on an original script is actually a right on the subsequent scripts that give continuity and develop the parent idea.

In addition to the above, this antecedent evidences another of the problems that the dichotomy between the idea and its expression harbors if it is taken into account that both cannot be established equally in all the categories of works; the materialization of the work is particular according to its nature. In this regard, contemporary works of art that resemble ideas more than physical objects are paradigmatic, where the essence is often concentrated on conception.

In contemporary art there are complex genres no longer because the idea is original, but because it is materialized with a technique that, despite being the singular element of the work, is not unique, it is not identity. According to the doctrine of law, neither the idea nor the technique is protectable in itself. This is perfectly exemplified by the works of Christo and Jeanne Claude that are characterized by wrapping gigantic buildings or covering large public areas, or the work of Damien Hirst, part of whose production consists of putting animal carcasses in formalin. Both approaches are characterized by the idea, because technical materialization is not in itself tutorable by intellectual property, although it was novel, an issue that also does not occur in these works.

Figura 9. Intervención temporal Verhüllte Bäume en el parque Berower de la Fundación Beyeler (fotografía de 178 árboles envueltos en un área de 55 000 metros cuadrados)



Fuente: Christo y Jeanne-Claude (1997-1998)

Consequently, in both cases it is difficult to use similar techniques and avoid that the works do not evoke them, even when the technique itself is not new and ideas as such cannot be protected. In this case, Termino (2015, p. 361) suggests doing a comparative examination focused on the similarities of shapes (design, color, etc.) looking for whether there is a similar general impression or that both works caused the same type of impact or effect. psychological.

Plagiarism techniques and artistic styles

In this section we will consider several examples that make another relevant issue visible: artistic styles. In principle, according to the legal doctrine of intellectual property law, the style of an artist is not protected by the laws of this branch of the legal system.

However, this requires nuances. On the one hand, there is the common practice, which has been repeated throughout history, of copying works in the style of other artists who were admired by way of learning. This is not and should never be considered a crime, since it is an essential part in the training of any artist. But as Reixach (2011, p. 92) points out, today the practice (which in fact always existed) of artists creating works “in the manner of” has been extended to satisfy the demand of collectors who cannot afford the originals. . In this case, the artist does not deceive about authorship, since he signs with his name, and although it can be understood as an economic use of the creativity of others and the works themselves are candidates for becoming false, if the author claims its execution and is not intended to deceive, does not pose legal or authorship or originality problems, since it is not an original work of his.

But sometimes it is considered plagiarism when there are coincidences in style, when judges consider that it is precisely this that gives originality to the work, beyond the idea or theme. In this sense, the conviction of John Galliano in France is illuminating. This fashion designer used a treatment of photographs (painted contact sheets) by photographer William Klein and was sentenced to pay \$ 200,000, despite the fact that Galliano used photographs different from those of Klein (Agencia EFE, 2007; Guerrin, 2007).

While Klein's work is based on lines or marks that refer to those made by photographers on contact sheets and constitute a trademark of the photographic trade union sphere, his contribution is that, starting from acrylic, he evolved into a lacquer that he developed technically. Galliano's work, as has been pointed out, did not use the



same images or the same technique (lacquers), but presents the characteristic composition of the painted contacts that William Klein had taken up again and had made his own and positioned as his own, that is, as a kind of identity brand.

Figura 10. “Painted Contact Sheet” series (plata, gelatina, impresión con pintura)



Fuente: William Klein (2001)

Figura 11. Campaña publicitaria primavera/verano 2007 que apareció en revistas de Francia, Italia, Rusia y Reino Unido



Fuente: John Galliano (2007)

Discussion and results

The considerations of plagiarism developed throughout the article make visible aspects ranging from action to the expression of artistic ideas and have brought some surprising conclusions, both from national and international doctrine, particularly regarding the dichotomy that occurs between the idea and the expression of the idea. It is shown that it is not true that "ideas are never protected", as Azcárate (2012) argues, who relies on different theorists to argue that "primitive ideas are not protected (...). [The] type of idea that originated the work protected by copyright is indifferent because the idea, even though it is extraordinarily unique, will continue to be free "(p. 20).

The separation between the idea and its expression for practical purposes is complicated; It could be that part of the problem lies in the intention of the author and not so much in the activity itself. Termiño (2015) maintains that differences should be established between the individual style and the style of an era. In this line, he gives an example to plastic artists such as Damien Hirst or Anish Kapoor, and argues that if the expression of their works is copied as long as their specific creations are not reproduced, the intellectual property laws will not be able to protect these works, since in principle ideas are not protected (Termiño, 2015, p. 211).

However, it is understood that this must be so since it cannot be forgotten that the individual style is nourished by the collective style, forming part of the historical time in which it occurs; they are somewhat indissoluble, even when the individual style tries to break or transgress the style of the time. At the same time, a personal style can influence and modify the style of an era by being taken by other authors who continue working in that line. For example, Andy Warhol was not only an author, as the doctrine acknowledges, that he took from everyone, but if his works had been protected with too much zeal, pop art would never have reached the dimension that it reached by precisely influencing others. It cannot be forgotten that creation is imitation, although imitation should not be confused with plagiarism.

