APPROPRIATING CREATIVE WORKS PROTECTED BY INTELLECTUAL PROPERTY RIGHTS

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Abstract:

The ownership, either public or private, is an expression for appropriating goods. Consequently, the appropriation takes the form of private (i.e. private property) and common forms (i.e. public property). The common law property defines appropriation as „a deliberate act of acquisition of something, often without the permission of the owner", but the intellectual property rights do not protect goods. Particularly in this case „the object" of appropriation does not represent a „res nullius" simply because the intellectual property right arises from the act of creation, therefore the appropriation of somebody else's creation becomes equivalent with stealing (plagiarism). Consequently, if we are to admit that the authors have a right of ownership over them, then ownership in intellectual property law has (it must have) other manifestations than those known and accepted in the common law of property.

Keywords: *appropriation, goods, intellectual rights, property, authors.*

1. Difficulty of properly qualifying intellectual property rights and its consequence on the „ownership" and control over intellectual creations

Trying to determine and clarify the legal nature of the rights the authors have over their intellectual creations, we should firstly consider the concept of „appropriation" and treat it with special attention. First of all we should draw attention to the fact that most of lawyers/jurists use the concept as a default one, not taking into consideration any particular explanation or demarcation. This comes from the customary use of „appropriation" in the common law of property. However, considering „ appropriation" within the frame of the special right of authors over their intellectual creations, we must delineate special uses of the concept.

Accordingly, „intellectual property law" is seen as a particular kind of law because its nature is difficult to be determined and stated categorically despite the fact that it has been enshrined as such in both conventional law and legal systems of the countries in continental Europe. The intellectual property law is still referred to as controversial as long as disputes relating to it have never ceased or been exhausted not even nowadays - neither in terms of recognizing its existence, legitimacy and necessity, nor in terms of its legal nature. There are opinions that it should not be recognized at all for the reason that copyright is the enemy of access to information and knowledge and, therefore, is an enemy of freedom[1].

From its early beginning, in France, the country that speaks and writes the most about it, copyright was considered among the rights of property, even if it was referred to as a particular kind of property, different than the concept of property which the common law deals with[2]. Meanwhile, this status came to be denied by jurisprudence[3], in order to reaffirm it again nowadays, quite categorically[4]. However, since there are cases when the Contemporary French doctrine still challenges this qualification, most often than not the current doctrine qualifies intellectual rights of the authors as property rights.

It is worth mentioning the contribution of those specialists that considered the rights of the authors over their intellectual creations as property rights, apart from the real estate property rights and obligations; moreover, their attitude must be positively assessed as they had that perspective on copyright long before the adoption of the first international

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[1] This is the case of The Libertarians, The Pirate Party in Germany and the Nordic Countries, but also of many challengers, quite vocal lately, supporting the current known as „copyleft", in opposition to copyright, as shown.

[2] Le Chapelier, in its report to the Law of Representation, on the 17th of January 1791, referred to the intellectual right as "**A property of a kind quite different from other properties**"; more than that, even the authors of the French Civil Code of 1804 avoided to regulate about this kind of property in their monumental legislative work - the reasons for this state of facts being understandable.

[3] For example, in a Decision of the Court of Cassation in France (the case of Grus, Sirey, 25 July 1887) it was recorded that „the rights of the author and the monopoly which they confer are unjustly designated as *property*, either in common language or in legal parlance". Therefore, the Court stated that, „far from being that kind of property similar to the one the Civil Code defined and regulated for the movable and immovable goods, the copyright gives the holders the exclusive privilege of a temporary use and interest. This monopoly over interests and exploitation include the right of reproduction and selling copies of the work and is regulated by law, making it subject to international conventions, as well as the right resulting from the realization of inventions, industrial designs or trademarks which constitute what is known as industrial property". The problem to which judges had to answer at that time was whether or not the President of the Republic was competent to conclude commercial treaties by himself (Article 6 of the Constitution of 1852) as a consequence of the issue of copyright, or if, because it was ownership, the competence was shared with the Parliament.

[4] It is worth noticing that in France jurisprudence had a great influence over categorizing the intellectual rights of the authors; denying their legal nature and reconsidering the authors' rights over intellectual creations as property rights, is a Praetorian work to a large extend.

convention (in 1883) which was to consecrate the concept of „industrial rights". Thus, in a paper edited in 1874, entitled „***Embriologie juridique***", the Belgian lawyer Edmond Picard proposed the establishment of a new category, that of „intellectual rights", without being able neither to impose his opinion, nor to determine the adoption of a such legislative solution, not even in his own country, despite the reputation he enjoyed.[5] As a consequence, the Belgian law of copyright (1886), which is a rigorous application of the „intellectual property rights", does not use the concept advanced by Picard. They preferred instead the term „property" in order to denote the rights of authors, inventors or mark holders and not the one proposed by the above mentioned specialist. However, Edmond Picard continued criticizing the theory that assigns the nature of property rights to copyright, on the ground that „the desire to enter by force, hammering these new rights in the category of real estate rights is certainly a scientific heresy"[6].

