

Intellectual Property protection: between a property right and a paucital right

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Abstract—Considering that Intellectual Property is characterized by various incoherent legal mechanisms, it is imperative to identify a common conceptual basis for any further interpretation and implementation. For this reason it is necessary to establish the place of the intellectual property rights within the classical classification of rights used by the general theory of law, in rights in rem and rights in personam. The analysis is based on *common-law* and continental legal systems, arguing the absolute and relative rights, the natural and positive law. If at the beginning it seems another complex and unanswered question regarding the intellectual property rights legal regime comparing to the classical property rules involving Lockean, Hegelian, utilitarian and monopolistic arguments, at the end my conclusion is that the intellectual property rights, more precisely the economic ones represents rights *in personam*, relative rights, paucital rights as Wesley Newcomb Hohfeld called them in opposition to multital rights, corresponding to a propter rem obligation of the material or electronic support owner incorporating the intellectual creation, which cannot reproduce it or in some case even use it without an intellectual property right infringement. The actual intellectual property system by stating limited terms of protection both for copyright and industrial property, embrace a utilitarian philosophy. Incentives are given to the authors for their unique intellectual creations. The rule of law protects the intellectual creations only to guarantee the remuneration of the author for his effort.

Keywords—intellectual property, economic rights, multital right, paucital right, propter rem obligation, right *in personam*, right *in rem*, legal entitlement, legal protection

1. CONCEPTUAL TENSIONS IN INTELLECTUAL PROPERTY LAW

WE can easily assume that intellectual property is an esoteric and arcane field, something that is only interesting and comprehensible to a specialist¹. Imagine the efforts made by a person without a legal background in order to understand all this legal mechanisms. Nowadays when intellectual property value seems to be tremendous important and is growing all the time², it is very probable that someone

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¹Boyle, J. *A politics of intellectual property: Environmentalism for the Net?* Duke Law Journal, 1997: 87-116

²"many meaningful reasons make intellectual property and its protection be imperative (...) the legal protection of new creations encourages

tries at least to search an information about a particular aspect of intellectual property and wants to understand it.

Even for someone with a private law background it is not the easiest thing to do to understand the intellectual property regime. Even if intellectual property law is part of the private law³, is an atypical domain because of the numerous imperative rules and the infinite international conventions. The private law, regardless the national systems, is not characterized by imperative regulations, which involve more of the time a public law or a criminal regulation. Also the international conventions are referring usually to different matters that are not regulated by the private law, like international crime, taxation or sovereign state matters. All this could be understood considering the specific object of the regulation, the intangible assets⁴, but also the importance of the impact of the intellectual property rights as a general rule⁵.

It is easy to understand for anyone that defusing this conceptual tension⁶ serves primarily to the correct interpretation and fair application of the legal dispositions in the intellectual property field, particularly in the civil law system. The Supreme Court of the United States has explained it the easiest, when it stated⁷ that understanding how these doctrines were originally designed and implemented in the next decades clarifies the legitimate expectation of inventors

investment, leading to other innovations; the promotion and protection of intellectual property stimulates economic growth, leading to the creation of new jobs and new branches of activity, improving the quality of life" See Ștefănescu, C., Petreanu, I., Munteanu, A. *Intellectual Property in Critical Conditions*. Proceedings of the WSEAS 3rd World Multiconference on Applied Economics, Business And Development (AEBD '11) WSEAS Press, 2011

³ further development on this matter see Speriusi-Vlad, A. *The Author of an Intellectual Creation Between a Simple Private Person and a Professional According to the New Civil Code*. Analele Universității de Vest din Timișoara, seria Drept, No. 2, 2013.

⁴ Moore, A. D. *A Lockean Theory of Intellectual Property Revisited*. San Diego Law Review, Vol. 50, 2012.

⁵ "without any doubt, in the last years, the impact of intellectual property rights has played a very important role in the promotion of innovative processes and indirectly in the process of economic growth" Georgescu, M., and Necula, S. *The Impact of Information Piracy and Intellectual Property Rights on the Economic Development*. Proceedings of the WSEAS 2nd International Conference on Finance, Accounting and Auditing (FAA '13) and 2nd International Conference on Risk Management, Assessment and Mitigation (RIMA '13) WSEAS Press, 2013.

⁶ regarding tensions on the intellectual property system Boyle, J. *A politics of intellectual property: Environmentalism for the Net?* Duke Law Journal, 1997: 87-116

⁷ Mossoff, A. *Intellectual Property and Property Rights. Introduction*. An Elgar Research Collection, Cheltenham, UK • Northampton, MA, USA, George Mason University Law and Economics Research Paper Series 14-31, 2013, 2014: ix-xxii.

on the their property⁸, but also when it recognized that doctrinal approaches in the field of copyright were structured from the beginning as normative justifications rooted in both the utilitarian theory and Locke's property theory based on natural law, namely the labor retribution of the owner⁹.

No doubt between the originality condition of the works protected by copyright, the novelty of the utility creations and the priority of the distinctive signs there is, if not an identity, at least one similarity, all highlighting the uniqueness of the protected intellectual creations.

