

**BASIC RULES OF PROTECTION IN THE COPYRIGHT  
AND INTELLECTUAL PROPERTY LAW. THE NATURE  
OF THE GRANTED RIGHTS IN THE FIELD OF  
INTELLECTUAL PROPERTY**

SPERIUSI-VLAD ALIN

Faculty of Law, West University of Timisoara, Romania

**Abstract**

Copyright generally refers to the right granted for the protection of literary, dramatic, musical and artistic works, as well as other other works resulting from the author's own intellectual creation. Related rights are those granted for the protection of performers, producers, broadcasters etc. In some laws, however, the term copyright is used to cover both the rights of authors and some or all of the related rights. In recent years it has become usual to refer to certain categories of rights as sui generis rights. These are rights which may be regarded as different in nature from copyright and related rights, though dealing with intellectual property in products and requiring a distinct sui generis protection. The protection provided by copyright, related rights and sui generis rights is to be distinguished from that available under laws concerning patents, trade marks, industrial designs and trade secrets and other forms of intellectual property. Patents are monopolies granted for the protection of inventions and new methods of manufacture. Patent protection depends on registration and other formalities, and is valid for a shorter period than copyright. Nevertheless, there can be an overlap between patent and copyright protection, for instance in regard to protection of computer programs or inventions related to such programs. Manufacture of an article may infringe a patent, even when the maker did not know of the patent's existence. Copyright of a work, however, is not infringed by a similar work, if the latter was created without any use of the pre-existing work. Trade marks are marks applied to goods or services in order to indicate origin. There are special rules as to what may be used as a trade mark, but no considerations of artistic quality apply. Sometimes a picture or other representation used as a trade mark will itself be subject to copyright protection, when the necessary criteria for such protection is fulfilled. Industrial designs are generally considered to be those designs used in the industrial manufacture of articles, in quantity. Some industrial designs are for purely functional objects. Other industrial designs have both functional and artistic aspects, for instance when a design for mass-produced metal lamps contains aspects that make the lamp attractive from the artistic point of view. The overlap between protection of industrial designs and copyright in artistic works is one of the most difficult areas of law in the field of intellectual property. Trade secrets are protected by the law relating to confidential information. Other forms of protection are available under laws relating to unfair competition, contracts and tortious acts, preventing prejudice to businesses by use of unlawful means. The unauthorised use of a

copyright work may well involve breach of one or more of these separate forms of protection. Copyright, related rights, sui generis rights, patents, trade marks, trade secrets etc. may be protected by civil remedies or criminal sanctions.

### **Key words**

Copyright; Intellectual Property; Trade Marks; Patents; Legal Protection.

## **1. GENERAL CONCEPTS**

With a view to a global approach article 2 of the Stockholm Convention regarding the establishment of the World Intellectual Property Organisation<sup>1</sup> defines the concept of intellectual property as representing the sum of rights over the creations of the mind such as: the rights regarding literary, artistic and scientific works, performances of performing artists, phonograms and radio broadcasts, inventions from all the field of human activity, scientific discoveries, industrial designs and models, trademarks, manufacturer and service marks, commercial names and denominations, protection against unfair competition as well as any other rights related to intellectual activity in the industrial, scientific, literary and artistic field<sup>2</sup>.

This concept is often criticised due to the fact that by using the word property we unjustly emphasise the material characteristic of the relations from this field in the detriment of their wealth and complexity. Similarly, the word intellectual emphasises a supposed non-material characteristic of goods that defines the nature of the relations in this field. This happens under the circumstances in which the nature of the relations that interest us cannot always be considered non-material goods<sup>3</sup>. Obviously, the concept intellectual property can have various meanings for different people. On the

---

<sup>1</sup> The convention for the establishment of the World Intellectual Property Organisation (WIPO) was adopted and signed at the diplomatic Conference for Intellectual Property that took place in Stockholm between the 11th of June and the 14th of July 1967; a Romanian delegation also attended the conference. The World Intellectual Property Organisation was established with a view to promoting industrial and literary-artistic property throughout the world. Another goal was to set up new ways of administrative collaboration between the associations for intellectual property based on the principle of financial autonomy of each union and on the right of each union to participate in solving common problems. Later on WIPO was recognised as a specialised institution of the United Nations Organisation being active and having valuable initiatives in the field of intellectual rights protection. Romania ratified the Stockholm Convention through Decree no. 1175 from the 28th of December 1986, published in the official bulletin No 1 from the 6th of January 1969 v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2003) - *Dreptul proprietăţii intelectuale, Dreptul proprietăţii industriale, Mărcile şi indicaţiile geografice, (Intellectual Property Law, Industrial Property Law, Trademarks and Geographic Indications)*, All Beck publishing house, Bucharest, p.1.

<sup>2</sup> Romiňan, C. R., Drăgan, J. (2004) – *Mic dicţionar de proprietate intelectuală, dreptul de autor şi drepturile conexe, (Small dictionary of intellectual property, copyright and related right)* Lumina Lex publishing house, Bucharest.

<sup>3</sup> Franceschelli, R. (1973) – *Trattato di diritto Industriale. Parte Generale, (Treaty of Industrial Rights)* vol. I – II, DOTT. A. GIUFFRÉ EDITORE, Milan, p. 11-12.

one hand, some people believe that it is part of human rights deriving from the natural right which supports the creations of the human mind by protecting the authors in relation to the users. On the other hand, for others it represents a commercial monopoly established for a better regulation of the market exploitation of the authors' creations. In between these two opposite approaches there are two other concepts each with its own philosophy and legal justification. The analysis concerning the placement of intellectual property in the normative system is not dependant on the national level, that is it should not be restricted to the national level as it encompasses worldwide cultural, political and commercial relations. Irrespective of how this concept is perceived there is always one common aspect which refers to the creations of the mind and the means through which these are shared with the general public<sup>4</sup>.

As national barriers disappear, the differences between the normative systems also diminish and the need to adopt common measures rises. In the past the national legal systems were solely responsible for the regulation of relations in the fields of intellectual property and sometimes reference was made to other systems. Today however, due to the new discoveries in the field of technology the whole approach has to change refocusing on an international one. This implies an assessment of the various law systems, respectively of both common law and civil law, assessment that should lead to adopting harmonized solutions basing on the traditional approach of each of these systems.

In order to comprehend the concept of the normative system we must focus on the meaning of the concept of norm, that is legal norm, because the system bares the meaning of structure in the present study. As one author<sup>5</sup> observed regarding the legal norm there are numerous definitions and the authors have difficulties in agreeing upon a single one. Consequently, the legal norm is defined as a rule of conduct set up or recognised by the public authority; its implementation is ensured by the legal consciousness and, where necessary, by the coercive force of the state or by the general,

---

<sup>4</sup> Literature states that the term "*intellectual property*" has its origin in a mistranslation of a word from English into French because of the fact that the first revolutionary decrees from France by which authors and inventors were acknowledged exclusive rights. These decrees reflect the influences of the English and American legal system where the word property is used. The French translation is *propriété* although the French view on property corresponds to the English *ownership*; in the circumstances in which the Anglo-American law the concept of *property* is more encompassing and includes even personal rights, thus dismissing an essential difference between the Anglo-American property and the one according to Napoleon's code (art.544 with the Romanian Civil Code correspondent art. 480). The Anglo-American legal system refers to a temporary right whereas the French legal system recognises it as a permanent right v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe, Tratat, (Copyright and related rights, Treaty)* Ed. All Beck, București, p.1.

<sup>5</sup> Mihai, G. C. (2008) – *Teoria dreptului (Theory of right)*, 3rd edition, C. H. Beck publishing house, Bucharest, p. 61.

impersonal, repeatable prescribed rule of conduct, rule of public authority that must be complied with. Similarly, as a social rule of conduct edited and sanctioned by the state. Its obedience is ensured as a last resort by the coercive force of the state. Similarly, as a category of social norms set up or acknowledged by the state compulsory for the relations between the subjects of law and applied under warranty of public force in case of breach. Similarly, as a rule of social behaviour enforced by the power of the state by which citizens are obliged to do what is fair and forbidden to do what is unfair; and last but not least, as a rule of human conduct. In this way society can coerce its members directly or indirectly to behave in a certain way by applying an exterior, public, organised, more or less intense pressure. To sum up, the normative system relating to the intellectual property field represents nothing but the structure of legal norms pertaining to the same field.

