

Review

OWNERSHIP OF INTANGIBLE RIGHTS - COPYRIGHT

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Abstract

Copyright is the type of property characterized by its intangibility, which is hardly perceivable by our physical senses. This special feature determines the way copyright is managed by authors and used by others. The absence of tangibility does not mean that copyright consists of mere ideas and concepts, on the contrary, it requires the fixation of the idea in whatever form in a tangible medium of expression. Not the idea itself, but the way it is expressed must be original. That dose of originality in the way the idea was developed stems mainly from the ways selected by the authors to use their creative skills.

Work is the idea transformed into an intellectual product, based on new artistic perceptions, addressing emotions and senses. But the intangible copyright is not closely related, nor does it depend on the fate of the copies of the work. The Albanian Law on Author's Rights provides that "*Copyright exists independently of any property right over the physical object in which the intellectual creation is expressed or*

materialized." Except for a few cases, this makes it non-consumable as long as it has not expired. The paper will explain that copyright is a valuable asset, but it cannot be considered a classic form of property. Copyright ownership exists from the moment a work is created and comes about as the result of the creation. Intangibility determines the main difference from other material properties. The use and application of copyright as intangible are not limited to one user or fixed in a geographical location. The paper will further analyze how intangibility imposes the existence of specific legal rules on how to own and use copyright, and it will also indicate the differences in the owner's rights and the author's rights. It also will highlight the difficulties in protecting copyright as intangible property as not limited by physical boundaries.

Keywords: *copyright, intangible rights, ownership, economic rights, medium of expression*

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Introduction

The right to property is one of the most important human rights. All international documents regarding human rights (UDHR, art. 17; Protocol 1 to ECHR, art.1; EU CFR, art. 17) emphasize the right to enjoy and exercise the rights of the owner. At the same time, the protection of intellectual property is explicitly mentioned under the same provision that expresses the protection of the right to property. (EU CFR, art. 17) Property has been an important legal concept since ancient times. While it has been affiliated with tangible types of property and physical world, where the boundaries were perceived clearly the progress of society, economy and technology has introduced the intangible type of property.

The Albanian Civil Code (ACC) distinguishes objects (*res*) from rights. ACC describes ownership over *res* as the owner's power to freely enjoy it economically, and dispose of it within legal limits, thus identifying *res* referring to its material nature and its economic utility. Under this perspective, the rights lack material character, but their exploitation produces economic benefits.

The rights deriving from intellectual products of arts, literature, and science are different. They seem to be related to a material intellectual product, the work, but they originate from the content of the work that reflects the original and individual way of expressing the author's ideas. This bundle of rights over the work is legally recognized as copyright, a different category of property. It is a non-physical property, often generating immense financial gain. Precisely for its special features, it has its system of rules, that governs its protection, use, license, and termination.

This article will explain that copyright is an asset, but it cannot be considered a classic form of property. Copyright ownership exists from the moment a work is created and comes about as the result of the creation. Intangibility determines the main difference from other material properties. The use and application of copyright

as intangible are not limited to one user or fixed in a geographical location. The paper will further analyze how intangibility imposes the existence of specific legal rules on how to own and use copyright, and it will also indicate the differences in the owner's rights and the author's rights. It also will highlight the difficulties in protecting copyright as intangible property as not limited by physical boundaries.

Acquiring and exercising property rights

Property is acquired according to the ways provided by the Civil Code (Art. 133), through:

- contracts and agreements that are intended to transfer ownership,
- rules of succession,
- law,
- court decisions,

involving some formal act or legal recognition.

The classic form of property, the one over objects, both movable or immovable, is explicit and totally perceivable by our physical senses. There is an object over which the ownership can be created, changed, transferred, waived, or terminated through unchanged legal ways for thousands of years. The immovable goods and others must be registered in public registers when required by law. *"Registration does not ensure the validity and effectiveness of the title of ownership. This is because the registration system does not create rights but is a declarative system."* (Albanian High Court Decision, 2024) This approach is based on a previous Unifying Decision according to which the registration is a common formality or a means of giving publicity to the transfer of rights. (Albanian High Court Unifying Decision, 2009) The Albanian law recognizes the power of registration that serves multiple functions: the certainty about the ownership making it a public knowledge, it facilitates transferring the rights and legal transactions and create reliable state data. The propriety rights belong to the owner, thus meaning an exclusive relationship with the *res* that excludes others. He has the right to transfer part of his rights, without losing ownership. The

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transferred rights are related to the use of *res* according to its economic purpose.

