Which property regime for intellectual property?

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To what extent can the so-called "intellectual property" right be considered a property right? In other words, can one speak of "property" in the legal sense when speaking of an intangible creation and its protection? After two centuries of debate, the question has received considerable attention. Bernard Vanbrabant, young legal expert at the University of Liège, wrote his doctoral thesis (1) on the topic. He raises the polysemy of the term "property" suggesting in particular a method of exclusive reservation of assets allowing for them to be marketed. In this regard, the line dividing tangible and intangible tends to blur. This is an original approach and a thorough definition of the nature of intellectual property that puts the notion in perspective with the Civil Code and initiates the resolution of quite a few controversies.

The concept of property is now extensive enough to include intangible property like products of the intellect. But is it realistic to reduce them to this single concept? Is it possible conceptually to lock down something that tends to be ubiquitous, like a piece of music, a painting or a software program? What are the limits of copyright, patents and registered trademarks? Above all, can the many specific unresolved questions be answered by applying to intellectual property rules that were conceived to govern real properties? The concept of intellectual property has fascinated philosophers, economists and legal experts for two centuries.

The detailed and meticulous thesis by **Bernard Vanbrabant**, who is a practising lawyer and has been an assistant at the department of the law of property and of evidence at the University of Liège for about 12 years, seeks to specify the legal nature of intellectual property and to define its property regime. More specifically, in over 1000 pages of questioning and analysis of case law, he examines the possible connections between **intellectual property law** and the **Civil Code**, written in 1804 to protect a the material goods of citizens, their...
property. "The Civil Code was mainly drafted to protect immovable property," the author explains. "Movable property, and in particular products of the mind, were of little importance to the authors of the Civil Code." However, to the extent that intellectual rights must necessarily obey a property regime, as with tangible, movable and immovable property, in many cases the articles of the Civil Code continue to offer a relevant legislative arsenal.

A broad field of investigation

If the encyclopaedic nature of the thesis is impressive, there is little evidence of philosophical or economic considerations. The angle is strictly legal. Nor does the author offer a study in comparative law. He only considers foreign legislation and practices outside Belgium where the reflections and solutions can be transposed into our own legislation. Despite these limitations, the field to be exploited was vast and still untouched, which explains the length of the thesis. The author could have reduced his field of investigation. For example, he could have focused on a more precise category of intellectual property right, like copyright or trademark or patents, or limited himself to studying contractual relationships. Nonetheless he decided to embrace the whole. "In Belgium, there has still been nothing published on the subject in general. France has already had its publication of studies on the relationship between intellectual property and civil law. Some conjure up very precise topics. One was written on the question of co-ownership, another on usufruct, yet another on the issue of licences, and so on. Here, there have clearly been publications on the issues connected with intellectual property. However, there was still no fundamental research on its relationship to civil law. I therefore proposed to tackle all the questions that this relationship raised through broad enough research in which practitioners would be able to find real answers in case of litigation." Beyond academia, research in fact targets mainly legal practitioners. Many questions are asked and analysed using an efficient and systematic methodology. "Of course, I don't answer all the questions. For example, I'd written an entire chapter on the issue of security on intellectual property, useful when an innovative company would like to obtain credit. In the same way one can encumber a house with a mortgage, or give a watch as pawn, is it possible to pledge intellectual property? But a recent evolution in Belgian law, on the issue of movable property security, forced me to put the chapter aside before defending my thesis."