II. HETEROGENITY OF INTELLECTUAL PROPERTY

Regardless of the substantiation of the intellectual property on natural law or on the utilitarian theory, no scholar questions the originality condition of copyright works, the novelty conditions of the utility creations and the priority condition of the distinctive signs, meaning their availability. The whole doctrine agrees that legal protection mechanisms in the intellectual property field¹⁰ apply for the new intellectual creations. In common language "to create" means to make something that was not there before. Even those who challenge the intellectual property system are doing it for ensuring the free access to what did not exist yet, to what is recently created.

The problem of balance between the rights acknowledged in the field of intellectual property and the third parties' rights to access the protected creation is highly stringent and approached not only from its theoretical perspective, but also at the level of international regulations.

Therefore, the amendments brought to the Convention of Berne and the Universal Convention on the copyright as a consequence of the problems raised by the developing nations, are relevant in terms that these nations needed to obtain materials legally protected under the intellectual property rights to support their educational programs and other initiatives designed to facilitate the implementation of the cultural development programs¹¹.

This entire international regulatory system is built based on several considerations focused on the protection or lack of

protection of intellectual property. For example, the first argument set out by ACTA stipulates that the efficient implementation of intellectual property rights is essential to support economic growth in all industrial sectors, as well as worldwide. Under the appearance of this noble or, at least, innocent purpose, the Anti-Counterfeiting Trade Agreement brings a series of substantial contributions to the national standards regarding the actual means of protection of intellectual property by means of the provisions set out at section 5– Enforcement of intellectual property rights in the digital environment¹². These provisions address the question: to what extent can the individual freedoms of either the users or the potential users be limited to protect the intellectual property?

III. INTERESTS PROTECTED BY INTELLECTUAL PROPERTY LAW AND USERS INTEREST

When talking about setting up the relation between the interests protected by the intellectual property law and the interests of the other persons, it is difficult to draw a line between the rationales that justify the restrictions of an exclusivity given by a legal protection status, at the community level, and the reasons that give no justifications for this aspect¹³.

One of the questions ACTA tries to give a relevant answer, is how far can we go to protect the intellectual property and to what extent can the individual freedoms of the users or the potential users be limited to protect the intellectual property rights. The answer was that we can go quite far and that the interest of both the authors of intellectual works and the holders of intellectual property rights is of paramount interest compared to the individual rights, interests and freedoms of the other legal subjects.

The question for which ACTA seemed to give a favorable answer for the holders of such rights has been launched again after the rejection of ratification at European Union level.

It is true that the question comes back and the answer is more likely to be unfavorable for the intellectual property holders' rights and favorable to the other subject. More precisely the answer offered by the European Parliament opened¹⁴ the discussion for a balance between holders' rights and the rights of users or potential users.

This line follows the arguments of European Court of Justice in the NETLOG case-law. The European Court of Justice restates on the 16th of February 2012 the necessity of a balance between the intellectual property holders rights and

⁸ *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 122 S. Ct. 1831, 152 L. Ed. 2d 944 (2002). The Supreme Court of the United States pointed out to the lower courts that they must be "cautious before adopting changes that disrupt the inventors' community legitimate expectations"

[http://scholar.google.ro/scholar_case?case=8250508786110786578&q=Festo+Corp.+v.+Shoketsu+Kinzoku+Kogyo+Kabushiki+Co.,+535+U.S.+722,+739+\(2002\)&hl=en&as_sdt=2006](http://scholar.google.ro/scholar_case?case=8250508786110786578&q=Festo+Corp.+v.+Shoketsu+Kinzoku+Kogyo+Kabushiki+Co.,+535+U.S.+722,+739+(2002)&hl=en&as_sdt=2006)

⁹ *Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003). In its judgment of the Supreme Court of the United States, the court emphasized the "complementary" relationship between different theories to justify the copyright as well as the utilitarian one and that of Locke.

[http://scholar.google.com/scholar_case?case=12147684852241107557&q=Eldred+v.+Ashcroft,+537+U.S.+186,+123+S.+Ct.+769,+154+L.+Ed.+2d+683+\(2003\)&hl=en&as_sdt=2006](http://scholar.google.com/scholar_case?case=12147684852241107557&q=Eldred+v.+Ashcroft,+537+U.S.+186,+123+S.+Ct.+769,+154+L.+Ed.+2d+683+(2003)&hl=en&as_sdt=2006)

¹⁰ for a comprehensive study regarding the theories and their authors, the supporters and opponents of intellectual property see Kinsella, N.S. *Against Intellectual Property*, Journal of Libertarian Studies, Ludwig von Mises Institute, 2001: 1-53.

¹¹ Sterling, J. A. L. *World Copyright Law, Second Edition*. Sweet & Maxwell Publications, 2003.

¹² Zuell, B. *The Vision of Global Internet Freedom*. International Journal of Computers and Communications, volume 8, NAUN Press, 2014

¹³ Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

¹⁴ "content creation involves the expenditure of moments of our lives, something that we all tend to value intrinsically. Intellectual property protection might be justified as a matter of respect for this precious and limited resource" See Ken H. *Justifying Intellectual Property Protection: Why the Interests of Content-Creators Usually Wins Over Everyone Else's*, INFORMATION TECHNOLOGY AND SOCIAL JUSTICE 47-68, E. Rooksby ed., 2006

other interest holders, base on the fundamental human rights, concluding that the administrator of an online network cannot order the constant supervision of its users to prevent illegal use of audio and video materials because several rights, such as the commercial freedom, the right to enjoy the protection of personal data, the freedom to receive and transfer information, would be breached.

