

“sair” da irracionalidade, utilizando directivas hermenêuticas precisas, que clarifica o papel dos argumentos jurídicos, quer como cânones interpretativos, quer como argumentos justificativos, dos quais não há razões visíveis que nos levem a prescindir deles, até porque, além do mais, aquilo que os viria substituir parece apresentar traços ainda mais imprecisos.

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## *What if IP is abolished? – Does the Charter of Fundamental Rights of the EU make any difference?\**

MESTRE NUNO SOUSA E SILVA

[nsousaesilva@gmail.com](mailto:nsousaesilva@gmail.com)

SUMMARY: 1. Introduction. 2. Trademarks (sort of) out of the polemic. 3. What does Intellectual Property mean under article 17(2) ECFR? 4. The scope of article 17 (2). 5. Conclusion.

### 1. Introduction

There are several provisions of international treaties (or declarations) on human rights that relate to Intellectual Property (IP). IP might be presented as “the protection of the moral and material interests resulting from any scientific, literary or artistic production”<sup>1-2</sup>, as property<sup>3</sup> or “as an end in itself”<sup>4</sup>. These perspectives are not incompatible, since one does not necessarily exclude the other.

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<sup>1</sup> Universal Declaration of Human Rights [1948] UNGA Res 217 A(III) (UDHR) Article 27(1) and, in very similar terms, International Covenant on Economic, Social and Cultural Rights [1966], G.A. res. 2200A (XXI) (ICESCR) Article 15.

<sup>2</sup> We are left to wonder whether that covers only copyright, copyright and patents or more fields of IP law. Paul Torremans, ‘Copyright (and Other Intellectual Property Rights) as a Human Right’ in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer 2008) 215, believes that only copyright is covered by this provision. The other IP rights are to be treated as a form of property. Estelle Derclaye, ‘Intellectual Property and Human Rights: Coinciding and Cooperating’, in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer 2008) 139, states that “not only creations but also inventions are classified as human rights”, and clarifies (fn.22) that although only “authors” are mentioned, the term “scientific production” “is deemed to also encompass inventors and designers”.

<sup>3</sup> European Convention on Human Rights, First Protocol to the Convention, Article 1 and the case law analyzed *infra*.

<sup>4</sup> Charter of Fundamental Rights of the European Union [2000] OJ C 364/01 (CFREU) Article 17 (2). The expression is the title of Alexander Peukert’s article: ‘Intellectual property as an end in itself?’ [2011] EIPR 67.

Normally, the provisions that allude to IP, hence (even if only implicitly) to an exclusive right, i.e., a right to forbid<sup>5</sup>, are associated with other freedoms or objectives such as the freedom “to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”<sup>6</sup>.

From this association it seems clear that certain restrictions arise<sup>7</sup>. It has also been pointed out that the international human rights system can be used as a basis for allowing certain exceptions and limitations to Intellectual Property, solving conflicts or allowing an equitable balance<sup>8</sup>. As stated by the UN Sub-Commission on the Promotion and Protection of Human Rights in a resolution of 2000: “(..) there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS agreement, on the one hand, and international human-rights law, on the other”<sup>9</sup>. And, indeed in several field of IP (most notably copyright) Human Rights have been used to carve out extraneous exceptions, i.e. exceptions that were not found in IP laws<sup>10</sup>.

At the same time the embedding of such considerations in the provisions relating to Intellectual Property constitutes not only a limit to the expansion of IP protection as a whole. It also sets a direction, an objective to the system and, even, a standard under which to judge it<sup>11</sup>.

An apparently different approach is found in the European instruments. The European Charter of Human Rights (ECHR) has no direct mention to IP.

<sup>5</sup> IP has a common feature, its negative nature. This aspect might not be helpful when trying to associate it with a positive message.

<sup>6</sup> See The same provisions mentioned in note 1.

<sup>7</sup> See François Dessemontet, ‘Copyright and Humand Rights’ in Jan Kabel and Gerard Mom (eds.), *Intellectual Property and Information Law* 113, Audrey R. Chapman, ‘Approaching intellectual property as a human right: obligations related to Article 15 (1) (c)’ [2001] Copyright Bulletin 4 and Peter K. Yu, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’ [2007] U.C. Davis Law Review 1039, 1071.