A concept for protecting creators

It is not a matter here of extending the legitimacy of the concept of intellectual property. However, briefly putting it in context again may be helpful. The concept of intellectual property was created following the French Revolution. Before then, creators and inventors, or more often their contracting partners (publishers), could already benefit from a form of protection pursuant to the regime of privileges. Technically, the scope of these privileges was no different since they gave these people exclusive use of their creations. These privileges, however, were not involved in an equality of persons before the law since they were granted rather arbitrarily by the sovereign. "At the time of the French Revolution," the lawyer recalls, "the system of privileges was rejected in all its forms. But it soon became clear that we couldn't move from a monopoly system, of protecting works against plundering and counterfeiting." This system, which is an integral part of the Enlightenment, is not designed as a privilege granted by the Prince. We speak then of property. The evolution is great. "The concept of property allows legislators to emphasise that it is a matter of natural law. Humans have a natural right to protection of their creations. The legislator, in this view, merely determines this natural law and puts it together."
For two centuries, this qualification has been constantly swinging like a pendulum between being challenged and then defended. It continues to do so today, in particular in the fierce debates inspired by the Internet and digital technologies. Those who would like to strengthen intellectual property rights, and thus protect creations strictly, rely on the notion of property which tends to legitimise this protection. Others speak more of "monopoly" or "privilege" (the term did not disappear with the Ancien Régime). They use public interest, the greater good, to oppose the concern of protection of individual property of a work, claimed by a single person. They thus try to erode this right to favour access by everyone to the work. This ongoing discussion revolves philosophically around a delicate question: "Is the right protecting intellectual property legitimate, or rather the opposite, should it be reinterpreted to benefit the greater good?"

The researcher had to take this issue into account, but without providing a definitive answer. "Certainly, the legal nature of these intellectual rights has interested me and is largely examined in the first part of my thesis. But this conceptual elaboration should primarily allow me to confront these rights with the provisions of the Civil Code, when there are lacunae in the laws that relate to them directly." Because despite the fact that the law and case law related to this matter is extensive and detailed, not every question receives a clear answer in intellectual property law... Parties who disagree often end up here, for example, in the case of co-ownership or when confronted with a problem of contract interpretation (see below). In the book, Bernard Vanbrabant demonstrates the interest still held by the Civil Code in resolving specific issues related to intellectual property. "Particularly for issues that relate to all goods in general: how intellectual rights may be transferred, to whom and under what conditions? How can they be acquired and for how long?"

**Exclusivity and patrimoniality**

The thesis is divided into three parts, the first being the longest. It is organised around three big questions. To what extent can the "exclusive" right in an intangible object, like a trademark or a work of art, be considered a property right? Can one speak of an intangible work as a good, as property, or should this term be reserved for the right which applies to this work, in other words, to the legal prerogative granted its author? And finally, is it a right in principle or by exception? The analysis of the nature of the intellectual right from these three perspectives was paramount. It was based on these conclusions that the author then decided which provisions of the Civil Code could be applied to intellectual property and with what adjustments.

First, is it possible to consider that the relationship between a creation and its maker (or the holder of the intellectual property right therein) is a property relationship? From a certain perspective, the answer is yes. "There is a common point between intellectual property rights and other forms of property rights," the lawyer asserts. "It is the exclusive nature that is attached to it. In other words, they offer a possibility of excluding or prohibiting. The Civil Code describes ownership as the right to enjoy possessions absolutely. The truth is that this private property flows from the power to prohibit all third parties from using the appropriated good. The right to enjoy my car, for example, is above all the right to prevent anyone from taking my car and leaving with it."

Bernard Vanbrabant reminds us: "It is from this perspective that the philosopher Pierre-Joseph Proudhon wrote that property is theft. Without being as controversial, it has to be admitted that property, including intellectual property, is deprivation or frustration of non-owners; but it is not their subjugation. The distinction is important from the point of view of legal technique: unlike so-called personal rights or rights of claim, property (material or intellectual) rights do not obligate a specific person. It prevents the use or exploitation of the property of the owner; this exclusivity relationship, a characteristic of ownership, applies to intellectual rights."
However, once this exclusivity relationship is founded and established, it would be better, Bernard Vanbrabant stresses, to consider the intellectual property right itself, in other words the legal prerogative granted by law, as the "property" included in the owner’s assets, susceptible to assessment, assignment (by contract) and conveyance (on the death of the holder or on the merger of companies). This vision of things makes it easier to deal with intellectual property as property.

These two dimensions of intellectual property rights, both as an exclusive prerogative and a possession, have real impacts, as the author illustrates using two examples.