More precisely the European Court of Justice found and ascertained the following: *"(...) the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights", "(...) the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as hosting service providers", "(...) Moreover, the effects of that injunction would not be limited to the hosting service provider, as the contested filtering system may also infringe the fundamental rights of that hosting service provider's service users, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively", "(...) the injunction requiring installation of the contested filtering system would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users. The information connected with those profiles is protected personal data because, in principle, it allows those users to be identified", "(...) the above mentioned injunction would harm the freedom of information, as it would be possible that this system fail to make a distinction between a legal and an illegal content, so that the use thereof could have as consequence the blockage of the communications consisting of legal contents. As a consequence, it is not contested that the answer to the issue regarding the legal nature of a transmission of information depends on the application of legal exceptions concerning the copyright, which varies from one member state to another. Additionally, some works may be regarded, in some member states, as public works or may be subject to a free publication on the internet, publication made by their authors."*

The Belgian Court of Law that referred the case to the European Court of Justice, requesting a judgment where the European Court could establish whether the EU applicable laws forbids the issue of an injunction by a national law court to an internet provider, asking the latter to implement a filtering system of the information posted by the users on its servers, filed the request for the delivery of a preliminary ruling in the trial between the "SABAM" (a collective management organization representing the authors, composers and editors) and the NETLOG (an internet service provider). In the light of the foregoing, the answer to the question referred is that Directives 2000/31, 2001/29 and 2004/48, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental

rights, must be interpreted as precluding an injunction made against a hosting service provider which requires it to install the contested filtering system.

The NETLOG case-law ACTA was rejected on in the European Parliament is not singular, but rather follows a decision given in the Case C-70/10 SCARLET EXTENDED SA c/ SOCIETE BELGE DES AUTEURS, COMPOSITEURS ET EDITEURS SCRL (SABAM) by which the European Court has laid down that EU law (Directives 2000/31/EC, 2001/29/EC, 2004/48/EC, 95/46/EC, 2002/58/EC corroborated and interpreted in relation to the requirements stemming from protection of applicable fundamental rights) precludes a court order issued by a national court which requires an Internet access provider to establish a system for filtering all electronic communications traveling through its services, in particular through the use of "peer-to-peer" software, which applies indiscriminately to all its clients to prevent illegal file transfer. On this occasion, CJEU sets a landmark in the control of the balance between intellectual property rights and other fundamental rights, when recognizing that protection of intellectual property right is enshrined in the EU Charter of Fundamental Rights, but does not follow in any way either its table of contents or the Court case-law, and that such a right should be intangible and, therefore, its protection should be assured. In this decision, the European Court outweighs the importance and the need of intellectual property protection with the right to personal data protection, freedom to send and receive information, and freedom to information.

This view of the European Court was later strongly nuanced, when identifying certain cases in which primacy of intellectual property to the legitimate rights and interests of other people, users or potential users of goods and services incorporating intellectual property subsists. More specifically, it is about the CJEU decision of April 19, 2012 in the Cause C-461/2010 BONNIER AUDIO AB et al. c/ PERFECT COMMUNICATION SWEDEN AB where it has been essentially established that Internet service providers can communicate to a copyright holder the personal data of users in order to identify the illegal distribution of protected works, and also the CJEU decision of March 27, 2014 in the Cause C-314/2012 UPC TELEKABEL WIEN GMBH c/ CONSTANTIN FILM VERLEIH GMBH where it has been essentially established that an Internet access provider may be required to block its customers' access to a website that is detrimental to copyrights. Is this a change in the case law of CJEU based on which ACTA was rejected? A response to such a powerful question is extremely important since giving up the arguments for the decision of the European Parliament to reject ACTA would call into focus the need for such protection standards. The answer can only be negative and not change the case-law of CJEU, as proven by the fact that the 2014 judgment insists on the need of a fair balance between the fundamental rights in question, which in fact reaffirms that the holders of intellectual property rights are, at least legally, on a par position toward other subjects. However, a less informed reader might consider that we are facing a change in case-law since, at least formally, in its recent decisions, CJEU

ignores the case-law of NETLOG and the one underlying it, not doing formally any reference to it.

After closer inspection, we can see that CJEU nuances its old legal considerations based on factual particularity of the new cases. A common point is that the European Court makes a distinction between the need to protect *in abstracto* the intellectual property, on the one hand, and the need to preventively protect *in concreto* the intellectual property, on the other hand, following infringement of intellectual property. By its recent case-law, CJEU does nothing but reaffirm that in the second case the rights and freedoms of other participants in the economic circuit, especially beneficiaries of goods and services incorporating intellectual property, even if the first hypothesis cannot be limited, may be limited to protect the legitimate rights and interests of holders of intellectual property.