The field of intellectual property<sup>6</sup> comprises: copyright, related rights, sui generis rights, patents, marks, industrial designs as well as the protection granted by means of special laws<sup>7</sup>. By copyright one can understand the right acknowledge by law of the author of a literary, artistic, musical or scientific creation as well as other creations resulting from the intellectual activity of the author. Related rights represent the rights enjoyed by performing artists for their performances, recording sound record producers for their own records, radio broadcast and TV for their own broadcastings. Sui generis rights differ in nature from author's and related rights despite

---

<sup>6</sup> The denomination adopted for this new category of rights and for the new discipline, deemed traditional and accepted as such, has often been criticised. On the one hand, this is due to the fact that the institutions (numerous) that form the new branch of law and its object of study are not always concerned with intellectual creations, creations of the spirit (this is the case of trademarks and geographic indications and of unfair competition). On the other hand, even in those cases where the protected object is represented by such creations their legal systems differ not only from the property system of the common law but also from one creation category to another; the distinctions being considerably large at times v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe, Tratat, (Copyright and related rights, Treaty)* All Beck publishing house, Bucharest, p. 2.

<sup>7</sup> The legal system of the intellectual creation set up between the 15th and the 18th century does not distinguish between the literary and artistic property (the object of which consists in protecting creations of the intellect materialized in art works) and patent right (the object of which was protecting the inventions with industrial characteristics for application) up until the end of the 18th century. The limit between the two categories of rights would only become clear at the beginning of the 20th century. Thus, the French law concerning patents dating back to 1791 did not mention inventors but "authors of useful discoveries". The term "author" was used both for inventors and for creators as we know them today. The distinction between these two categories of authors was made by taking into account the utility of their creations: in the case of inventor authors the industrial application, while in the case of proper authors the exclusively artistic utility of their creations. However, the American constitution adopted in 1787 already makes this distinction through art. 1 section 8 clause 8 by empowering the congress to promote "the progress of science and useful arts granting the authors and inventors an exclusive right over their creations and inventions" v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe, Tratat, (Copyright and related rights, Treaty)* All Beck publishing house, Bucharest, p.5 - 6.

the fact that they refer to a product pertaining to the field of intellectual property which require a different protection, sui generis due to the new technologies. Sui generis usually refer to data basis<sup>8</sup>. Patents represent real monopolies granted for the protection of inventions and new methods of production. The protection acquired by means of patents depends on registration and other formalities and is granted for a shorter period than the one corresponding to copyright, usually 20 years instead of life-long validity + 50 or 70 years, the period of validity granted to copyright. Notwithstanding, there can be an overlap between the protection granted by means of patents and the one granted by means of copyright which is the case in certain countries for computer programmes or inventions related to this programmes. The creator of an asset may breach an existing patent even without knowing of its existence. In the case of copyright it is not breached in the circumstances in which the creator of a similar work does not use a pre-existing creation. Trademarks are marks applied to goods and services with a view to indicate origin. In certain cases a picture or another type of representation used as a commercial brand may constitute the object of protection granted by copyright if and when the requirements imposed by these are fulfilled. Industrial designs are generally perceived as being those designs used in the industrial production of goods in certain quantities. Some industrial designs have an exclusively functional purpose as is the case with the components of an engine. Other industrial designs have not only a functional aspect but also an artistic one; therefore the overlapping between the protection granted to industrial designs and the one to artistic creations by means of copyright is one of the most troublesome in the field of intellectual property. Other forms of protection are granted by means of legal provisions referring to unfair competition. Also to be included in the field of intellectual property are: geographic names employed in order to distinguish between similar products by using the name of the place where it has been produced. Champagne and Cognac are the most suggestive examples. The protection granted by means of copyright does not coincide with the one granted to geographic names. The same applies in the case of protection granted to types of species.

The national legal system represents a unitary ensemble in the form of a structured, homogenous system. Within the unity of the legal system, the legal norms that compose it are classified following various criteria in certain subsystems, i.e. in legal institutions and legal branches. As no legal norm can exist independently in the sphere of the remaining norms, neither can legal institutions nor branches exist as completely separate norm groups. Most of the authors argue that at the basis of the division of the legal system and branches lies the character of the social relations governed by a group of legal norms. In other words branch division starts from the object of legal ruling. The distinctive and unitary character, the specific features of the

---

<sup>8</sup> Tafforeau, P. (2004) – *Droit de la propriété intellectuelle. Propriété littéraire et artistique. Propriété industrielle. Droit international*, Gualino éditeur, Paris, p. 29.

social relations belonging to a certain field of activity deem it necessary and possible to be governed by a particular category of norms.

Alongside the main criterion of dividing the legal system in branches the one related to object ruling another specific criterion coexists, the one referring to method where the state acts upon certain social relations. If the object ruling is the objective criterion for the establishment of legal branches then the method represents the subjective criterion determined by the volition of the law-maker. The legal branch can be defined as a set of legal norms organically intertwined which govern social relations characterized by the same feature, the use of the same method or complex of methods.

By its very definition as a sub-ensemble of a system none of the legal branches exist separately. At times a branch may constitute the common right for another or several other branches which means that its rules apply to the latter if there are no special rulings for the respective domain and if the norms resorted to are comparable to the principles and specificities of the social relations governed by the legal branch where the norms find application. Moreover, certain public institutions, due to their importance, are concerned with almost all legal branches. A classic example is property right. In other cases although it constitutes the specific object of a legal branch some social relations are additionally protected by applying rules from other branches also due to general interest, for instance such a protective function is carried out by the provisions of criminal or administrative law. The connection between the legal branches is evident in the content of legal relations also known as related. These are only some of the causes that objectively determine the multiple connections between legal branches.<sup>9</sup>

## **2. THE SCOPE OF THE STUDY**

For these reasons, the present study firstly aims at determining the rules, the fundamental mechanisms of legal protection for the works contained within the intellectual property area from the point of view of the basis of protection, such as the nature of the guaranteed rights, the criteria for protection, the conditions for granting protection and, last but not least, the structure of the protection, respectively the way in which laws are structured linguistically and legally. This carries a particular significance from the exclusive point of view of copyright and less from the one of industrial property.

The analysis is at the same time an auxiliary in establishing the relation between the national and the international right as well as the relation

---

<sup>9</sup> Țiclea, A. (2007) – *Tratat de dreptul muncii, (Labour Law Treaty) 2nd edition*, Universul Juridic publishing house, Bucharest, p. 58.

between the national and the EU right and not lastly, in establishing the common right in the field of intellectual property. In Romania, for instance, this aspect was significant even previous to the new civil code as well as subsequent to it. Establishing the structure of the legal regulations in the field of intellectual property is essential, irrespective of their formal, international, regional or national origin in relation to the creation, especially due to the fact that an intellectual creation can benefit from multiple types of protection mainly due to the coexistence of regional, national and international systems of protection corresponding to each category of intellectual creation. Multiple types of protection are addressed particularly due to the fact that a certain intellectual creation, provided it fulfils a number of conditions, may constitute an object for specific protection systems corresponding to several categories of intellectual creations. To be more precise, the creation protected by the trade mark system can benefit from the specific protection granted to industrial designs and models, but in certain cases also from the protection system related to intellectual property. The same applies to inventions.

### **3. FUNDAMENTAL RULES OF LEGAL PROTECTION GRANTED TO CREATIONS IN THE FIELD OF INTELLECTUAL PROPERTY**

#### **3.1 INTRODUCTION**

When speaking about establishing the fundamental rules of legal protection granted to works in the field of intellectual property we must address two fundamental criteria, the first being the basis of the protection, i.e. the nature of the guaranteed rights, the protection criteria, respectively the conditions to benefit from protection, and the second being the structure of the protection, i.e. the way in which the laws are structured linguistically and legally, taking into account that the last criterion is relevant exclusively in the field of intellectual property and less in the industrial one. This is a consequence of the fact that the protection of intellectual property does not require any previous formalities whereas the protection of industrial property entails undergoing a procedure of registration and verification of the existence of content-related and formal conditions as well as the existence of the title of protection.<sup>10</sup> Actually, the way in which the laws are structured linguistically and legally carries a great significance in the field of intellectual property protection, due to the fact that, in this case, the protection does not require any previous formalities. However, in the field of industrial protection it bears little significance due to the fact that here it entails undergoing a procedure of registration and verification of the existence of content-related and formal conditions as well as the existence of the title of protection. In the field of industrial property the criteria for protection carry a great importance, respectively the conditions for granting legal protection to the creations belonging to this area, which will also be

---

<sup>10</sup> Ligia Dănilă (2008) – *Dreptul de autor și dreptul de proprietate industrială (Copyright and Intellectual property right)*, C. H. Beck publishing house, Bucharest, p. 1.

analysed for the area of intellectual property. The nature of the guaranteed rights will, at the same time, be analysed separately, in both the fields of intellectual and industrial property.