Although Termiño (2015) points out that for the author it may be more damaging to take advantage of his work copying his style than the fact that a specific work is imitated or copied, since copying a work can be an isolated act, while the imitation of the style could be repeated and suppose a permanent association (or impersonation) with the original artist.



Despite the fact that this is true, caution should be exercised regarding the protection of style, as it could reduce and even stifle the legitimate creative freedom of the rest of the community. As Jorge Ortega (2000) points out: "The protection of an author's style seems unfeasible, as soon as it is presented as such a vague and subtle aspect (...). Style cannot be protected, because if not, there would be no artists' schools" (p. 236).

In this same sense, Cánovas (1996) argues that "no author can (...) feel copied if there is no similarity with a particular work of his" (p. 74). This theorist understands that, in the case of plastic works, if there is no intention of confusing, making the plagiarized work pass as authentic from the original author (in which case we will be faced with an assumption of fraud), one should not speak of plagiarism, of just as plagiarism is not talked about in imitations or copies when it is not about cheating. Now, Cánovas (1996) clarifies that the situation is different when it is not only created in the manner of an artist, but elements of some of his works are copied.

But the style can be protected in its repeated manifestation in works and always associated with them and not by copyright, but by other means, as Termiño (2015, p. 215) points out, through patent law, for example, when the requirements of the applicable standard are met. Reixach (2011, p. 94) argues in this sense that accusations could be brought forward through unfair competition, fraud or misleading consumers.

Thus, although in this sense copyright laws want to protect creative freedom and its availability of resources to the community, once again, resources can be found to continue to put individual interests above all others.

On the other hand, as Ignacio Temiño (2015) points out, plagiarism has currently evolved towards a figure linked to the concept of essentiality or substantiality of the work, that is, that using an essential part of the work would already be plagiarism, to the background the question of the extension. Protection covers the work as a whole, but also in each and every one of the original parts that have their own entity, as independent elements (Termiño, 2015, p. 109).

The determination of that essence or substantiality of each work varies depending on the genre it is and will also be a function of what a judge determines, who has to compare the work with the pre-existing ones in order to single out the substantial content. In the case of a novel, for example, a key fact will be that determining factor in the evolution of the work, in its plot and outcome, however small it may be. It can be considered essential due to its weight in the set. This issue was decided in the aforementioned case of Pérez Reverte, who did not emerge unscathed, and also in the



litigation that confronted Dan Brown, the author of the Da Vinci Code, with the authors of the Sacred Enigma. In this case, the courts of the United Kingdom pointed out that, despite the coincidences in the line of argument (according to which Jesus Christ and Maria Magdalena would have an offspring that would reach the present day), and that the author acknowledged knowing the work of the applicants, the requirement to copy a substantial part could not be justified.

American jurisprudence also ruled in favor of Jeff Koons by recognizing fair use in a collage titled Niagara, in which Koons included the photograph titled Silk Sandals by Andrea Blanch, originally used in an advertising campaign for the Gucci brand. In the decision that ruled in Koons's favor, the fair use argument was accepted when considering the change of purpose, but above all, the substantiality used of Andrea Blanch's original work as part of a much larger painting.

The problem that this raises is that in front of terms such as substance, character of the artistic work, essence of the work or even originality, there is no “aesthetic” security either, therefore, there is a systematic displacement towards the terrain of subjectivity. Therefore, although most people see plagiarism as the quintessential intellectual crime, it should be weighed, not condemned or defended in a passionate or simplistic way because, as has been stated, it is not easy to define, not even from the point of view of legal view.

As the lucid Anatole France (2014) argued, “a situation does not belong to whoever finds it, but to whoever has firmly fixed it in the memory of men” (p. 11)

Conclusions

It is a mistake to consider the absolute separation between the idea and its way of being expressed because the former, being materialized, is inextricably linked to the latter. In principle, the fact that ideas cannot be protected because they have to be free, since otherwise they would restrict the creativity of the future is a foundational axiom of necessary copyright. However, a contradiction is incurred because although the protection of the idea is denied and it is alleged that only the expression is protected, this is not possible. This is evidenced, for example, when declaring intellectual property infringed when the same work is transferred to a different genre than the initial one.

Neither the techniques or the use of materials can be protected despite being the identity of the author. Neither personal style, in the abstract sense (like ideas), can be guarded, because creative freedom and the general interest must prevail over the individual. However, as it has been exposed, the style can be protected in other ways, through patent law.

The underlying issue is not so new: the ideas that are made public are eminently free, but it is forgotten that if someone takes an idea from another, he does not stop having it. In other words, its consumption is unrivaled in purely economic terms.