In the *Bonnier Audio* case law, the preliminary question addressed to CJEU by a Swedish Court, concerns the situation in which the applicant of the summons (the copyright holder) proved the existence of solid evidence to the copyright prejudice caused by the intended user. This decision comes after a series of preliminary rulings where European Union law rules have been interpreted in favor of protecting the identity of Internet users and their online privacy; unlike *Bonnier Audio*, they concerned situations where the Internet provider was required the large scale monitoring of users' online activities and filtering of all materials posted on social networking sites to avoid copyright infringement. This is the difference made by CJEU between an actual and a potential injury, the latter not justifying a large-scale monitoring and filtering. In the case-law of *UPC Telekabel Wien*, the European Court goes further by showcasing the situation justifying the implementation of preventive measures against third persons who have not committed any illegal act, and showing that a concrete infringement of intellectual property must lie behind these preventive measures. Specifically, by this decision, CJEU responds to the Supreme Court of Austria that a person who publicly posts protected objects without the consent of the copyright holder, on an Internet website, he uses the services of Internet access provider of persons accessing these objects, and that a provider such as UPC Telekabel enabling clients to gain access to protected objects publicly made available on Internet websites by a third party, is nothing more than an intermediary whose services are used for copyright infringement. Starting from this factual premise, the European Court stresses that the directive aiming to ensure the rights' holders with a high level of protection, does not require a special relationship between the person prejudicing the copyright and the intermediary against whom a summons may be brought, and also that it's not necessary to prove that the clients of the Internet access provider effectively access the protected objects publicly made available on websites by a third party, as the Directive requires for the measures taken by Member States in compliance thereof to aim not only at the cessation of infringements of copyrights and related rights, but also at their prevention.

Even if the acknowledgement of the rights on tangible

properties, particularly the lands, leads to a winning for the entire community through a better exploitation thereof, the protection of intellectual works has the potential to affect and even to encourage the inventive activity.

More precisely, the acknowledgement of several rights in the field of intellectual works, even if it apparently seems to represent an inducement for the authors, does not necessarily lead to the increase of the quality and quantity of the production of intellectual works, comes with an adverse effect too. This may happen because of the fact that the rights in the field of intellectual property can somehow hinder not only the inventive activities through the drawbacks set in the subsequent research works¹⁵ [3], but also the free access to information and knowledge, including here the excessive limitation of the free circulation of intellectual works. Therefore, the protection of copyright meant to serve creativity and promote access to information turned into a real obstacle for both, particularly due to a higher protection term that can easily exceed a century.

A proper example in this case is the judgment ruled by US Supreme Court in the case of *Sony Corp. of America vs. Universal City Studios, Inc.*, also known as the *Betamax* case which gives an example of setting relevant landmarks in terms of limiting the control of the intellectual property holders rights over the new technologies which can contribute to the illegal reproduction and communication of intellectual works; these landmarks can also be enforced to the latest technologies applicable to internet¹⁶. In this case the judges of the US Supreme Court, criticizing the ruling of the court of first instance, in this case, the US Ninth Circuit Federal Court of Appeal, underlined that "it is extraordinary to argue that the legislation in the copyright field confers to all holders of these rights, including here the two plaintiffs, the exclusive right to distribute video recording devices VTR (Video Tape Recorders) by the simple fact that these could be used to infringe their rights". Starting from this case, we can make an analogy with the ACTA's regulation, which is intended to be the answer of the regulatory system in the field of intellectual property to the danger posed by the internet and the new piracy technologies, considering the fact that, although the new technologies pose new risks regarding the breach of the rights applicable to the field of intellectual property, they also came with tremendous benefits. For example, even if the greatest movie producers in the United States of America feared the new technology of video tape recorders can seriously affect the cinematographic industry, it was almost in no time proven that, until the implementation of the DVD technology, almost half of the cinematographic industry market was covered through distribution of video tapes; so, the disadvantages were clearly inferior to the benefits brought by this new technology that has significantly contributed to the

¹⁵ Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

¹⁶ Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

dissemination of the cinematographic creations¹⁷. Even in the subsequent case-laws, i.e. *A&M Records, Inc. v. Napster*¹⁸, *Inc. and MGM Studios, Inc. v. Grokster, Ltd.*, the same law courts, more precisely, the Ninth Circuit Federal Court of Appeal and the US Supreme Court of Justice, even if they seemed to go back to and amend the judgments previously delivered, they didn't; moreover, the courts insisted that the intellectual property rights should be protected in relation to the technologies that appear to be explicitly promoted among the users, in terms of copyright infringement¹⁹.

IV. LEGAL PROTECTION OF INTELLECTUAL CREATION

The purpose of the protection of intellectual creations must be properly understood.

The first goal was to encourage the authors of intellectual works by stimulating their creativity, helping thus implicitly to the development of the entire society. To encourage creativity and develop the society, the lawmakers decided to allow authors to have access to the market; in other words, the authors gained rights and took upon themselves a series of obligations in relation to their own intellectual works. This entire legal protection must be outlined in relation with the targeted objective: the development of the society using the very means that have been identified for this purpose: the legal recognition of the intellectual works which results as a direct consequence in the protection of the author's interests. Presently, there is the tendency to support the idea that the essential purpose would be solely focused on the protection of the author's interests, disregarding somehow the general context that talked about the development of the society. This tendency poses a serious risk in terms of deviating the legal protection from its initial purpose and turning it into a blockage of the development of society, obstructing the access to information and hindering the development of the previously agreed contractual relations as a consequence of acknowledging some super- prerogatives of the author to block thereof by invoking the moral rights, for example. Given these aspects, I consider that it is of paramount important to establish a balance in the relation between the holders of intellectual property rights and the other legal subjects because the legal protection shall never deviate from its purpose when the interests of all subjects re properly and vehemently defended. The current imbalance is particularly due to the fact

that the legislation in the intellectual property field was created at the initiative of the holders of intellectual property rights, who totally ignored or at least, they disregarded the rights of the other legal subjects. For example, the Berne Convention of 1886 on the protection of literary and artistic works has been prepared and signed under the powerful influence of the International Literary and Artistic Association presided by Victor Hugo.