### **3.2 THE NATURE OF THE GRANTED RIGHTS IN THE FIELD OF INTELLECTUAL PROPERTY**

In order to establish the nature of the granted rights in the field of intellectual property, we must first determine and describe the different theories and explanations regarding the origin and the nature of copyright<sup>11</sup>, related rights and sui generis rights, including the justification behind granting these rights, all this having a say in the legal regulations regarding the conflict of interest and of rights as well as the procedure to solve these conflicts. The subsequent analysis aims to identify the different categories of rights pertaining to this field, the historic source of these rights, the classification of these rights in the various regulation systems, the justification for granting these rights to certain categories of holders, including their effects, the possible conflicts of interest and the solving methods.

The phrase copyright refers to both the copyright acknowledged by the English common law for the limited publication of his work and to the right acknowledged by the British system, by means of various regulations, the oldest one dating back to 1710, followed by the ones in 1842, 1911, 1956,

---

<sup>11</sup> Initially unprotected by special norms when copyright was mistaken for the right on the manuscript, a right that with the object of certain privilege after the invention of printing, “the least questionable property”, according to the laws of the French revolution, a “kind of property”, “incorporable, exclusive and opposable property right”, are only a few of the qualifications that copyright has been given throughout its history in order to justify the protection granted to creations and authors. At present, the qualification preponderant for these rights is the one stated by Edmond Picard in 1877 according to which inventors’ rights and authors’ rights form a distinct category, the one of intellectual rights, which possess a complex content, regarding intellectual rights as property rights only a conventional way. The theory of intellectual rights as complex rights composed of moral and patrimonial rights has developed, as previously shown, into variants: monist and dualist. The monist or unitary theory does not deny the complex character of copyright but claims that the personality of the author and his creation are tightly linked thus making it impossible to separate the moral from the patrimonial rights or to establish a hierarchy between them. In this approach moral rights represent elements of copyright enjoying the same value and duration as patrimonial rights. Based on this connection the monist system allows the transmission of copyright in its entirety heirs or to persons designated by the author, these enjoying the same absolute moral rights as the author himself. The dualist theory states that moral and patrimonial rights which together compose the content of copyright exist distinctively and are governed by different regulations. It also underlines that the dominant aspect of copyright relies in the moral right. Moral rights outlive patrimonial rights and exert a great permanent influence on them. Moral rights do not lose their validity once the creation was published, on the contrary they continue to be linked to the creation and, obviously, to the author exerting to same extent their influence even after the death of the author or its becoming a public asset v. Roş, V.; Bogdan, D.; Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe. Tratat, (Copyright and related rights. Treaty)* All Beck publishing house, Bucharest, p. 194 - 195.



1988, including the acknowledged right of the author in the United States' legal system in 1976, as well as the right granted to authors by the French, the German and the Romanian legal system<sup>12</sup>. However, irrespective of the legal system that states it, the copyright must be defined and analysed in relation to its beneficiary, i.e. the holder, and the object of protection, respectively the creations that are protected by means of acknowledging this right. For this reason, distinction needs to be made between the protection granted to the author of the creation and the protection granted to the holder of a related right, i.e. the holder of a *sui generis* right. We need to have the same consideration for the fact that when granting protection to each holder, be it the author, the holder of a related right or the holder of a *sui generis* right, a series of rights are granted which are mostly exclusive but also partly less exclusive.

Substantial information regarding the nature of the right can be inferred from the historic analysis of this right. Such an analysis can emphasise either a constant development from origins to present or significant changes that alter the classification and the purpose of the acknowledgement of the rights. The literature analyses the nature of the copyright as follows<sup>13</sup>: (1) as a property right, in this approach the copyright is derived from the natural right (hence the term of intellectual property); (2) as a monopoly right, in this approach the copyright is an acknowledged monopoly exclusively related to carrying out certain economic activities; (3) as a personality right, in this approach the copyright being a right of personality, i.e. the creation of the author is an outcome of his personality, thus, if the personality of the individual must be protected, so does its work, an outcome of this personality; (4) as a *sui generis* right, i.e. acknowledgment of the copyright with a view to protecting his work is *sui generis*, respectively a right that possesses a particular legal nature, uncharacteristic for other rights.

This classification must not be subject to a rigid analysis, due to the fact that it is influenced by the various definitions that it permits. Thus, the right of property can be considered a monopoly, the same way that a monopoly can be considered to have a *sui generis* nature. In case we try to determine the legal nature of copyright by viewing it as a property right, we must consider the fact that the term property allows for various interpretations and that various legal systems interpret the term differently. More precisely, certain assets may be the object of property in some legal systems, whereas in others they may not. Furthermore, we also witness in this case the interdependency between the terms referring to property and monopoly. As previously mentioned, property may also be analysed as a form of monopoly.

---

<sup>12</sup> Sterling, J.A.L. (2003) - *World Copyright Law*, Second Edition, Sweet & Maxwell Publications, London, p. 40.

<sup>13</sup> Sterling, J.A.L. (2003) - *World Copyright Law*, Second Edition, Sweet & Maxwell Publications, London, p. 45;  
Colombet, C. (1997) - *Propriété littéraire et artistique et droits voisins*, 8<sup>e</sup> édition, Editions Dalloz, Paris, p. 12.

The origin of the property theory related to copyright is present also in the writings of John Locke and is further developed by numerous writers, including Diderot. Basically, this approach sees the literary and artistic property as a particular application of personality, maybe with a few exceptions. Diderot argued that either the author is the owner of his creation or nobody is the owner of his own assets. Lamartine considered the copyright to be the holiest property. In 1880, the Court of Causation stated in the Masson case<sup>14</sup> that literary and artistic essentially movable property possesses the same characteristic and must have the same nature as any type of property, except for the limited public interest affecting its duration. Such a property is movable not only where its principal value is concerned but also regarding its products and must, therefore, contribute to the community assets<sup>15</sup>.

The statement that copyright is a monopoly makes no distinction depending on the type of monopoly considered, i.e. market monopoly characteristic to a certain circumstance or legal monopoly characteristic to a certain legal circumstance. Additionally as the sale of goods that do not entail any right related to intellectual property cannot be analysed in the same way in which sale of different goods, for instance books, incorporate certain materials where rights exist irrespective of the object by means of which they are presented to the public. Thus, it is of utmost importance to highlight the fact that in 1887 the Court of Causation sensitive to the idea that, if copyright is exclusively classified a type of property, it will be included in the legal system of corporal property therefore leading to the lack of protection of

---

<sup>14</sup> Colombet, C. (1997) - *Propriété littéraire et artistique et droits voisins*, 8<sup>e</sup> édition, Editions Dalloz, Paris, p. 12.

<sup>15</sup> The division of “intellectual property” from common law property, an extremely important step in the evolution of the discipline, did not take place earlier than the 19th century. It was then that they rightly observed that the result of intellectual creation cannot be equated to the goods that constitute the property object in common law. The rules of common law analysed in order to provide solutions for the protection of intellectual creations have proven unsatisfactory. From this necessary distinction to setting up an adequate terminology for this new institution and for the new legal branch about to be established it only took one step and this was taken by Edmond Picard, who, in an article dating back to 1883, entitled „Embriologie juridique”, suggested to substitute the “the highly criticisable intellectual property” with “intellectual rights” as a distinctive category related to 1) rights corresponding to persons (state and capacity), 2) obligations and 3) real rights. Thus, In France, by means of a ruling from the 25<sup>th</sup> of July 1887 of the Court Of Causation it was retained that “copyright and the monopoly they provide are unjustly designated either in common language or in legal language as «property». Far from being a property like the one defined and regulated for the movable and immovable assets in the Civil Code copyright provide holders with the exclusive privilege of a temporary exploitation: this monopoly of exploitation comprises the right to reproduce and sale of copies of the creations and is regulated by law also constituting the object on international conventions same as the right that results from inventions, industrial designs and models or trademarks and which represents what is known as «industrial property v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe, Tratat (Copyright and Related Rights. Treaty)*, All Beck publishing house, Bucharest, p.3.

moral rights, forfeits the term property and replaces it with monopoly and exclusive rights<sup>16</sup>.

