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2. Pruning the European intellectual property tree: in search of common principles and roots

S  verine Dusollier

A few years ago, William Cornish wondered whether intellectual property had not become 'omnipresent, distracting, irrelevant'.¹ Many others now doubt the coherence of the intellectual property regime and denounce its excessive development. Taking stock of these sound and always well-reasoned critiques, the conference organized in Strasbourg in the frame of the EIPIN assumed the uneasy task of reconstructing European intellectual property.

This reform of the IP regime ought necessarily to begin with an assessment of the existing rules and their relevance. As the European Union knows a multiplicity of IP rights, from classical ones (copyright, patent, trademark or design) to more marginal ones, in terms of the economic sectors concerned (rights in databases, in plant varieties, in semiconductors, in geographical indications), the quest for consistency could integrate a reflection on the common core embedded in that diversity. Is there (and should there be) common ground and uniform principles across all intellectual property rights? And to what extent should diversity and specificity of intellectual property rights give way to a common approach?

This paper aims at identifying and assessing the existing similarities or common principles in intellectual property rights in the European Union. Despite their apparent diverging functions, subject-matter and scope of protection, copyright, trademark, patent and the other intellectual property rights share at least the fact that they belong to a set of rules granting some exclusive rights in intangible assets, whether creation or signs. Their inclusion under the same label 'Intellectual Property' should at least count for something and induce some joint ends and means.

I strongly believe that belonging to a broader field of intellectual property matters. It obliges us to form unified perspectives, questions and answers as to

¹ W. Cornish (2004), *Intellectual Property – Omnipresent, Distracting, Irrelevant?*, Oxford: Oxford University Press.

how immaterial resources deserve protection and how limits to that protection should be more central than in tangible property. This common approach is probably vanishing in the legislative work of the European Union that tends to deal separately with each IP right on an ad hoc basis, with no permeability with other rights. This is regrettable, for the way Europe conceives its intellectual property regime as a whole will ultimately shape its innovation, economic development and knowledge wealth. This paper is a very modest attempt to seek overall rules in intellectual property, or at least a more systematized ordering of the many protections, to serve as a first skeleton for a reform of intellectual property.

In 2008, in a conference organized by the University of Helsinki, Andrew Christie sketched a vision of a unified system for intellectual property, where all rights would merge into a single one, protecting diverse subject-matter.² To that end, he borrowed the metaphor of a tree from an intervention made the day before by Annette Kur³: intellectual property could be portrayed as a tree whose many branches represent all the protections granted by literary and artistic property or industrial property. I will take over this image. Intellectual property is a tree, an old one, a big one, a very luxuriant tree, one that seems to have grown a bit too much, without control and in an anarchic manner. It has many branches, some of them threatening to break under their own weight. The tree looks pretty and rich, but it also seems to suffer from suffocation, from lack of space. Tree specialists all agree that it is time to prune the tree, in order to make it breathe and blossom again. It will probably require some difficult cuts and the removal of some lively branches, but it is to make it develop better in the end.

To start the actual work, a preliminary step would be to agree on the common design its many branches should take. It requires the identification within the diverse regimes of intellectual property of the common features upon which further convergence could be built. The actual pruning will be however left to others.

The regimes surveyed by this paper will primarily be copyright, trademark, patent and design rights, which can be considered as the sequoias of the IP jungle. The other varieties, i.e. related rights, the *sui generis* right in databases, the geographical indications or appellations of origin, plant variety rights or

² A. Christie (2008), 'A Possible Vision of a One Right System for IP', *One Right System for IP – Vision Impossible?*, IPR University Center International Conference, Helsinki, 3 October.

³ A. Kur (2008), 'Differentiated Protection Based on Unitary Ground – A Feasible Approach?', *One Right System for IP – Vision Impossible?*, IPR University Center International Conference, Helsinki, 3 October.

even the protection of semiconductors (that is a plant that not so many people can claim to have actually seen), will be addressed only incidentally or for comparison purposes.

Questions that will be successively addressed are the following: the justification of the granted protection (the *why* of the protection) (2), the subject-matter (the *what?*), requirements for protection (the *how?*), as well as the exclusions from protection (the *what not?*) (3), the scope of protection (the *what for?*) (4), the limitations and exceptions to such protection (the *not for what?*) (5), the duration (the *when?*) (6).

Contractual protection, rules of ownership, management of the rights will be left out, as the analysis is already broad enough. The enforcement or remedies conferred to all intellectual property rights will not be touched upon as they have been largely harmonized by Directive 2004/48 on enforcement.⁴

Unfair competition law will not be addressed either, even though it forms a relevant protection of creation, signs or other intangible items.⁵ Nevertheless, the choice to omit it is justified by its less structured protection regime (in terms of rights conferred, limitations, conditions) and by its lack of exclusive and exploitable rights, replaced by a rule of liability to be enforced *ex post*. That does not diminish the evidence that unfair competition, as well as competition law, plays a role in the intellectual property landscape, that I will not have time to develop.

Before addressing the many elements of the protection, a first step will be to underline the variable intensity put by the European lawmaker into each IP right, which influences the level of harmonization and configuration of the EU intellectual property regime (1).

1. LEVEL OF EUROPEAN INTERVENTION

Diversity in IP rights can be partially explained by the many levels of European lawmaking. Not all rights have been tackled by EU lawmaking with the same intensity, and the European gardener has not treated all branches of the IP tree alike.

⁴ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 in the enforcement of intellectual property rights, hereafter 'the enforcement directive'.

⁵ See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

The more thorough intervention is the creation of an EU-wide right, as has occurred in trademark,⁶ design right⁷ and plant variety right.⁸ Geographical indications and appellations of origin can also be granted at the EU level,⁹ which generates a title superseding the national protection. Such community rights have the desirable effect of granting a title of protection valid on the whole internal market. Provided for by Regulations, they can be said to genuinely construct a European intellectual property regime.

Less integrative are harmonization efforts that tend to provide common principles to national intellectual property protection, without encroaching upon the national sovereignty and territoriality of the protection. The most successful and comprehensive harmonization endeavour has arguably occurred in trademark,¹⁰ where only one directive has managed to bring together the laws of Member States on many aspects.¹¹ The same process of coupling a harmonization directive with a community right regulation along the same rules has occurred for design.¹² Harmonization can also be called a success for the protection of unoriginal databases by the *sui generis* right¹³ and of semiconductors,¹⁴ as two brand new rights have been created on similar principles (even though the latter has not been applied much by courts).

Copyright, despite no fewer than eight directives, remains a largely national matter.¹⁵ Harmonization has occurred on specific points. Technical subject-

⁶ Council Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trademark (codified version), hereafter 'the Community trademark regulation'.

⁷ Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs, hereafter 'the Community design regulation'.

⁸ Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights, hereafter 'the Community plant variety rights regulation'.

⁹ Council Regulation (EC) No. 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, hereafter 'the Community geographical indications regulation'.

¹⁰ Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trademarks (codified version), hereafter 'the trademark directive'.

¹¹ See the Max Planck Institute for Intellectual Property and Competition Law (2011), *Study on the Overall Functioning of the European Trade Mark System*, February.

¹² Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs hereafter 'the design directive'.

¹³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, hereafter 'the database directive'.

¹⁴ Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products.

¹⁵ B. Hugenholtz (2009), 'Copyright Without Frontiers: the Problem of Territoriality in European Copyright Law', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Cheltenham, UK and Northampton, MA: Edward Elgar Publishing, pp. 12–26.

matter such as computer software or databases have received a harmonized protection within copyright, in terms of definition, criteria of protection, ownership, exclusive rights, exceptions.¹⁶ But questions of interpretation challenging the actual level of harmonization have been recently brought to the attention of the Court of Justice of the European Union, as in the *Football Dataco* case for copyright in databases,¹⁷ the *Softwarova* case¹⁸ or the *SAS Institute* one¹⁹ for copyright in software. Those references to the Court indicate that harmonization still leaves many questions open.

Other fields for harmonization in copyright have been related rights,²⁰ the determination of some exclusive economic rights, e.g., cable and satellite rights,²¹ the *droit de suite*,²² lending and rental rights,²³ reproduction, distribution, communication and the making available rights, redefined to fit the digital age,²⁴ the duration of copyright and related rights,²⁵ the protection of digital management of rights.²⁶ The infosc directive also had the ambition of

¹⁶ See for databases, the database directive, and for computer programs, Directive 2009/24/EC of the European parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), hereafter the 'software directive'.

¹⁷ CJEU, 1 March 2012, *Football Dataco Limited v Yahoo UK Limited*, C-604/10. The question here was precisely the extent of harmonization brought by the directive and the freedom that is left to Member States to keep their own national interpretations and rules, in parallel to that of the directive.

¹⁸ CJEU, 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09.

¹⁹ CJEU, 2 May 2012, *SAS Institute Inc. v World Programming Ltd*, C-406/10.

²⁰ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), hereafter 'the rental and lending directive'.