He begins with the patrimonial nature that most prerogatives described as intellectual property rights have. "An artist dies and leaves his inheritance to his children. They are undivided. The heirs inherit not only the canvas but also the copyrights which they will be able to exploit. Normally, the heirs have to arrange things amongst themselves and agree unanimously on how to proceed. However, if they are no longer in agreement and cannot come to an arrangement on how to manage the property, each of them may exercise their right to division, which is a well-known prerogative recognised in the Civil Code. Can literary or artistic property be divided? The law on copyright does not provide an answer to this question. However, considering the legal nature of intellectual property rights, one could draw a distinction. On the one hand, some prerogatives, called moral, like that of divulging unpublished work or requiring the association of the creator’s name for exploitation of the work, are not susceptible to division; notwithstanding the terms of a possible division, any of the heirs may object if there is a violation of one of these moral rights. However, this is an exceptional case that is encountered primarily in cases of copyright." Most of the rights, including an author’s exploitation rights, which drain revenues, are patrimonial in nature. "It is a priori possible to contemplate sharing these rights, which may be analysed as possessions."

Another interesting example, which reveals the consequences of the exclusive nature of intellectual rights, is that of the extinctive prescription (limitation). In principle, when a right has not been exercised by its holder for a specified number of years, it lapses. This rule applies to rights to claim; nonetheless, it is generally accepted that property is not subject to the rule of limitation: we do not lose property if we do nothing. The typical application of extinctive prescription is that of the creditor who, if he doesn’t come forward for ten years, loses his right to claim. This permits the debtor to be, following time determined by the law, released of his obligations and move out of his status of "subjugation."
Thus, since the property involves a relationship of exclusion and not a situation of subjugation, it is understandable why it escapes the mechanism of extinctive prescription. "Now, are intellectual property rights subject to limitation? Let us take the example of a painter's heir who realises that a company has been using the artist's works for 30 years, for example, to sell post cards. Intellectual property law has been breached but can this breach still be sanctioned, notwithstanding the passage of time? Building on the relationship between intellectual property right and (traditional) property rights, the heir could sustain the legal permanency of his prerogatives and, therefore, addresses the judge to order the company to stop the use (unless an agreement is reached, with the heir, on the conditions of this use). The company may not hide behind the rule of extinctive prescription because the heir holds a right to prohibit any person from using the object, not a right to request the performance of something."

**Principle or exception?**

A cross-cutting issue provides food for thought on the proprietary notion of the intellectual property right. Is it a right in principle, or a particular right, of exception? In other words, is it possible, in principle, every time we create something, to prohibit third parties from taking hold of it? Or does this exclusivity rather exist only from the moment when the legislator grants a right by giving it a name (copyright on works, patent rights on inventions, etc.)? And when there is no case provided by a statute, does the exclusive right still hold? Currently, in Belgium, it is recognised that the principle governing intangible creations is that of freedom. Intellectual property rights, as broad as they are in some cases, would therefore be exceptional, the basic rule of free competition remaining. We therefore define the rules of property in a scope of freedom. However, some authors argue that the legislator's intervention should not be a conditio sine qua non for intellectual property. These authors believe that rights do not need to be named, or organised by a statute, to exist. The controversy is fraught with consequences. "Specifically, the issue is raised primarily in relation to what
is called parasitism, or parasitic competition, the wrongful nature of which is questioned. In the competitive battle, dishonest practices, like theft, breach of trust, misappropriation and counterfeiting, are not permitted. Some case law goes beyond this, and holds that slavish imitation of products, services or advertisements, and thus the misappropriation of the efforts and investments of others, is unfair per se. It is a behaviour that could be brought to an end before the courts. If we do not place any limits on this case law, an action in unfair competition in the event of parasitism would offer a kind of innominate intellectual property right to the person who institutes such action. What is at work here is the logic of an automatic appropriation of intellectual productions, as a principle."