The theory according to which copyright is a personality right stems from Immanuel Kant and since the origin of copyright is associated with the personality of the author the concept of moral right becomes more and more present in this matter.

In what concerns the sui generis right, it has its own nature which does not present any legal connection to other specific rights. The legal concept of sui generis has been analysed in two contexts: firstly, as an explanation to the nature of copyright and secondly, as a description of the right that must be thus distinguished from the copyright and other related rights.

As we analyse the classifications pertaining to the national legal system we must highlight the fact that in certain national systems the law resorts to the legal classification of rights, whereas in other cases it makes no distinction regarding it, the classification being thus inferred or resulting from the legal theories applicable to the respective countries. Furthermore, it is of great importance to distinguish between the existing classifications in certain national laws and the classifications adopted in certain countries by the body of literature. Art L.111-1 of the French code states the fact that the author of an intellectual creation enjoys the incorporeal, exclusive and all-opposing property right arising from the mere creation of it. This right basically includes attributes of an intellectual, moral but also economic order in the system set up by the French Code. Based on this legal provision the courts in France attempted to identify the mark of the author's personality with a view to determine the existence, respectively non-existence, of the protection granted by the code. Subsequent to the invention of computer programmes, the Court of Cassation adopted a much more flexible approach dismissing the mark of the author's personality and referring to the intellectual contribution, i.e. *apport intellectuel*. This approach maintains the fundamental connection between the individual and his work but the personality of the author as a determining criterion in the mechanism of granting protection is removed<sup>17</sup>. The German law states that the copyright protects the author in its personal and intellectual relations where the creation and its usage are concerned. German jurisprudence from the 20th century acknowledges the copyright as a combination of both material elements and immaterial elements without separating property and personality. This is the Monist theory. In the Romanian legal system there is a traditional approach that considers copyright a complex right. Thus, the Law regarding the Press from 1862 acknowledged writers, song writers and creators of artistic creation the right to enjoy the right to reproduce, sell or

---

<sup>16</sup> Colombet, C. (1997) - *Propriété littéraire et artistique et droits voisins*, 8<sup>e</sup> édition, Editions Dalloz, Paris, p. 12.

<sup>17</sup> Sterling, J.A.L. (2003) - *World Copyright Law*, Second Edition, Sweet & Maxwell Publications, London, p. 53.

cede their creations throughout their whole lives, while publishing, reproduction or imitation of a creation is only possible with prior consent of the author. In other words, the Romanian law-maker from 1962 did not combine copyright with property right but adhered to the dualist thesis of copyright. This thesis was shared and developed in our countries literature by professors Aurelian Ionașcu, Constantin Stătescu, Francisc Deak, Stanciu Cârpenaru și Yolanda Eminescu<sup>18</sup>. Decree no. 321 from 1956 states the content of copyright without offering an explicit classification of the right in moral and patrimonial rights. Law 8/1996 ended the controversy relating to the nature of copyright by stating in art 1 that this right is linked to the author's person and bears moral and patrimonial attributes<sup>19</sup>. In other words the law-maker adopted the classification of copyright as a complex right encompassing both moral and patrimonial rights<sup>20</sup>.

With a view to identifying the nature of guaranteed rights, respectively recognised, it is imperious that existing classifications in international and regional instruments be studied. Therefore art 1 of the Berne Convention for the protection of literary and artistic creations refers to the set up the union for protecting authors' rights related to literary and artistic creations. At the same time, the convention refers to granting exclusive rights to the authors.

The nature of these rights granted by the member states is not explicitly specified although it is obvious that both civil rights and any other remedies at the states disposition are taken into consideration. To be more precise the convention leaves it for the member states to define according to their own legal system the legal nature of the acknowledged rights. The convention

---

<sup>18</sup> Classifying copyright as a complex right is adopted in all European countries, especially after, as a result of the Convention of Rome from 1928, it has been adopted also in the text of the Berne Convention (revision which entered into force at the 1<sup>st</sup> August 1931). The United States' signatory the Berne Convention in 1988 represented an important step in generalizing this concept of the nature of copyright and would lead to diminution up to the total removal of the differences between the two main systems of protection of copyright: the continental, which provides prevalence to moral rights, and the *copyright*, where moral rights are, if not completely ignored, acknowledged, baring a reduced significance and not based on special laws but by applying the rules of common law in the field of personality rights v. Roș, V.; Bogdan, D.; Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe. Tratat (Author's Right and Related Right). Treaty*, All Beck publishing house, Bucharest, p. 195.

<sup>19</sup> The creative activity of man is materialized in the creation over which he is granted absolute rights which constitutes a regulation object in the frame of intellectual property. The modern view on copyright shared currently by most legal systems renders this right with a complex content comprising two categories of prerogatives: the first is the capacity reserved for the author to enjoy all immaterial benefits which bring glory, fame, respect and for which his **moral rights** are acknowledged. The second category is the right to financial gain from the usage of his creation for himself and for his descendants wherefor his **patrimonial rights** are acknowledged v. Roș, V.; Bogdan, D.; Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe. Tratat (Author's Right and Related Right). Treaty*, All Beck publishing house, Bucharest, p., p. 194.

<sup>20</sup> v. Roș, V.; Bogdan, D.; Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe. Tratat (Author's Right and Related Right Treaty)*, All Beck publishing house, Bucharest, p., p. 195.

acknowledges the existence of a category of economic rights different from the known category of moral rights.

The universal convention of copyright adopted in Geneva in 1952 emphasis the protection of copyright. Art. 4 states the fact that the rights referred to in art 1, that is copyright, including the base rights which ensure the economic interests of the authors including the exclusive right to authorise, produce, publish and broadcast the creations. Art 5 guarantees an exclusive right referring to the translation of the creation. Notwithstanding, the definition of the legal nature of the acknowledged rights is left for the signatory states, the same as in the case of the Berne Convention.

Section I of part two of the TRIPS<sup>21</sup> agreement is called copyright and related rights. Articles 9(2), 10(2) and 11 refer to protecting copyright. Despite all these, there is no distinct or separate classification of copyright and related right. The distinction between the two results from the analysis and overlapping of these provisions. The Stockholm Convention from 14 July 1967 does the same regarding the establishment of the World Intellectual Property Organisation which in art. 2, refers to the protection of copyright while in art. 5 it mentions copyright without specifically providing a classification of copyright. However, this classification results from an analysis of the provisions of the convention.

Directive no. 91/250/CEE from 14 May 1991 regarding the protection of computer programmes forces member states to protect computer programmes by means of copyright, as well as literary works as understood in the Berne Convention. Directive no. 92/100/CEE from 19 November 1992 regarding the rental and lending right and some related rights in the field of intellectual property refers to the creations in the field of copyright and from other similar fields in the context of the provisions referring to rental and lending rights. Directive no. 93/83 from 27 September 1993 regarding the coordination of certain rules concerning copyright and related rights applicable to satellite broadcasting and cable retransmission refers in art. 7 to the copyright to authorize share his creation with the public via satellite. Art. 5 of the same directive states the fact that protecting related rights with not affect in any way the protection of copyright. Art. 8(1) refers to the holders of copyright and related rights as well as to broadcasting operators via satellite and cable retransmission. Directive no. 93/98 from 29th of October 1993 regarding the harmonisation of the protected duration of the copyright and of related rights refers in art. 1(4) to the acknowledgement of the copyright over collective creations as well as the expiry of the protection granted by means of copyright in art.4. Basically, to conclude, all these directives of the Council of the European Union the word copyright is used in the English version to describe the right granted to

---

<sup>21</sup> Agreement referingl to the aspects of intellectual property rights relating to trade signed on the 15th of April 1994, known as TRIPS – Trade - Relates Aspects of Intellectual Property Rights

authors over original creations. In French, German and other languages the phrase copyright (*droit d'auteur*, *urheberrecht*) is used for the same term. The NAFTA agreement refers in art. 1705 (1)(3) to copyright and related rights without defining these concepts in any way.