²¹ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, hereafter 'the satellite and cable directive'.

²² Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.

²³ See the rental and lending directive.

²⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, hereafter 'the infosc directive'.

²⁵ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), hereafter 'term directive', amended by the Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

²⁶ Provided for the software directive for technical protection of the computer programs and by the infosc directive for the rest of copyright, related rights and *sui generis* rights.

harmonizing copyright exceptions, but everybody would agree that this attempt has failed²⁷ as the directive only provides for an exhaustive list of 23 exceptions from which the Member States are free to choose both to adopt the exception and to decide upon its conditions of application. It results in the impossibility of knowing for sure that an exploitation of a work (for example the use of works in online teaching) across European borders will benefit from exceptions in the whole territory of the internal market.

Still in copyright, a draft directive on collective management has been announced, which makes the EU lawmaker step into a new territory, formerly reserved to Member States, and a directive on orphan works has just been released.²⁸ For the latter, it is difficult to talk about real harmonization as the directive only provides a mutual recognition of the status of an orphan work granted in one Member State and recommends some guidelines to carry out the diligent search of the rights owners that is required as a preliminary step to acknowledge a work as orphan.

Patent has been the *parent pauvre* of the EU legislative efforts. There is no need to recall the unhappy saga of the community patent, still wishful thinking after more than 30 years of discussion. Besides, no directive has been adopted to harmonize the general rules of patent in the Member States. The only achieved intervention of the European Union in the patent arena has been to sustain the patentability of biotechnological inventions,²⁹ hereby enhancing a thriving new industry in Europe. As a result, patent laws remain largely fragmented in the Member States, even though the rules of the EPO patent might have influenced national laws, all Member States being part of the Munich Convention.³⁰

Last but not least, the European Union has tried to better secure the enforcement of its intellectual property by enacting a horizontal directive dealing with enforcement and remedies in all intellectual property rights.³¹

²⁷ Amongst many others, L. Guibault, G. Westkamp, T. Rieber-Mohn, P.B. Hugenoltz, et al. (2007), *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, report to the European Commission, DG Internal Market, February; M.-C. Janssens, 'The Issue of Exceptions: Reshaping the Keys to the Gates in the Territory of Literary, Musical and Artistic Creation', in *Research Handbook on the Future of EU Copyright*, supra note 15, p. 332.

²⁸ Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works, 25 October 2012.

²⁹ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, hereafter 'the biotechnology directive'.

³⁰ The TRIPS Agreement and the Paris Convention on Industrial Property also ensure that key rules in patent are similar in all European Member States.

³¹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

2. THE JUSTIFICATION AND OBJECTIVES OF INTELLECTUAL PROPERTY

The quest for a common ground for IP rights proves to be hazardous. The European legal texts applicable in intellectual property refer to diverse grounds for legislation. A common justification could well be found in article 17 of the EU Charter of Fundamental Rights that solemnly declares that 'Intellectual property shall be protected'.³² But can it be inferred from that rather blunt formulation that the protection of intellectual property is an end in itself, hence not needing any further justification? Despite the apparent strength and self-confidence of this declaration, many scholars agree that it should not be construed as providing a free rein to IP protection.³³ The Charter only follows previous qualification of the right to property, as it includes intellectual property, as a fundamental right,³⁴ without settling the ultimate justification of this protection.

Beyond this overall affirmation, a common rationale for intellectual property protection, whatever its type, is still lacking in the *acquis communautaire* and in legislative debates. Each directive or regulation tends to offer a series of objectives and foundations to the protection it provides. Justifications that are usually proffered can be categorized in different types.

A classical economy-based rationale is the role of exclusive rights to provide a necessary incentive to creation or innovation. This appears in the enforcement directive that states in its first recital that 'the protection of intellectual property is important [...] for promoting innovation and creativity'. The same recital links the achievement of the internal market to the need to create 'an environment conducive to innovation and investment', which can find satisfaction in IP protection. Similar objectives are mentioned in the infosoc directive ('to foster substantial investment in creativity and innovation [...] and lead in turn to growth and increased competitiveness of European industry'³⁵), in the community design regulation ('enhanced protection for industrial design [...] encourages innovation and development of new prod-

³² Article 17(2), European Charter of Fundamental Rights, OJ, 18 December 2000, C 364/01.

³³ See notably J. Griffiths and L. McDonagh, 'Fundamental Rights and European IP Law – the Case of Art 17(2) of the EU Charter', in this volume; C. Geiger (2008), 'Intérêt général, droit d'accès à l'information et droit de propriété : la propriété intellectuelle analysée à la lumière des droits fondamentaux', in S. Dusollier and M. Buydens, *L'intérêt général et l'accès à l'information en propriété intellectuelle*, Bruxelles: Bruylant, p. 249.

³⁴ See the Opinion of the Advocate General, 14 April 2011, *Scarlet Extended SA v Sabam*, C-70/10, §90.

³⁵ Infosoc directive, recital 4.

ucts and investment in their production'³⁶), in the database directive,³⁷ as well as in the community plant varieties rights regulation ('to stimulate the breeding and development of new varieties'³⁸).

Closely related to the incentive reasoning, intellectual property rights are also considered as a desirable *protection of investment*, hereby offering some return on production costs and remunerating the actors involved. This appears in copyright, patent or design protection and is often coupled with innovation-based motives.

For instance, in copyright, the infosoc directive explains that:

if authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as 'on-demand' services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.³⁹

This rationale is explicit in the protection of subject-matter for related rights that merely consists in economic contribution to creation, such as the rights in phonograms, first fixation of films or broadcasts. 'The possibility of securing [the income of performers] and recouping [the investment required for the production of phonograms and films]'⁴⁰ justifies the legal protection conferred to the rightholders concerned by the directive on rental and lending rights that harmonized the protection of related rights in the European Union. Similar justifications are found in the software directive,⁴¹ the biotechnology directive,⁴² the database directive⁴³ and in the resale right directive that insists on the adequate remuneration of artists.⁴⁴

³⁶ Community design regulation, recital 7.

³⁷ See recitals 9–12 of the database directive.

³⁸ Community plant variety rights regulation, recital 5.

³⁹ Infosoc directive, recital 10. The next recital even mentions 'safeguarding the independence and dignity of artistic creators and performers'.

⁴⁰ Rental and lending directive, recital 5.

⁴¹ See the software directive, recital 2.

⁴² See the biotechnology directive, recitals 2 and 3 ('maintain and encourage investment in the field of biotechnology').

⁴³ See the database directive, recital 12 ('Whereas such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of the makers of databases').

⁴⁴ See recital 3 of Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of a original work of art ('The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art').

Return on investment is also proffered as a ground for protection of trademarks, as the ECJ has recently admitted the need to protect other functions of trademark, in particular 'those of communication, investment or advertising'.⁴⁵ The protection of investment in a brand as a publicity signal is now recognized as an objective of trademark, whether famous or not.⁴⁶

The diversification of agriculture and its positive effects on the incomes of farmers equally appears in the objectives of the protection of geographical indications.⁴⁷ Likewise, protection of investment often results in the protection of a specific economic sector, agriculture for geographical indications, the information market for the *sui generis* right,⁴⁸ the nascent biotechnology industry for the biotechnology directive.⁴⁹

A last type of justification, still rooted in economic considerations, is to prevent free riding and ensure that competition is not distorted, even though that last motive aligns itself on the very objective of harmonization directives to achieve an internal market by removing the differences of protection amongst the Member States. Trademark protection clearly comes within that scope,⁵⁰ but traces of that rationale can be tracked in the protection of databases and software when copies are said to be possible at a fraction of the cost needed for their development.⁵¹

Each intellectual property right also has ancillary and specific objectives linked to its own subject-matter. Protection of geographical indications and appellations of origin purports to ensure some product quality,⁵² an objective that has been gradually acknowledged also in trademark. The Court of Justice has indeed recently insisted on the protection of the function of guaranteeing the quality of the goods or services,⁵³ beyond the protection of the function of origin and has applied this function even to trademark with no reputation. Here

⁴⁵ ECJ, 18 June 2009, *L'Oreal v Bellure*, C-487/07, §58 *in fine*.

⁴⁶ CJEU, 22 September 2011, *Interflora*, C-323/09, §40

⁴⁷ See recital 2 of the geographical indication regulation.

⁴⁸ See recital 7 of the database directive.

⁴⁹ See recital 1 of the biotechnology directive ('Whereas biotechnology and genetic engineering are playing an increasingly important role in a broad range of industries and the protection of biotechnological inventions will certainly be of fundamental importance for the Community's industrial development').

⁵⁰ See recital 2 of the community trademark regulation and the recital 2 of the trademark directive.

⁵¹ See the identical formulation in recital 2 of the software directive and recital 7 of the database directive.

⁵² See recital 3 of the geographical indication regulation ('a constantly increasing number of consumers attach greater importance on the quality of foodstuffs in their diet rather than to quantity. This quest for specific products generates a demand for agricultural products or foodstuffs with an identifiable geographical origin').