Anyway, it is within the boundaries of the scientific research ethics to assign authorship of this idea to the one that used it first, while admitting that this matter had been previously tackled in similar terms long before Picard; for example, in a study (1869) belonging to Alfred Bertauld, professor of civil law at the University of Caen. Consequently we must say that, at the time these theories were formulated, the term „intellectual property" had not been enshrined in international conventions yet – i.e. the Paris Convention of 1883 protecting the „industrial property" and the Berne Convention of September 9, 1886 dealt with the „Protection of Literary and Artistic Works" without qualifying in any way the rights of the authors. The term „intellectual property" was to be fully recognized (internationally) once the Stockholm Convention of 1967 was adopted for the establishment of the World Intellectual Property Organization.

The same attitude (namely, denying the property nature of copyright), can be traced in the past centuries with other practitioners, such as A-Ch. Renouard, H. Desbois and P. Olagnier in France and J. Kohler and I. Kant (the latter of philosophical positions) in Germany.

Auguste-Charles Renouard, for example, criticized those opinions qualifying authors' rights as property rights, stressing the need to maintain a fair balance between the public interest and the interest of the author, while highlighting that recognition of a property right in favour of the authors does not necessarily weigh in their favour, except as a (sacred) right to reward. Thus, Renouard said: „*The author is entitled to receive from the public/society a fair price for his service*", considering that the price is an equivalent for „*the exclusive right of reproduction*". Further on, he considered that „*the immaterial world is, by its nature, rebellious to the jealous use that property involves*" because „*thinking is, by its nature, impossible to be appropriated*". We must never forget that Renouard was the one who advanced the term „copyright" as a set of prerogatives of authors and, besides that, he had an important contribution in affirming the importance of moral rights of authors! The same attitude is to be traced at Proud'hon.

Closer to modern times, Paul Olagnier, after the adoption of the Berne Convention in 1886, argued that the property right of authors can be imagined only for undisclosed works, while Henri Desbois supported, in turn, that „free public access to any creation contradicts the exclusiveness of *usus* when considering ownership".

Immanuel Kant[7] (addressing the same issue on philosophical premises, this time), discussed the relationship author/editor, on the one hand, and the relationship author/consumers, on the other hand, calling for „personal rights" of creation, awarded to the publisher not to the author, as expected, in opposition to „real rights" of the material work. Kant analysed therefore copyright as a personal right, as opposed to ownership of the tangible goods. According to the theory developed by Kant, intellectual work is a discourse that the author sends to the public by means of language, so that any impairment of the work itself represents, in fact, impairment of the author's personal rights. Kant's perspectives on „personal rights" made J. Kohler say that the „personal doctrine" (of copyright) „is the bastard child of a genius who was unfamiliar with the legal system."

Many authors have considered these „personal rights" as monopoly rights, or the rights of customers, while others determined them as rights of intangible assets, or as exclusive rights (Romanian legislative system adopting this perspective), all of which are rather preoccupied to clarify the content of this particular right than to identify its legal nature.

Thus (considering only the most important Romanian laws on the matter):

- According to art. 1(1) of Law no 8/1996 on copyright and related rights, „copyright vests in the author and embodies moral and patrimonial attributes" (similar to the complex/dual rights, not to the property rights);
- According to art. 31 of Law no 64/1991 on patents, „the patent gives its owner the exclusive right to exploit the invention over its term";
- According to art. 36 of Law no 84/1998 on trademarks and geographical indications „trade mark confers to its holder an exclusive right on the mark";

[5] Edmond Picard (1836-1924) was a lawyer, Professor at the Free University of Brussels, where he had as a PhD Candidate a Romanian (Matila Ghyka, who defended his thesis in 1909); he is also known as writer, publicist, and Senator of the Belgian Socialist Party. He was one of the most esteemed Belgian specialists in "intellectual property" rights.

[6] Andree Puttemans, *Intellectual property rights and unfair competition*, (Bruxelles: Bruylant, 2000), 21.

[7] Kant's reputation, not only in his hometown, Königsberg, today Kaliningrad, but in Prussia as well, was so great that it caused a whole industry of copyists to meet numerous requests of granting access to his courses purchased through his students.

- According to art. 30 of Law no. 129/1992 on the protection of designs „for the entire duration of the design registration, the holder has the exclusive right to use and to prevent their use by third parties not having his consent".