In this light, we often wonder to what extent an intellectual work is entitled to protection by its very own nature. Or, in a vision adjusted to the intellectual property field, but which concerns the natural right too, to what extent the author of an intellectual creation can expect that the result of his/her creative activity be protected, considering his/her work and efforts made to complete his/her creation. The answer to this question, in my opinion, can be only one. The author cannot have a natural right over his intellectual creation. And this happens because a person cannot appropriate intellectual creation, by its very nature, if such person cannot totally identify him with the material support of the creation. Again, we are talking about the natural property right over the material support and not over the work itself as the latter cannot exist without its material support. Moreover, this impossibility to appropriate an intellectual work is not just a consequence of its immaterial nature; it derives from the relation between the intellectual creations and the society, the universal patrimony and the knowledge, in general. More precisely, the very nature of the intellectual creation requires no legal protection, as opposed to the tangible properties. Furthermore, by its nature, an intellectual creation, irrespective of the fact that it is a work subject to copyright protection, a utilitarian creation or a distinct trademark, circulates freely from one individual to another, enriching thus the stage of knowledge and contributing to the social progress and the human development. This characteristic is not met in the case of other tangible properties. These properties, by their nature, have no vocation to contribute to the development of the society. On the other hand, the intangible properties contribute to the development of society to the same extent as the tangible properties, encouraging the private property and the relations between natural persons, contributing thus to the social welfare.

In the letter sent by Thomas Jefferson to Isaac McPherson, as an answer to one of his requests to advise about his opinion on a patent released to Oliver Evans, he uses this opportunity to firstly review the rights acknowledged to the inventors by means of different patents, and then to express his reserves regarding the extent to which Evans' device, which consisted of several containers able to move cereals, represented a real invention. In the same letter, Thomas Jefferson gives several pertinent arguments on the different between the tangible properties and the intellectual property, summing up that every intellectual creation is intrinsically meant to enter the public domain, since it is protected under certain conditions set out by the law solely to encourage the creative activity required to develop the society by remunerating the author thereof. Thomas Jefferson underlines that the rights over an invention

¹⁷ Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

¹⁸ "Napster was a P2P music file sharing application which became very popular, since it allowed users to get the music they wanted for free. The songs that were being traded using the Napster application were under copyright Napster tried to negotiate and settle with record companies. (The Recording Industry Association of America (RIAA) sued Napster in December of 1999. Napster was found guilty of copyright infringement (...))We see in the Napster dispute the fundamental clash between innovation as an opportunity for new markets (Napster's view) and as a perceived threat to existing ones (the record labels' view)" See Zuell, B. *The Vision of Global Internet Freedom*. International Journal of Computers and Communications, volume 8, NAUN Press, 2014.

¹⁹ Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

do not automatically highlight a natural right because, the permanent property upon the tangible goods that goes beyond the simple possession is a characteristic of the laws set up by an organized society; therefore, the inventions, by their nature, cannot be subject to the ownership title as long as, by their nature, they circulate freely unlimitedly from one individual to another, provided that they have been disclosed by their author²⁰. Starting from this point, Jefferson launches a real warning where he underlines that the holders' rights in the field of intellectual property are not revealed from the natural right. Therefore, he demonstrates that everything that is protected under the intellectual property rights is totally different from everything that is protected under the property rights over the tangible properties. Partly due to these differences, Jefferson does not perceive the intellectual property as a natural right based on work of the intellectual creation's author, but as a temporary monopoly created by the state to encourage creativity. Secondly, he argues that no person is directly entitled to the acknowledgement of his/her intellectual property right as these rights may be or not granted depending on both the will of the law-maker and the social standards ("will and convenience") without any claims or complaints from a person. Thirdly, the intellectual property rights are not and must not be permanent; in fact, they should be quite limited and should not last longer than it is necessary to encourage creativity. Fourthly, a connection point, the intellectual property rights pose certain risks from the perspective of the nature of the monopoly. So, due to the fact that the intellectual property confines the natural tendency of the ideas and creations of the mind to be freely disseminated from one person to another for educational purposes ("*ideas (...) freely spread from one to another over the globe, for the moral and mutual instruction of man*"), in certain cases, it can discourage creativity instead of encouraging it. Fifthly, the decision to have an intellectual property system is just a first choice in a long row of choices. Even if it is considered that the protection of intellectual property is a good idea, there should be determined the categories of intellectual creations which to justify, in terms of community ("*worth to the public the embarrassment*"), the disadvantages of an exclusive right; hence, it is very difficult to determine such limits²¹.