<sup>8</sup> Namely conflicts between the right of privacy and enforcement of IP, copyright and/or trademarks and freedom of expression. Listing the conflicts and providing a brief analysis, see e.g. Derclaye (n2) 141 ff.

<sup>9</sup> Sub-Commission on Human Rights resolution 2000/7 of August 17, 2000, available at <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?OpenDocument>> accessed 8 April 2013.

<sup>10</sup> An example is the Dutch decision *Dafurnica* analysed by Lucie Guibault, ‘The Netherlands: Darfurnica, Miffy and the right to parody!’ [2011] JIPITEC 236 or the two French trademarks cases (E\$\$o and “jeboycottedanone.com”) mentioned by Christophe Geiger, ‘Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?’ [2004] IIC 268.

<sup>11</sup> On the possibilities to change the expansionist trend see Annette Kur and Henning Grosse Ruse-Khan, ‘Enough is Enough – The Notion of Binding Ceilings in International Intellectual Property Protection’ (2008). Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-01. <<http://ssrn.com/abstract=1326429>> accessed 07 April 2013.

However, it has been decided that, to this effect, IP will be treated as property, covered by Article 1 of the First Protocol<sup>12</sup>.

Article 17(2) of the Charter of Fundamental Rights of the European Union (CFREU) is laconic, stating: “IP shall be protected”. It has been said that this is a “mysterious provision with an unclear scope”<sup>13</sup> and concerns that this provision was an expression of a growing maximalism, viewing the protection of investment as something self-justified, were voiced<sup>14</sup>.

At the same time IP, particularly copyright<sup>15</sup>, is more and more disregarded. It risks losing its normative nature as it grows unbalanced<sup>16</sup> and is increasingly being depicted as absurd<sup>17</sup>. The association of IP with Human Rights, as has been pointed

<sup>12</sup> *Smith Kline and French Laboratories Ltd v. the Netherlands*, no. 12633/87, Commission decision of 4 October 1990, (“The Commission finds that a patent accordingly falls within the scope of the term ‘possessions’ in Article 1 of Protocol No. 1”), *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 72 (“Article 1 of Protocol No. 1 is applicable to intellectual property as such”).

<sup>13</sup> Christophe Geiger, ‘Intellectual property shall be protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: a mysterious provision with an unclear scope’ [2009] EIPR 113.

<sup>14</sup> These have now been pacified since the CJEU has adopted a balancing approach. For instance in Case C-275/06 *Promusicae* [2008] OJ C64, §68 it was said that Member States should “rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order” [including IP]. This has further been confirmed in Case C-360/10 *Sabam* [2010] OJ C288 and Case C-70/10 *Scarlet Extended* [2011] (at §55: “...in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction...”).

<sup>15</sup> Jane C. Ginsburg, ‘Essay – How Copyright Got a Bad Name For Itself’ [2002] Columbia Journal of Law and the Arts <<http://ssrn.com/abstract=342182>> accessed 09 April 2013, states, “I have a theory about how copyright got a bad name for itself and I can summarize it in one word: Greed”. HL MacQueen, ‘Towards Utopia or Irreconcilable Tensions? Thoughts on Intellectual Property, Human Rights and Competition Law’ [2005] SCRIPTed 453 <<http://www.law.ed.ac.uk/ahrc/script-ed/vol2-4/hlm.asp>> accessed 09 April 2013: “Intellectual property is, on any view, in crisis.”

<sup>16</sup> Showing that in the US Context see John Tehranian, ‘Infringement Nation: Copyright Reform and the Law/Norm Gap’ [2007] Utah Law Review <<http://ssrn.com/abstract=1029151>> accessed 07 April 2013 and Siva Vaidhyanathan, *Copyrights and Copyurongs: The Rise of Intellectual Property and How It Threatens Creativity*, (NYU Press 2001).