On the other hand, there is the work, deriving from the idea transformed into an intellectual product, based on new artistic perceptions, addressing emotions and senses. It is also tangible in a medium of expression, which serves to prove the genius of the author. (D'Ammassa, 2014) However, copyright exists independently of any property right over the physical object in which the intellectual creation is expressed or materialized. (ALAR, art. 43/1) The intangibility feature is the primary reason for the different treatment compared to classical types of properties.

Copyright over the works exists from the moment the work is created by its author and both economic and moral rights are vested in him. There is no formality required to prove the unique bond between the author and its creation. The work belongs to its author without the need to register it according to the Free Formality Principle. This important principle is reduced to an optional provision for the Union states to include or not in their domestic laws, since the revision of the Berne Convention, in Stockholm in 1967. (WIPO, 2003)

The creation process is the only possible way that makes someone an author. (ALAR, Art. 17) Attribution is of utmost importance regarding the work. The name of the author is attached to the work like a brand name. The author has automatically moral and economic rights over the work. The first one stays with the author and cannot be transferred, licensed, or waived *inter vivos*. The author can keep and use the economic rights, or he can transfer, license, or waive them away. The rights received by the author are exclusive, meaning the author is the only person with the power of decision-making over the work. Given that the boundaries of ownership over tangible objects are natural and easily understood, but also legally regulated, through the provision of authors with exclusive rights, several new boundaries are "artificially" created. (Aliprandi, 2014)

According to ACC the only way the author acquires ownership of copyright is by law, the *lex specialis* that establishes that. Other forms of transferring rights do not make the new acquirer author, but copyright holder. This is a real and critical distinction because in transferring the traditional type of property, the tangible one, there is a new owner with the same rights as the previous one. The right holder has some of all the economic rights transferred *inter vivos* by the author, but he cannot have the moral rights that cannot be waived, alienated or licensed. The moral rights protect the creative integrity and good name of the creator expressed in his work. Economic rights protect the economic interest of the author and allow the author to benefit from the direct or indirect exploitation of his work. (WIPO, 2008) Economic rights belong initially to the creator of the work, usually as a party with the capacity to negotiate and enter into agreements. (O'Hare, 1982)

The author has no ownership of the copies of the work once they are sold or donated. The first sale doctrine dispossesses him from the property over the copy. Nevertheless, the loss of control over the copies sold does not affect his status as author. The author continues to own the content and generally, he can reproduce endless copies of the work. An owner, once sold or donated his *res*, loses all his rights over it.

The author, due to his moral rights, may impose the user of work restrictions on the use and exploitation of it. The right of withdrawal arose as a response to the author's dilemma of whether to give priority to his injured personality and morals, or to the implementation of the contract. The right to withdraw is based on the prevailing idea that the work remains the author's "spiritual creation" as a profound expression of his personality and that whatever happens, the close connection between the author and the work is not interrupted. (Strömholm, 1957) The resale right offers the possibility for the author to benefit from future resales of his visual artwork. (ALAR, Art. 33) These rights guarantee continuous control of the author over the work.

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The owner does not contain any kind of rights that prevents complete detachment from *res*.

The *res* can be used by one or several users depending on the type and size. The immovables can only be used in the place where they are located. Consumables can only be used once or more.

The content of the work can be used without limits, and most works can be reproduced without any restrictions by creating as many copies as the author wishes. At the same time, many people all around the world can use the content of the work easily, completely, and without hindering others, thus considering copyright “*pure public goods*” (Yoo, 2007) characterized by their non-rivalry nature. (Marcowitz-Bitton, et al., 2023) In most cases, carrying them is simple as well, because of the digital copies of the works. There is another crucial difference between the use of *res* and works. If someone is using *res*, nobody else can use that at the same time. The work permits simultaneous and different uses of it. Copyright cannot be subject to the execution of obligations. Only the economic benefits derived from the use of copyrighted work may be subject to the execution of obligations. If the author has violated a contractual obligation, by not completing the work or by not publishing the manuscript, he is not obliged to fulfill it, but he will be responsible for the damage resulting from it. There is another advantage of copyright over the classic type of property. The law recognizes and permits the use of the institute of expropriation that can occur when the state decides that in the public interest someone should be deprived of the right to property. This institute expresses the priority given to public interest over private interest by striving for the owner of his property and denying him the further exercise of his rights. The state's decision-making is subject to a completely legal procedure and obliges it to compensate the owner for the full value of his property. (ACC, Art. 155) While expropriation in this sense cannot exist for copyright.