⁵³ ECJ, 18 June 2009 *L'Oreal v Bellure*, C-487/07.

also, it is not certain that the Court wished to limit this function to trademarks with a reputation.⁵⁴

Literary and artistic creation brings with it some cultural aspects. The cultural importance of copyright protection is underlined in many directives, without playing a central role. For instance, the infosoc directive reminds us of the 'great importance from a cultural standpoint' of copyright and related rights,⁵⁵ referring immediately to the former article 151 of the treaty mandating the cultural competence of the Community.⁵⁶

All those justifications might look a bit messy and inconsistent. Surprisingly, EU legislative texts do not mention much the balance that is generally said to be embedded in intellectual property protection. The directive on enforcement of 2004 is remarkable in that regard as it clearly affirms that:

the protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his/her invention or creation. It should also allow the widest possible dissemination of works, ideas and know-how. At the same time, it should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet.

This statement is echoed in the infosoc directive that opposes freedom of expression and the public interest to the fundamental protection of intellectual property. However in many copyright legal texts, it is said that any harmonization of copyright must take as a basis a high level of protection,⁵⁷ which inclines to tilt the balance in favour of one side of the scale only.

The reluctance of the European lawmaker to specifically address the overall objective of intellectual property, beyond classical incentives-based arguments, is puzzling. Recitals about the effect of a high protection on the European competitiveness sound like a well-learned script. Reforming the intellectual property system and trying to make it more comprehensive and convergent would at least require providing the same roots for all protection of intellectual property under an overall objective of enhancement of creation, innovation and competition.

⁵⁴ CJEU, 22 September 2011, *Interflora*, C-323/09.

⁵⁵ Infosoc directive, recital 12.

⁵⁶ See also recital 3 of the rental and lending directive insisting on the cultural development of the Community.

⁵⁷ See recital 9 of the infosoc directive, and particularly recital 11 of the term directive ('The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole').

3. OBJECT OF PROTECTION

Addressing the object of intellectual property requires analysing first the type of immaterial content that is liable for protection, i.e. the subject-matter (3.1), then the fundamental exclusion of ideas from intellectual property (3.2), the requirements for protection (3.3) and finally, the cases of exclusions and their motives (3.4).

3.1 Subject-matter of Intellectual Property

Each intellectual property right protects a differently defined subject-matter: literary and artistic work for copyright, invention for patent right, sign for trademark, the appearance of a product for design right, a database for the *sui generis* right, the creation of a plant variety for plant variety right, or names of regions or specific places for geographical indications and designations of origin.

The divergence of subject-matter seemingly displays the heterogeneous nature of intellectual property and jeopardizes any project trying to put some order in the different branches thereof. Some would say that it is impossible to conceive similar principles and rules to protect so dissimilar objects of protection.

Actually, one can distinguish three categories of subject-matter: The first one encompasses all types of 'creation', whether a work in copyright, an invention in patent, the appearance of a product in design or a plant variety in the plant variety right. All those rights protect some activity of innovation or creation, but separate them from each other depending on the field or means of creation. Copyright protects artistic and literary creation, not limited to the arts, but rather conveying expression in a visual, sound or language medium. The related rights of performers are enjoyed in performances, which are another form of creation. Patent protects creation in the technical field expressed in technical means. The plant variety right vests upon botanical variations of plants. As to industrial designs, they are hybrids between artistic and technical creations. Both the directive and the regulation define the 'design' as 'the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation'. Design cannot be exclusively technical as the right does not subsist in features of appearance of a product, which are solely dictated by their technical function (see *infra*). With that limit in mind, a vast range of designs can be protected, from mere artistic shapes with no specific function to appearances of technical components of a product.

A second category includes 'signs or denominations', either protected by trademark or by the right in geographical indications. The notion of 'sign' is very broad, for it gathers all forms of expressions conveying some meaning, from words, numbers, sentences, to images, shapes, sounds or colours. A sign

is to be set apart from the notion of creation. Trademark does not need the sign to be created specifically to distinguish a product or service in order to enter into function. Existing words, images, colours or sounds can perfectly apply for trademark protection. Instead of a creation, the very focus of the protection in trademark, and incidentally in the protection of geographical indications, is the use of a sign, existing or not, in relation to products or services.

Aside from those two categories of subject-matter eligible for IP protection, some productions are protected as mere 'investments'. This is the case of non-original databases when protected by the *sui generis* right or of related rights protecting first fixations of films or phonograms and broadcasts.

Classifying the subject-matter of intellectual property in these three key categories (creation – sign – investment) could form three main branches with rules adapted to the type of object to be protected, whether a creation, a sign or an investment. Reasonably, the objectives of regulating creations, whatever their field, would obey similar considerations and differ from those governing signs or investments. For instance, the economic reasoning about incentives only play a role for creation, and partially for investments, but not for signs whose use does not need to be incentivized. Investments might not even need to be incentivized but need a protection against free-riding. Balancing protection with public interest would also be differently shaped as the effect of protecting a creation or a sign is necessarily different. Another key difference between creation and sign is that the first one should be protected against copying by an absolute protection whereas for signs, it is their use in relationship with products or services that matters, which only leads to a relative protection.

The three big branches of the tree might then be separated again to set up different principles of protection depending, for instance, on the artistic or technical nature of the creation.

3.2 The Exclusion of Ideas

Whatever the subject-matter of protection, an underlying principle is shared by all intellectual property rights: ideas should remain free. As a rule, no intellectual property applies to abstract ideas or principles, but it appears more clearly in some rights than in others.

It is a key and explicit rule in copyright that is strongly affirmed in many legal texts under the idea/expression dichotomy. It is surprising that almost no community legislative act – but the software copyright directive⁵⁸ – expressly

⁵⁸ Article 1(2) of the software directive: 'Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this directive'.

repeats that foundational principle. Arguably that can be explained by the fact that no directive addresses the subject-matter of copyright in a comprehensive way. On the other hand, the idea/expression dichotomy is more visible in international texts, such as the WIPO Copyright Treaty, in its article 2, or the TRIPS Agreement, in its article 9(2).

This paradigmatic criteria for copyright protection is however unsteady in the *acquis communautaire*. Despite the upfront affirmation in the software directive that ideas and functional elements are not protected, the protection of computer programs hides very badly the difficulty of keeping ideas free from the effect of copyright protection in the expression of the program, as demonstrated by the intricate provision of decompilation, required to uncover mere ideas behind the protection of unavailable source code. The Court of Justice of the European Union has recently answered questions referred by a UK judge about the infringing nature of the replication of functional aspects of the program that did not require any copying of its source code.⁵⁹ This gave the opportunity to the court to insist on the key principle that ideas are not protected by copyright, which it justified by the encouragement of 'technological progress and industrial development'.⁶⁰

The exclusion of ideas is a well-known mantra in copyright but it is also valid in other intellectual property rights, yet more implicitly. Patent, for instance does not protect abstraction, but only technical features, as implied by the list of exclusions of article 52(2) of the European Patent Convention, most of which are explained by their abstract dimension (e.g. discoveries, scientific theories and mathematical methods, schemes, rules and methods for performing mental acts, or presentations of information). An idea, understood as any abstract concept with no concrete application or materialization in a technical solution or process, is not eligible for patentability.

By its very nature and definition, a design has a material character, concretized by the lines, shapes, texture or materials of a product that form the very object of the protection. The exclusion of an idea or abstract feature is here self-evident.

Even in trademark protection, an abstraction or concept is not liable for protection, as was clearly reminded by the European Court of Justice in the *Dyson* case,⁶¹ which is rarely presented under that aspect. In that decision, the judges have excluded the protection of a transparent bin forming part of the external surface of a vacuum cleaner. The Court held that a trademark constituted by all the conceivable shapes of a product, in a general and abstract

⁵⁹ CJEU, 2 May 2012, *SAS Institute Inc. v World Programming Ltd*, C-406/10.

⁶⁰ *Ibidem*, §40.

⁶¹ ECJ, 25 January 2007, *Dyson v OHIM*, C-321/03.

manner, is not a sign in the meaning of trademark law.⁶² Without clearly considering that such subject-matter would actually be an idea or a concept by nature excluded from IP protection, this decision can be construed as admitting the protection of trademark only for specific and determined signs and not for abstract matter.

Pruning the IP tree shall require strong affirmation of the principle of exclusion of ideas in all fields of intellectual property and its inscription in the *acquis communautaire*. Instead of leaving more or less implicit traces of this fundamental paradigm, a clear statement should ascertain the necessary freedom of using ideas, principles or methods. That would provide some solidity to resist attempts of commodification over those building blocks of innovation, creation and industrial or commercial development, as it was witnessed in the computer program area.

3.3 Requirements for Protection

Requirements for protection logically depend on the type of intellectual property right concerned: originality for copyright, a set of three conditions for patent (novelty, inventiveness and industrial application), mainly distinctiveness for trademarks, novelty and individual character for design.