<sup>17</sup> As an example, the website <http://www.totallyabsurd.com/lists> US’ most absurd patents and inventions. Of course that, as Robert Brauneis, ‘Copyright and the World’s Most Popular Song’ [2010] GWU Legal Studies Research Paper No. 1111624 <<http://ssrn.com/abstract=1111624>>, 58, points out, in some of these cases we are dealing with incomplete or distorted information, the Author calls this the risks of anecdotes: “Anecdotes can have great persuasive power in law as in other areas of life, because they are engagingly concrete – what actually happened to a real, named person, or a particular song, is more engrossing, and seems more authentic, than statistics and generalizations. Yet if anecdotes are not true, or are not typical, they may give a distorted impression of the world, and may obscure the difficult policy choices that actually need to be made in a given area.”

out by Christophe Geiger<sup>18</sup>, “can offer a remedy for the overprotective tendencies of intellectual property and can help this field of law recover its legitimacy”. However, for that to happen, one has to recognize certain limits to this expansion and peruse the actual laws’ compatibility with the Human Rights system.

The rise of the so-called “pirate parties”<sup>19</sup>, that advocate either abolition or change of the extent of IP, is a good motive to question whether there is a fundamental core of IP that cannot be changed and that has to be guaranteed, such as a minimum duration of copyright, a certain scope of patent rights, the protection of investment or the moral rights of authors.

I will address the IP protection effect (if any) of the Human Rights provisions that mention it directly or indirectly, looking at the convergences and not at the conflicts<sup>20</sup>. My analysis will concentrate specifically in understanding Art. 17 of the European Charter of Fundamental Rights<sup>21</sup>. The question to be answered is whether Intellectual Property is, nowadays, a necessary result of the human rights system. Or, in a nutshell: could IP be abolished without violating the International Human Rights System? What has to subsist and what can be abolished?

## 2. Trade marks (sort of) out of the polemic

Trade marks seem to be out of the polemic<sup>22</sup>. They are normally not mentioned by the abolitionist movements and don’t seem to be the concern of most Human

<sup>18</sup> “Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union’, [2006] IIC 371, 374.

<sup>19</sup> These have mainly followed the Swedish *Piratpartiet*, created in 2006. According to the Wikipedia, these parties have been started in more than 40 countries and in 7 of those they have elected representatives ([http://en.wikipedia.org/wiki/Pirate\\_Party](http://en.wikipedia.org/wiki/Pirate_Party)). In 2010 “The Pirate Parties International” was founded. It presents itself as “an organization supporting the Pirate Parties around the world. The PPI offers a common resource for international collaboration and can provide help to form a local party in your country”, <http://www.pp-international.net/about>.

<sup>20</sup> This is the basic dichotomy when looking at the relationship/framework between IP and Human Rights. Cfr. Laurence R. Helfer, ‘Human Rights and Intellectual Property: Conflict or Coexistence?’ [2003] *Minnesota Law Review* 47 ff.

<sup>21</sup> According to Jonathan Griffiths and Luke McDonagh, ‘Fundamental Rights and European IP Law – the case of Art 17(2) of the EU Charter’, in Christophe Geiger (ed), *Constructing European Intellectual Property: Achievements and perspectives* (Edward Elgar 2013) 81, there are close similarities in the structure of article 17 (2) and Art.1, Protocol 1 ECHR, that will render the jurisprudence of the Strasbourg’s Court useful to solve “some of the current uncertainty concerning the meaning and scope of Art 17 (2)”.

<sup>22</sup> Which might be a neglected but important aspect, mainly after decisions such as Case C-487/07, *United Brands* [2009] ECR I-05185. As *Kyr/Bentley/Ohly* ‘Sweet Smells and a Sour Taste –

Rights instruments. However trade marks, and even trade mark applications, are considered property under the ECHR<sup>23</sup> and they are beyond doubt IP, hence covered by Article 17 (2) of the European Charter of Fundamental Rights.

## 3. What does Intellectual Property mean under article 17(2)?

Defining IP is a challenge, if not an impossible task.