The ownership term of protection

The ownership over *res* exceeds the owner's life. The ownership passes to the legitimate heirs without an expiry date. They became the new owners. The ways ownership ends are also provided by the Civil Code. Thus, traditional ownership of *res* can be considered “eternal”. When the owner dies, the ownership is passed to heirs fundamentally without any changes, who have the same rights as the previous owner. The perpetuity feature creates overlapping of assets of the future generations.

Economic rights and the moral rights too, also exceed the author's life. The first one is applied a term of protection of 70 years *pma*. The *ratio* behind the term of protection is related to the public importance of the works. The works enter the public domain once the economic rights have expired. The worst scenario for moral rights is to be protected as long as the economic rights of the author. (Berne Convention, Art. 6*bis*/2) In Albania moral rights are perpetual. They are related to the unique and personal bond of the author with his work. Nevertheless, succession never makes his heirs to be considered authors. The heirs exercise copyright as right holders. So, there is a different status for the legitimate heirs. The economic rights of authors are not perpetual to clearly express the role of creativity. It is often prescribed as an “agreement” between the authors and the public, where the authors and their heirs can exercise copyright only for a period and after that the works enter the public domain to be enjoyed by the public without any restriction and free of charge.

Protection of copyright

The owner, the author or the rights holder are always exposed to the risk of their property being damaged, destroyed, stolen or misused. Although the risk approaches different assets, in different forms and ways, property owners are forced to face these challenges by relying on appropriate legal measures, culminating in protection through the courts. While the owner of a tangible

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object is usually concerned about functioning, and physical integrity of their *res*, which can be violated by human actions or the forces of nature, the author or right holder is concerned not only about the violation of economic rights, but also about the violation of moral rights.

The protection of *res* requires diligent care, proportional to the risk that may be posed to it. So, the owner must protect it from damage, loss, theft, or destruction or through legal means to prevent someone else from acquiring ownership of it. The owner of tangible objects has more possibilities to protect their property: physical security like borders, locks and fences, or insurance against loss.

Copyright is much more complicated to protect. After all, copyright protection points to safeguarding the creativity of human beings. Copyright violations are difficult to detect and often are “accepted” or considered “morally ambiguous”. (Marcowitz-Bitton et al., 2023) There are authors that believe that copyright infringements are not to be recognized as criminal offenses. Especially the digital environment makes it quasi-impossible to prevent every unauthorized use of the work. Online piracy, plagiarism, and infringement of moral and economic rights have become common situations faced by authors in the world today. Thus, copyright infringement often occurs on a large scale, meaning serious damage to rights holders. That is why authors support the idea that there should be an overlap of protection through technological protection measures over legal protection. (Ginsburg, 2005)

Conclusions

Property rights are the most important human rights, provided by all national legislations worldwide and by international declarations and conventions. But copyright is the most sacred right. It is direct compensation for the creative process and for the intellectual products which are treasured as public goods. Although there exist difficulties in perceiving the fact that copyrights are a type of property. The

intangibility determines acquisition, exercise, transfer, and protection of copyright. Different from the traditional and tangible type of property where the owner is at the center of the legal relationship between the *persona* and his *res*, it is of utmost importance to understand that the author, copyright holder, and physical owner have distinct legal statuses.

Copyright is an intangible asset, currently of immense value and the authors state that copyright is their currency. It is difficult to create a safe place to save copyright from a variety of infringements, due to its intangible nature that creates specific challenges that do not exist for traditional property.

Four best strategies that can be effective in the long-term protection of copyright are:

- Enforcing the law, especially the criminal law.
- Raising public awareness.
- Developing technological solutions.
- Applying reduced price for obtaining copies of the works.

These strategies, if adequately applied can help to find the right balance between the private interest of the creator and the public interest.

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