From these classifications we can draw the conclusion that in the continental system the classification of copyright, respectively its analysis in a more or less intense relation to the personality of the author, highlights the importance of protection granted by means of human rights with all that this entails. In the common law systems the historic evolution of the copyright concept indicates a much more pragmatic approach closely linked to the concept of advantages to society and reward to the author. The same system brings forth more arguments against the prevalence of copyright. All debates regarding the classification of the rights in this fields take place on a different level between the two systems, the continental and common law, the continental emphasising the inherent character of this fundamental right, whereas common law emphasis the protection of the creation in light of the economic theories referring to market goods.

The rights granted to persons who present creations to the public without being their authors subscribe to the category of related rights or neighbouring rights<sup>22</sup>. Numerous creations do not reach the public except through the intervention of other persons who execute, interpret, direct, record and broadcast by means of phonograms, videograms, scenic performance, radio or television. Performing artists, producers of phonograms and radio broadcasting organisms have claimed the statute of protective creations for their creations and the programmes that they broadcast. In their capacity of authors the protective measures are relatively recent, at least in relation to the protection granted to creation authors and imposed particularly by the development of the modern means to communicate creations.

From a certain perspective the performing artist takes the place, i.e. provides the interface between the author of the creation and the person who records the performance or presents it to the public by broadcasting it. The issue whether the performing artists should enjoy any rights similar to those of the copyright has been a subject of enduring debate. On the one hand, it is claimed that the performing artists does not create anything, or better said, it does not create but presents the creation of another person in his own particular style. For this reason the performing artist would not be entitled to any rights of the same nature as the one acknowledged for the author. On the other hand, it is claimed that the performer can many a time be as creative as the author of the creation he presents thus transforming a mediocre creation into a memorable performance. As a rule, it is an undeniable fact that as the performing artist through his own performance

---

<sup>22</sup> Sterling, J.A.L. (2003) - *World Copyright Law*, Second Edition, Sweet & Maxwell Publications, London, p. 70.

creates a new creation will obtain the status of author. For instance, when inserting an improvisation in his own performance in a totally different from the original creation<sup>23</sup>.

The debates generally underline the situation in which by performing no note or word is added to what was previously written. The tendency in national laws was to offer a different status to the contribution of the performing artist compared to the author and even if he is granted protection this should be different and even diminished in comparison to the one granted to the author. This partially undeniable importance of some records in spreading intellectual creations, the literature has reported hostile opinions regarding their qualification as protected creations in the field of copyright. In order to support this view it has been shown that some record producers carry out a highly significant industrial action for the development of literary and musical culture but that in these cases it does not reflect an intellectual creation. Recordings are the result of mechanical operations where the skills of the technicians who perform them are reflected only in preparing the best conditions to carry out the recordings.

The issue of phonogram protection has been permanently resolved simultaneously with the adoption in 1961 of the Rome Convention for the protection of performing artists, phonogram producers and broadcasting organisms and especially after the adoption in 1971 of the Geneva Convention for the phonogram producers against unauthorised reproduction of their phonograms. Thus, phonograms and their producers are protected in the majority of states by special norms but also in the frame of copyright. However, art.3 of the Geneva Convention does not enforce protection of phonograms in the frame of copyright leaving it to the national laws to choose whether to protect them by granting them a copyright or a specific right by means of laws regarding unlawful competition or by criminal sanctions<sup>24</sup>.

Basically, phonogram producers are granted protection in the continental system by means of a related right while in common law by granting them a

---

<sup>23</sup> The performer is same as the creator an artist, his creation is not an initial creation (primary) but a follow-up creation (secondary) meant to make the initial creation understandable and accessible. The initial creation is presented under a graphic form and provided the secondary creation is a qualitative one it can result in enhancing the beauty of the initial creation. This is remarkable because the importance of the performer's role is at times equal, at times superior even to the importance of the author's role. The performance not pertaining to the initial creation can however not be detached from the secondary creation thus implying a necessary incorporation to the latter. This connection possesses such a profound character that its interpretation or performance displays the special virtue of being able to compromise or to render brilliance to the pre-existing creation v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe, Tratat, (Copyright and related rights)*. All Beck publishing, Bucharest, p.464.

<sup>24</sup> Roş, V.; Bogdan, D.; Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe. Tratat, (Copyright and Related Rights. Treaty)* All Beck publishing house, Bucharest, p. 468-469.

copyright, with the distinction that in the United Kingdom the phonogram does not have to be an original one in order to enjoy protection whereas in the United States it has to be an original one.

The rights of broadcasting organisms are granted protection in continental systems by means of a related right whereas in the United Kingdom they are granted a copyright, with the distinction that also in this case the creation, respectively the programme that they broadcast, does not have to be an original one in order to enjoy protection. In the United States the broadcasting organisms are granted protection by means of a sui generis right and by acknowledging a copyright for the programmes that have as subject original creations. Several states as well as several directives of the Council grant producers of videograms related rights distinctive from the right acknowledged through transfer of cinematographic creations from their authors.

In respect to publishers' rights such related rights are acknowledged as a result of the investment and expertise in the graphic and electronic production of the editions. This protection is regulated in several national laws.

As we analyse the classifications made in this field by the national laws we have to mention that the rights of performing artists and of phonogram and videogram producers and of broadcasting organisms are as previously shown classified in the continental systems as related or neighbouring rights. In the common law system, respectively in the copyright system, performing artists can be acknowledged a separate right distinctive from the acknowledged copyright. In the United Kingdom of Great Britain and in all countries of the Commonwealth phonogram producers and broadcasting organisms have rights pertaining to the copyright category acknowledged.

In the United States audio recordings if and when they are original are protected by means of copyright<sup>25</sup>. In Romania, art. 92 of law 8/1996 states that rights related to copyright do not affect copyright and that, no provision belonging to title 2 of the law (which regulates related rights) must not be interpreted as a limitation to exercising copyright.

---

<sup>25</sup> The word «*copyright*» shows a tendency to replace in common language the phrase «*copyright*». Actually, the word *copyright* has a different meaning and content and the body of literature admits that the phrase is not translatable. Protection in the *copyright* system is characterized by the fact that it **concerns exclusively pecuniary rights of authors, ignoring their moral rights**. In the *copyright* system the right arises through the existence of a copy of an object whereas in the continental system of *copyright* the right arises from the intellectual effort, from the activity carried out by an author, a creator. According to some authors what differentiates between the two systems of protection is the fact that in the continental system of *copyright* the protection focuses on the author whereas in the *copyright* system the focus is on the creation. v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe, Tratat, (Copyright and related rights. Treaty)* All Beck publishing house, Bucharest, p.551.



The terminology adopted in order to denote these rights attempts, respectively hints at, the pre-emption of copyright over related rights. Nevertheless, this tendency to establish a hierarchy is contrary to the interests of authors and those of performing artists that would eventually understand they depend on each other<sup>26</sup>. Therefore, France rejected his hierarchy as it was considered harmful for the partnership that needs to exist between the holders of the two categories of rights. In these circumstances, it is highly significant to mention French jurisprudence in the Furtwangler case<sup>27</sup>, litigation initiated in 1956 and indisputably resolved 1964. The French courts thus retaining that the talent and the genius of the performer entails the same enriching elements as does the novelist, the playwright and the composer and, on this grounds, the judges in the aforementioned ruling concluded that “the artist’s performance is a creation and the performer enjoys copyright”<sup>28</sup>.

In respect to the classification of related rights at an international level it must emphasised that the rule of coexistence between copyright and related right was stated in art.1 of the Rome Convention which provides that “the protection granted under this convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works”. Consequently, no provision of this Convention may be interpreted as prejudice in such protection. Indeed the Rome Convention does not provide a clear classification of rights granted to performing artists as it refers only to granting protection and acknowledgment of rights. The way in which these rights are incorporated into the national legal systems depends on the signatory states. A similar protection mechanism to the one set up by the

---

<sup>26</sup> Roş, V.; Bogdan, D.; Spineanu-Matei, O. (2005) – *Dreptul de autor și drepturile conexe. Tratat, (Copyright and Related Rights. Treaty)* All Beck publishing house, Bucharest, p. 463.