The Paris Convention<sup>24</sup>, in its Article 1(2), states that “The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition”. The TRIPS Agreement<sup>25</sup> adopts a perspective that “the term “intellectual property” refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.”, even if certain categories, like GIs or the protection of trade secrets (“undisclosed information” as defined in article 39(2) TRIPS) are of a very contentious nature. Similarly, Commission Regulation (EC) No 772/2004<sup>26</sup>, defines intellectual property rights as including “industrial property rights, know-how, copyright and neighbouring rights”<sup>27</sup>. These are all functional definitions; they consider IP as an umbrella-term for specific regulatory purposes<sup>28</sup>.

What can be extracted from these definitions when interpreting Article 17(2) of the Charter is therefore limited. There are some rights that are beyond doubt IP. The “untouchables” are copyright, trademarks and patents. However, more

The ECJ’s *L’Oréal* decision’ [2009] Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper No. 09-12; University of Cambridge Faculty of Law Research Paper No. 10/01. <<http://ssrn.com/abstract=1492032>> 6, point out “if more respect had been paid to free speech aspects, the Court might have found better ways to reconcile the interests at stake”.

<sup>23</sup> *Anheuser-Busch Inc. v. Portugal* n12 §78.

<sup>24</sup> Paris Convention for the Protection of Industrial Property [1883] last revised in 1979.

<sup>25</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights [1994] Marrakesh Agreement Establishing the World Trade Organization, Annex 1C.

<sup>26</sup> Commission Regulation (EC) (EC) 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements. [2004] OJ L123.

<sup>27</sup> Article 1 (g).

<sup>28</sup> As an example of this “functional” nature, Article 1 (h) of the same regulation states that “patents” means patents, patent applications, utility models, applications for registration of utility models, designs, topographies of semiconductor products, supplementary protection certificates for medicinal products or other products for which such supplementary protection certificates may be obtained and plant breeder’s certificates.”

and more often we find “legal hybrids”<sup>29</sup>. The legislators are faced with the choice between enacting *sui generis* regimes to protect investment (such as the database maker right or the recently enacted German newspaper publisher’s right), protecting it under unfair competition clauses, bringing it under an existing regime (such as the case of computer programs<sup>30</sup>) or not protecting it at all<sup>31</sup>.

A broad approach to the concept – such as the one found in the Enforcement Directive<sup>32</sup> – might be a good solution. Albeit broad, the Directive leaves unfair competition outside of its (mandatory) scope<sup>33</sup>. Indeed, it might be the best interpretation to consider that the dividing line is the one between absolute rights<sup>34</sup>, and relative claims that arise out of a competitor’s behavior<sup>35</sup>.

The kindness of this solution depends mainly on what normative meaning is given to article 17(2) of the Charter. If it is seen as a mere guarantee against arbitrary behavior and expropriation, then the extent of what is considered Intellectual Property is of less relevance. If a maximalist view is taken, then the

<sup>29</sup> Providing a thorough analysis cfr. Jerome Reichmann, ‘Legal Hybrids Between the Patent and Copyright Paradigms’ [1994] Columbia Law Review 2432 ff.

<sup>30</sup> As pointed out by Thomas Dreier, ‘The Council Directive of 14 May 1991 on the Legal Protection of Computer Programs’ [1991] EIPR 319, 320, any neighbouring rights’ or *sui generis* approach would have necessitated the creation of a new instrument for international protection. This would be a long and cumbersome process without any guarantees of success. Art. 10 (1) TRIPS has now established this approach as mandatory for WTO members.

<sup>31</sup> For an overview of different perspectives on imitation in Europe see Ansgar Ohly, ‘The Freedom of Imitation and Its Limits – A European Perspective’ [2009] IIC 506. For an economic analysis of the reasons for and against the protection of investment see Mark A. Lemley, ‘Property, Intellectual Property and Free Riding’ [2005] Texas Law Review 1031.

<sup>32</sup> Directive (EC) 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157 recital 13: “It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned.”

<sup>33</sup> *ibid.*: “Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities”.

<sup>34</sup> Including property, intellectual property and even personality rights. The latter are precisely the civil law expression of human rights.