One can however find some common features in those apparently diverging conditions. Indeed, they can be arranged in a continuum comprising four levels: creation – novelty – adequacy – investment. *Creation* includes all conditions that require, in one way or another, some level of intellectual intervention, beyond mere financial or technical contribution. Conversely, *novelty* is strictly objective and means that something that did not exist before has now been produced. What I refer to by *adequacy*, for want of a better term, is the capability to satisfy the objectives of the intellectual property protection, in other words, the fact that the subject-matter requesting protection is fit for its purpose. As we will see, trademark, and to some extent, patent law, impose conditions for protection related to the very objective of the right granted. *Investment* is the lower requirement as it only implies a financial contribution in producing the intellectual object.

Copyright is clearly related to the creation criteria. A work has to be original to be eligible for protection. The requirement of originality is only partially harmonized by EU law, for software, photographs and databases, are defined as 'the author's own intellectual creation'. This Community definition of originality has been extended by the European Court to all copyrighted works.⁶³

⁶² *Ibid*, §35.

⁶³ ECJ, 16 July 2009, *Infopaq v DDF*, C-5/08, §37. It has been upheld in CJEU, 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, §46.

Considering originality as a Community notion that needs to receive a uniform interpretation will force the choice of which conception of originality will prevail amongst the many comprehensions of that notion in the Member States. One often opposes the subjective approach of the civil law countries, focusing more on the imprint of the creator to the objective approach of the UK and Ireland that rather insist on skill and labour.⁶⁴ The EU decision in the *Football Dataco* case might be construed as rejection of the 'skill and labour' test,⁶⁵ even though it remains controversial. Whatever the conception, originality belongs to the 'creation' requirement in the sense that copyright protection is triggered when there is an intellectual creation emanating from the author, which the European court has defined as the possibility, for the author, to express his creative abilities in the production of the work by making free and creative choices.⁶⁶

Design lies between creation-based and novelty-based systems. A first condition is that the design must be new, which is satisfied if no identical design has been made available to the public before the registration. A second condition is that the design must have an individual character, defined as the fact that the overall impression the design produces on the informed user differs from the impression produced by the existing designs. It departs from novelty as the test is not purely objective but integrates some creative involvement of the designer, perceptible by the user, thereby entering into the realm of creation-based requirements.

Plant varieties have to be distinct, uniform, stable and new, which puts them in the category of novelty, the other conditions not revealing any test of creation.

Trademarks do not have to show creation or novelty to be protected. The key requirement of distinctiveness more particularly refers to the fact that signs should be able to perform their function of origin of the product or service. In Community law, the distinctiveness of a trademark has been defined as 'the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings'.⁶⁷ In other words, trademark must be fit for the purpose of distinguishing goods or services: a sign that would be perceived by the consumers as referential or descriptive qualities of the product or as mere

⁶⁴ A. Strowel (1993), *Droit d'auteur et Copyright – Divergences et convergences*, Bruxelles: Bruylant; R. Casas Valles, 'The Requirement of Originality', in *Research Handbook on the Future of EU Copyright*, supra note 15, p.102.

⁶⁵ CJEU, 1st March 2012, *Football Dataco*, C-604/10.

⁶⁶ CJEU, 1st December 2011, *Painer*, C-145/10.

⁶⁷ ECJ, 22 June 1999, *Lloyd v Loint's*, C-342/97, §22.

ornamentation of the product or of its packaging is not apt to serve as a trademark.

The requirement of distinctiveness can thus be qualified as a test of adequacy: only signs that can accomplish the very function of the trademark, i.e. distinguishing products or services, are eligible to the protection. Trademark law excludes descriptive, generic or customary signs, which by themselves are inappropriate to operate as trademarks, as the public will not perceive them as indications of origin of the product or service.

There is however a small touch of novelty in trademark conditions for protection in the fact that the sign should not be already registered in an identical or similar form for identical or similar products or services.⁶⁸ This intervention of novelty is rather limited as it is not absolute but relative in two respects. Firstly, only the owner of a former trademark or other protected sign is entitled to complain about the registration of a sign similar to his own. Second, the protection of a sign being limited to similar products or services, by the speciality principle, the trademark does not have to be absolutely new, as in patent law, but should only not have been registered already in the same field of commercial production.

Patent is a very peculiar case, as inventions have to comply with requirements that mix creation, novelty and adequacy. The key criterion is certainly novelty: the invention should be new and not exist already. But there is also some creative aspect in the condition of inventive step: the invention should not be obvious to a person skilled in the art, having regard to the state of the art. It should not be an obvious step in technical progress, thereby requiring some innovation from the inventor.

And finally, the condition of industrial application relates to the usefulness of the invention, its capacity to serve industry, and can be attached to the notion of adequacy, mentioned above.⁶⁹ Only inventions that can serve to 'something' and lead to production of goods or services are fit for protection.

A final type of requirement in intellectual property is investment. It applies to databases that can pretend to the protection of the *sui generis* right if they have necessitated a substantive investment. No creation, novelty of adequacy here, but merely some degree of financial contribution.

Surprisingly, related rights do not obey to any requirements for protection. The rights of performers are granted as soon as there is a performance that has some artistic dimension. Arguably, the condition of performance is not even a test for protection but its very subject-matter. Deciding that the artistic performance is a condition might to some extent include the right of performers in

⁶⁸ Even for different products in the case of protection of famous trademarks.

⁶⁹ The condition of industrial application also reflects the technical feature of an invention, thereby excluding abstract matter.

the 'creation' category, as something has to be created by the performer. It is more disturbing that producers of phonograms or films do not have to demonstrate a significant level of investment to enjoy related rights. This is one of the only cases where an intellectual property right is granted with no formalities or specific conditions to fulfil. This explains that their specific rights cannot rejoice the *sui generis* right on databases in the investment category of conditions for protection.

This lack of any qualitative or quantitative threshold, compared to the many requirements applicable to the other forms of intellectual property, raises a legitimate concern of overprotection. There is no reasonable ground explaining this lack of any condition for protection, except maybe the presumption that any phonogram or film production requires a high amount of investment. At least some level of investment could be required.

Despite the relative differences in the conditions for protection, all intellectual property rights recognize a twofold principle of non-discrimination. On one hand, there is no minimal threshold of protection in many IP rights; on the other hand, the protection is applied independently of the type of creation or sign.

On the first element, intellectual property rights generally grant protection to eligible subject-matter, even though the satisfaction of the conditions to be met is minimal. For instance, trademark can have a weak distinctive character (but it will have consequences on the degree of their protection to some extent). The originality required for copyright protection does not function quantitatively or qualitatively, and the author's own intellectual creation has been construed very broadly by the European Court in the *Painer* case,⁷⁰ following national case law that generally applies a low threshold. Likewise, the test of non-obviousness in patent seems easily passed, even for mundane inventions.

A second factor of non-discrimination lies in the generosity of intellectual property rights that welcome all types of creations or signs. Copyright is not limited to works in the artistic field, but protects, as required by the Berne Convention for that matter, scientific, informational, functional creations. Article 27 of the TRIPS Agreement imposes the patentability of 'all fields of technology', an expression that has been used in article 52(1) of the EPC, in its revised version of 29 November 2000. As to trademark, all imaginable signs have knocked on the door of registration and have been broadly welcomed in, to the extent of the satisfaction of the requirement of graphical representation.⁷¹

⁷⁰ CJEU, 1 December 2011, *Painer*, C-145/10.

⁷¹ See for colours (admitted), ECJ, 6 May 2003, *Libertel Croep BV v Benelux-*

Taken together, both refusals to discriminate on subject-matter in intellectual property result in a very broad protection in the key fields of intellectual property. Copyright, trademark, design and patent rights have gained a catch-all character, which raises concerns of overprotection and, in practice, enables overlapping rights in a same subject-matter.⁷² Categories of IP subject-matter might appear as being properly delineated and separated (artistic creations for copyright, technical ones for patent, signs for trademark, appearance of a product for design). Yet the actual munificence of intellectual property tends to multiply the situations where several rights apply to the same object, even though they might protect different aspects thereof. The shape of technical components might be protected by national copyright or design, as the artistic purpose of the creation is not required and the level of originality is very low. Software is now protected by copyright and by patent, despite the formal exclusion contained in article 52(2)(c) of the EPC.⁷³ This is probably one of the densest parts of the IP tree that can give an impression of an anarchic and overgrown foliage.

3.4 Exclusions from Protection

Exclusions from protection are largely linked to each intellectual property with no overall approach. Two major causes for exclusion can however be systematized.

The first one is justified by *public order* or *ethics considerations* and can be found in almost all intellectual property rights. Contradiction with public policy excludes signs from trademark protection. Article 3(1)(f) of the trademark directive and article 7(1)(f) of the community trademark regulation reject the registration of trademarks which are contrary to public policy or accepted principles of morality. Two other absolute grounds for refusal or invalidity are related to public policy, i.e. the exclusion of deceptive signs and of trademarks concerned with article 6ter of the Paris Convention (official signs, flags, State emblems, of countries or international intergovernmental organizations).

