

IT CAN BE CONSIDERED THAT THE INHERITANCE OF INTELLECTUAL PROPERTY RIGHTS IS AN EXCEPTION FROM THE UNITARY FEATURE OF THE HERITAGE?

Alice Mihaela POSTĂVARU*

ABSTRACT:

THE LEGAL NATURE OF THE INTELLECTUAL PROPERTY RIGHT REPRESENTS ONE OF THE MOST CONTROVERSIAL ISSUES. BASED ON THE QUALIFICATIONS USED, THE PERSPECTIVES SUPPORTED BY THE LITERATURE CAN BE GROUPED INTO TWO MAIN THEORIES.

THE INTELLECTUAL PROPERTY RIGHTS REPRESENT DEROGATION FROM THE FACT THAT THE HERITAGE IS FORMED BY THE PATRIMONIAL RIGHTS FOUND IN THE DECEASED PERSON'S PATRIMONY. IN ORDER TO CONCLUDE ON THE FACT WHETHER THE INTELLECTUAL PROPERTY RIGHTS, BY THEIR DOUBLE NATURE REPRESENT AN EXCEPTION FROM THE UNITARY FEATURE OF THE HERITAGE, WE SHALL ARGUE UPON THE LEGAL FEATURES OF THE HERITAGE AND SHALL APPROACH CERTAIN NOTIONS OF INTEREST WITHIN THE RIGHT TO INHERIT AND ITS MEANINGS, AS WELL AS CERTAIN TERMINOLOGICAL ASPECTS SUCH AS THE SUCCESSION, SUCCESSORS AND SUCCESSIONAL TRANSMISSION.

OUR LAW STATES CERTAIN EXCEPTIONS FROM THE UNITARY FEATURE OF HERITAGE UNDER CERTAIN CONDITIONS. THUS, MOVABLE ASSETS, AS WELL AS ASSETS FROM THE HOUSEHOLD, WEDDING GIFTS, IN THE AREA OF LABOR LAW – WAGES, ANNUAL LEAVE PAYMENT, THE PENSION NOT RECEIVED BY THE DECEASED PERSON, AS WELL AS THE PATRIMONIAL COPYRIGHTS.

KEYWORDS: INTELLECTUAL PROPERTY, INTELLECTUAL PROPERTY RIGHTS, UNITARY CHARACTER OF INHERITANCE, SUCCESSION, HERITAGE

Considering the double nature of the intellectual property rights, in the meaning that they have a patrimonial and a non-patrimonial side, as well as the features of the copyrights, the present paper aims to reflect on the fact whether the transmission by heritage of these types of rights represent an exception from the unitary feature of the inheritance or not.

The patrimonial copyrights are subjective rights, whose existence is conditioned by the will of the author to publish his work and to exploit it for his and his successors' benefit. These rights have the following features: are connected to the author, are exclusive and temporary.

The personal feature of the copyright is stated by Art 1 of the Law regarding copyrights and related rights, the text stating no difference between the moral and patrimonial rights. Art

* Postdoctoral scholar, "Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy, within the project "PhD and Postdoctoral Studies – Horizon 2020: promoting the national interest by excellence, competitiveness and responsibility in the Romanian fundamental and applied scientific research", contract ID number: POSDRU/159/1.5/S/140106. The project is co-financed by the European Social Fund through the Sectorial Operational Program for the Development of Human Resources 2007-2013: *Invest in humans*.

12 of the same law states that the author of the document has exclusive patrimonial right, if and in what way his document shall be used or exploited, including the right to consent that his document be used by other persons.

If for the moral rights the transmission is allowed exceptionally and only for the exercise of two categories of moral rights, once the exclusive right of exploiting the document has been exercised it can be transmitted by the author, both by acts between living persons, for a cause of death, as well as, in certain cases, by the effects of the law¹.

Regarding the temporary feature of these rights it is interesting the fact that the intellectual property rights are part of the successional estate, but the patrimonial prerogatives connected to them can be exercised only during their validity.

The exclusive feature of these rights has a double meaning, namely: the first is that the author has the right to decide if his manuscript shall be exploited, how and when, and the second one being that of the monopoly for the exploitation which exclusively belongs to the author.

Broadly, the intellectual property contains all rights resulted from the scientific, literary and artistic, industrial and commercial activities.