<sup>35</sup> This distinction between relative and absolute rights can also be challenged. See Miguel Galvão Telles, ‘Direitos Absolutos e Direitos Relativos’ (Absolute and relative rights) in *Estudos em Homenagem ao Prof. Doutor Joaquim Moreira da Silva Cunha* (Coimbra Editora 2005) 649, 673, pointing out that absolute rights can be relative rights against the State. At 675, the Author concludes that the distinction should be kept. It will depend on what is the good affected: if it is a concrete behavior (or result) of a different person, then it is a relative right, if it is the behavior or result itself, then it will be an absolute right.

identification of Intellectual Property and its fundamental core will be of great importance as there will be a big potential to impact on the freedoms of expression, information and competition.

#### 4. The scope of article 17(2)

There are two extreme positions when reading Article 17(2). On one side we found the so called maximalist position, reading the article almost as a commandment. In the words of Alexander Peukert<sup>36</sup>, “this limited view on the effects of IP rights leads to a normative conclusion: if there are only beneficial effects the protection level should be high and increasing”. In fact this rhetoric has been used to defend an increase in the level of protection<sup>37</sup>.

On the opposite side we find the view that this provision is “nothing more than a simple clarification of art. 17(1)”<sup>38</sup>. The argumentation towards this second position relies on its alignment with the jurisprudence of the European Court of Human Rights<sup>39</sup> and the fact that it is more reasonable. Furthermore, as seen<sup>40</sup>, this position is also in harmony with the balancing reasoning adopted by the CJEU in the last decisions: IP is considered a Human Right but far from being entitled to an absolute protection, it might have to be eschewed in face of other Human Rights considerations.

Does this last position mean that Art. 17(2) is devoid of all meaning? In a certain sense, the answer to that question is in the affirmative. It does not matter that much whether we are talking about the highly “controversial in nature” *database right* or the more “settled” copyright. Once someone has the right to a certain form of protection for his/hers material or immaterial property (“lawfully acquired possessions”), article 17(1)’s guarantees and limitations (“the use of property may be regulated by law in so far as is necessary for the general interest”) will be applicable.

<sup>36</sup> n4 68.

<sup>37</sup> Cfr. Jonathan Griffiths and Luke McDonagh, n21, 89-90.

<sup>38</sup> Christophe Geiger, n13 116. This is the position of Christophe Geiger, *ibid.*, Jonathan Griffiths and Luke McDonagh, n21, 90 and Alexander Peukert, n4, 71.

<sup>39</sup> According to Art. 6 (2) of the Treaty on European Union the ECHR is a source of fundamental relevance in the EU legal system (“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”).

<sup>40</sup> See n14.

According to Jonathan Griffiths and Luke McDonagh<sup>41</sup> this means the national and European legislators will be given a wide margin of appreciation and the control to undertake in the framework of Article 17 of the Charter is one of proportionality and respect for the rule of law<sup>42</sup>. This will also mean that the respect for rights granted has to be taken into consideration.

Nonetheless, it is highly debatable whether one may own information, investment or goodwill. These sort of intangible goods, which are part of the subject matter of Intellectual Property, seem to react oddly to the idea of absolute appropriation<sup>43-44</sup>. But that's indeed what IP is: the artificial appropriation of immaterial goods<sup>45</sup>. In the cases where no specific IP right exists and that are covered by unfair competition (like trade secrets<sup>46</sup> in several jurisdictions<sup>47</sup>) a larger freedom for the legislature seems to exist. It is however possible, that the jurisprudence of the CJEU and/or of Strasbourg consider certain aspects of these immaterial goods under the "legitimate expectations" line of jurisprudence. For instance, in the case *Iatridis v. Greece*<sup>48</sup> the European Court of Human Rights held that clientele (of a cinema) constituted an asset, protected as property.

<sup>41</sup> See note 21 at 86.

<sup>42</sup> The idea is to avoid excesses and not to scrutinize legislative activity. As Lorenz Fastrich, 'Human Rights and Private Law' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart 2007) 23, expresses it "a maximization of human rights on one side can suffocate freedom on the other side". This applies both to the activity of private parties and of national legislators.