In light of these reasons, I consider that the rights in the field of intellectual property represent the exception as the general rule stipulates that all intellectual creations are meant to enter the public domain²². The legal protection title is conferred the moment the intellectual creation satisfies certain conditions referring to novelty, utility and the existence of an author. Indeed, talking about property in the field of intellectual creations is quite improper. In spite of how strange it might seem that the intellectual property does not involve a

property right²³.

As to the object of the regulation in the field of intellectual property, we must take into consideration the fact that the legal guidelines do not introduce the intellectual creations in the legal system civil circuit as assets on which a series of rights can exist; in fact, these guidelines limit themselves to protect the moral and the economic rights. Basically, scholars do not insist on this distinction between the intellectual rights and the intellectual creations when referring to the object of the legal protection. On the other hand, this vision is extremely important to determine the nature of the rights in this field. We may invoke the fact that the property right is sometimes mistaken for the thing to which it is subject to, but this is a traditional concept in the Roman law²⁴. Even if Ihering wrote that all assets are analyzed taken into account the rights they imply or confer²⁵, in the field of intellectual property, the extremely detailed regulation of the prerogatives pertaining to the holders of such rights, corroborated with the fact that the works and other intellectual creations existed long before the establishment of any system of legal protection, can influence the nature of rights, especially because, in the case of the *jus in rem*, the holder's prerogatives are regulated quite briefly. All rights in this field are born the moment the intellectual creation satisfies the conditions required to set up the legal protection title, i.e. the novelty, the utility and the existence of an author. Thus the legal protection title (mechanism) refers exclusively to the rights arising in connection to the protected creation. The current doctrine oscillates in respect to the nature of the intellectual property, particularly due to the time limitation, which contrasts with the continuity of the property. Therefore, it has been underlined that "*the rights on intangible assets can be considered property rights, but we should note the fact that they are not genuine property rights and this happens because they are basically temporary, they are connected to the holder's person; moreover, they exist only due to the involvement of third parties, and the protection regarding the possession of such assets outlines specific aspects; therefore, the acquisitive prescription does not apply, the action in counterfeiting and the action in disloyal competition are*

²³ "Full legal ownership includes: 1. the right to possess — that is, to enjoy exclusive physical control of the thing owned; 2. the right to use — that is, to personal enjoyment and use; 3. the right to manage — that is, to decide how and by whom the object shall be used; 4. the right to income — that is, to enjoy the benefits derived from personal use; 5. the right to the capital — that is, the power to alienate the thing and to consume, waste, modify, or destroy it; 6. the right to security — that is, immunity from expropriation; 7. the power of transmissibility — that is, the power to bequeath the object; 8. absence of term — that is, the indeterminate length of one's ownership rights; 9. prohibition of harmful use — that is, one's duty to forbear from using the thing to harm others; 10. liability to execution — that is, liability to having the thing taken away for repayment of debt, and; 11. residuary character — that is, the existence of rules governing the reversion of lapsed ownership rights" See Moore, A. D. *A Lockean Theory of Intellectual Property Revisited*. San Diego Law Review, Vol. 50, 2012.

²⁴ Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

²⁵ Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

²⁰ Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

²¹ Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

²² Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

operating”²⁶.

When analyzing the legal nature of the rights in the field of intellectual property²⁷, the doctrine fluctuates between the concept according to which the right of the intellectual creation’s author is a property right²⁸, the concept according to which the intellectual rights represent a distinct category of rights – sui generis (E. Picard), the concept according to which the immaterial assets are perceived as a distinct category of economic rights (J. Kohler), the concept of the goodwill’s rights (P. Roubier), the concept of the monopoly rights²⁹, the concept of the personality of the author of intellectual creation³⁰ [9]. All these conceptions try, more or less to address some particular treats of the rights in the field of intellectual property, namely the coexistence of the moral rights and the economic rights as well as the limit of the economic rights, identifying the legal nature of the rights in the field of intangible property. As for the moral rights, as argued by the concept according to which the subject right of the author of the intellectual creation is a jus in rem over an intangible property, they do not coexist with the economic rights; they are distinct rights. In fact, the interest is chiefly aroused by the limited period of the economic rights. But this approach must be made in a different manner. The limited period of the economic rights in the field of intellectual property does not represent a definite characteristic thereof, but a natural consequence of the reason for which these rights have been acknowledged in the regulatory system. More precisely, the legal nature of the economic rights in the field of intellectual property must not be determined based on a secondary effect of reason that underlay the regulation thereof; it shall be determined based on a complex analysis of the grounds which led to the protection of such rights, irrespective of the effects. Intellectual creations existed long before the acknowledgement of any rights related to them, and prior to the setting up and establishing the legal protection, the intellectual works enjoyed the confirmation and protection thereof at the social and cultural levels, as far as the authors were honored and the plagiarists were blamed by the community. I have previously showed that every intellectual creation has the “natural” vocation to enter the public domain, irrespective of the creative activity, the effort or the talent of its author. Based on certain reasons concerning the incentive of the creative activities needed for the development of the society, certain rights have been acknowledged solely to gratify the authors thereof. We should never forget the ration that accounts for the encouragement of the creative activity for the benefit of the development of community, because the intellectual work through, by its very own nature, tends to be

accessible to all members of community to whose development it has contributed. This tendency that allows an intellectual creation to be accessible to the public is not a consequence of its immateriality, but it falls under its inherent nature to enrich the universal cultural patrimony. To encourage the creative activity, the society acknowledged a series of economic rights for the authors thereof to be remunerated for their creative efforts. Seeing the reward conferred for their creative efforts, either these authors or others will create more works, inventions, distinctive trademarks that will contribute to the development of the society. However, the intellectual creations tend to be accessible to everyone and implicitly, to be a part of the public domain (and this will happen after the expiry of their legal protection period). Due to this reason, the law does not recognize the intellectual creations as intangible goods; it solely acknowledges certain economic rights granted in favor of the authors who use thereof at the contractual levels.