<sup>27</sup> The philharmonic orchestra of Vienna recorded for broadcasting during 1939-1945 several pieces of classical opera, among which Beethoven’s third symphony directed by W. Furtwangler. The recording was seized by the enemy during the Berlin seige according to the Potsdam agreemnet. Later on it was sold to an American company which produced phonograms. This recording was subsequently employed in order to produce disks, some of which were also distributed in France. W. Furtwangler lodged a complaint with the Court of Seine pursued by his descendents requesting the prohibition of the sale of the recording using his name, as he did not consent to its distribution under his name. The Court ruled in favour and obliged the defendant to erase the name Furtwangler from the disk. Later on new action was introduced requesting the withdrawal of the disks from the markets using as an argument the capacity of the orchestra director as a performer and thus breaching his moral right. The Court of Seine by means of a ruling confirmed by the Court of Appeal in Paris decided that the performing artist may forbid any unauthorised performance, that the German broadcast obtained from Furtwangler only the right to broadcast the recording but not the one to reproduce it by manufacturing disks and that the rightful successor could not obtain more rights than the German broadcast so that the unauthorised producers of the disk caused a prejudice which they are liable for v. Roş, V., Bogdan, D., Spineanu-Matei, O. (2005) - *Dreptul de autor și drepturile conexe, Tratat, (Copyright and related rights. Treaty)* All Beck publishing house, Bucharest, p.463.

<sup>28</sup> Eminescu, I. (1997) – *Dreptul de autor (Copyright)*, Lumina Lex publishing house, Bucharest, p. 94.

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, adopted in Rome on the 26th October 1961, is to be found also in the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms, adopted in Geneva on the 29th October 1971. Romania adhered to the Rome Convention by means of Law no. 76 from 1998<sup>29</sup> and to the Geneva Convention by means of Law no. 78 from 1998<sup>30</sup>.

This convention refers to the protection of producers against certain crimes (for instance, duplication without previous agreement or consent), however the way in which the convention is implemented depends on the national laws of each signatory state. What the convention essentially accomplishes is the acknowledgment of a copyright or of another specific right by protecting against unfair competition, respectively by protecting criminal law instruments. The TRIPS Agreement, more precisely in title section 1 of part 2, refers to “copyright and related rights” thus distinguishing between granted rights, which are acknowledged to authors of literary, scientific and artistic works according to the Berne Convention for the Protection of Literary and Artistic Works, and the rights of performers, phonogram producers and broadcast organisation included in the category of related rights. The World Intellectual Property Organisation Performances and Phonograms Treaty adopted in Geneva on the 20th December 1996 at the diplomatic conference of WIPO referring to certain aspects of copyright and related rights that came into force on the 20th May 2002 mentions the protection of beneficiaries and their rights but does not classify their rights as being neighbouring or related to copyright.

Directive no. 92/100/CEE from the 19th November 1992 referring to rental and lending rights on certain rights related to copyright in the field of intellectual property protection<sup>31</sup> makes reference to various rights related to copyright in the field of intellectual property protection. Art. 6, 7, 8 and 9 address the regulation of certain rights denominated as rights related to copyright. Therefore, this directive distinguishes between rights acknowledged to authors of literary and artistic works on the one hand, and rights acknowledged to performers on the other hand. This distinction can also be observed in directive no. 83/93 from the 27th September 1993 concerning the coordination of certain rules regarding copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission<sup>32</sup> as in directive no. 98/93 from the 29th October 1993

---

<sup>29</sup> published in *Official Monitor* no. 148 from 14.04.1998.

<sup>30</sup> published in *Official Monitor* no. 156 from 17.04.1998.

<sup>31</sup> published in *The Official Journal of the European Union* no. L 346/27.11.1992, p. 0061-0066.

<sup>32</sup> published in *The Official Journal of the European Union* no. L 248/06.10.1993, p. 0015-0021.

concerning harmonizing the term of protection of copyright and certain related rights<sup>33</sup>.

From the analysis of this classification one can draw the conclusion that the distinction between copyright and the rights related to it cannot have extremely obvious effects. Nevertheless, it should be mentioned that, on the one side copyright is perceived at least within continental systems, civil law systems, as tightly linked to the personality of the author, therefore he is automatically granted the protection specific to these rights. On the other hand, where related rights of producers are classified based on the protection of investment and organisational talents, the concept of personality is absent, therefore the protection mechanism relies on economic and commercial aspects. The very same situation applies to broadcasting mechanisms. These classifications of related rights also include the performers, thus subjecting them to the same exceptions, limitations, restrictions of the term of protection as are holders of copyright. The reason behind these classifications is to an extent a historical one, but often leads to a series of anomalies. For instance, the question arises naturally as to why the work of an author needs protection throughout his lifespan plus a considerable period after his death whereas the performance of a performer is only protected for a limited period during his life although it is very likely that his performance will be the object of an unauthorised use beyond this period of protection.

In respect to sui generis rights it must be emphasised that recently the phrase sui generis, i.e. the rights which possess a specific nature, was applied to categories of rights acknowledged in relation to certain productions which are viewed differently than the productions protected by means of copyright and related right. For this reason the possibility and the desire to grant a certain protection by means of sui generis rights instead of copyright or related rights causes much controversy. Mainly, the rights in this field which fall under the classification sui generis include the right over pictures, material and information, which are not original, however national legal systems may grant a related right in this field. Two such examples are rights acknowledged to producers of databases. The information contained in technical, legal, financial and commercial databases etc. is the result of a high expenditure related to the collection, coding, valorisation and protection of these rights. The rights granted and acknowledged to authors of such databases reward this effort enjoying protection taking into consideration the investment and their utility.

Furthermore, previous to the establishment of the protection system by means of acknowledging a sui generis right in this field databases represented and were protected as applications of compilations displaying the same originality issues but on a different scale. Their protection by

---

<sup>33</sup> published in *The Official Journal of the European Union* no. L 290/24.11.1993, p. 0009-0013.

means of copyright was accepted based on economic grounds in order to protect the investments and to cover expenses. However, it has been observed that a strict application of the principles governing copyright will inevitably lead to losing protection granted by copyright in the case of most databases if not all of them. This was due to the fact that selection of material and data included in the database did not always bear the trademark of the author's personality as databases have a tendency to exhaustive, i.e. together all information referring to a certain area, a certain subject. The attempt to protect the database by means of copyright triggered either a reassessment of the essential principles applied in this field, respectively a new definition of originality, or the granting of a rather theoretical protection. Faced with these shortcomings the solution was to regulate distinctively by granting databases a sui generis right.

In any case, in this field, we should not disregard the persons in connection to the databases: the author of each work included in the database, the person, who selected and laid out the material as it appears in the database, as well as the person who invested in the production of the database. The first two persons can enjoy the protection granted by copyright, at least to the extent to which we deal with an original creation whereas the author of the database, the last person, can enjoy a sui generis right according to the directive no. 96/9/CEE on the legal protection of databases<sup>34</sup>. From this reason it must be emphasised that the sui generis right of database producers stem from this directive. Taking into consideration the fact that, this directive classifies the right of database producers as a sui generis right, so will each of the national legal systems when transposing the directive. More precisely, in those cases where the directive generates direct effects the classification from the directive will be applied, as for the rest of cases the classification of the right acknowledged to database producers may vary.

Consequently, the French legal system transposed directive no.96/9/CEE regarding the legal protection of databases into its internal system by the law adopted on the 1st of July 1998. According to this law "the person, who initiates and takes on the risks of corresponding investment benefits from the protection of the database content when its establishment, evaluation and presentation reflect a substantial financial, material or human investment". Thus, the object of protection of this law is the financial, material or human investment and not a simple data compilation. Art. 112-3 of the French intellectual property code defines the database as "a collection of works, of data or of other independent elements laid out in a systematic or methodical manner and individually accessible through electronic means or any other means." In Romania Law no.285/2004, following the pattern of the aforementioned directive, introduced in title 2 of Law no.8/1996 a new chapter 6 entitled "sui generis rights of database producers". According to art 122 point 1 paragraph 2 "by database we understand the collection of

---

<sup>34</sup> published in *The Official Journal of the European Union* no. L 77/20 from 1st April 1996, p. 0028-0035.

works, of data or of other independent elements, protected or not by copyright or related rights, laid out in a systematic or methodical manner and individually accessible through electronic means or any other means”.