Stricto sensu, the intellectual property rights are rights of property defined by the civil law, which allow the authors to beneficiate from the development of their creations. Some authors consider that the notion of property is not identical with that of property referring to corporal assets, as defined by Art 480 of the Civil Code as real, exclusive, absolute and continuous right².

The current legislation – the new Civil Code reiterates the old regulation in Art 555, which does not modify its essence. Thus, the analysis shall be based on the new regulations, one being able to compare it with the situation mentioned by the previous regulation.

According to another opinion it is considered that the rights resulted from the patent for invention, which a right of industrial property enjoys all privileges given by the right of property³, starting from the idea that the exclusive exploitation right is a real right referring to an embeddable good.

Other authors consider that for the creation, the owner exercise with preeminence *utendi, abutendi*. It is unconceivable that a sculpture or painting, a musical piece, a symphony etc. are being exposed or performed, to not be valorized by other persons. The owner of this “*sui-generis*” property benefits mainly in the exclusivity of *utendi, abutendi*. The concept of property is strongly connected to its owner⁴.

We share the opinion that the institutions forming the intellectual property and which forms its object of study not always refer to intellectual creations, such as the case of trades and geographic indicators, but even for the cases in which the object is represented by intellectual creations, their legal regime being different than the one of the property stated by the common law⁵.

The intellectual property law has as object of study the protection of the intellectual creation, of the authors and of their results under different forms under which are materialized, but also the protection of the distinctive markings from the commercial activity.

Within the category of intellectual property fall the rights of industrial property, the copyrights and other related rights. These can also be grouped into three categories: the first

¹ Viorel Roş, *Dreptul proprietăţii intelectuale*, (Bucharest: Global Lex, 2001), 126

² Otilia Calmuschi, *Dreptul proprietăţii intelectuale*, (Bucharest: Titu Maiorescu University Press, 2004), 15

³ Florea Bujorel, *Dreptul proprietăţii intelectuale. Dreptul de proprietate industrială*, (Bucharest: The Publishing House of România de Măine Foundation, 2007)

⁴ Dumitru Păuneţ, “*Câteva consideraţiuni cu referire la dreptul de proprietate asupra creaţiei*”, *Dreptul* 6 (1996)

⁵ Roş, *Dreptul proprietăţii intelectuale*, 126

one having as object the rights resulted in relation with the rights of draftsmen (designs and industrial models), technical creations patented as inventions, utility models, the protection of new types of plants and animal species, the protection of topographies of integrated circuits, the protection of confidential information. The second category has as object the distinctive markings, and it includes the trades, geographic indications, commercial names and firms. The third category aims the combat of unfair competition in relation to other industrial property rights. Generally, there are numerous convergent opinions, in the meaning that this latter category does not represent a distinct object of the industrial property, but an action through which the industrial property rights are protected.

The two areas of the intellectual rights – copyrights and industrial property rights – are similar due to the object under legal protection and through the nature of the subjective rights of the authors. The intellectual property rights manifest upon certain embeddable assets, protected by special regulations.

As mentioned above, within the category of intellectual rights are included the copyrights and related rights, as well as the industrial property rights.

All authors in this area agree that the intellectual property rights have a double nature, namely, they have both a non-patrimonial side, related to the author's personality and a patrimonial side, resulted from the valorization of the rights from the protection of different objects from the intellectual property.

The legal nature of the intellectual property right represents one of the most controversial issues. Depending on the qualifications used, the points of view supported by the literature can be grouped into two main theories. The intellectual property right is considered to be a property right or a different right forming a special category. The theory of property was stated by the French revolution's legislation. The supporters of the theory of property have stated that the monopoly for exploitation offers a striking analogy with the owner's right over a good. According to another opinion, the copyright for intellectual creation is considered as a different group of rights. This rights *sui-generis* are called intellectual. The classic division of rights, in personal, obligations and real rights, stated by the Romanian law, Edmond Picard has added a new group, that of intellectual rights. The intellectual rights have a patrimonial feature, offering the owner the right of monopoly for exploitation and are *erga omnes* opposable. Unlike the real rights, the intellectual rights have as object the activity and thinking of the human being.

According to another opinion, the right of intellectual creation is a non-patrimonial personal right giving birth consequential to other patrimonial rights.

For a complete analysis of the rights first must be established the object of the copyright, which may be formed by original intellectual creation works in literature, artistic or scientific areas, regardless of the means of creation, expression and independent of their values. Also, it represents an object of the copyright the derived works, which by their nature represent intellectual creations.