Contradiction of public policy or morality provides a similar ground for exclusion in design right, also under the harmonizing directive and the regulation creating a community protection.

Merkenbureau, C-104/01; for sounds (admitted in principle but with a subsisting difficulty of graphical representation), ECJ, 27 November 2003, *Shield Mark BV v Joost Kist*, C-283/01; for smells (rejected so far), ECJ, 12 December 2002, *Ralf Sieckmann*, C-273/00.

⁷² S. Dusollier and A. Cruquenaire (eds) (2009), *Le cumul des droits intellectuels*, Bruxelles: Larcier; E. Derclaye, and M. Leistner (2011), *Intellectual Property Overlaps: A European Perspective*, Oxford: Hart Publishing.

⁷³ EPO Enlarged Board of Appeal, 19 February 2010, G-2/08.

Public order is more articulated in patent protection. The European Patent Convention provides that inventions the commercial exploitation of which would be contrary to 'ordre public' or morality will not be patented. The EPO case law has built some interpretation of this notion by specifying that the bar to patentability grounded in public order mainly depends on a careful weighing up of the negative effects of the invention and of its beneficial outcome for humankind.⁷⁴ More recently, both the EPO Enlarged Board of Appeals and the European Court of Justice, in cases of a patent involving embryonic human stem cells, have pointed out that:

it is not the fact of the patenting itself that is considered to be against *ordre public* or morality, but it is the performing of the invention, which includes a step (the use involving its destruction of a human embryo) that has to be considered to contravene those concepts.⁷⁵

Grounds for excluding inventions from patent protection based on public order or ethics have also materialized in a list of unpatentable inventions in the directive on biotechnological inventions,⁷⁶ encompassing processes for cloning human beings, processes for modifying the genetic identity of human beings, the use of human embryos for industrial or commercial purposes and the modification of the genetic identity of animals without any substantial medical benefit. Equally related to ethical debates about life patenting, the biotechnology directive excludes the patenting of the human body and the simple discovery of one of its elements, plant and animal varieties, and essentially biological processes for the production of plants or animals. But those exclusions can equally be justified by the lack of a technical invention in such subject-matter, which could be described as mere discoveries, and the exclusion for plants does not prevent the grant of a plant variety right. More generally, the exclusion of therapeutic methods can be explained by a strong public policy motive.

Only copyright avoids exclusion based on public policy. Having said that, most Member States exclude official documents from protection, which can also be explained by public policy and the objective to keep legal norms available to citizens. But this exclusion is not included in the *acquis communautaire*.

⁷⁴ EPO Board of Appeal, 3 October 1990, T-19/90 (Oncomouse), OJ EPO, 1990/476, Reason 5.

⁷⁵ EPO Enlarged Board of Appeal, 25 November 2008, G-2/06, §29; CJEU, 18 October 2011, *Bristle*, C-34/10, §52.

⁷⁶ Article 6(1) of the biotechnology directive. See also, for the European patent, the similar list in Rule 28 of the Implementing Regulations to the Convention on the Grant of European Patents.

A second ground for exclusions is the need to keep some resources available for competitors. This explains many exclusions from trademark protection, such as descriptive signs (trademarks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services), usual signs (signs or indications which have become customary in the current language or in the bona fide and established practices of the trade), and for three-dimensional signs, the exclusion of the shape of which results from the nature of the goods themselves and the shape of goods which is necessary to obtain a technical result. A similar competitive consideration lies in the exclusion from protection by design rights of designs dictated by their technical function and of designs of interconnections.

This is an essential ground for exclusion that responds to the competition dimension of intellectual property, sometimes evoked in the rationale or context of the legislative action of the European Union.

Excluding some subject-matter is an important policy option, useful to organize competition or to choose not to protect some matter, for ethical, public order or economic reasons. Paradoxically, the determination of excluded subject-matter mainly appears as being bound to each IP right with no real overall perspective. This separated approach is understandable, as exclusions should also be devised according to the specific subject-matter of each protection. However, it has some side effects, as the categories of subject-matter for each intellectual property right are not perfectly closed or coherent, and some creations or signs are increasingly protected by overlapping rights. As a consequence, excluded matter can enjoy protection by other types of right than the one that excludes it. It is not always problematic, since the ground for exclusion might be the need to properly delineate each intellectual property field, as is the case with aesthetical presentations, excluded from patent protection, but protected under copyright. Another example is the exclusion by trademark law of shapes that give a substantial value to the product, which can be partially explained by the more adequate protection of such shapes by design right.

The two grounds for exclusion that we have underlined are particularly relevant. They could be better systematized and cross, when necessary, all IP rights, while taking the particularity of each right and its subject-matter into account.

3.5 Formal Requirements

With the noteworthy exception of literary and artistic property, intellectual property rights are subject to formality requirements. Patent, trademark,

design right (even though a reduced protection exists for unregistered design), plant variety right, geographical indication and appellation of origin are all governed by a rule of registration-based acquisition of right and transfer.

Formalities, it is well known, are prohibited by the Berne Convention as a precondition to the existence and exercise of copyright. The advent of the digital environment, that abounds with creations difficult to retrace to their copyright owners, has revitalized that question.⁷⁷ Formal requirements in copyright are not a taboo anymore and parallels are drawn with trademark and patent law registration systems. If one could liberate copyright from the restraining anchor of the Berne Convention in one way or another, a common ground could well be found across the different intellectual property rights to align the regimes of formalities, while preserving particular interests of copyright, such as the moral right. At least nothing prevents, under current international copyright law, formalities from being imposed to make transfer of rights valid against third parties.⁷⁸ That would be a first step in the direction of a more efficient and easier identification of copyright owners.

More surprising is the absence of any formalities to enjoy and exercise related rights, the *sui generis* right in databases or the protection of technological measures and rights management information against circumvention and removal, despite some proposals to that effect.⁷⁹ The case of the performer set aside, nothing explains that formalities cannot be required from the industrial and economic entrepreneurs who are the producers of phonograms and films, the broadcasters, the producers of databases or the providers of works in a DRM-protected format. Registration of their production or of the application of the technology they deploy in their business models would in our view be necessary and justified.⁸⁰

4. SCOPE OF PROTECTION/RIGHTS CONFERRED

At first blush, the rights conferred by each intellectual property right appear to be rather different. In copyright, moral rights set aside, rights to control *repro-*

⁷⁷ S. Van Gompel (2011), *Formalities in Copyright Law – An Analysis of Their History, Rationales and Possible Future*, Kluwer Law International, pp. 2–8.

⁷⁸ S. Dusollier (2011), '(Re)introducing Formalities in Copyright as a Strategy for the Public Domain', in L. Guibault and C. Angelopoulos (eds), *Open Content Licences from Theory to Practice*, Amsterdam University Press, p. 75.

⁷⁹ *Ibid.*, pp. 92–94.

⁸⁰ Registration of DRM could also provide some solution to users wishing to benefit from exceptions, to help the interoperability and to resist the obsolescence of the lock-ups affixed to digital content.

duction, *public communication* and *distribution* are granted to the right owner.⁸¹

Patent rights protect against any *making* and any *use* of the invention, but for private purpose. Whereas trademark defines its scope of protection as the *use* of the protected sign in the course of trade, which includes, but not exhaustively,⁸² affixing the sign to the goods or to the packaging thereof; offering the goods, putting them on the market or stocking them for these purposes under that sign, offering supplying services thereunder; importing or exporting the goods under that sign; or using the sign on business papers and in advertising.⁸³

The design regulations also refer to a protection against unauthorized *use* of the design, which is further defined as 'the making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes'.⁸⁴

The realm of the rights conferred on each type of IP rights appears rather specific, both in technical and legal terms. Indeed, what could be similar between a copy of a work, the use of an invention itself and the use of a trademark in relation to a product? Actually, those notions are not so distinct as they seem to be. They all fit under a broader notion of *exploitation*: whatever the type of intellectual property, the exclusive rights delineate the power of the owner to take an effective benefit of her property. The scope of her rights covers uses of the protected subject-matter that presumably tend to achieve the purpose of its protection. This explains why, technically speaking, definitions of the rights slightly differ and take form according to the type of subject-matter.

Exploiting a literary or artistic work means to achieve its circulation in the public, which can be done directly and with no mediation (hypotheses covered by the communication right) or indirectly through a copy (hypotheses of the reproduction right, but also of the distribution, lending and rental rights).

A patent entitles its owner to control any making or use of the invention, beyond the private use, which is equivalent to say that the invention is exploited, for the technical solution is put into operation in such use or making. The patent holder's interest is to capture the benefits of her invention when it is applied in a product, technology or process.

⁸¹ Other exclusive rights in copyright are the rights to control rental, lending, resale for artistic works, and adaptation.