The reasons why the Romanian legislature adopted this solution are difficult to decipher. Our opinion is that one of the possible reasons why Romanian legislator didn't qualify this particular kind of rights as ownership could be the difficulty in considering them as such owing to the particular characteristics of intellectual creations which confer upon them features that differentiate between them and common law property and make them goods with characteristics requiring a distinct legal regime.

Taking for example concepts like appropriation and the ratio of appropriation, we can see that they are crucial in the common law of property, because the rapport of appropriation creates appropriation. Therefore, our attention is focused on analysing the case of intellectual creations, where, as we have already seen, the Romanian legislator avoided systematically qualifying them as property rights.

2. Common law property and the appropriation of goods/assets in common law

2.1. Appropriation. General terms

The meanings of the term „appropriation" (Late Middle English: from late Latin *appropriatio(n-*), from *appropriare* 'make one's own'), as it is used in common law of property, should not generate confusions as they are used as such for a long period of time. Such definitions are: „The act of taking something for your own use, usually without permission"[8] or „The action of appropriating something: *dishonest appropriation of property.*

The real question here is to what extend the „appropriation" is important for the common law of property? The answer is: extremely important! Because the appropriation rapport is the key point that generates „property rights". Moreover, the common law of property approaches the concepts of „ownership" and „property" as implicitly understood: there can be no property, at least in the classical sense of the term, without an appropriation act, the rapport of appropriation creating appropriation.

Appropriation of property by the right-holder is the act which excludes or deprives others of having free access to the same asset.

As a subjective representation, the concept of property - complex concept with historical, philosophical, sociological, and legal meanings as well - is the result of a long evolution of legal thinking in the continental law system and is constantly evolving. Therefore, in all times and in all systems of law, appropriation was and still is the legal act through which an asset (unassigned or belonging to another) is possessed; the act or fact that creates property. As a consequence, we may say that it can be no property right in the absence of appropriation.

Appropriation of assets/goods, says Valeriu Stoica, *initially manifested as simple possession, a possession which then founded the subjective religious and juridical representations reflecting the reality of this appropriation.* Both private and public property is an expression of private property, respectively a communitarian appropriation of property. Private appropriation is more than just the individual possession of the goods (personal property) and community ownership does not include any form of joint or collective possession of the goods. The relation private appropriation vs common appropriation of goods is governed, in a liberal society, by the principle of private property development[9].

Professor Valeriu Stoica, whose work we have referred to above, makes a categorical distinction between tangible and intangible assets referring to the possibility of their appropriation. Thus, he argues that „things ONLY can be appropriated, but not everything can be appropriated"; likewise, he considers that „in contradistinction to tangible goods, which are naturally likely to be appropriated, intangible assets can be appropriated only if there is a law authorizing such. In other words, in order for a tangible asset not be appropriated, a specific prohibition of the law is needed, while an incorporeal property can only be appropriates if there is a law authorizing such"[10].

The above mentioned Romanian jurist states, however, like many French jurists, that the concept of property is flexible enough to include intellectual property rights. Still we cannot but find that the Romanian legislator described the rights of authors over their creations differently, either as complex rights in relation to original creations protected by copyright, or as exclusive rights in relation to new and utilitarian creations.

Under these conditions, can we state, against the law and the qualification of these rights by special laws that the authors' rights over their creations still have the legal nature of property rights? The answer may be yes, if and only if we equate between complex rights and property rights, on the one hand and / or between the exclusive rights and property rights, on the other hand; on condition that we find all the attributes of property rights governed by special laws.

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[8] http://dictionary.cambridge.org/dictionary/british/appropriation - ! citatele trebuie in formatul indicat pe pagina asta de Internet: http://www.chicagomanualofstyle.org/tools_citationguide.html

[9] Valeriu Stoica, *Drept civil. Drepturile reale principale*, (Bucureşti: Humanitas, 2004), 15

[10] Valeriu Stoica, *Drept civil*, 15 - „*spre deosebire de bunurile corporale, care sunt în mod natural apropriabile, bunurile incorporale devin apropriabilenumai cu autorizarea legii. Altfel spus, pentru ca un bun corporal să nu fie apropriabil este nevoie de interdicţie a legii, în timp ce un bun incorporal devine apropriabil numai dacă există o autorizare a legii*".

2.2. The object of private property rights / public property rights. Methods of appropriation

The first question we have to answer nowadays is: what are the objects of property rights and which forms do they take in common law? This information is to be found in The New Romanian Civil Code: art. 553 and 557 referring to assets, objects of private property rights, respectively, art. 858-859 and art.863, referring to public property.

Thus, according to art. 553 NCC, „All the assets of private use/interest belonging to either individuals, or legal persons (private or public), including assets that make up the private domain of the state and territorial administrative units, represent the object of private property"[11]. The definition seems broad enough to include intellectual creations among the „objects" the text of the law refers to, assuming that intellectual rights over creation have the legal nature of property rights as real rights.

