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## Intellectual property and the bundle-of-rights metaphor

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### SUMMARY

Intellectual property is generally understood as being a form of property that is of the same nature or at least akin to property as it applies to chattels or land in general. This nature of property assumes an absolutist and monolithic view of the scope of rights granted to IP owners, which explains an ongoing critique of such qualification of property by some scholars. Rarely is this assimilation questioned by examining the theories and conceptions underlying property as a legal institution. This essay is aimed at better understanding the distinct characteristics of intellectual property as a regime for the creation, use and exploitation of works and inventions by analytically comparing, on the one hand, the concepts upon which property in tangible and intangible subject matter rests, and, on the other, the different views held in regard of property under common law and continental civil law, respectively. More particularly, the essay puts the dominion-based concept of property of civil law in contrast to the bundle-of-rights metaphor that, over time, Anglo-American scholarship has developed as a theoretical conception of property. Taking copyright as an illustration, the essay demonstrates that the multi-faced bundle-of-rights metaphor, with its distributive and relational dimensions, is useful and flexible enough to explain how copyright organizes the intellectual production, circulation and exploitation of works. Some legal conundrums of copyright, such as the retaining of a remuneration right by the author along with the transfer of copyright to producer or publisher, could also find some answer in viewing IP as a bundle of distinct entitlements. In addition, the narrative of the bundle of rights allows a better understanding of how the exclusivity that copyright protection confers upon the author is a matter of degree and could be exercised to include and satisfy the private or public interests of other stakeholders in the use and exploitation of the work.<sup>1</sup>

### I. INTRODUCTION

Intellectual property is generally portrayed as a property right,<sup>2</sup> both semantically and conceptually. However, such characterization stops short of inquiring into the relevance for intellectual property (IP) of theories of property or analytical tools developed with regard to

property in general. It is almost as if property may be taken for granted, with no need to elaborate further what it means in terms of rights and powers of IP owners.

Whereas IP is regularly used by property scholars to demonstrate their theories or arguments about property,<sup>3</sup> rare are the IP thinkers that use property scholarship to describe or

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<sup>1</sup> This research was carried out with a funding by European Research Council (ERC INCLUSIVE Grant number 616103). Thanks go to Sandrine Hallemaans for research assistance at an early stage of reflection, and to Fabiana Bettini and Daniela Festa for useful references to property theory.

<sup>2</sup> See Robert Merges, 'What Kind of Rights are Intellectual Property Rights', in Rochelle C. Dreyfuss and Justine Pila (eds.), *The Oxford Handbook of Intellectual Property Law* (OUP, 2018), at 59: '[IP] walks like property, talks like property, and acts like property. And so it is'.

<sup>3</sup> Henry E. Smith, 'Intellectual Property as Property: Delineating Entitlements in Information', 116 *Yale L.J.* 1742, 1750 (2007).

analyse what IP is or should be.<sup>4</sup> Intellectual property appears to live its life, unencumbered by the debates that have been raging in property theory for the last century, as if these did not apply to it. Amongst such debates is the opposition between two metaphors or discourses that could serve to analyse property: the ‘bundle-of-rights’ theory on the one hand, and, on the other, the concept of property-in-a-thing.

What is more, it is generally assumed that the notion of property is in itself enough to justify an extensive control over the IP subject-matter by right holders, either from a law and economics perspective,<sup>5</sup> or from a natural rights position,<sup>6</sup> both implying an overarching control over use and disposition of intellectual property assets.<sup>7</sup> Even opponents to an expansionist view of IP, and particularly in copyright, point at its property nature as the usual suspect. Hence, defeating the qualification of IP as property has been a regular weapon of resistance to IP maximalism.<sup>8</sup>

I used to be reluctant to consider IP as property, for various reasons,<sup>9</sup> including this strategic critique of an expansionist view of copyright. Another one was the many limitations of copyright, patent or trade mark rights, that are not coming from outside their legal regimes (as it is usually the case for property limitations), but are embedded in the very fabric of each right. Today, after having benefitted from exploring the rich scholarship on property, my perspective is less radical. I realize now the extent to which my rejection of the idea of property in IP was influenced by the continental or civil law view of property, by its absolutism and ‘dominium’ accent,<sup>10</sup> which does not fit well with the way IP rights operate. I can finally adhere

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<sup>4</sup> To the notable exception of Julie Cohen, ‘Property as Institutions for Resources: Lessons from and for IP’, 94 *Texas L. Rev.* 1–57 (2015).