⁸² CJEU, 23 March 2010, *Google*, C-236/08, C-237/08, C-238/08.

⁸³ See article 9(2) of the Community trademark regulation and the article 5(3) of the trademark directive.

⁸⁴ Article 9(1) of the Community design directive, as well as article 12 of the design directive.

As to trademark, its function and benefit are to serve to distinguish products or services of one undertaking from another. Exploiting a trademark hence covers any use of the mark to designate a product or service, whether in direct relation to a product or service, or in marketing or publicity.

Insisting on this common feature of all intellectual property rights would reinforce the consistency of the intellectual property framework. One could go as far as acknowledging that one single right, called the *right of exploitation*, could be adopted to encompass all the rights granted to IP owners, whatever subject-matter is concerned.⁸⁵ The unique umbrella of the right of exploitation would not only be a matter of systematization and convergence but it would also, and perhaps more fundamentally, serve as a useful concept to refocus all technical or incidental acts of use that have gradually entered into the scope of the rights, thanks to this unlimited list of rights contained in each intellectual property regime. Let me give two examples.

The copyright case law of the last two years shows some uncertainty, perhaps even a disorienting confusion, when dealing with new technological developments that challenge technically-defined exclusive rights. It has happened with the communication to the public and the reproduction right. As to the communication to the public, the European Court had put forward a sound criterion in the *SGAE* case: the new public,⁸⁶ and has gradually developed it in any case related to the communication to the public.⁸⁷ There is an act of communication to the public if the work is communicated to a public different from the public at which the original act of communication of the work is directed.

Aligning the scope of the communication right with the transmission to a new public arguably follows the notion of exploitation, as works are exploited when they are reaching different publics, who can hence enjoy, view or listen to the content so received. It can also serve to determine, amongst many technical acts that contribute to the transmission of a work to its final public, which ones should be covered by the exclusive right.⁸⁸ Yet, a recent decision has shown confusion by adding a supplementary element to the communication right, that of the possible access by the public to the essential element of the work.⁸⁹ Facts of the case related to the television broadcasting of the graphic

⁸⁵ Christie, *supra* note 2.

⁸⁶ ECJ, 7 December 2006, *SGAE v Rafael Hoteles*, C-306/05, § 40.

⁸⁷ See CJEU, 4 October 2011, *Football Association Premier League*, C-429/08; CJEU, 13 October 2011, *Airfield*, C-431/09 & C-432/09; CJEU, 15 March 2012, *Phonographic Performance*, C-162/10; CJEU, 15 March 2012, *SCF*, C-135/10.

⁸⁸ See an application to technical acts required by broadcasting, the Opinion of the Advocate General, 17 March 2011, *Airfield*, C431/09 and C-432/09.

⁸⁹ CJEU, 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, §57.

user interface of a computer program, which the Court did not consider as an act of communication covered by copyright as the interaction with the user, deemed to be an essential element of such interface, was impossible. Beyond the puzzled reaction that many scholars had when discovering this unexpected condition for the communication right and its blatant contradiction with the refusal of the Court to qualify the user interface as a computer program (which conversely could have explained the requirement of an interaction), the only way to understand and accept this element might be to attach the ruling to the notion of exploitation. Should not the communication to the public be restricted to cases where the work is indeed achieving its purpose of being transmitted to the public, and effectively received by the public? The difficulty comes from the fact that the graphic user interface should indeed ensure some interactivity with the user to be properly received, but that the European judges could not consider it as a software. As a consequence, the decision seems to imply that the requirement of interaction applies to all works protected by copyright, whereas what is at stake is rather the communication of the essential elements of the work, in other words that the work is really exploited when communicated, meaning that it is capable of reaching its new public.

I doubt however that this was the implicit intention of the European Court, since, in other decisions dealing with reproduction right, and more particularly the temporary right of reproduction, its approach was rather attached to technical definitions of the act, than on a purpose-bound notion of exploitation. Indeed, in the *Infopaq* case, the European judges did not enter into a discussion of the ultimate purpose of the copies that occurred, but only touched upon their genuine transient nature, by requiring that 'the process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end'.⁹⁰

As a reminder, the infosoc directive includes in principle temporary copying within the scope of the reproduction right but exempts acts that are only transient or incidental, are an integral and essential part of the technological process of a network transmission or of a lawful use and have no independent economic significance.⁹¹ Many have denounced the lack of clarity of that demarcation line between unauthorized and authorized copying.⁹² It would be

⁹⁰ ECJ, 16 July 2009, *Infopaq v DDF*, C-5/08, §64.

⁹¹ *Ibid.*

⁹² For instance A. and H.-J. Lucas (2006), *Traité de la propriété littéraire et artistique*, Lexis-Nexis, 3^{ème} éd., p. 205, n°245; S. Dusollier (2005), 'Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work', *EIPR*, 201-4.

clearer to embrace acts of transitory copying only when they can be qualified as exploitation of the work, meaning that a further circulation of the work can occur from the temporary copy itself. This would rejoice the purpose of the reproduction right that is to grant a control over the public circulation of the work, not over its mere use. The copy should not in itself enter into the realm of the exclusive rights, but only when it is the means of a further exploitation of the work. Transposed to the temporary copy, the fact that they are technically copies (which is the view of the infosoc directive) does not suffice to make them relevant for copyright: it is also necessary that they can trigger a new act of communication. The Advocate General Kokott, in her opinion on the *Football Premier League* case, seems to follow that reasoning when she considers that the exemption of temporary copying allowed in article 5(1) of the infosoc directive is precisely 'to permit acts of reproduction which are the condition for actual exploitation'.⁹³ But her conclusion, according to which a temporary reproduction on the television screen is not exempted under article 5(1) of the infosoc directive, ruins that hope. Her mistake is to consider that 'however, the economic significance of a broadcast is, as a rule, based on its reception'. Reception of a work as a principle eludes the realm of copyright, but providing the possibility for the public to receive and get access to a work does not, as it is the key matter for exploitation. The Court of Justice has rightfully corrected the opinion of its Advocate general on that point.⁹⁴ In our view, the notion of 'independent economic significance' that has appeared in the *acquis communautaire* to separate controlled temporary copies from exempted ones, can only be understood as 'being able to trigger a new exploitation'.

This single notion of exploitation could further simplify the definition of exclusive rights in copyright by not artificially separating the many technical acts of reproduction or communication that follow one another in one exploitation, and require all, under the current state of copyright, a distinct authorization, and generally an additional remuneration.

A second example of a possible reorientation of intellectual property around the notion of exploitation is the recent evolution of the European case law in trademark that attaches the counterfeiting of the trademark to the verification that the use of the protected sign has infringed one of the functions of the trademark.⁹⁵ By establishing a link between the scope of protection and the

⁹³ Opinion of the Advocate General, 3 February 2011, *Football Association Premier League Ltd and Others v QC Leisure and Others*, C-403/08 and C-429/08, §92.

⁹⁴ CJEU, 4 October 2011, *Football Association Premier League*, C-403/08 and C-429/08, § 171.

⁹⁵ See, in chronological order, ECJ, 12 November 2002, *Arsenal v Reed*, C-206/01; ECJ, 25 January 2007, *Adam Opel*, C-48/05; ECJ, 18 June 2009, *L'Oréal*

very objective of the trademark grant, it indirectly installs the notion of exploitation on the throne of the protection. Indeed, the control of the trademark owner will only be limited to cases where her trademark has been exploited without any authorization, and not merely used. The difference between exploitation and use in trademark would be that for a trademark to be exploited, the capacity of the trademark to accomplish one of its functions in the use made by a third party would be affected. As in copyright, the notion of exploitation would adapt to the intellectual property right in question and would follow the function of the circulation of the protected subject-matter that the intellectual property protection aims to control. It would be circulation to the public for copyright, and public use of the sign to distinguish products or services for trademark.

True, the evolution of the European Court of Justice around the requirement of some harm to one of the functions of the trademark is somewhat bothering, particularly in double identity cases of infringements (i.e. use of a sign similar to the registered trademark for similar products) where no likelihood of confusion is required.⁹⁶ Other puzzling consequences of such case law are the extension of the protection of the image of a brand beyond the trademark with a reputation and the difficulty to allow for referential exceptions when some infringement to the functions of a trademark has been proven.⁹⁷ However, imposing a single right of exploitation in trademark would not give an autonomous role of the functions of the trademark, and certainly not to the vague functions of investment or publicity. On the contrary it could help draw a clear line between prohibited use of a protected trademark and referential use that should still be allowed for they are not acts of exploitation of the sign.

The same argument is equally valid for patent: the scope thereof should be limited to acts of use and making that correspond to a notion of exploitation tailored to technical inventions. Their purpose being the application of technical solutions and process, any use that puts the protected invention into operation is an act of exploitation of the patent that should be exclusively reserved to its owner. One could find traces of this exploitation-based reasoning in one

Bellure, C-487/07; CJEU, 23 March 2010, *Google*, C-236/08, C-237/08, C-238/08; CJEU, 8 July 2010, *Portakabin*, C-558/08; and the comment of this evolution in M. Senftleben, 'Adapting EU Trademark Law to New Technologies – Back to Basics?', in this volume.

