GENERAL GUIDELINES CONCERNING THE RELATION INTERNATIONAL INTELLECTUAL PROPERTY BUSINESS VERSUS HUMAN RIGHTS AND CIVIL LIBERTIES

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Abstract: Today, *the intellectual property protection is no longer an absolute social and legal that justifies adoption of any measures necessary to protect it. Initially seen as the prerequisite for sustainable development, implementation of new technologies, and encouragement of international trade, the intellectual property, especially prior to ACTA (Anti-Counterfeiting Trade Agreement) international trial implementation, and also thereafter, was increasingly identified as a source of violation of fundamental rights and civil liberties, i.e. the right to protection of personal data, the right to privacy, freedom to send and receive information freedom of information, freedom to contract, and freedom to carry out economic activities (freedom of commerce). As far as international trade transactions have often a component of intellectual property that requires to be protected, it is necessary to identify the landmarks, the rules establishing de facto limits in order to protect the intellectual property without risk of infringement of fundamental rights and civil liberties of other persons, in particular users or potential users of goods and services incorporating intellectual property. The best guidelines in this regard may be provided by the CJEU (Court of Justice of the European Union) case-law both due to its reasoning underlying the decision of the Parliament to reject ACTA ratification and the fact that the case-law of this Court, especially the most recent one, is highly complex and nuanced, not denying in any way the importance of intellectual property, and identifying certain cases where their primacy persist and whose analysis leads to laying down some general rules in the field.*

Keywords: international business, intellectual property, human rights, civil liberties, ACTA, propter rem obligation

JEL classification: O31, O34, O35, O38

Even if the acknowledgement of the rights on tangible properties, particularly the lands, leads to a winning for the entire community through a better exploitation thereof, the protection of intellectual works has the potential to affect and even to encourage the inventive activity. More precisely, the acknowledgement of several rights in the field of intellectual works, even if it apparently seems to represent an inducement for the authors, does not necessarily lead to the increase of the quality and quantity of the production of intellectual works, comes with an adverse effect too. This may happen because of the fact that the rights in the field of intellectual property can somehow hinder not only the inventive activities through the drawbacks set in the subsequent research works (Boyle, 2008), but also the free access to information and knowledge, including here the excessive limitation of the free circulation of intellectual works. The problem of balance between the rights acknowledged in the field of intellectual property and the third parties' rights to access the protected creation is highly stringent and approached not only from its theoretical perspective, but also at the level of international regulations. Therefore, the amendments brought to the Convention of Berne and the Universal Convention on the copyright as a consequence of the problems raised by the developing nations, are relevant in terms that these nations need to obtain materials legally protected under the

intellectual property rights to support their educational programs and other initiatives designed to facilitate the implementation of the cultural development programs (Sterling, 2003). Therefore, the protection of copyright meant to serve creativity and promote access to information turned into a real obstacle for both, particularly due to a higher protection term that can easily exceed a century (Boyle, 2008). A proper example in this case is the judgment ruled by US Supreme Court in the case of Sony Corp. of America vs. Universal City Studios, Inc., also known as the Betamax case which gives an example of setting relevant landmarks in terms of limiting the control of the holders of intellectual property rights over the new technologies which can contribute to the illegal reproduction and communication of intellectual works; these landmarks can also be enforced to the latest technologies applicable to internet. In this case the judges of the US Supreme Court, criticizing the ruling of the court of first instance, in this case, the US Ninth Circuit Federal Court of Appeal, underlined that ”it is extraordinary to argue that the legislation in the copyright field confers to all holders of these rights, including here the two plaintiffs, the exclusive right to distribute video recording devices VTR (Video Tape Recorders) by the simple fact that these could be used to infringe their rights” (Boyle, 2008). Starting from this case, we can make an analogy with the ACTA’s regulation, which is intended to be the answer of the regulatory system in the field of intellectual property to the danger posed by the internet and the new piracy technologies, considering the fact that, although the new technologies pose new risks regarding the breach of the rights applicable to the field of intellectual property, they also came with tremendous benefits. For example, even if the greatest movie producers in the United States of America feared the new technology of video tape recorders can seriously affect the cinematographic industry, it was almost in no time proven that, until the implementation of the DVD technology, almost half of the cinematographic industry market was covered through distribution of video tapes; so, the disadvantages were clearly inferior to the benefits brought by this new technology that has significantly contributed to the dissemination of the cinematographic creations (Boyle, 2008). Even in the subsequent case-laws, i.e. A&M Records, Inc. v. Napster, Inc. and MGM Studios, Inc. v. Grokster, Ltd., the same law courts, more precisely, the Ninth Circuit Federal Court of Appeal and the US Supreme Court of Justice, even if they seemed to go back to and amend the judgments previously delivered, they didn’t; moreover, the courts insisted that the intellectual property rights should be protected in relation to the technologies that appear to be explicitly promoted among the users, in terms of copyright infringement (Boyle, 2008).