<sup>43</sup> Annette Kur and Thomas Dreier, 'European Intellectual Property Law' (Edward Elgar 2013) 2, 7 ("the notion of 'property' insinuates a complete and total control rather than the result of a balance between conflicting proprietary interest on the one hand, and access and use interests on the other hand"). However the last sentence of article 17(1) ("The use of property may be regulated by law in so far as is necessary for the general interest.") allows this balancing, property is not seen as something absolute.

<sup>44</sup> Daniel J. Gervais, 'Intellectual Property and Human Rights: Learning to live together' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer, 2008), 5: "...when applied to informational or ideational objects, the concept of property is imperfect. At the very least, in that context 'property' must have a different purpose and meaning" (footnote omitted).

<sup>45</sup> Michael Lehmann, 'Property and Intellectual Property – Property Rights as Restrictions on Competition in Furtherance of Competition', [1989] IIC 1.

<sup>46</sup> The debate in this field is also whether trade secrets can and should be protected as an expression of privacy (such is the position of Tanya Aplin, 'A right of privacy for corporations?' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer, 2008), 475) or property (so defend Marco Bronckers/Natalie Mcnelis, 'Is the EU obliged to improve the protection of trade secrets?', [2012] EIPR 673). It seems to me that these approaches are not incompatible.

<sup>47</sup> For an overview view the Hogan Lovells International LLP, Report on Trade Secrets for the European Commission, available at <[http://ec.europa.eu/internal\\_market/ipenforcement/docs/trade/201201-study\\_en.pdf](http://ec.europa.eu/internal_market/ipenforcement/docs/trade/201201-study_en.pdf)> accessed 09 April 2013.

<sup>48</sup> No. 31107/96 [GC] (ECHR 25 March 1999) §54.

## 5. Conclusion

It seems to me that the dividing line should be set in the distinction between absolute and relative rights. The former are rights against the world, they set a general obligation of respect (*erga omnes* effect). They can and should be divided between rights of personality and rights of an economic nature. The rights of personality are an expression of human rights through civil law mechanisms, thus they need no further justification.

Property, and to this effect Intellectual property is a way of regulating economy and is therefore in a more "shaky" position; its basis is somehow political and its existence and the extent of its protection is a matter for society to decide<sup>49</sup>. However, the European Charter of Fundamental Rights holds a certain view in this matter as can be seen not only by Art 17, but also by Art 16, establishing the freedom to conduct a business. Furthermore, the Treaty on the European Union<sup>50</sup>, in its Article 4, establishes that economic policies shall be conducted "in accordance with the principle of an open market economy with free competition".

The EU has taken a view on this matter and the radical and immediate abolitionism does not seem possible, as long as IP is seen as property and legitimate expectations are protected<sup>51</sup> – which is in line with the most recent decisions of the European Court of Human Rights<sup>52</sup>. Since this specific form of property is "artificial"<sup>53</sup>, it might be abolished, but only to the future.

For IP abolitionists (especially in the copyright field, due to its high duration) Karl Marx's sentence – "The tradition of all dead generations weighs like a nightmare on the brains of the living."<sup>54</sup> – might come to mind. Indeed, even if

<sup>49</sup> However, Article 17 (1) UDHR reads: "Everyone has the right to own property alone as well as in association with others". That was why "the U.S. and Ecuadoran delegates claimed, the provision [article 27 UDHR] was redundant and protected what was already covered by the right to own property" (Peter K. Yu n7 1056). Nevertheless the same reasoning applies, if, in general, no property rights are granted then no violation of Human Rights occurs. As Peter K. Yu puts it "the existence of the right to the protection of interests in intellectual creations is far from self-evident." (id at 1070).

<sup>50</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

<sup>51</sup> Though this principle has its limits as mentioned by Eleonora Rosati, 'Toward an EU-wide Copyright? (Judicial) Pride and (Legislative) Prejudice' [2013] IPQ 47, 57.

<sup>52</sup> The decision *Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden* App no. 40397/12 (ECHR 19 February 2013) and the judgement *Ashby Donald et Autres c. France*, no. 36769/08 (ECHR 10 January 2013).