<sup>5</sup> Frank H. Easterbrook, ‘Intellectual Property Is Still Property’, 13 *Harv. J.L. & Pub. Pol’y* 108, 109 (1990); Edmund W. Kitch, ‘The Nature and Function of the Patent System’, 20 *J.L. & Econ.* 265, 266 (1977); Ejan Mackaay, *Law and Economics for Civil Law Systems* (Edward Elgar, 2013), at 299.

<sup>6</sup> André Lucas, Agnès Lucas-Schloetter, Carine Bernault, *Traité de la propriété littéraire et artistique* (Lexis-Nexis, 5<sup>th</sup> ed. 2017), at 27–35; Adam Mossoff, ‘Is Copyright Property?’, 42 *San Diego L. Rev.* 29, 37–40 (2005); Pascal Kamina, ‘Author’s Right as Property: Old and New Theories’, 48 *J. Copr. Soc’y* 383 (2001).

<sup>7</sup> On that point and the reference to property, see Alain Strowel, *Droit d’auteur et Copyright – Divergences et Convergences* (Bruylant and L.G.D.J., 1993), at 135.

<sup>8</sup> Neil Netanel, ‘Why Has Copyright Expanded? Analysis and Critique’, in Fiona Macmillan (ed.), *New Directions in Copyright Law*, at 11–15 (Edward Elgar, 2008). But see also Pascale Chapdelaine, ‘The Property Attributes of Copyright’, 10 *Buffalo Intellectual Property Law Journal* 34 (2014): ‘To distance the nature of copyright from property is no guaranteed panacea against the expansionist tendencies of copyright’ (at 46–7).

<sup>9</sup> See Séverine Dusollier, *Droit d’auteur et protection des oeuvres dans l’univers numérique – Droits et exceptions à la lumière des dispositifs de verrouillage des œuvres* (Larcier, 2005), at 316 ff.

<sup>10</sup> Anna di Bilant, ‘Property: A Bundle of Sticks or a Tree?’, 66 *Vanderbilt L. Rev.* 869 (2013), at 870:

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Civil law systems conceive of property as ownership, as holistic dominion: exclusive, single, indivisible, and different in nature from lesser property interests. By contrast, property in the common law is pluralistic and fragmented, having at its core the estates system and the many ways of carving up lesser property interests, from life estates to defeasible fees and future interests.

</quotation>

to the concept of property to describe IP on two conditions. The first requires to enlarge the focus so as to encompass, under the ‘property’ label, what Hanoch Dagan or Julie Cohen, amongst others, refer to as ‘property institutions’,<sup>11</sup> or any ‘institution for organizing the use of resources in society’.<sup>12</sup>

Hanoch Dagan, in particular, has developed a pluralistic view of property by looking at various property institutions that the label of ‘property’ standardizes under a common umbrella.<sup>13</sup> This is a conception of ‘property’ that would seem natural to common law scholars, but would veer away from the stricter *droit de propriété* enshrined in article 544 of the Napoleonic Civil Code.<sup>14</sup> Such pluralism is indispensable to make IP and copyright belong to property, while accommodating their particular features and limitations and debunking expansionist intentions. A heterogeneous view of property that would be dependent upon the type of resources it organizes and regulates is better adapted to the diverse institutional forms that intellectual property assumes, from copyright to collective trademarks, from patents to *sui generis* rights in databases.

The second condition is that IP be addressed under the metaphor of a ‘bundle of rights’, and no longer envisaged strictly as a right in a ‘thing’, whether a work, an invention or a mark. This is what this essay will particularly develop. In a way, it follows the question put forward by Michel Vivant in a former volume of this series: ‘Rather than asking ‘What is property?’, we should ask: ‘What can we expect from the property institution given the idea we have of this right (in other words, the idea we have chosen to adopt)?’<sup>15</sup>

As an answer to such a question, I would expect from the property institution to give me the tools to apprehend some vexing questions of IP and reconcile the property dimension, stripped of its expansionist ambition, with a distributive and balanced approach. The bundle of rights that copyright, trademark or patent rights enshrine could perfectly capture the discrete entitlements and limitations that the many IP rights organize. The idea of the bundle of rights

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<sup>11</sup> Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press, 2011); Cohen, *supra* note 4, 94.

<sup>12</sup> Thomas W. Merrill, ‘The Property Strategy’, 160 *U. Pa. L. Rev.* 2061, at 2062 (2012).

<sup>13</sup> Dagan, *supra* note 11.