With reference to the object of public property, art. 859 NCC stipulates about „assets that belong to the state or territorial administrative unit, which, by their nature or by the statement of the law, are of domestic or public interest, provided they are covered by one of the ways prescribed by law". In fact, there are two categories of objects in question here:

- First category, which is the exclusive object of public property, namely: soil resources of public interest, the airspace, the waters with energy potential of national interest, beaches, territorial waters and natural resources of the economic zone as well as the continental shelf and other assets established by organic law.

And

- A second category, represented by „other assets" belonging to the state or territorial administrative units, public or private field, but only if they were acquired by one of the ways provided by law.

Our opinion is that intellectual creations belong to the second category mentioned above, as long as we admit that intellectual property rights have the legal nature of property rights. In other words, assuming that the intellectual rights over creations are property rights, they can be „object" of public property rights, representing public domain, either considered at international, or national / local level.

Special laws governing intellectual property state about „public domain" quite differently when speaking about intellectual creations. Their perspective is similar to neither administrative / financial laws, nor to the New Civil Code. Customizing the discussion to the „public domain" for intellectual creations, the law states that those works / creations which are no longer under a period of protection can be exploited freely by any user. Therefore, we are speaking about a special type of „public domain" with an open access, restricted by the condition of respecting the moral rights of authors over their creations.

As for the methods of acquiring property rights, which are in fact methods of appropriating property, art. 557 NCC states that „a property right can be acquired, under the law by convention, legal or testamentary inheritance, accession, usucapio as a result of good faith possession (for movable assets and fruits), by occupation, tradition and by court decision, when the asset is implicitly transferring property. (2) In those cases provided by law, the property may be acquired by the effect of an administrative document. (3) The law may regulate other ways of acquiring property".

Concerning the public property rights, art. 858 NCC states that „public property relates to those property rights belonging to the state / territorial administrative unit over the goods/assets which, by their nature or by the statement of the law, are of public use/interest, on condition that they are acquired as provided by the law". This statement is consistent with the principle that authorities are prohibited everything, unless specifically allowed by the law, while for individuals, the principle is that everything is allowed, unless prohibited by the law.

As far as the methods of appropriating public property assets are concerned, the legislature passed a surprising solution, thus regulating, through art. 863 NCC, as marginal „cases of public property appropriation", the following acquisition modalities:

a) By tender, made under the law;

b) Expropriation for reasons of public utility, under the law;

c) By donation or legacy, supported by law, if the property, by its nature or by the will of the disposal, becomes of public use/interest;

d) By convention for consideration, if the property, by its nature or by the will of the acquirer, becomes of public use/interest;

e) By transfer of property from the private domain of the state to its public domain or from the private domain of the administrative-territorial unit to its public domain, under the law;

f) Other means provided by law.

Therefore, in our attempt to identify methods of acquiring property rights, we should consider the following:

- In comparison to the Law no. 213/1998, „natural way" is no longer provided as a means of acquiring public property rights. Nevertheless, our opinion is that it would be worth considering due to the fact that a natural event could produce geographical changes requiring a special assessing of the state property over goods/assets ranging from those provided in art. NCC 859 (on public property);

[11] Original text: art. 553 NCC, „*sunt obiect al proprietății private toate bunurile de uz sau de interes privat aparținând persoanelor fizice, persoanelo rjuridice de drept privat sau de drept public, inclusive bunurile care alcătuiesc domeniul privat al statului și al unităților administrativ-teritoriale*".

- in case of donation, the asset can turn into public use, by the will of the disposal;
- in case of acquiring property through „Convention for consideration", the nature of the asset and the will of the acquirer are to be taken into consideration in order for the property to migrate into public domain and become of public use;
- regarding „Convention for consideration" as a way of acquiring public property rights, it seems that it is likely to undermine the principle of entitlement to public property by the state's own methods (procurement, expropriation, donation or bound) and that the domain of application, if any, must be clarified.

That is why it is worth noticing that, unlike the rules of the old Civil Code (art. 644-645), the present Romanian law does not represent, in itself, a method of acquiring property rights. Nevertheless, the law can stipulate other ways of acquiring property (either public or private), the doctrine claiming that the present solution was adopted as a consequence, under the influence of critics that were made to the former way of acquiring property. Likewise, it is to be observed that the texts that have generated the most criticism, respectively art. 5 and 20 of Law no. 15/1990 on the reorganization of state economic units as autonomous companies are still in force, even if they provide that autonomous administrations and companies established through reorganization are the rightful owner of their transferred patrimony.

The problem arising here is whether or not any of the methods of acquiring property, covered by art. 577 NCC, is applicable to intellectual creations, even assuming that their rights have the nature of property rights? The answer is obviously negative, on the premises that the new Civil Code stipulates for the qualification of copyright as property rights in art. 577 line (3) which provide ***that the law may regulate other ways of acquiring property***.