⁹⁶ For a critique of the CJEU recent case law in that regard, see *Max Planck Study*, *supra* note 11, pp. 103 *et seq.*

⁹⁷ A circular reasoning then applies: there is an infringement if the indication of origin is troubled or the image of the brand is prejudiced, and a limitation is only valid if the use was fairly made, which is almost impossible to admit if some prejudice to the trademark has already been proven. See the *Portakabin* case, *supra* note 87, for a fine example of the dead-end situation when limitations of trademark are invoked.

of the rare CJEU decisions in patent law. In the *Monsanto* case, the CJEU has refused the protection of the patent to 'a patented DNA sequence which is not able to perform its function'.⁹⁸ Even though the question referred to the Court dealt with the object of the protection, not its scope or the rights conferred to the patented invention, both are interrelated. One way to interpret this decision is to consider that the patent protection cannot cover inventions when they are not operating as technical mechanisms. In the case of the soy flour fabricated from patented soy, the import thereof was only related to a dead matter, an invention incapable at the moment of the import, to exert its technical function. It follows that the patent owner being only entitled to stop uses of the invention in operation, her control amounts to the exploitation of the invention. The notion of use and making in patent law should be understood in that sense.

I have deliberately left aside the issue of moral right. Specific to copyright protection and performers rights,⁹⁹ such a right adds a subjective touch to protection of economic exploitation and cannot be reduced to the notion of exploitation I have just defined.

5. LIMITATIONS AND EXCEPTIONS

5.1 Exceptions to the Exclusive Rights

Limitations and exceptions to the protection are amongst the thickest and most entangled branches of the IP tree. It is even difficult to sketch a common picture here.

Copyright recognizes a long list of exceptions ranging from private copy, exceptions for education and libraries, for disabled people, for social institutions, to news reporting, quotation, parody, use during religious or official celebrations, for the purpose of advertising an exhibition, and so on. Copyright in software and databases have their own list of exceptions, tailored to the technical subject-matter at stake.

Patent is generally limited by private use and use for research, as well as by compulsory licensing that could be granted to manufacturers of the invention in the case of dependent inventions, unexploited inventions, or to cater to the needs of countries with public health problems in the case of pharmaceutical

⁹⁸ CJEU, 6 July 2010, *Monsanto*, C-428/08, §49.

⁹⁹ It also appears in patent law where the paternity of the inventor is guaranteed by the mention of his/her name in the application.

products. The only community legislation in patent, the biotechnology directive, applies the first case of compulsory licensing, by authorizing a breeder that cannot exploit a plant variety right without infringing a prior patent, or reciprocally the holder of a patent who cannot exploit a biotechnological invention without infringing a prior plant variety right, to apply for a compulsory licence.¹⁰⁰ It also introduces a specific exception that replicates the well-known farmers' privilege in the plant variety rights legislation, allowing the farmers to use the patented seeds, their harvest or breeding stock for their own farm.¹⁰¹

Actually, it is too hasty to say that the biotechnology directive is the sole EU intervention in patent. The European Parliament and Council have enacted in 2006 a Regulation organizing a system of compulsory licensing of patents permitting the manufacture of pharmaceutical products for export to countries suffering with public health issues,¹⁰² which is a rare case of an EU piece of legislation that only deals with a limitation to intellectual property.

Limitations to trademark protection are mainly referential uses (including the use by a third party of his own name and address, of indications about characteristics of the product or service or to indicate the intended purpose of a product or service).¹⁰³

Design exceptions borrow from copyright and patent and include private use, experimental use, citations or illustrations for teaching, as well as a right of prior use.¹⁰⁴

Stand-alone justification can equally explain some limitations such as health consideration in patent or necessary use in copyright (namely justifying the temporary copy, back up copy, ephemeral recordings by broadcasting organizations, incidental inclusion of a work or the normal use in software and database protections and many others), whereas the rationale of the exception might be even more difficult to assess (think only of the use of works during celebrations!).

The overall impression of the exceptions twigs of the intellectual property tree is disorder. Diverse limitations appear to be justified when exclusive rights and subject-matter are diverse, but once again, when intellectual property admits many situations of overlapping rights in the same object, a better

¹⁰⁰ See article 12 of the biotechnology directive.

¹⁰¹ See article 11 of the biotechnology directive.

¹⁰² Regulation (EC) No. 816/2006 of the European Parliament and of the Council of 17 May 2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems.

¹⁰³ See article 7 of the trademark directive and article 12 of the Community trademark regulation.

¹⁰⁴ See articles 20 and 22 of the Community design regulation, as well as the more limited exception allowed by article 13 of the design directive.

harmonization of exceptions across the different rights, might be needed. Efforts to systematize those diverse limitations could draw upon different grounds for allowing exceptions and be organized around key boxes where existing exceptions could be arranged. They would create a sort of Charter of User's Rights,¹⁰⁵ benefiting users, independently of the type of intellectual property right.

Private use could be a first category of limitation, as it is generally acknowledged as a natural boundary of the exclusivity in copyright, patent, trademark and design laws. Maybe it should not even be considered as an exception but as the logical reverse of the notion of exploitation delimitating the rights conferred.

Close to private use, a second category of exceptions would encompass all *necessary or incidental uses*. It would absorb the normal use of software and databases, the temporary reproduction in copyright (that could also disappear thanks to a reorientation of the rights around the notion of exploitation), the incidental use in copyright, the use during repair, and maybe referential uses in trademark.

Then, exceptions pursuing an objective of *competition or promoting innovation* could form a third block that would already include many existing exceptions (such as the decompilation of software, the compulsory licences for dependent inventions or unexploited ones, the farmers' privileges, the rights of prior use in design and patent laws). The referential uses of protection trademark could also belong here, as they are justified under the free movement of goods or freedom of services.

This category could be expanded to introduce new or redefined exceptions in some intellectual property regimes. A good example is the exception pertaining to research that exists in many intellectual property rights but not to the same extent. Design law admits the acts done for experimental purposes, copyright mentions an exception for illustrations of research (aligning blindly this motive with the illustration for teaching, without a more tailored application), and authorizes the reproduction of software when conducted to study the program. But a harmonized research exception is still lacking in European patent law, apart from the possibility to get access to deposited biological samples for experimental purposes as laid down by the biotechnology directive.¹⁰⁶

Transformative uses could enter into intellectual property in a more direct way by taking over exceptions based on the right to express oneself or freedom of the press. It would encompass the quotation, parody and news report-

ing exceptions in copyright but is oddly absent in the other IP rights. This absence can be easily explained in patent where exploitation does not touch upon the expressiveness of an invention (and it is difficult to imagine cases where it would). Conversely, an exception for parody in trademark has recently invited itself in court cases, by reason of the increasingly cultural and semantic value of brands. Indeed, trademarks are used to convey meaning in our liberal economies, and constitute signs with an expressive force, that can be used to criticize for political or artistic motives. Rather than relying to the freedom of expression itself, which implies striking a fair balance between the IP rights and the restriction it imposes on the fundamental rights, with uncertain outcome, an overall exception for free speech could be introduced in all IP rights, including trademark. For that matter, such an introduction in trademark has been advocated in the recent study of the Max Planck Institute on the Community Trademark, under a broader exception of 'honest referential use'.¹⁰⁷ An exception for free speech would also prove useful in design law to avoid unnecessary litigation such as the case brought by Louis Vuitton against a Dutch artist who had reproduced one of its design-protected bags in a painting denouncing the lack of attention to the Darfur situation (in contrast with excessive attention to show-business stars).¹⁰⁸ The freedom of speech of the artist has prevailed in the Netherlands but not in France where she was enjoined to stop selling T-shirts reproducing the art work, which illustrates the uncertain result of applying freedom of speech directly against intellectual property.

Access to knowledge or essential resources would be another important category of limitations. It already pertains to the copyright exceptions enjoyed in teaching, by libraries or persons suffering from a disability. In parallel to knowledge, access to other resources might be essential and justify a limitation to intellectual property, as the access to medicines and its correlative compulsory licensing in patent. Farmers' privileges in plant variety rights or biotechnological patent follow a similar rationale, as the access of farmers to seeds of their harvest can be considered as essential to ensure their subsistence. Food security or biodiversity could in the near future give good reason for other cases of compulsory licensing in patent or plant variety rights.

Finally, *de minimis* exceptions could be admitted, but rather than relying on a closed list of all imaginable cases where countries have exerted enough

¹⁰⁷ Max Planck Institute for Intellectual Property and Competition Law, *Study on the Overall Functioning of the European Trade Mark System*, February 2011.