Also worth mentioning is the fact that directive 96/9/CEE regarding the legal protection of database locates the right of database in chapter 3 subtitle sui generis right. As a consequence of the classification in the field of sui generis rights it stands out that there is apparently no grounds for which sui generis rights should hold a less significant status than the one acknowledged to copyright and related right. Nonetheless, sui generis rights are acknowledged for a shorter period than the one corresponding to copyright. Moreover, in this field the arguments for acknowledging this right are far closer to the case of inventions and industrial designs, thus leading to the application of a protective regime for a limited period of years, and not for the duration corresponding to the lifespan of the author plus a certain period of time. In the field of sui generis rights the effects of directive no. 87/54/CEE from the 16th December 1986 on the legal protection of topographies of semiconductor products<sup>35</sup> carry a crucial significance as law-makers acknowledge that even in the case of topographies of semiconductor products we are dealing with a sui generis right established in the favour of their producers<sup>36</sup>.

In order to determine the protection in the field of industrial property, respectively the nature of the rights guaranteed in this area, we must take into consideration the fact that the works, the creations which constitute the object of protection in this field represent, similar to the other creations protected under the umbrella term intellectual property, products of human creating activity, respectively the result of rational thinking, knowledge and activity, of human capacity to come up with and notice concepts and to operate with abstract notions<sup>37</sup>. Industrial property first and foremost

---

<sup>35</sup> published in *The Official Journal of the European Union* no. L 024/27.01.1987, p. 0036-0040.

<sup>36</sup> Sterling, J.A.L. (2003) - *World Copyright Law*, Second Edition, Sweet & Maxwell Publications, London, p. 79.

<sup>37</sup> In category of “intellectual rights” comprises copyright and related rights as well as “industrial property rights”. In turn the latter are divided in three categories: the first has as object the rights related to the rights of authors of industrial designs and models, technical creations patented as inventions, the protection of new species of plants and animals, the protection of the topographies of integrated circuits and the protection of confidential information; the second has as object the distinctive signs which include trademarks, geographic indications, commercial names and companies; the third related to unfair competition additionally annexed to new creations and distinctive signs and which is the object of study of a separate discipline. The main idea that leads to the establishment of intellectual protection and to the creation of a new legal branch is that these spiritual products cannot be protected against their use by other persons in the way that material goods are protecting by mere possession. Once the product of intellectual creation is made available to the public its creator can no longer exert control over the use of his work. v. Roş, V.; Spineanu-Matei, O.; Bogdan, D. (2003) – *Dreptul proprietăţii intelectuale. Dreptul proprietăţii industriale, mărcile şi indicaţiile geografice, (Intellectual Property*

protects intellectual and content-related creations applicable industrially, also known as “utility creations”. When specifying the object of protection, the Paris Convention from 1883 concerning Industrial Property Protection and the Stockholm Convention for the Establishment of the World Intellectual Property Organisation added to these creations trademarks, geographic indications, commercial names as well as protection against unfair competition, the TRIPS agreement, including confidential information<sup>38</sup>.

Similarly, the French literature, when analysing industrial property makes a subdivision into larger fields: the right of industrial creations and the right of distinctive signs<sup>39</sup>. Basically, the field of industrial creations includes protection granted to industrial designs and models, to utility industrial creations and inventions, to new types of plants, to invention through utility models and to topographies of semiconductor products<sup>40</sup>, whereas the right of distinctive signs comprises the protection of marks, geographical indications, commercial names, emblems and domain names<sup>41</sup>.

For this reasons, with a view to identify the nature of the rights guaranteed in the field of industrial property we shall focus our analysis on the legal nature of the inventor’s right and on the legal nature of the right on marks while comparing them to the other intellectual property rights especially to the protection granted by copyright. The issue regarding the legal nature of the right to mark was the object of heated dispute. The dispute tackled even the inclusion of the marks in industrial property although none of the European or international legal systems took this into consideration maintaining marks within industrial property. Paul Robier was the first to contest the right to client. Similarly, the right to mark was considered an exclusive right of exploitation, a right to client, a personality right, a monopoly right and even a competition right.

Currently however, there is less focus on the qualification of right to mark, but more a detailed analysis of the content of this right with a view to identifying the effects that have real consequences of the right to mark. At

---

*Right. Industrial Property Right, Trademarks and Geographical Indications*) All Beck publishing house, Bucharest, p. 5.

<sup>38</sup> Roş, V.; Spineanu-Matei, O.; Bogdan, D. (2003) – *Dreptul proprietăţii intelectuale. Dreptul proprietăţii industriale, mărcile şi indicaţiile geografice, (Intellectual Property Right. Industrial Property Right, Trademarks and Geographical Indications)* All Beck publishing house, Bucharest, p. 27.

<sup>39</sup> Chavanne, A.; Burst, J.-J. (2006) - *Droit de la propriété intellectuelle*, 6<sup>e</sup> édition, Editions Dalloz, Paris, edition completed by Jacques Azéma and Jean Cristophe Galloux, p. 79 and p. 737.

<sup>40</sup> Dănilă, L. (2008) – *Dreptul de autor şi dreptul de proprietate industrială, (Copyright and Industrial Property right)* C. H. Beck publishing house, Bucharest, p. 237, 254, 275, 277, 285.

<sup>41</sup> Dănilă, L. (2008) – *Dreptul de autor şi dreptul de proprietate industrială, (Copyright and Industrial Property right)* C. H. Beck publishing house, Bucharest, p. 185, 225, 230, 233 and 234.

the beginning of the last century, the right to mark was viewed as a genuine property right and it still is, as explicitly shown by some legal systems. Thus, Thierry van Innis argued that “the right to mark is to be analysed as a genuine property right”<sup>42</sup>. At the same time, in the French Intellectual Property Code, art. 713-1 it is stated that “mark registration offers holders a property right over this mark with the products that it designates.” The Romanian law-maker has been more reserved avoiding to explicitly qualify the right on marks as a property right, however in art 35. of Law 84/1998 it states that “registering a mark offers its holder an exclusive right over the mark.” The legal systems in Belgium, Luxemburg and the Netherlands acted similarly; their uniform law on mark qualifies the right to mark as an exclusive right. Obviously this qualification did not prevent the literature from considering the right to marks as a property right supporting this view with the following arguments: the right to mark combines all the attributes of a classical property right: *usus*, *fructus* and *abusus*. In virtue of the rights acknowledged by the law the holder of the mark is the only one capable of disposing and ceasing it as he pleases. He is also the sole beneficiary of the financial gains resulting from the exploitation of the mark, exploitation which may be done personally or under licence agreement. It is also worth mentioning the fact that the holder of the mark may abandon it or may adopt an attitude leading to the loss of the mark. Secondly, even if the right to mark is subject to certain time and space limitations specific to its nature, these limitations can also be found in the case of other classical property rights which do not affect the essence of the right. Baring these arguments in mind, we also need to consider international regulations in the field of the legal nature of the rights of distinctive signs. The Paris Convention for the protection of industrial property includes marks in the category of industrial property goods. In the preamble of the TRIPS Agreement the signatory states acknowledge the fact that “intellectual property rights are private rights”.

In the Romanian legal system the right to mark is obtained by registering the sign chosen by the applicant, registration which grants the holder an exclusive right over it. However, registration of the sign is preceded by a pre-registration on the side of the applicant which is sufficient in order to obtain the right over this sign, but in the attributive system this represents only the first phase in obtaining the right. Through the registration of the sign the applicant acquires an exclusive usage right which limits the usage of this sign in relation to the product or service that it designates. Nevertheless, the right to mark remains even in the attributive system a mere pre-reservation right thus bringing benefit to the first person to register it. This is due to the fact that if this sign is free, i.e. available, and all other

---

<sup>42</sup> Innis, Thierry v. (1997) – *Les signes distinctifs*, Editions Bruylant, Bruxelles, p. 329, quote from Roş, V.; Spineanu-Matei, O.; Bogdan, D. (2003) – *Dreptul proprietăţii intelectuale, dreptul proprietăţii industriale, mărcile şi indicaţiile geografice, (Intellectual Property Right. Industrial Property Right, Trademarks and Geographical Indications)* All Beck publishing house, p. 24.

basic conditions for its registration as a mark are met, the administrative authority can deny the issuing of the registration certificate. The right to mark granted by registration has a particular character also in relation to other industrial property rights due to the fact that its object and function are not to grant a monopoly over a distinctive name but to facilitate commerce and to ensure costumers' protection.