3. Categories of intellectual creations and their characteristic features

Intellectual creations are numerous and varied as gender and target and destinations. What unites these works and how to justify their grouping in the same category, putting them under the same umbrella? What distinguishes them from the goods of common law, so that they may need special laws to protect them? Why did the authors feel the need to have their creations protected by special laws derogating from the general law and why did such protection need centuries of struggles? Why did the legislature need to decouple „intellectual property" of „ordinary property"? How and why can the property rights have contents and attributes of intellectual and moral order, when property rights are patrimonial, by nature, as defined by the Civil Code?

3.1. Object of protection by intellectual property rights

In terms of the Stockholm Convention and the TRIPs, which states upon the intellectual property rights, they are property rights related to intellectual activity in the industrial, scientific, literary and artistic fields. Creations under discussion here could be: literary artistic and scientific works; performances, phonograms and broadcasts; databases; inventions in every field of human activity; industrial designs; configuration schemes (topographies) of integrated circuits, undisclosed information; trademarks and services etc.

Therefore, all these are products of creative activity, but their destination is different: some, having aesthetic or evolutionary function (i.e. literary, artistic and scientific works), others, utility functions (inventions, topographies of semiconductor products), others, hybrid products, interweaving both aesthetic and utilitarian functions (i.e. designs and patterns) and others, the function of favouring trade and protecting consumers through the information they provide about the products marked (trademarks and geographical indications). The result of these observations is that intellectual property not only differs from the common law property, but intellectual creations differ between them as well!

3.2. Characteristics of intellectual creations

First of all we may say that the intellectual property rights deals with property that is achieved through creative intellectual activity and its object is the protection of the authors 'rights. Unlike the common law of property, or the civil law, dealing with people in general and goods made by physical effort, not involving creative activity, the legal perspective on intellectual creations, however, reflects a relationship between creators and consumers, between creators and users of intellectual creations that can be both creators and non-creators of works, between the two categories of persons and goods is an important difference that justifies a difference in treatment. Some authors say, exaggerating on purpose, in order to reveal its importance and specificity, that intellectual property right is exclusively designed for scientists and artists.

i) The most obvious link between these creations is their common origin and their divergent nature (unlike the assets in common law): they are the result of a creative effort, the result of their authors' intellectual activity which is rightfully considered an extension of the personality of the authors.

ii) Intellectual creations are characterized by their nature of intangible assets, with spiritual existence (most of the time existing in the conscience of the author and its public), regardless of any retaining on/in some specific medium. Most often they are of ideal and abstract existence (computer programs are perhaps the best example to demonstrate the abstract character of creative intellectual property). They are and should be treated separately from their material

support, even when this distinction is more difficult, as it is, for example, the case of works of fine art. Nevertheless, the common law distinguishes between and tangible and intangible assets[12], but they are not products of intellectual activity. In common law, both tangible and intangible assets have economic value, being valued in money. Claiming rights and goodwill are typical examples of intangible, even if the universality may include tangible and intangible, intellectual creations as well.

iii) In common law, the distinction between an „asset" and „the right of property over that asset" is relatively simple. When speaking about intellectual property things are not so simple, because, firstly, we need to make the distinction between intellectual creation itself and the material incorporating it. Only then we can distinguish between „creation" and „the right over creation". Just so we understand why a book buyer is not the owner of the work incorporated into the book; why the holder of a painting (which, in terms of the common law, represents a movable asset and its possession equals, according to civil law, property) is nothing but the holder of the tangible, not the rightful owner of the painting; why the owner of a car (that car including several creations and intellectual property rights, such as inventions, designs etc.) does not hold rights to these works and cannot dispose of them, even if he can freely dispose of his car that comprises all the above mentioned; why the inventor or the author of a design is the right holder of the object of his invention, but not the owner of all the products that are obtained due to the exploitation of his patent or certificate. Intellectual creation is not represented by the product itself but the idea exploited, the expression of it, the way it is described to be materialized in an object.

iv) Generally accepted common law definitions of „assets" (goods of economic value that are useful to satisfy man's spiritual or material need, susceptible of appropriation as economic rights)[13] and „heritage" (universality of rights and obligations with economic value belonging to a subject of law) are not satisfactory and applicable to intellectual property, because the intellectual creation does not necessarily need to have economic value, not even to satisfy a specific material or spiritual need, in order to be protected by the law. The fact that intellectual property rights and their object (creations) have today a major economic role, implicit economic value, or spiritual status does not change their nature, because the law does not protect individual rights on condition of economic/artistic/scientific value. The real conditions that need to be met are as follows: originality, or, where appropriate, novelty, inventive step, industrial applicability, distinctiveness, etc. In other words, the economic value of the intellectual products is neither important nor required. Economic value, i.e. the value that represents quality and condition of the goods/assets in the common law[14] is not necessary when intellectual creations are involved. Intellectual creations are independently protected irrespective of any economic or artistic value. However, the economic value of an intellectual creation and the value of the creation itself are subjective and difficult to determine.