V. NATURE OF INTELLECTUAL PROPERTY RIGHTS

Regarding this aspect is very important to underline that the actual intellectual property system by stating limited terms of protection both for copyright and industrial property, embrace a utilitarian philosophy. Incentives are given to the authors for their unique intellectual creations. The rule of law protect the intellectual creations only to guarantee the remuneration of the author for his effort.

The natural tendency of disseminating the intellectual creations, contributing thus to the enrichment of the universal cultural patrimony, derives simply from the author’s creative activity. In other words, the authors create so that the result of their work and efforts reach the each and every member within the community they are living in. Bearing this aspect in mind, we may argue that in the case of intellectual property, one of the core elements of property, *animo sibi habendi*, is missing because nobody creates an intellectual work solely for himself, but to include it into the universal cultural patrimony and to the commune knowledge. At a certain moment, the society may decide through its regulatory system whether the author should be rewarded or not by acknowledging some rights, and from that point on, we may say that the author had a legitimate expectation concerning the acknowledgement of certain economic rights.

However, the acknowledgement of these rights does not change the nature of the work or the relation of the author with his creation, as we know and the regulatory system sets forth that the work has been assigned to the wide public, even from the moment it has been developed. The path followed by the intellectual creation starting with its conception up to the inclusion thereof into the public domain, proves once more that it is quite improper to talk about a temporary property, even if we would admit that the work is acknowledged as an immaterial asset. In the event that we would somehow admit that the intellectual work has been legally acknowledged as an immaterial asset, after the expiry of the protection period, the work would disappear, it would “disintegrate” into the public domain, and consequently, it would no longer be subject to

²⁶ Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

²⁷ Mihai, L. *Invention. Ground conditions of patents. Rights*. Bucharest: Universul Juridic Publishing House, 2002.

²⁸ Moore, A. D. *A Lockean Theory of Intellectual Property Revisited*. San Diego Law Review, Vol. 50, 2012.

²⁹ Franceschelli, R. *Trattato di diritto Industriale. Parte Generale*, vol. I - II, Milano: DOTT. A. GIUFFRÈ EDITORE, 1973.

³⁰ Schroeder, J. L. *Unnatural Rights: Hegel and Intellectual Property*. Cardozo Law, Legal Studies Research Paper No. 80, 2004.

any legally protected economic right or interest. It is important to underline that this “disintegration” into the public domain has nothing to do with the expropriation of land properties, and the public domain in the field of intellectual property has nothing in common with the state’s public domain. The moment an intellectual creation becomes part of the public domain, no economic right can be created in relation to such work given the lack of existence of any legal protection as no requirement related to innovation and newness is met, since the wide public already knows the work. In fact, the law does not acknowledge the intellectual creation as an immaterial, intangible asset, but it acknowledges some economic rights over a limited period of time (the path followed by the intellectual work on its way to the public domain being suspended during this period). A proof of the fact that the law does not acknowledge the intellectual creation as an immaterial asset is the existence of the public domain itself. The intellectual creation certainly becomes *res nullius* the moment it enters the public domain. However, a defining characteristic of the immaterial assets is the fact that they cannot exist in default of a holder of the right inherent to such assets, regardless whether it is known or not. In other words, the intangible assets can never become *res nullius*, as they belong to their creator whose rights are acknowledged and protected by the law. The explanation lays in the fact that the law acknowledges only the rights over the intellectual creation, and not the intellectual creation itself. The manner the law regulates the holders’ prerogatives in relation to the intellectual creation is an unquestionable evidence that we are not in the presence of any *jus in rem*. The legislation in force provides an exhaustive regulation of each and every prerogative and this fact is not applicable to the *jus in rem* where the prerogatives are implied. Therefore, it is relevant the fact that, regarding the use of the work in the copyright domain where the author’s right to disseminate his/her work is clearly acknowledged, the law insists on the existence of a separate right: the right to authorize, upon request, the access to the protected work. As we see, this is the best example that gives a detailed account of the prerogatives in the Directive 2001/29/CE, as the first right does not include the first. The argument, according to which the intangible property is based on the law while the tangible property is based on the possession itself, does not confute this thesis; on the contrary it strengthens it and the trader’s or expert’s prerogatives in relation to the goodwill are simply acknowledged, without being excessively detailed. Furthermore, the thesis admits that the goodwill is subject to the property right. More than frequently, the authors, out of their desire to argue and support their own legal idea concerning the nature of the rights in this field, try to classify the prerogatives acknowledged to the holders based on the prerogatives pertaining to the *jus in rem*. The best example in this sense is the artist’s resale royalty (*droit de suite*). Even if the doctrine argues that “the artist’s resale royalty is the attribute of a *jus in rem* which consists, irrespective of the actual owner of such asset” [10], the reality is quite different: based on this right, the author becomes the creditor in respect to the amount that he is legally entitled to

receive from the purchaser of the intellectual work; the artist’s resale royalty is a genuine right of claim, duly set up and implemented through the applicable legislation.