¹⁰⁸ See the decision refusing the design right infringement on free speech grounds, *Rechtbank's-Gravenhage*, 4 Mai 2011, n°389526/ KG ZA 11-294, available (in Dutch), at http://www.mediareport.nl/wp-content/uploads/2011/05/kvdl-727526-v1-vonnis_d_d_4_mei_2011.pdf

¹⁰⁵ This expression is taken from Kur, *supra* note 3.

¹⁰⁶ Article 13(3) of the biotechnology directive.

influence, as in article 5 of the infosoc directive, it might be useful to introduce in all intellectual property rights a *fair use* clause, provided that the use does not conflict with normal exploitation of the subject-matter concerned.

One finds here one key element of the three-step test that now applies to all exceptions of copyright according to article 5(5) of the directive of 2001. Exceptions are only permitted in certain special cases, which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholders. A similar test exists in patent law in the TRIPS Agreement that admits limitations in the absence of an unreasonable conflict with the normal exploitation of the invention and with the legitimate interests of the patent owner, as well as in trademarks. Also for trademarks, the case law has construed the obligation to comply with honest practices in industrial or commercial matters when using the protected sign for referential purpose or comparative advertisement, by aligning it with the absence of any likelihood of confusion.¹⁰⁹ If the notion of exploitation in trademark amounts to the capacity to control the use of the sign to distinguish products or services, likelihood of confusion harms the normal exploitation.

Some coherence could be gained in using a two-step test or three-step test, including the respect of the normal exploitation of the protected subject-matter and the legitimate interests of the intellectual property owner, not as a limiting device to existing exceptions, but as a further breathing space to assess fair use of the creation or sign.¹¹⁰ It would be then a reverse three-step test, allowing some fair use beyond what is explicitly authorized by the law.

5.2 The Rule of Exhaustion

The principle of exhaustion is a common limitation to trademark, copyright, patent and design. It prevents the enforcement of an intellectual property right

¹⁰⁹ ECJ, 11 September 2007, *Céline SAR v Céline SA*, C-17/06, §34:

The issue of whether that condition has been satisfied must be assessed by, inter alia, taking account of the extent to which the use by the third party is understood by the relevant public, or at least by a significant section of that public, as establishing a link between the third party's goods and those of the trade mark proprietor or a person authorised to use the trade mark, and of the extent to which the third party ought to have been aware of that.

See also CJEU, 8 July 2010, *Portakabin*, C-558/08, §67; concerning comparative advertising see ECJ, 12 June 2008, *O2 Holdings*, C-533/06.

¹¹⁰ This proposal has been made by some scholars for copyright, see C. Geiger (2007), 'The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society', *e-Copyright Bulletin*, January-March, and the Wittem Code, article 5.5.

against further commercialization of goods that have been put on the European market with the consent of the intellectual property owner. Details of the application of exhaustion might slightly differ from one right to another. But the principle is shared by all rights in intellectual property, as well as its rationale rooted in the principle of the free movement of goods within the internal market. What is also common is the geographical scope of the exhaustion that has been determined by the ECJ as covering the European Union territory.¹¹¹

6. DURATION

IP students generally learn that intellectual property is by nature limited in time, and that inherent quality is what makes it differ from tangible property that is inherently perpetual.

Copyright lasts for 70 years after the death of the author(s); patents are valid for a maximum of 20 years; community design for a maximum of five successive terms of five years; related rights for 50 years and the *sui generis* right applies to databases for 15 years.

This last duration can be extended for a renewed term each time a substantial investment is made to the database. This possibility to renew protection upon each substantial change, begs the question of the target of this lengthened duration: would it only vest in the contents resulting from the new investment or in the database as a whole?¹¹² Opting for the second interpretation would offer a protection potentially unlimited in time to databases.

Trademarks enjoy a specific situation as the protection lasts as long as the sign is genuinely used as a trademark and remains distinctive. However the effect of this limitless duration is relative as the protection only pertains to determined products and services and the protection, in opposition to other intellectual property rights, does not vest in a creation whose access by the public after some time would be essential.

The principle of a limited duration has been implicitly reasserted by the General Court of the European Union in the *Astra Zeneca* case. On the basis of competition law, the Court has found an abuse of dominant position in the false information given by a pharmaceutical firm to the patent office in order

¹¹¹ In copyright the community exhaustion, rather than an international one, has been confirmed in ECJ, 2 September 2006, *Laserdisken*, C-479/04; in trademark, see ECJ, 16 July 1998, *Silhouette*, C-355/96.

¹¹² On that question, see E. Derclaye (2008), *The Legal Protection of Databases – A Comparative Analysis*, Cheltenham, UK and Northampton, MA: Edward Elgar, pp. 139–40.

to get a longer period of supplementary protection certificate.¹¹³ This decision tends at least to safeguard the rule of a limited duration strictly determined by the law, and dares to have recourse to the arm of competition law to enforce it.

However, this decision appears to run against the current, conveyed by the tendency to prolong whenever possible the duration of protection. A notable example is the directive lengthening the duration of performers' and producers' right in music,¹¹⁴ which does not give sufficient account to the principle of a limited duration.

Beyond this principle, what is at stake is the immutability of the public domain. Rarely mentioned in intellectual property legislation, the public domain is mainly conceived as the repository of works or inventions whose term of protection has lapsed.¹¹⁵ The European Union has not developed a strong position on the public domain, for all efforts focus on development of intellectual property. Consequently, the public domain is what is left after the intellectual property has taken its toll, and extending duration of a right is only analysed through the lens of economic development, not through the impoverishment of the public domain. Such a biased approach underlines cases where restoration of rights is admitted on purely technical application of legal provisions, without any consideration of the effect of such renewal of rights on the public domain where such creations stood. The ECJ has namely restored related rights in a phonogram, for a country where this phonogram was never protected by virtue of article 10(2) of the term directive.¹¹⁶

Pruning the intellectual property tree would require leaving breathing space for the leaves to fully blossom. Public domain, comprising unprotected resources (such as ideas or abstract matter) but also resources whose term of protection has ended, gives to subsequent creation the raw material to build upon. The total absence of public domain as a common principle of European intellectual property is unfortunate. It is time for the public domain to justify some legislative attention in itself and be addressed for what it is, and not only as an unintended counterpart of intellectual property.¹¹⁷

¹¹³ Gen. Court, 1 July 2010, *AstraZeneca v Commission*, T-32/05.

¹¹⁴ Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011.

¹¹⁵ For a broader conception of the public domain, see S. Dusollier, *Scoping Study on Copyright and Related Rights and the Public Domain*, WIPO, 2010.

¹¹⁶ ECJ, 20 January 2009, *Sony v Falcon*, C-240/07.

¹¹⁷ On the issue of the public domain in intellectual property, see S. Dusollier & V.L. Benabou (2007), 'Draw me a public domain', in P. Torremans (ed.), *Copyright Law: A Handbook of Contemporary Research*, Edgar Elgar, pp. 161–184; S. Dusollier (2009), 'The Public Domain in Intellectual Property: Beyond the Metaphor of a

7. CONCLUSION

At the end of this botanical journey, the realities and principles common to all intellectual property rights are rather scarce. There is the overarching principle, laid down in the EU Charter of Fundamental Rights, that intellectual property should be protected. The fact that ideas should remain free is another important motto in European intellectual property. The principle of exhaustion applies across all exclusive rights, and enforcement and remedies are almost similar whatever the right infringed.

Beyond these common lines, traces of similarities can perhaps be detected in formalities (save for copyright and related rights), in exclusive rights conferred, or in the rule of a limited duration. However, justifications, subject-matter, rights and exceptions largely remain fragmented and leave ample manoeuvre for uncontrolled extension of intellectual property and overlapping of rights.

What tree would we like in intellectual property? Should we focus on a unitary system, valid for all subject-matters? Or should we admit a hybrid mix of commonalities and diversity? My choice would be to have at least common roots in the form of an overall foundation sustaining intellectual property and based on innovation and promotion of knowledge, including a necessary balance, and a solid trunk based on some overarching principles. Those principles should be a proper limitation of subject-matter,¹¹⁸ a registration-based grant of protection, a unitary right of exploitation for all intellectual property rights, though adjustable to the subject-matter concerned, a common catalogue of exceptions and limitations, as well as an effective public domain.

The branches of intellectual property could develop under their own rules and specificity to cater to the needs and mechanics of the diverse subject-matter concerned.

It is time to start pruning the tree. Gardeners know quite well that the very objective of pruning, however radical and destructive it might seem, is to get a blossoming tree that, after its forced reduction for some time, will grow bigger and in a more harmonious fashion. Who would refuse such a special treatment to intellectual property?

Domain', in P.L. Jayanthi Reddy (ed.), *Intellectual Property and Public Domain*, Hyderabad: Icfai University Press, pp. 31–69.

¹¹⁸ The objective would be to see what deserves exclusive protection and what, on the contrary, could develop under the normal conditions of the market with no protection, but that of unfair competition.