The purpose of the protection of intellectual creations must be properly understood. The first goal was to encourage the authors of intellectual works by stimulating their creativity, helping thus implicitly to the development of the entire society. To encourage creativity and develop the society, the lawmakers decided to allow the authors to have access to the civil circuit; in other words, the authors gained rights and took upon themselves a series of obligations in relation to their own intellectual works. This entire legal protection must be outlined in relation with the targeted objective: the development of the society using the very means that have been identified for this purpose: the inclusion of the intellectual works in the civil circuit whose direct consequence is the protection of the author’s interests. Presently, there is the tendency to support the idea that the essential purpose would be solely focused on the protection of the author’s interests, disregarding somehow the general context that talked about the development of the society. This tendency poses a serious risk in terms of deviating the legal protection from its initial purpose and turning it into a blockage of the development of society, obstructing the access to information and hindering the development of the previously agreed contractual relations as a consequence of acknowledging some super- prerogatives of the author to block thereof by invoking the moral rights, for example. Given these aspects, I consider that it is of paramount important to establish a balance in the relation between the holders

of intellectual property rights and the other legal subjects because the legal protection shall never deviate from its purpose when the interests of all participants in the legal relations applicable to this field are properly and vehemently defended. The current imbalance is particularly due to the fact that the legislation in the intellectual property field was created at the initiative of the holders of intellectual property rights, who totally ignored or at least, they disregarded the rights of the other legal subjects. For example, the Berne Convention of 1886 on the protection of literary and artistic works has been prepared and signed under the powerful influence of the International Literary and Artistic Association presided by Victor Hugo. The effect of this legislative politics that inevitably led to the hindering of the progress is now analyzed in the American doctrine by an author who made an analogy. Professor James Boyle (2008) wondered what would have happened with the ordinary consumers, if the gas lamp sellers had the chance to set the rules designed to govern the activities carried out by the companies working in the electricity field "*intellectual property legislation had always been a cozy world in which the content, publishing, and distribution industries were literally asked to draft the rules by which they would live. The law was treated as a kind of contract between the affected industries. Rationally enough, those industries would wish to use the law not merely to protect their legitimate existing property rights, but to make challenges to their basic business plans illegal*".

A person cannot appropriate the intellectual creation, by its very nature, if such person cannot totally identify it with the material support of the creation. Again, we are talking about the natural property right over the material support and not over the work itself as the latter cannot exist without its material support. Moreover, this impossibility to appropriate an intellectual work is not just a consequence of its immaterial nature; it derives from the relation between the intellectual creations and the society, the universal patrimony and the knowledge, in general. More precisely, the very nature of the intellectual creation requires no legal protection, as opposed to the tangible properties. Furthermore, by its nature, an intellectual creation, irrespective of the fact that it is a work subject to copyright protection, a utilitarian creation or a distinct trademark, circulates freely from one individual to another, enriching thus the stage of knowledge and contributing to the social progress and the human development. This characteristic is not met in the case of other tangible properties. These properties, by their nature, have no vocation to contribute to the development of the society. On the other hand, the intangible properties contribute to the development of society to the same extent as the tangible properties, encouraging the private property and the relations between natural persons, contributing thus to the social welfare. In a letter sent by Thomas Jefferson to Isaac McPherson, as an answer to one of his requests to advise about his opinion on a patent released to Oliver Evans, he uses this opportunity to firstly review the rights acknowledged to the inventors by means of different patents, and then to express his reserves regarding the extent to which Evans' device, which consisted of several containers able to move cereals, represented a real invention. In the same letter, Thomas Jefferson gives several pertinent arguments on the different between the tangible properties and the intellectual property, summing up that every intellectual creation is intrinsically meant to enter the public domain, since it is protected under certain conditions set out by the law solely to encourage the creative activity required to develop the society by remunerating the author thereof. Thomas Jefferson underlines that the rights over an invention do not automatically highlight a natural right because, the permanent property upon the tangible goods that goes beyond the simple possession is a characteristic of the laws set up by an organized society; therefore, the inventions, by their nature, cannot be subject to the ownership title as long as, by their nature, they circulate freely unlimitedly from one individual to another, provided that they have been disclosed by their author (Boyle, 2008). Starting from this point, Jefferson launches a real warning where he underlines that the