This reasoning is also applied to other rights; in reality, the author of the intellectual creation is legally entitled, from an economic point of view, to enforce his right to charge and cash in amounts of money from the persons or entities that are using his work, with or without the author’s agreement. The prerogatives acknowledged to the author of the intellectual creation are specific to a right *in personam* instituted by the law, and consequently, the author can use such right solely in the contractual relations involving his work. If somebody uses the work without firstly obtaining the holder’s agreement, he may defend his interests based on civil liability in tort. Practically, the author’s economic rights and the rights the other holders may exclusively be enforced at the contractual or extra-contractual levels, on the grounds of the civil liability in tort³¹, and in both cases, we are dealing with certain rights *in personam* and not with rights *in rem* or *sui generis* rights. It is improper to talk about a temporary monopoly, because this would assume that, after the expiry period, this monopoly could be used upon another person, which is not the case, considering the public domain and the conditions of novelty based on which the legal protection is instituted. And even if the monopoly concept is assumed, its main feature is given by the possibility of other persons to restrain the use of the intellectual work. Furthermore, there is a characteristic that differentiates the exclusive use in the field of intellectual property from the use itself (*usus*) as an attribute of the property right, and from the prerogative of the inherent use of the property right. In the case of the creations of the mind, the use thereof is “non-rival” (as stated by James Boyle), and non-exclusive respectively. In other words, the use does not exclude the simultaneous use of the same object. There cannot be multiple and simultaneous uses of the same land, but we can definitely talk about the multiple uses of a MP3 file or an image by more than one person, as the use of such items by one person does not interfere with the use of the same intellectual creation by another person³². The argument according to which this rule might be applicable to all intangible assets is not valid, and the example for such invalidity is given by the goodwill that simply excludes “multiple” uses thereof. In reality the economic rights in the field of the intellectual property represent the *jus in personam* correlative to a *propter rem* obligation of the owner of the material (electronic) support of the intellectual creation. As a matter of fact, Remo Franceschelli, in an article addressing the legal nature of the rights pertaining to authors and inventors rights, published in a deferential volume dedicated to Roubier, makes a similar observation, stating that the characteristic that defines the intellectual property right is the fact that the owner of the material support of the intellectual work cannot reproduce the work, and the classification of the economic

³¹ Harrison, J. L. *Copyright as Contract*. 2014. Available at SSRN: <http://ssrn.com/abstract=2470121>

³² Boyle, J., *The Public Domain. Enclosing the Commons of The Mind*. New Haven: Yale University Press, The Project Gutenberg eBook, 2008.

rights in the field of intellectual property as a jus in rem does not explain the reason based on which the author of the intellectual creation can, even if after having sold the material support of such creation, prevent the buyer from reproducing the work and to act as the owner of a tangible asset (Remo Franceschelli underlines this aspect by giving a series of simple and easy-to-remember examples: the wheat we buy can be sowed, the potatoes can also be planted, the eggs we buy can be either consumed or put into an incubator; then, he draws the conclusion that the core, the essence of the intellectual property which however does not exist in default of the implementation of the special legislation in this field, lays in this negative, *non facere* obligation-, and not in the common-law possibility of the author to use the intellectual creation. Franceschelli underlines this negative obligation using a right of monopoly. But this approach is wrong because the idea of monopoly leads us to the idea that after expiration, it might be granted to a different holder, which is not the case, as long as even Franceschelli acknowledges that, in this field, we have no assets (even if he argues his position exclusively on immateriality) because intellectual creations naturally enter the public domain, becoming part of the universal knowledge patrimony accessible to everyone, with a note that for a limited period of time the users of these intellectual creations must pay the authors thereof, the former (users of intellectual creation) having a proper rem obligation afferent to the material support of intellectual creation, and the latter (authors of intellectual creation) having a right of claim correlative to the proper rem obligation previously mentioned.

It is clear that the intellectual property protection must not represent an absolute objective, socially and legally speaking, that justifies of any legal measures necessary to protect it. Initially seen as the prerequisite for sustainable development, implementation of new technologies, and encouragement of international trade, the intellectual property, especially prior to ACTA international trial implementation, and also thereafter, was increasingly identified as a source of violation of fundamental rights and civil liberties. This is important considering that the international trade transactions have often a component of intellectual property that requires to be protected, that requires the protection of the intellectual property without risk of infringement of fundamental rights and civil liberties of other persons, in particular users or potential users of goods and services incorporating intellectual property.

APPENDIX

This paper follows my previous presentation *The Nature of Intellectual Property Rights considering the relation between the author's prerogatives and the Human Rights and Civil Liberties* at the WSEAS International Conferences on Economics, Political and Law Sciences (EPLS '14) held in Braşov, Romania, June 26-28, 2014 and published in *Advances in Economics, Law and Political Sciences, Business and Economics Series | 15*, World Scientific and Engineering Academy and Society Press, 2014.

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