The right to mark does not protect the sign itself since commerce is protected and not the mark. What is relevant in this analysis is the fact that choosing a mark does not imply any act of intellectual creation and does not suppose any novelty, originality or inventive activity. Therefore, it is not included in the category of rights deriving from utility creations or new creations as some authors call them: inventions, industrial designs and models. As previously mentioned the right to mark belongs to the category of distinctive signs, a subcategory, in case it can be called like that, of industrial property right. In case a similar sign comprises an original graphic or verbal creation it is susceptible of protection also under copyright. If it belongs to a third person it can be registered as a mark only if the patrimonial rights have been transmitted to the applicant of the mark registration by the author of the creation through a written cession agreement according to art.42 of the Romanian Copyright Law 8/1996.

In the case of distinctive signs the legal nature of the right must be determined considering the fact that we are dealing with a way of respecting each competitor's rights over the distinctive signs of his activity in relation to the other competitors. Therefore, the object of protection represents the prevention of direct competitors from using the holder's sign, thus also eliminating confusion among consumers. For this reason the holder of the distinctive sign is acknowledged the right to use it for his products and services and to maintain his clients. Unlike the invention patent mark registration protection does not grant a right of unlimited exclusive exploitation. The protection covers a range of product categories; the probability may arise different products carry the same sign without it constituting a breach of right to mark.

Furthermore, the right over distinctive signs holds an advantage in relation to the right over invention, respectively it can be extended for an unlimited duration, extension which can be granted at the request of the holder who in his turn can thus strengthen his position in relation to its direct competitors. In the case of inventions after the expiry date of the patent it becomes a public asset or can be used by anyone without any restriction. In the field of inventions, the most relevant area in new creations, creators or their successors are granted protection over their creations. The protection of patented inventions by means of a patent generates an exploitation monopoly in favour of the patent holder granting him the right to forbid anyone from exploiting the invention without his approval.

As regards industrial creations an important aspect is that the right of exclusive exploitation of an invention is an absolute right which allows the



holder to forbid anyone from using the invention without this approval. In comparison to this, the right over distinctive signs is a relative one. It is not opposable erga omnes as a right but only to direct competitors of the holder of the mark<sup>43</sup>. In an attempt to justify the protection granted to inventions the natural right of the inventor over the product or the intellectual creation has repeatedly come up. Other authors argue that the patent can play the role of a reward. The most frequent justification remains the public benefit that granting exploitation monopoly to the patent holder entails<sup>44</sup>.

Over time numerous theories, very similar to the already existing theories in the field of copyright, have been elaborated regarding the legal nature of the subjective right of the inventor: property right, sui generis right, right to client, inventor's personality right. As in the case of copyright it has been argued that the subjective right of the inventor would be a personal non-patrimonial right which has patrimonial consequences<sup>45</sup>. Another approach claims that the subjective right of the inventor is not a proper right affecting an incorporeal good destined for industrial usage since establishing its legal nature equates with establishing the legal nature of the exploitation right which is a proper right<sup>46</sup>.

However, irrespective of the theory we embrace, we need to keep in mind that the inventor becomes the holder of moral as well as patrimonial rights, moral rights even if not explicitly regulated by the law can be easily deduced, i.e. the right to public disclosure of the invention, the right to acknowledgement of the author of the inventions, the right to name, the right to the issue of a protective title or to mentioning the name in the patent, the right to the issue of a copy of the patent of invention. In case of the patrimonial rights of the patents holder we need to mention the fact that they do not differ considerably from one legal system to another including the following patrimonial rights: the right to priority, the exclusive right to exploitation of the invention and the temporary right to exclusive exploitation of the invention. The right to priority is regulated in the Romanian legal system in art. 17 of Law 64 from 1991 which states that the establishment of the national regulatory deposit of the invention ensures a

---

<sup>43</sup> Roş, V.; Spineanu-Matei, O.; Bogdan, D. (2003) – *Dreptul proprietăţii intelectuale, dreptul proprietăţii industriale, mărcile şi indicaţiile geografice, (Intellectual Property Right. Industrial Property Right, Trademarks and Geographical Indications)* All Beck publishing house, p. 26.

<sup>44</sup> Bentley L., Sherman B. (2002) – *Intellectual Property Law*, Oxford University Press, Oxford, p. 313, quoted by Olteanu G. (2008) – *Dreptul proprietăţii intelectuale, (Intellectual Property Right)* second edition, C. H. Beck publishing, p. 172-173.

<sup>45</sup> Ionaşcu, A. (1961) – *Dreptul de autor în legislaţie, Revista Justiţia Nouă, no. 6/1961*, (Copyright in current law, New Justice Magazine) quoted from Olteanu, G. (2008) – *Dreptul proprietăţii intelectuale, (Intellectual Property Right)* second edition, C. H. Beck publishing, p. 173.

<sup>46</sup> Mihai, L. (2002) - *Invenţia. Condiţiile de fond ale brevetării. Drepturi, (The Invention. Content-related conditions affecting patents. Rights)* Universul Juridic publishing house, Bucharest, p. 96.

right to priority over any deposit related to the same invention established at a later date or with a known later date of priority.

In the same field of new creations or utility creations, as French literature calls them, it is important to highlight the fact that from industrial designs and models arise not only moral rights but also patrimonial rights. In this respect moral rights are: to decide if, how and when the work is to be released to the public, to claim the acknowledgment of the capacity of the author, to decide on the name assigned to the work when released to the public, to claim respect for the integrity of the work and to oppose any modification as well as any alteration brought to the work that may cause prejudice to its honour or reputation and to withdraw the work and, if necessary, offering compensation the holders of exploitation rights prejudiced by the withdrawal. Patrimonial rights include: the right to decide whether to use or exploit the work, the right to decide in what way to use or exploit the work, the right to consent to others' using the work or to distinctive and exclusive authorisation rights, as well as to resale royalty. The field of industrial designs and models presents a similar context to distinctive signs when encompassing an original graphic or verbal creation. As previously mentioned there is a cumulus of protection, the author of industrial designs and models thus enjoys rights arising not only from his capacity of author but also rights arising from the registration of the industrial model and design with the Romanian Patent Office (OSIM). If we attempt to analyse the legal nature of the acknowledged rights, of the patrimonial rights of authors of new creations, respectively utility creations, we must bear in mind that both moral and patrimonial rights arise, the moral patrimonial rights borrow from the nature of the non-patrimonial rights of the creators of works in the field of copyright, whereas the patrimonial rights fall under the specific rules in the field of industrial property. Therefore, after expiry of the validity the creation becomes a public asset, so that it can be used by anyone without any restriction with the exception of the case where we have a cumulus of protection granted by copyright.

**Literature:**

- Azéma, J.; Galloux, J.-Ch.: *Droit de la propriété industrielle*, Paris: Editions Dalloz, 2006, 964 pages, ISBN 224 704126 4.
- Colombet, C.: *Propriété littéraire et artistique et droits voisins*, Paris: Editions Dalloz, 1997, 463 pages, ISBN 978-2-247-01124-7.
- Eminescu, Y.: *Tratat de proprietate industrială vol. I Creații noi*, București: Editura Academiei Republicii Socialiste România, 1982, 200 pages.
- Roș, V.; Spineanu-Matei, O.; Bogdan, D.: *Dreptul proprietății intelectuale. Dreptul proprietății industriale. Mărcile și indicațiile*

*Dny práva – 2009 – Days of Law: the Conference Proceedings, 1. edition.*  
*Brno : Masaryk University, 2009, ISBN 978-80-210-4990-1*

geografice, București: Editura All Beck, 2003, 746 pages, ISBN 973-655-246-2.

- Roș, V.; Bogdan, D.; Spineanu-Matei, O.: Dreptul de autor și drepturile conexe. Tratat, București: Editura All Beck, 2005, 725 pages, ISBN 973-655-571-2.
- Schmidt-Szalewski, J.; Pierre, J.-L.: Droit de la propriété industrielle, Paris: Editions du Juris-Classeur, 2003, 694 pages, ISBN 2-7110-0315-9.
- Sterling, J.A.L.: World Copyright Law, London: Sweet & Maxwell, 2003, 1321 pages, ISBN 0 421 790 709.

**Contact – email**

*alinsperiusivlad@svs-partners.com*