holders' rights in the field of intellectual property are not revealed from the natural right. Therefore, he demonstrates that everything that is protected under the intellectual property rights is totally different from everything that is protected under the property rights over the tangible properties. Partly due to these differences, Jefferson does not perceive the intellectual property as a natural right based on work of the intellectual creation's author, but as a temporary monopoly created by the state to encourage creativity. Secondly, he argues that no person is directly entitled to the acknowledgement of his/her intellectual property right as these rights may be or not granted depending on both the will of the law-maker and the social standards ("will and convenience") without any claims or complaints from a person ("claim or complaint from anybody"). Thirdly, the intellectual property rights are not and must not be permanent; in fact, they should be quite limited and should not last longer than it is necessary to encourage creativity. Fourthly, a connection point, the intellectual property rights pose certain risks from the perspective of the nature of the monopoly. So, due to the fact that the intellectual property confines the natural tendency of the ideas and creations of the mind to be freely disseminated from one person to another for educational purposes - "ideas (....) freely spread from one to another over the globe, for the moral and mutual instruction of man" - in certain cases it can discourage creativity instead of encouraging it. Fifthly, the decision to have an intellectual property system is just a first choice in a long row of choices. Even if it is considered that the protection of intellectual property is a good idea, there should be determined the categories of intellectual creations which to justify, in terms of community ("worth to the public the embarrassment"), the disadvantages of an exclusive right; hence, it is very difficult to determine such limits (Boyle, 2008). In light of these reasons, I consider that the rights in the field of intellectual property represent the exception as the general rule stipulates that all intellectual creations are meant to enter the public domain. For the same purpose the dissident opinion of Judge Stands concerning the decision pronounced by the Supreme Court of Justice of the United States of America in the cause of International News Service v. Associated Press "*the general rule of law is, that the noblest of human production-knowledge, truths ascertained, conceptions, and ideas-become, after voluntary communication to others, free as the air to common use* (...) *the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules*" (Boyle, 2008). The title of legal protection of an intellectual creation is conferred the moment it satisfies certain conditions referring to novelty, utility and the existence of an author. Indeed, talking about property in the field of intellectual creations is quite improper. In spite of how strange it might seem that the intellectual property does not involve a property right, it must be considered that the name of the intellectual property has its origin in a wrong translation of a word from English into French, due to the fact that in the first revolutionary decrees from France which acknowledged the exclusive rights of the authors and inventors, we may find the influences of English and American law that uses the word property; this word has been translated into French as propriété, although the French conception about property corresponds to the English word ownership, in the context in which in the Anglo-Saxon law, the concept of property is broader and includes even personal rights - *jus in personam* (Roș et al., 2005). There is a characteristic that differentiates the exclusive use in the field of intellectual property from the use itself (*usus*) as an attribute of the property right, and from the prerogative of the inherent use of the property right. In the case of the creations of the mind, the use thereof is "non-rival" (as stated by James Boyle), and non-exclusive respectively. In other words, the use does not exclude the simultaneous use of the same object. There cannot be multiple and simultaneous uses of the same land, but we can

definitely talk about the multiple uses of a MP3 file or an image by more than one person, as the use of such items by one person does not interfere with the use of the same intellectual creation by another person (Boyle, 2008). The argument according to which this rule might be applicable to all intangible assets is not valid, and the example for such invalidity is given by the goodwill that simply excludes "multiple" uses thereof. In reality the patrimonial rights in the field of the intellectual property represent the *jus in personam* correlative to a propter rem obligation of the owner of the material (electronic) support of the intellectual creation. As a matter of fact, Remo Franceschelli, in an article addressing the legal nature of the rights pertaining to authors and inventors rights, published in a deferential volume dedicated to Roubier, makes a similar observation, stating that the characteristic that defines the intellectual property right is the fact that the owner of the material support of the intellectual work cannot reproduce the work, and the classification of the patrimonial rights in the field of intellectual property as a *jus in rem* does not explain the reason based on which the author of the intellectual creation can, even if after having sold the material support of such creation, prevent the buyer from reproducing the work and to act as the owner of a tangible asset. Remo Franceschelli underlines this aspect by giving a series of simple and easy-to-remember examples: the wheat we buy can be sowed, the potatoes can also be planted, the eggs we buy can be either consumed or put into an incubator; then, he draws the conclusion that the core, the essence of the intellectual property which however does not exist in default of the implementation of the special legislation in this field, lays in this negative, *non facere* obligation-, and not in the possibility of the author to use the intellectual creation.