Also, it must be considered the objects of intellectual property, which have an author (named creator or inventor).

Regarding the copyright, the esteemed professor Yolanda Eminescu states that within the prerogatives forming the copyright, are found two categories having a different legal regime: the personal non-patrimonial and the patrimonial prerogatives. Within the general theory of the subjective rights, the doctrine enlists the moral right of the author together with the rights related to the physical and moral existence and integrity of the person and to the rights referring to his identity, within the category of personal non-patrimonial rights, characterized as being non-transferable and imprescriptible.

The intellectual property rights having a patrimonial feature are transmissible, by means stated by the current laws in this area.

Thus, the Law No 8/1996 on copyright and neighboring rights, as well as the Law No 129/1992 on the protection of designs and patterns, Law No 84/1998 on trademarks and geographical indications, Law No 64/1991 on patents, Law No 350/2007 on utility models state means of transmission of the rights resulted from the creations of intellectual property, transfer, license, legal and testamentary succession.

According to Art 953 of the Civil Code, the heritage represents the transmission of the patrimony of a deceased natural person towards one or multiple living persons.

The civil law refers to the notion of succession in a larger meaning, representing any transmission of rights between living persons or for a cause of death, transmission which can be universal, which can have a universal or a particular title. In this meaning, for instance the assignee is the assignor's successor, with a particular title. Therefore, the notion of succession only in the narrow term – transmission for a cause of death – is the equivalent of the notion of inheritance.

It must be mentioned that first of all it is correct the term of inheritance in the favor of the succession because the latter one has a broader acceptance. Related to notions, one can note in literature the usage of more terms such as: inheritance, succession and successional transmission.

Related to the successional transmission we are wondering if there is an influence in its legal features from the presence in the successional estate of the intellectual property rights.

Surely, this question aims the unitary feature of the successional transmission. In the legal literature, there are debates, without being a unity of opinions, if the copyrights are an exception from the unitary feature of this transmission.

Though the special laws on intellectual property state the fact that the authors' rights may be inherited, there is no express mention if this transfer of rights is being performed based on the common law.

Both the national and the communitarian legislation state only the means of transmission of these rights, between living persons, by assignment or license contract or for a cause of death, by legal or testamentary heritage, without mentioning the procedure by which the transmission is performed. Therefore, the opinions expressed by most authors converge towards the idea that the copyrights by inheritance are performed based on the provisions from the common law and not based on certain special procedures.

Most authors consider that in order to be present the unitary feature of the inheritance, the rights and obligations of the deceased person must be transmitted towards the legal heirs or legatees according to the same norms, regardless of the nature and/or provenience or origin of the rights forming it.

Another opinion considers that the inherited goods are subjected to a successional regime derogative from the common law, this being affirmed in the analysis of Art 4 of the Law from 28 June 1923 on the literary-artistic property, modified by the Decree No 351/27 June 1956 on the copyright, according to which the successional devolution of the copyright is derogative from the common law in that the patrimonial prerogatives derived from this right were inherited only temporary, in certain cases, during the heir's life or, in other cases, on the duration established by the law⁶.

According to another opinion, broadly supported and based on the provisions of the new law stating the copyright⁷, supports the idea that in the case of these rights we were and are not in the presence of an exception from the unitary feature of the successional transmission,

⁶ Mihail Eliescu, *Curs de succesiuni*, (Bucharest: Humanitas, 1997), 26

⁷ Law No 8/1996 on copyright and neighboring rights

because its norms belong to the common law, the special law stating only special rules regarding the temporary feature of the inherited patrimonial copyrights, including the testamentary inheritance, with the consequence of the impossibility to re-transmit it through succession (or in any other means) after the expiration of the term stated by the law, impossibility due to the extinction of the right itself, and not because we are in the presence of a derogation from the unitary feature of the inheritance⁸.

Certain authors have not supported the transmission of copyrights as an exception from the unitary feature of the inheritance⁹.

Unlike them, others consider that there is not an exception from the unitary feature of the inheritance the transmission of the patrimonial copyrights according to the Law No 8/1996¹⁰.

The unitary feature of the successional right corresponds with the unity of the transmitted patrimony and of the right of property, which forms the main object of the inheritance¹¹.

Referring to the same subject, there is another interesting opinion unlike the ones previously expressed in the literature, which shows that any deviation, even an insignificant one, represents an exception, or on the contrary, that only the notable differences in the legal regime may be noted as such exceptions¹².