v) The result of creative work is not to be identified or confused with the product itself. Unlike other man-made goods, intellectual creations have no material substance and remain so even when they are fixed on a material (in the form of words, musical notes, lines, colours, designs etc.), or in electronic format. Property over support and property over creation are and remain distinct and subject to different legal rules, as distinct are to be treated the creation itself and the product which it materializes in The books we read are just copies of intellectual works and their purchase do not confer to the buyer any rights on the work. The copy of a paper (authorized or unauthorized) belongs to its buyer, not the work set in this paper. Thus, intellectual creations are to be treated separately from their material support, even when this distinction is difficult to be done, as, for example, in case of works of fine art.

vi) As intangible assets, intellectual creations are joined by another common feature, which is a major „fault" for them all: being spiritual products, nobody can protect them against being used by others through the means of simple possession, as it happens with tangible goods, for that they can be operated simultaneously by several people. Once the product of intellectual creation (literary, artistic or scientific, invention, design, model etc.) was made public, its creator cannot exercise, in fact, control of its use.

Consequently, materiality of the tangible good in common law (electricity being an exception, commonly invoked as an intangible good suitable to support the equivalence with the intellectual property - intangible – in order to be classified as property right) prevents possession from being exercised by several people simultaneously (except co-owners) over the same asset. In addition to that, it is noticeable that material objects having generally a well-defined functionality are unlikely to be used by several people simultaneously for the same or different purposes. We cannot speak of territorially differentiated possession over an estate, i.e. a piece Romanian land cannot be possessed, simultaneously, in Romania and in Hungary. Not even movable assets are more malleable

[12] The law knows two categories of intangible assets: firstly, the rights with a tangible object which are, in fact, intangible because they are not identified with their object (i.e. usufruct, debts, etc.); secondly, the absolute intangible assets. The latter case speaks about rights which are not attached to any tangible, such as a merchant's customers or intellectual property rights.

[13] Gheorghe Beleiu, *Drept civil român*, (Bucureşti:Şansa, 1995), 91

[14] The meaning of "good" implies economic value which is useful to satisfy man's spiritual or material need and is susceptible of appropriation as economic rights. In order to be in the presence of good, in the sense of civil law, two conditions must be met: 1) the economic value must be able to satisfy a material or spiritual need of man; 2) be capable of appropriation (attribution) as economic rights - Gheorghe Beleiu, *Drept civil român*, 97

in this regard: one and the same car, calculator, pen, etc., cannot be possessed in Bulgaria and Romania concurrently.

Possession of tangible goods involves contact between man and object, independently of the territory where such contact is made. Instead, intellectual creations, not being constrained of materiality or possession for use, can be used in different countries at the same time, by multiple users.

Moreover, what is inconceivable for material goods becomes rule with intellectual creations: the possibility of concomitant use of several people in different places without making the work/creation unavailable to others (as happens in the case of electrical energy which can be used by a consumer not independent of other potential consumers). It is somewhat similar to the use of public goods, which is, in principle, non-competitive and may be exercised concurrently by multiple people (i.e. roads, schools, hospitals etc.). In this case, concomitant use requires, as a rule, the presence in the same place, while in the case of intellectual creations; concomitant use may be exercised in different places. The possibility of concomitant use in different places by multiple users represent a characteristic feature of intellectual works, most often this being the reason for which they were created.

vii) Intellectual creations have common features with public assets and utilities, thus explaining both the subjective position of consumers towards them and their delayed protection and legislation. Similar to public assets and utilities, whose consumption by one person does not prevent another person to do the same, intellectual creations are, in principle, non-rivalrous in the sense that their use is not competitive and the result of their usage does not represent their disappearance, more than that, their appropriation by an individual, if we admit that it is possible and necessary, does not make them unavailable for another user. Instead, public utility consumption implies the presence in the same place, whereas, intellectual creations allow concomitant use in different places.

viii) Intellectual creations quality and ability to be quantitatively unlimited makes them differ from common law property which is limited. In other words, intellectual property is unlimited, while property of tangible goods is limited. Many of the intellectual creations are ephemeral – this meaning that information technology or new solutions can change so fast that some creation could be left aside before obtaining the title of protection. The Internet practice shows us that many creations (if not all) are highly vulnerable to acts of unauthorized use.