But what the law says is that you cannot take an idea without permission and convert the intangible into property. It is a method of artificial production of property through the legal norm, which makes knowledge behave analogously to the material goods of the industrial age, which implies not a few problems, some of which have been analyzed in this article.

Copying is allowed but imitation is prohibited in order to preserve value, while virtually all demonstrations baffle their followers once their plagiarized elements are uncovered because the allusion, usurpation, simulation, and copying are inherent in creation, and link genres and centuries, all of which make up the culture of which we are a part.

References

- Agencia EFE. (19 de abril de 2007). Galliano, condenado por plagio. *El País*. Recuperado de https://elpais.com/elpais/2007/04/19/actualidad/1176965338_850215.html.
- Agencia EFE. (6 de mayo de 2011). El escritor Arturo Pérez Reverte, condenado a pagar 80.000 euros por plagio. *El País*. Recuperado de https://elpais.com/cultura/2011/05/06/actualidad/1304632809_850215.html.
- Azcárate, C. R. (2012). *Las obras del Espíritu y su originalidad*. Madrid, España: Reus.
- Bercovitz, R. (coord.) (2001). *Manual de propiedad intelectual*. Valencia, España: Tirant lo Blanch.
- Bercovitz, R. (coord.) (2008). *Comentarios a la Ley de Propiedad Intelectual*. Madrid, España: Tecnos.
- Cánovas, D. E. (1996). *Los derechos de autor de obras de arte*. Madrid, España: Civitas.
- Christo y Jeanne-Claude. (1997-1998). Intervención temporal Verhüllte Bäume en el parque Berower de la Fundación Beyeler. Recuperado de <https://christojeanneclaude.net/timeline>.
- Dewey, J. (2004). *Democracy and Education*. New York, United States: Dover Publications.
- France, A. (2014). *Apología del plagio*. Barcelona, España: José. J de Olañeta.
- Galliano, J. (2007). Campaña publicitaria Dior primavera/verano 2007. Recuperado de: <http://archeologue.over-blog.com/article-29440226.html>.
- García, C. (2000). *Objeto y sujeto del derecho de autor*. Valencia, España: Ed. Tirant lo Blanch.
- Guerrin, M. (19 de abril 2007). Le styliste John Galliano condamné pour contrefaçon d'œuvres de William Klein. *Le Monde*. Extrait de http://www.lemonde.fr/culture/article/2007/04/19/le-styliste-john-galliano-condamne-pour-contrefacon-d-uvres-de-william-klein_898488_3246.html.
- Joe La Pompe. (October 6, 2017). Half Rotten Idea? / Une Idée À Moitié Moisie? *Joe La Pompe*. Retrieved from <https://www.joelapompe.net/2017/10/06/ziploc-haier-lemons/>.
- Joe La Pompe. (April 8, 2009). Follow the Lines / Sur La Même Ligne Créative. *Joe La Pompe*. Retrieved from <https://www.joelapompe.net/2009/04/08/follow-the-lines-sur-la-meme-ligne-creative/>.

- Joe La Pompe. (September 26, 2017). Not Well Hidden / Copie Pas Très Bien Cachée? *Joe La Pompe*. Retrieved from <https://www.joelapompe.net/2017/09/26/hidden-child-danette-volkswagen/>.
- Joe La Pompe. (October 27, 2017). A Stack of Similarities? / Un Tas De Similarités? *Joe La Pompe*. Retrieved from <https://www.joelapompe.net/2017/10/27/newspaper-park-geun-hye-donald-trump/>.
- Klein, W. (2001). “Painted Contact Sheet” series. Retrieved from <https://courroiedetransmission.files.wordpress.com/2013/06/william-klein-7.jpg>.
- LegArs. (7 de octubre 2011). Pollock y el plagio. *LegArs*. Recuperado de <http://www.legars.eu/?p=430>.
- Lobato, M. (2008). Los límites del derecho de autor. Transformación, uso inocuo y falta de protección del contenido. *Comunicaciones de Propiedad Industrial y Derecho de la Competencia*, (49), 111-119.
- Organización Mundial del Comercio [OMC]. (1994). *Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio*. Organización Mundial del Comercio.
- Organización Mundial de la Propiedad Intelectual [OMPI]. (1996). *Tratado de la OMPI sobre Derecho de Autor*. Ginebra, Suiza: Organización Mundial de la Propiedad Intelectual.
- Posner, R. (2013). *El pequeño libro del plagio*. Madrid, España: El Hombre del Tres.
- Reina, M. F. (2012). *El plagio como una de las Bellas Artes*. Barcelona, España: Ediciones B.
- Reixach, L. P. (2011). *Autoría, autentificación y falsificación de las obras de arte*. Barcelona, España: Ediciones Polígrafa y Fundación Gala-Salvador Dalí.
- Servet, V. M. (2010). *Tratado práctico de Propiedad Intelectual*. Madrid, España: El Derecho y Quantor.
- Termino, I. (2015). *El plagio en el derecho de autor*. Pamplona, España: Aranzadi .