Most opinions emphasize the fact that in relation to the legal or testamentary devolution of the inheritance, from which are part the copyrights, including the establishment of the successional quotas or the reserves of the forced heirs or of the successional vocation is applied the common law.

In the same meaning, another opinion supports the idea that in the absence of other clarifications, the successional transmission of the rights on inventions shall be subjected to the rules of common law. As derogation, for the duration of the rights and their territorial limitations the special law shall be applied¹³.

Because the special laws on intellectual property vaguely states these aspects, in the meaning that it is mentioned only that the “intellectual property rights can be transmitted through successional means”, a more clear regulation of this issue would be more than necessary.

In the same regard, at the next revision of the laws stating the area of the intellectual property, in the chapter destined to the “*rights and obligations*” should include the norms according to which is performed the legal or testamentary succession, or a reference norm, stating that “the transmission of the rights through legal or testamentary succession is performed based on the norms of common law”, stating that “are applicable the provisions of Book 4 *Inheritance and liberalities*” from the Civil Code.

In all these cases, regarding the legal or testamentary devolution of the inheritance, from which these rights are part, including the establishment of the successional quotas or the reserves of the forced heirs or of the successional vocation, the common law is being applied.

⁸ Francisc Deak and Romeo Popescu, *Tratat de drept succesoral, 1st Volume, Moștenirea legală*, 3rd Edition revised and amended (Bucharest: Universul Juridic, 2013), 46-49

⁹ Dan Chirică, *Drept civil. Succesiuni și testamente* (Bucharest: Rosetti, 2003), 31-35; Marin Popa, *Drept civil. Succesiuni*, (Bucharest: Oscar Print, 1995), 12-13; D.C. Florescu, *Dreptul succesoral*, (Bucharest: Universul Juridic, 2011), 11-13

¹⁰ Ilioara Genoiu, *Dreptul de moștenire în Codul civil*, 2nd Edition (Bucharest: C.H. Beck, 2013), 10

¹¹ Constantin Stătescu, *Drept civil. Contractul de transport. Drepturile de creație intelectuală. Succesiunile* (Bucharest: Didactic and Pedagogic Publ.-house, 1967), 108

¹² Bogdan Pătrașcu and Ilioara Genoiu, *Moștenirea și felurile ei în Noul Cod civil. Comentarii*, 2nd Volume, 3rd Edition revised and amended (Bucharest: Universul Juridic, 2011), 593

¹³ Ioan Macovei, *Tratat de drept al proprietății intelectuale* (Bucharest: C.H Beck, 2010), 135, 231

The common law is also being applied in regard to the successional transmission and the division of the heritage from which the patrimonial copyrights are part.

As noticed in the literature, regarding the duration for which the heirs inherit these rights shall be applied special rules stated by the law, the patrimonial copyrights being recognized without time limitations.

The rights from the area of industrial property are transmitted through legal or testamentary inheritance, according to the common law, without any special time limitation, to the heirs, unlike the rights recognized for the deceased person. The inheritance of these rights generates effects for third party persons starting with the date of the publishing in the Official Industrial Property Bulletin of the mention of transmission registered by State Office for Inventions and Trademarks, as well as in the area of transmissions between living persons.

Though, it must be mentioned that the right to use the invention, by third parties in certain special situations may be transmitted only with the patrimony or with a part of the patrimony of the third party owner of the right, and in case of death, only by legal inheritance or by universal or with universal title legacy, but not by particular title legacy.

Though Law No 8/1996 on copyright and neighboring rights establishes a time limitation regardless of the heir's person, it can be said that we are not in the presence of an exception from the unitary principle of the inheritance, because we are talking about a time limitation of the very right passed on by the author to his heirs, at the expiration of the term stated by the law extinguishing the patrimonial copyrights, not forming part from the subsequent patrimony of the deceased, similar to other rights affected by an extinctive term¹⁴.

It must be mentioned that the inheritance involves both the successional active and passive, namely by inheritance shall be passed on all the rights and obligations resulted from the registration of an object of intellectual property. Incident with the temporary feature of the patrimonial rights of intellectual property, with the taking over of these rights, the heir shall also take over the obligation to pay the maintenance taxes for the certificate of registration from which the industrial property rights are resulted, for instance. These obligations are born in the heir's person, at the opening of the inheritance or subsequent, regardless of the deceased person's will.

Without the fulfilment of such obligation, the rights would stop and their owner – the heir would no longer be able to exercise the exclusive prerogatives of these rights.