ix) The products of intellectual are extremely mobile, especially nowadays. Unlike the assets in the common law, intellectual creations are, nowadays, able to move instantly and globally, while in ancient times, they were escorting their creator, wherever they went, even though their movement was slow. As far as their ability to move is concerned, we find that boundaries are absolutely useless, works „traveling" indifferent to both territorial limitations of the law or the means by which they propagate, being, practically, impossible to control under the current state of the art when the perfect host, the cyberspace, sets no borders or limitations.

x) Unfortunately, all the intellectual creations have a major „fault": the rights over intellectual creations are, as determined by law, transferable rights. The most common forms of capitalization of creation are contracts of assignment, licensing and franchising. Likely to be used simultaneously by multiple people, assigning rights over these creations can be held simultaneously by multiple people, the transferor being able to maintain the right of using that protected work. Once the works are in circulation/use, the authors cannot control their use any more. If the work was made public, the public is subjected to the temptation of using it whenever he pleases, or whenever he can make a profit out of it, and this temptation increases as the work is more valuable. Thus the author cannot authorize each use and cannot control unauthorized uses.

xi) On the other hand, assessing rights over intellectual creations is not completely transferable (i.e. moral rights), and more than that, it is limited (as acts inter vivos) to the economic rights, not having as a result, ipso facto, the assignment of the property rights to the purchaser. In the case of copyright, for example, there operates not only the presumption of favouring the author's economic rights even if not expressly assigned, but also the failure to assign those rights regarding some unexpected usage of the work was not known at the time of the assignment of rights, even if the transfer was complete at the time of the occurring change. This means that the rights of the transferee are not identical in content with the rights of the transferring author. While, under certain conditions, the exercise of moral rights belong to the successors, them having the duty of ensuring compliance with the moral rights of their authors (authors, meaning persons whose succession they take), it means that neither the successors can be assigned with economic rights only.

xii) The moral side of intellectual rights over creations, which some authors consider to be bizarre even if it is consecrated by the law systems inspired by the Berne Convention, determines the difficulty in qualifying these rights. The law attaches moral and patrimonial attributes to the author's property, while the property is basically patrimonial in common law practice. Furthermore, the two categories of rights have distinct legal regimes. Therefore, it is highly artificial to bring together two distinct legal regimes which belong to two antithetical categories of *summa divisio* (moral rights are inalienable, imprescriptible and perpetual, while patrimonial rights are limited in time). The inalienable character of moral rights is the strongest argument in rejecting their qualification as property rights. According to art. 555 of the New Civil

Code, „private property is the right of the owner to possess, use and dispose of property exclusively, absolutely and perpetually, within the limits established by law". In this case the right of assignment is inherent to the property right, even if it is not considered a specific feature. An appropriated good may only be affected by a temporary perpetuity. Thus, attaching the moral and patrimonial prerogatives of the author to the property rights leads necessarily to a misinterpretation of this right.

3.3. Necessity and opportunity of appropriation

Since the Romanian legislator did not qualify the authors 'rights as property rights, we can conclude that appropriation of such rights is neither possible nor necessary. Therefore, art. 577(3) has not to be considered by authors with respect to their works; as a specific feature of the intellectual creations.

At this point we agree that intellectual creations should not be appropriated, at least not in the classical sense of the concept of appropriation. According to common law, appropriation represents the act of taking something for your own use, while an intellectual creation belongs to its author through the act of creation. In other words, the author cannot appropriate something that rightfully belongs to him simply because he is the holder-creator and it would be pointless for him to make such an action. Appropriation is worth discussing only for the work of others, but in this case the act of appropriation would constitute a violation of the rights of the true author.

If we assume, however, that appropriating creations protected by intellectual property rights is possible in some particular ways for these kind of assets which are not at all similar to the ones in common law, then we find that there are assets (such as: registered as a trademark, the same sign can be registered by more applicants for different goods and/or services) that can be appropriated by more people at the same time. Then, there are cases (geographical indications/signs, for example) that cannot be appropriated by any private or public person because they are, by definition, available to any producer in the designated geographical indication and exclusion from the use of any manufacturer is unthinkable. At the same time, it is important to mention that, speaking about indications, the manufacturer has a right of use, not a property one.

While the common law refers to appropriation (at least so it happened in the beginning) in terms of taking into possession something that does not rightfully belong to you, when speaking about „intellectual property", the asset which represents the exercise of the right is the creation of the author himself; it is an asset that never existed before it was created by its author. That is why an intellectual creation is so personal that it seems part of the author himself or an extension of its author. How to say then that the author is not, naturally, „master" of his own creation? That it does not naturally belong to him, needing an act of appropriation, while the ties between author and his work are so close that their separation is impossible and meaningless?!