The entire international regulatory system is built based on several considerations focused on the protection or lack of protection of intellectual property. For example, the first argument set out by ACTA stipulates that the efficient implementation of intellectual property rights is essential to support economic growth in all industrial sectors, as well as worldwide. When talking about setting up the relation between the interests protected under the intellectual property and the interests of the other persons, it is difficult to draw a line between the rationales that justify the restrictions of an exclusivity given by a legal protection status, at the community level, and the reasons that give no justifications for this aspect (Boyle, 2008). Taking into consideration the international regulations, one of the questions ACTA tries to give a relevant answer is how far can we go to protect the intellectual property and to what extent can the individual freedoms of the users or the potential users be limited to protect the intellectual property rights. The answer was that we can go quite far and that the interest of both the authors of intellectual works and the holders of intellectual property rights is of paramount interest compared to the individual rights, interests and freedoms of the other legal subjects. The question for which ACTA seemed to give a favorable answer for the holders of such rights has been launched again after the rejection of ratification at European Union level. The answer which seems to be offered in the European Parliament provides for a certain balance between holders' rights and the rights of users / potential users. This line is also followed by the case-law of European Court of Justice in the NETLOG cause: the European Court of Justice in the decision pronounced in cause C-360/10 BELGISCHE VERENIGING VAN AUTEURS, COMPONISTEN EN UITGEVERS CVBA (SABAM) c/ NETLOG NV of February 16th, 2012 restates the necessity of a balance between the interests of the holders of the intellectual property rights and the interests of all other legal subjects, invoking thus the fundamental human rights. For precision the answer to the preliminary question was " *In the light of the foregoing, the answer to the question referred is that Directives 2000/31, 2001/29 and 2004/48, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against a hosting service provider which requires it to install the contested filtering system*".

The Anti-Counterfeiting Trade Agreement entered into by and between the European Union and its member states, Australia, Canada, Japan, Korea, United Mexican States, Morocco, New Zeeland, Republic of Singapore, Swiss Confederacy and the United States of America was based on the desire of the United States of America, the European Union, Switzerland and Japan to establish a new standard of protection in the field of intellectual property, paying a special attention to the works subject to and protected by copyright. Subsequently, other states, such as Australia, South Korea, New Zeeland, Mexico, Jordan, Morocco, Singapore, United Arab Emirates and Canada joined negotiations: and the agreement was signed on January 27th 2012. The fact that the negotiations have been confidential and the procedures governing the negotiation and signing of this agreement have not been concluded under the patronage of an international organization gave rise to powerful controversies - this fear is not fully justified because the conclusion of some of the most efficient international instruments in the field of intellectual property was not led by any international organization; on the contrary, these instruments laid the foundations of certain international organizations (as the Berne Union), the most powerful counter-example being the Universal Convention regarding the copyright, the negotiations for its conclusion being led by UNESCO, and the TRIPS Treaty designed to regulate the incidence of intellectual copyright on the trade, signed under the aegis of the World Business Organization; this fear can be justified to the extent in which the contracting parties of this international agreement would have particularly intended to block the participation of some international organization, especially of World Intellectual Property Organization and it is worth to mention the fact that the agreement lays the basis of a new international entity, more precisely under the grounds of Chapter V of Anti-Counterfeiting Trade Agreement being settled the Anti-Counterfeiting Trade Agreement Committee - regarding the rules set forth by this international treaty, which finally culminated with the rejection of the treaty by the European Parliament on July 4th 2012. In other words, the treaty could no longer be considered a de facto and de jure part of the legal regulations implemented by both the European Union and the member states. In favor of the ACTA, its supporters invoked the fact that it provided efficient and proper means, which complement the TRIPS Agreement, to apply the intellectual property rights, considering the differences between their legal systems and their procedures; they also argued that it gave relevant alternatives to other international regulations on intellectual property, which, at that moment of societal development, provided ”the raw material for the economy”. Against ACTA there has been invoked the fact that the agreement was too ambiguous and that could lead to potential misinterpretations, particularly in terms of the excessive limitation of citizen’s rights and freedom. The opponents underlined the fact that ACTA would bring about an imbalance between the intellectual property rights and the holders thereof, between the service providers from the digital media and the users of such media, resulting thus in a breach of the citizens’ freedoms.