<sup>14</sup> Which reads as ‘*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements*’ (property is the right to enjoy and dispose of things in the most absolute way, to the extent that its use is not prohibited by laws or regulations).

<sup>15</sup> Michel Vivant, ‘Intellectual Property Rights and their Functions: Determining their Legitimate “Enclosure”’, in G. Ghidini, H. Ullrich, P. Drahos (eds), *KRITIKA: Essays on Intellectual Property*, vol. 2, 44 (Edward Elgar, 2017), at 47.

is rarely used in IP,<sup>16</sup> or when it is,<sup>17</sup> it aims mostly at applying a transactional view in a typical Coasean way.<sup>18</sup> I hope to offer a richer insight into what this conceptualisation of property could bring to IP thinking.

This essay will be limited to copyright, for sake of clarity and brevity, but the exercise could be done as well for patent or trade mark rights, or the legal protection of any IP. It does not fetishize the bundle-of-rights metaphor, nor uses it to dismantle or reduce the rights of IP owners. The point of this exercise is not to ‘decompose, reshuffle, or recombine’<sup>19</sup> the rights that law confers on intellectual properties, nor to claim a particular organization of the bundle. Instead, my aim is to expand on a specific conceptualization of property and, to borrow the words of Mikhail Xifaras, ‘to make it play an active role in the production of [the IP institution] by providing the vocabulary and grammar in which the real life relationships, as well as the normative constructions applicable thereto, are framed’.<sup>20</sup>

In the first Part, the qualification of copyright as property will be retraced to underline that such labelling acts both as a justification of the right and as a legal definition of what its scope should be. Part II will then explore the notion of the bundle-of-rights and its development in the US legal scholarship, to the point that it has become the most generally used description of property, leading some to consider that one could talk today of a ‘disintegration’ of property.<sup>21</sup> In Part III, the main consequences of the characterization of property as a bundle of rights will be explained. For each, some possible effects of the bundle approach in copyright will be analysed.

## II. COPYRIGHT CONSIDERED AS PROPERTY

The nature of copyright, patent and other IP rights as ‘property’ is sometimes presumed without much reflection, sometimes developed at length. In his seminal work on the comparison

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<sup>16</sup> See Chapdelaine, *supra* note 8 at 37; Andrew C. Michael, ‘Patent Transfer and the Bundle of Rights’, 83 *Brooklyn L. Rev.* available on [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2883829](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2883829) (applying the bundle of rights to explain better the transfer of *in personam* rights in a patent); see Hugh Breakey, ‘Properties of Copyright – Exclusion, Exclusivity, Non-interference and Authority’, in H. Howe and J. Griffiths (eds), *Concepts of Property in Intellectual Property* (Cambridge University Press, 2013), at 137 that applies Hohfeld’s bundle of rights analytical description to copyright (with sometimes unconvincing outcomes or reflections). See also Hanoch Dagan, ‘Property and the Public Domain’, 18(3) *Yale J. L. & Humanities* 84 (Spring 2006), who looks at property understanding to reinvigorate a rich public domain.

<sup>17</sup> Jeremy De Beer, ‘Making Copyright Markets Works for Creators, Consumers and the Public Interest’, in Rebecca Giblin and Kimberley Weatherhall, *What If We Could Reimagine Copyright?* (Canberra: ANU Press, 2017), at 147–75.

<sup>18</sup> On this peculiar use of the bundle of rights, see *infra*.

<sup>19</sup> To copy an expression used by Pierre Schlag, ‘How to Do Things with Hohfeld’, 78 *Law and Contemp. Probs.* 185 (2015), at 219.

<sup>20</sup> Mikhail Xifaras, *La propriété, Etude de philosophie du droit* (PUF, 2004), at 14.

<sup>21</sup> Thomas C. Grey, ‘The Disintegration of Property’, 22 *NOMOS* 69 (1980), at 85 n. 40.

between the *droit d'auteur* and the copyright regimes, Alain Strowel endeavours to retrace the unfolding of the property narrative from both a historical and a theory of law perspective.<sup>22</sup> He distinguishes two distinct concepts that are used to describe copyright as property.<sup>23</sup> On one hand, a *theory* of property is called upon to justify that a right is conferred on creators of literary and artistic works. On the other, the *legal category* of property is applied to copyright in order to define the type of right that is so created and to make it belong to a specific legal institution which defines its proper scope and boundaries. This second exercise may vary from one country to another, as the legal definition of property and ownership differs nationally. The justification of copyright as property will be recalled first (A.), before examining to what extent copyright can be said to belong to the legal category of a property right (B.). Thereafter, a brief sketch will be given of the consequences that such property characterization entails for copyright (C.).