<sup>53</sup> Classic property is also artificial (as all laws are) but possession has a natural exclusionary effect that is not found in IP.

<sup>54</sup> <<http://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch01.htm>> accessed 09 April 2013.

a decision to reduce the duration of copyright or to abolish it is reached, it can only have prospective (*ex nunc*) effects<sup>55</sup>. Meanwhile, a lot of “reconstruction” can be done in the content and scope of IP rights, mainly through limitations and exceptions<sup>56</sup>.

In brief IP is to this effect property and can therefore be abolished for the future, i.e. it can stop being granted in a non-discriminatory basis. Only the core of IPR (a certain core) will have to be maintained as an expression of human rights/personality rights.

Determining what that core is will depend on the answer to several questions such as the existence and extent of the human rights of companies<sup>57</sup> and how much of human rights/personality rights interests are covered by Intellectual property<sup>58</sup>. Not having to determine that depends much on how reasonable IP can become<sup>59</sup>.

<sup>55</sup> This was in fact the argumentation that led to a harmonization of the duration in the EU by the highest term. Cfr. Silke von Lewinski, ‘The EC Duration Directive: An Example of the Complexity of EC Copyright Harmonization’ in Peter Yu (ed), *Intellectual Property and Information Wealth*, vol. IV (Praeger 2007) 257, 260.

<sup>56</sup> Not only because of human rights concerns as points out Thomas Dreier, ‘Regulating competition by way of copyright limitations and exceptions’ in Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* 232.

<sup>57</sup> See, v.g., Marius Emberland, ‘The Human Rights of Companies’ (OUP 2006).

<sup>58</sup> For instance Josef Drexler, ‘Constitutional Protection of Authors’ Moral Rights in the European Union – Between Privacy, Property and the Regulation of the Economy’ in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart 2007) 159, explores the several grounds for moral rights. David Vaver, ‘Does intellectual property have personality?’ in Reinhard Zimmermann and Niall R. Whitty (eds), *Rights of Personality in Scots law: A Comparative Perspective* (University of Dundee Press, 2009), 403, asks that exact question: “how far do intellectual property laws protect personality interests?”

<sup>59</sup> But not only. Rochelle Cooper Dreyfuss, ‘Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm’ [2010] *Cardozo Law Review* 1437. concludes that much of the open innovation is dependent on IP mechanisms.

## A Teoria dos Princípios

DR. RÚBEN RAMIÃO

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### Introdução

No âmbito da ciência jurídica atual, no que à teoria do Direito diz respeito, é usual distinguir-se um princípio jurídico de uma regra jurídica. Tal é feito com o intento de construir uma teoria que explique e diferencie os princípios das regras (*Norm-Prinzip, Principles-Rules, Norm-Grundsatz*). Esta visão decorre de um entendimento específico do fenómeno jurídico, enquanto sistema de normas, e que tem influência nas ciências mais dogmáticas, como a ciência constitucional, que é o seu exemplo mais evidente. Não é, pois, de estranhar, que a teoria constitucional reivindique para si a teoria dos princípios. Não só pelo tipo de normas constitucionais que existe, mas porque a Constituição, ou melhor, a génese de uma Constituição permite refutar o chamado positivismo jurídico<sup>1</sup>. A teoria dos princípios é um chavão que é usado para refutar a neutralidade do Direito, e para afirmar um tipo específico de jusnaturalismo<sup>2</sup>, ainda que disfarçado – que é o idea-

<sup>1</sup> MANUEL ATIENZA y JUAN RUIZ MANERO, “Dejamos Atrás el Positivismo Jurídico”, *Isonomía*, 27, Octubre, 2007, págs.7-26.

<sup>2</sup> Muitos juristas procuram fugir à qualificação de “jusnaturalismo”, e sustentam que o neoconstitucionalismo não é uma construção jusnaturalista. Todavia, é certo que existem diferentes teorias jusnaturalistas – desde a conceção do Direito natural divino, ou seja, aquele que resulta da vontade de Deus; o Direito natural que brota da “natureza das coisas”; ou o Direito natural apreensível pela razão humana (iusracionalismo). Mas, todas as conceções jusnaturalistas se