Consequently, when speaking about „intellectual property rights" and only about them, we do not deal with things from the outside world within the meaning of the common law; we deal with the author's own spiritual creation. Therefore, the creation is so inseparable from its author that it makes it impossible for the associated rights to be transmitted and the appropriation to be assumed by third parties. This means that none other than the true author can be expected and can claim for himself the authorship of a work. In case the work was made by somebody else, the act of appropriation has to have legal consequences, unless this happens any time after the author's death or when the work has fallen into the public domain and can be freely used. The author of an intellectual creation, and only he alone can claim anytime and anywhere, authorship of the work and to him only the property rights recognized and granted by the mere act of creation. The successors of the author, as holders of real rights, will never have all the rights the true author used to have over his creation. Another category of users of the creations, the third parties (customers, holders) have the right to freely use a creation after the author's death or when the work has fallen into the public domain, but they will never be assumed as authors, provided they are usurpers, plagiarists or pirates. Moreover, the true author cannot transmit his authorship as „paternity" over an intellectual creation is inalienable.

Exception to the rule of inequality between the authors' rights and the intellectual rights transmitted to third parties are the trademarks and geographical indications/signs. This happens due to the fact that, most often, trademarks are likely to be chosen only from those in the public domain (that are available because they have been registered as provided by others), and the right over trademarks is more like an occupational right than a copyright in itself. In case trademarks are protected by copyright the intellectual work protected this way will belong to its author forever.

Classifying intellectual creations as „intangible assets", we may state another distinction between them and the goods/assets in common law. There is an opinion that the common law speaks only about the appropriation of tangible assets, while the intangible can be appropriated only for the cases when the law provides so, or, in the words of one of the specialist in the domain: „In order for a tangible asset not to have the ability of being appropriated, a special provision of the law is requested, while, for the appropriation of an intangible asset authorization of the law is required"[15].

[15] Valeriu Stoica, *Drept civil*, 128.

If that were the case, then the copyright (free of formalities) could not be generated by the mere fact of producing a certain work, the same as patent right, arising from the invention itself, should also be authorized; instead, they are considered distinct rights and are not subject to authorization.

Moreover, if special authorization from the law would be required in case of „appropriating" own creations, for which the author is a priori considered the rights holder, quality provided by the law since the eighteenth century, this would represent a step back in time before 1586, when the lawyer Marion Simon, baron of Druy, obtained the cancelation of a bookstore privilege from the Parliament of Paris, on the claims that: „people recognize to each other the property over works they made or invented, and following the example of God, who is the master of both heaven and earth / day and night, the author of a book is its master and as such he may have free dispose of it". Otherwise, if we accept that the rights of authors over their intellectual creations are natural rights, it is pointless to discuss the problem of appropriation in this respect. Therefore, those assets belonging naturally to an individual do not need appropriation, they only need recognition and, eventually, special protection of the law in case of abuse.

The common law of property, art. 557 NCC, stipulates that „property rights may be acquired under the law, by convention, legal or testamentary inheritance, access, adverse possession as a result of good faith possession of movable and fruit, by occupation, tradition, and by court decision, when the property itself is being transferred. (2) In the cases provided by law, the property may be acquired by the effect of an administrative act. (3) The law may regulate other ways of acquiring property". However, apart from law, none of these ways of acquiring property is common to intellectual creations. But in terms of the law, it is worth noticing that if intellectual creations, authors' rights do not originate in a certain law, them being implicitly assigned to the creation once their paternity established. The law can only recognize and protect them.

Consequently, the authors' rights do not arise due to some human authority; they are natural rights, like the rights to personal liberty, physical integrity, life and like any natural right, as any other intrinsic right that is not based on the process of legislating, they may even come in contradiction with state law. Their belonging to the category of natural rights explains why copyrights are, at least in some of their components, „perpetual".

Thus, authors' rights do not extinguish, they belong to the authors, either dead or alive, even if the term of protection established by law has passed and the creation has fallen into the public domain. In case the author has assigned his rights to the transferee, he is still considered the author of that creation, the transferee being nothing but the holder, not getting the authorship over creation. Moreover, the rights of authors have gained recognition during the Enlightenment, i.e. in the times when natural rights were conceptualized and the foundations for human rights were laid.

In conclusion, we must acknowledge that the Romanian legislator did not qualify authors' rights over their creations as property rights. The complex dual right recognized for authors of new and original creations, as well as the exclusive rights for authors of new and original creations cannot be regarded otherwise than the legislature did.

If we consider „appropriation" as a manifestation of the author's will to act as master of his own creation and if we admit that the rights afforded to authors had all the attributes of property rights, then and only then „appropriation" makes sense; otherwise, it is useless with the intellectual rights.

References

- Gheorghe Beleiu, Drept civil român, (București: Șansa, 1995)
- Andree Puttemans, Intellectual property rights and unfair competition, (Bruxelles: Bruylant, 2000)
- Valeriu Stoica, Drept civil. Drepturile reale principale, (București: Humanitas, 2004)
- http://dictionary.cambridge.org/dictionary/british/appropriation