**Origin, variation, extinction; cessions et licences**

The thinking outlined in the first part allows the author to specify the nature of intellectual property rights. He concludes, as stated above, by drawing a connection between two characteristics that appear to be their own. Intellectual rights are particular exclusive rights and are nearly always possessions (except in certain cases, particularly that of the moral rights of authors and performers). Because of this dual consideration, the author could develop the second and third parts of his thesis. In these chapters, he compares, as regards a specific case, the intellectual rights with the principles of property law and contract law as provided by the Civil Code. Given that intellectual property rights grant to their holder specific exclusive prerogatives in relation to an intangible product, and not a general right to enjoy a tangible object, they are governed by the formalities and laws specifying under what conditions they can be acquired, and how they lapse. The second part of the research aims to map, describe and understand these different processes, which vary according to the nature of the right. For example, pieces of music, inventions and software programs are not protected in the same way. They are not all governed by the same laws. There are specific ways of acquisition. For an author, the simple fact of the creation is enough to result in protection. And this protection - copyright - will last up to 70 years after the author's death. In other cases, the fact of using is enough. For example, if a restaurant owner places a sign on his establishment, this simple gesture will prevent all competitors from opening a restaurant with the same name directly across from the original. However, some creations require formalities of filing, publication and registration prior to intellectual rights being granted. This is the case for patents in particular. "In these cases, provision is made for a monopoly over exploitation reserved for the holder of an invention. But the secrets must be revealed to his peers, the author explains. "And once the monopoly lapses, any one may use the said invention."

The patenting system, while protecting the creator (or the "successor in title", the employer, for example) for a given time, is also intended to give notice to third parties, to provide extensive publicity for the invention. This is how Alexander Graham Bell, for example, was able to make economic use of the invention of the telephone for twenty years before competitors could in turn develop the technology. But it isn't only these inventions that require very precise formalities to be protected. Marks (words or logos) also need to be registered, etc. "There are very specific means of acquisition determined by the nature of the intellectual property and described in the laws related to this matter," Bernard Vanbrabant sums up.
And alongside these existing procedures, I wondered whether the means of acquisition or of lapsing provided in the Civil Code, which generally apply to tangible things, could, as necessary, apply to these intellectual creations or distinctive signs. Some legal experts have in fact supported this proposition in France. While the results ultimately turn out to be quite meagre, some extensions are no less feasible." An interesting question, for example, is related to the application of the rules of acquisition of the property through the fact of possession. According to Bernard Vanbrabant, the rule of **usucaption** (acquisitive prescription) could be applied in some cases of intellectual property: nonetheless, it would have to be assumed that someone had been using and promoting a work for many decades without a genuine successor in title reacting, which is, to an extent, a textbook example.

The third and final part broaches the question of contracts, which are inevitable in intellectual property. The holder of the intellectual property rights, for example, is not always able to honour all the obligations, in particular, payment of the various "taxes" due in the field of patents, or to perform all the acts of exploitation that these rights allow. He must therefore be linked with third parties by concluding one or more contracts. This is the case for the author who works with an editor, or the musician and the production house, or the inventor and the factory for which he works. Not to mention the intermediaries who may take the responsibility for circulating the works, cases of co-ownership, regardless of whether it is in the context of a group creation or pursuant to an inheritance. The list is long and there are as many sources of litigation as there are of possible contracts.

Again, it was relevant to check whether the Civil Code could assist in filling certain gaps in this aspect of the matter of intellectual rights and how the rules that it contains should be applied.

In this third and final part, Bernard Vanbrabant pays very close attention to the questions that are raised by the two most common types of contracts in the matter. The **assignment contract** and the **licensing contract** where the rights holder may or may not wish to dispose of his rights. This contractual duality seems in effect to concern all intellectual property rights, although many may raise doubts about the relevance of the distinction in
the field of copyright. Assignment contracts transfer the rights that no longer belong to the creator because the two parties have signed the contract, while licensing contracts allow the use of creations without the inventor losing his rights.

**A great conceptual step forward**

The two last parts focus primarily on case law, on intellectual property litigation, whether or not common depending on the questions examined. The author approaches them systematically by relating them to articles in the Civil Code. He attempts to provide solutions, or considerations, by returning to conceptual tools developed in the first part. Depending on litigation and following its possible approximation to movable or immovable property, as an asset, the author establishes the relevance of invoking an article in the law that initially did not consider intellectual property rights. The case-by-case study shows that the method is effective in initiating new more precise legislation. It will act as an example or tool for reflection for all practitioners facing this type of problem.

Needless to say, the author does not answer all questions, even though the work provided is considerable. What appears to be the greatest contribution for the still young and tumultuous world of intellectual property is precisely the rigour and the constancy in the methodological application the author uses to approach each problem after having defined precisely the nature of intellectual property and the rights that cover it.

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