The NETLOG case-law ACTA was rejected on in the European Parliament is not singular, but rather follows a decision given in the Case C-70/10 SCARLET EXTENDED SA c/ SOCIETE BELGE DES AUTEURS, COMPOSITEURS ET EDITEURS SCRL (SABAM) by which the European Court has laid down that EU law (Directives 2000/31/EC, 2001/29/EC, 2004/48/EC, 95/46/EC, 2002/58/EC corroborated and interpreted in relation to the requirements stemming from protection of applicable fundamental rights) precludes a court order issued by a national court which requires an Internet access provider to establish a system for filtering all electronic communications traveling through its services, in particular through the use of “peer-to-peer” software, which applies indiscriminately to all its clients to prevent illegal file transfer. On this occasion, CJEU sets a landmark in the control of the balance between intellectual property rights and other fundamental rights, when recognizing that protection of intellectual property right is enshrined in the EU Charter of Fundamental Rights, but does not follow in any way either its table of contents

or the Court case-law, and that such a right should be intangible and, therefore, its protection should be assured. In this decision, the European Court outweighs the importance and the need of intellectual property protection with the right to personal data protection, freedom to send and receive information, and freedom to information.
This view of the European Court was later strongly nuanced, when identifying certain cases in which primacy of intellectual property to the legitimate rights and interests of other people, users or potential users of goods and services incorporating intellectual property subsists. More specifically, it is about the CJEU decision of April 19, 2012 in the Cause C-461/2010 BONNIER AUDIO AB et al. c/ PERFECT COMMUNICATION SWEDEN AB where it has been essentially established that Internet service providers can provide a copyright holder with the personal data of users to identify the illegal distribution of protected works, and also the CJEU decision of March 27, 2014 in the Cause C-314/2012 UPC TELEKABEL WIEN GMBH c/ CONSTANTIN FILM VERLEIH GMBH where it has been essentially established that an Internet access provider may be required to block its customers' access to a website that is detrimental to copyrights. Is this a change in the case law of CJEU based on which ACTA was rejected? A response to such a powerful question is extremely important since giving up the arguments for the decision of the European Parliament to reject ACTA would call into focus the need for such protection standards. The answer can only be negative and not change the case-law of CJEU, as proven by the fact that the 2014 judgment insists on the need of a fair balance between the fundamental rights in question, which in fact reaffirms that the holders of intellectual property rights are, at least legally, on a par position toward other participants in the economic circuit. However, a less informed reader might consider that we are facing a change in case-law since, at least formally, in its recent decisions, CJEU ignores the case-law of NETLOG and the one underlying it, not doing formally any reference to it.
After closer inspection, we can see that CJEU nuances its old legal considerations based on factual particularity of the new cases. A common point is that the European Court makes a distinction between the need to protect *in abstracto* the intellectual property, on the one hand, and the need to preventively protect *in concreto* the intellectual property, on the other hand, following infringement of intellectual property. By its recent case-law, CJEU does nothing but reaffirm that in the second case the rights and freedoms of other participants in the economic circuit, especially beneficiaries of goods and services incorporating intellectual property, even if the first hypothesis cannot be limited, may be limited to protect the legitimate rights and interests of holders of intellectual property.
In the *Bonnier Audio* case law, the preliminary question addressed to CJEU by a Swedish Court, concerns the situation in which the applicant of the summons (the copyright holder) proved the existence of solid evidence to the copyright prejudice caused by the intended user. This decision comes after a series of preliminary rulings where European Union law rules have been interpreted in favor of protecting the identity of Internet users and their online privacy; unlike *Bonnier Audio*, they concerned situations where the Internet provider was required the large scale monitoring of users' online activities and filtering of all materials posted on social networking sites to avoid copyright infringement. This is the difference made by CJEU between an actual and a potential injury, the latter not justifying a large-scale monitoring and filtering. In the case-law of *UPC Telekabel Wien,* the European Court goes further by showcasing the situation justifying the implementation of preventive measures against third persons who have not committed any illegal act, and showing that a concrete infringement of intellectual property must lie behind these preventive measures. Specifically, by this decision, CJEU responds to the Supreme Court of Austria that a person who publicly posts protected objects without the consent of the copyright holder, on an Internet website, he uses the services of Internet access provider of persons accessing these objects, and that a provider such as UPC Telekabel enabling

clients to gain access to protected objects publicly made available on Internet websites by a third party, is nothing more than an intermediary whose services are used for copyright infringement. Starting from this factual premise, the European Court stresses that the directive aiming to ensure the rights' holders with a high level of protection, does not require a special relationship between the person prejudicing the copyright and the intermediary against whom a summons may be brought, and also that it's not necessary to prove that the clients of the Internet access provider effectively access the protected objects publicly made available on websites by a third party, as the Directive requires for the measures taken by Member States in compliance thereof to aim not only at the cessation of infringements of copyrights and related rights, but also at their prevention.

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SUB-SECTION:THE IMPACT OF FOREIGN LANGUAGES ON THE BUSINESS ENVIRONMENT