Regarding the calculation of the reserve and of the available quotas for special issues referring to the evaluation of the assets part of the gross active of the heritage are placed in the situation in which within the successional estate are registered rights of intellectual property, whose patrimonial value cannot be established at the moment when the succession is being opened, and we refer here at the situations in which *de cuius* was the owner of an exclusive right of use resulted from the registration of an invention, trademark, geographical indication, design or pattern, of patrimonial copyrights etc. Not being accurately evaluated, the intellectual property rights may generate certain difficulties in the calculation of the available reserve and quotas, as well as under the aspect of the reduction of excessive liberalities.

Such issues are not possible if the deceased person has had forced heirs, and his entire patrimony was left by will to a residual legatee. In such hypothesis, at the request of the forced heirs, the notary public or the court shall proceed to the reduction of the liberality within the limit of the available quota and all heirs shall receive a certain quota from the successional patrimony, which shall also be applied for the intellectual property right.

As a conclusion, we cannot argue that the inheritance of the intellectual property rights represents a true exception from the unitary feature of the inheritance, as are considered the

¹⁴ Deak and Popescu, *Tratat de drept succesoral*, 46-49

inheritance by the surviving spouse, in the absence of descendants, who comes in concurrence with ascendants or collaterals, the spouse inheriting – beside his successional part and without the concurrence of the heirs referring to these assets – the furniture and household objects affected to the common use of the spouses (Art 974 of the Civil Code) or another exception, in the area of labor – the inheritance by the surviving spouse, major children of the deceased person of his parents of the wage, of the annual leave payment or the pension not received by the deceased person. Regarding these exceptions, they can receive such qualification because are stated by special rules and follow a different special regime unlike the common one. These regulations are derogations from the common law and are found in special laws, as following: Art 167 Para 2 of the Labor Code, Art 66 of the Framework Law No 284/2010 on the unitary payment of employees paid from public funds, Art 120 of the Law No 263/2010 on the unified public pension system.

This paper has been financially supported within the project entitled “*Horizon 2020 - Doctoral and Postdoctoral Studies: Promoting the National Interest through Excellence, Competitiveness and Responsibility in the Field of Romanian Fundamental and Applied Scientific Research*”, contract number POSDRU/159/1.5/S/140106. This project is co-financed by European Social Fund through Sectorial Operational Program for Human Resources Development 2007-2013 Investing in people!

REFERENCES

1. **Bujorel, Florea.** *Dreptul proprietății intelectuale. Dreptul de proprietate industrială*, Bucharest: The Publishing House of România de Măine Foundation, 2007
2. **Calmuschi, Otilia.** *Dreptul proprietății intelectuale*, Bucharest: Titu Maiorescu University Press, 2004
3. **Chirică, Dan.** *Drept civil. Succesiuni și testament.* Bucharest: Rosetti, 2003
4. **Deak, Francisc, and Romeo Popescu.** *Tratat de drept succesoral, 1st Volume, Moștenirea legală, 3rd Edition revised and amended.* Bucharest: Universul Juridic, 2013
5. **Eliescu, Mihail.** *Curs de succesiuni*, Bucharest: Humanitas, 1997
6. **Florescu. D.C.** *Dreptul succesoral*, Bucharest: Universul Juridic, 2011
7. **Genoiu, Ilioara.** *Dreptul de moștenire în Codul civil*, 2nd Edition. Bucharest: C.H. Beck, 2013
8. **Macovei, Ioan.** *Tratat de drept al proprietății intelectuale.* Bucharest: C.H Beck, 2010
9. **Păuneț, Dumitru.** “Câteva considerațiuni cu referire la dreptul de proprietate asupra creației”, *Dreptul* 6 (1996)
10. **Pătrașcu, Bogdan, and Ilioara Genoiu.** *Moștenirea și felurile ei în Noul Cod civil. Comentarii*, 2nd Volume, 3rd Edition revised and amended. Bucharest: Universul Juridic, 2011
11. **Popa, Marin.** *Drept civil. Succesiuni.* Bucharest: Oscar Print, 1995
12. **Roș, Viorel.** *Dreptul proprietății intelectuale*, Bucharest: Global Lex, 2001
13. **Stătescu, Constantin.** *Drept civil. Contractul de transport. Drepturile de creație intelectuală. Succesiunile.* Bucharest: Didactic and Pedagogic Publ.-house, 1967