### **A. The Traditional Property-based Approaches to IP and their Critique**

Intellectual property, as its name indicates, is traditionally conceived of as *property*, albeit a specific type of property.

The recourse to Locke and to his justification of property rights as a way to explain the recognition of exclusive rights in intellectual creation is well-known and regularly underscored as a valid explanation of IP being the legal outcome of intellectual labour.<sup>24</sup> It sometimes verges on a natural law argument, the creator or innovator being endowed with the right in her creation, while the law only acknowledges this property *ex post*. The label of ‘property’ was rapidly embraced as a strategy by 18th centuries publishers pleading for a copyright protection in books, as property was seen as inherently transferable, hence justifying their acquiring the right from the creators when buying the manuscript, and the right to publish it.<sup>25</sup>

The vision of copyright as property has been regularly challenged or qualified. Some attenuate the application of Lockean writings to IP by a reminder of his ‘provisos’ that could

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<sup>22</sup> Strowel, *supra* note 7, at 77ff. See also, Jane Ginsburg, ‘A Tale of Two Copyrights: Literary Property in Revolutionary France and America’, *R.I.D.A.*, January 1991, at 125–255.

<sup>23</sup> Strowel *supra* note 7, at 95.

<sup>24</sup> On Locke's theory see, e.g., C. B. MacPherson, *The Political Theory of Possessive Individualism* (Oxford University Press, 1962); James Tully, *A Discourse on Property: John Locke and his Adversaries* (Cambridge University Press, 1980); Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), at 137–252. On its application to intellectual property see, e.g., Peter Drahos, *A Philosophy of Intellectual Property* (ANU Press, 1996), at 41–68; William Fisher, ‘Theories of Intellectual Property’, in Stephen R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (2001), at 184–9; Mireille Buydens, *La propriété intellectuelle – Evolution historique et philosophique* (Bruylant, 2012), at 165 ff., on the general theories of property.

<sup>25</sup> See for a vibrant pleading in favour of publishers, Denis Diderot, *Lettre historique et politique adressée à un magistrat sur le commerce de la librairie*, 1763, but also in the discussions leading to the UK Statute of Anne, the petition in *Journal of the House of Commons*, 1706, quoted by Strowel, *supra* note 7, at 187.

reconcile the rights of individual creators with the public domain or with users' claims in creative works.<sup>26</sup> Others move away from Locke and property justifications to envisage copyright as a regulation of an act of speech and of the participation in the democratic dialogue.<sup>27</sup> Most of what have been called 'communicational' theories find their source in the concept of the public 'use of reason' as developed by Kant, and defined by the German philosopher as 'the use which a person makes of it as a scholar before the *reading public*'.<sup>28</sup> Proponents of a Kantian justification of copyright share the view that the author's creation is a public act of speech initiating a dialogue with the public, meaning with other speakers, and that copyright law should be part of a legal framework facilitating that dialogue.<sup>29</sup> Works are not mere commodities but are acts of speech<sup>30</sup> and copyright should secure equal and reciprocal freedoms for both authors and readers of copyrighted works.<sup>31</sup> As explained by Anne Barron, referring to Kant's writings, copyright is 'a systematic legal structure for the protection of communicative freedom',<sup>32</sup> this structure being constituted by the rights of authors, publishers and the reading public in relation to authorial communications, and not only aimed at protecting the right to speak as authors and the reciprocal right of readers. Such a communicational view of copyright disconnects the protection of creation from the only property that could result from labour and could then be transferred to the publisher, but considers the right of the author as a personal right, not a property right, and the publisher as a mere 'transmitter' of her discourse.<sup>33</sup>

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<sup>26</sup> See notably, Robert Merges, 'Locke for the Masses, Property Rights and the Products of Collective Creativity', 36 *Hofstra L. Rev.* 1179 (2008); Wendy Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property', 102 *Yale L. J.* 1533 (1996). See also Axel Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Palgrave MacMillan, 2008).

<sup>27</sup> See for instance, Niva Elkin-Koren, 'A Democratic Approach to Copyright Law in Cyberspace', 14 *Cardozo Arts & Ent. L.J.* 215–95 (1996); Anne Barron, 'Kant, Copyright and Communicative Freedom', 31 *Law and Philosophy* 1 (2002); Neil Netanel, 'Copyright and a Democratic Civil Society', 106 *Yale L.J.* 283–387 (1996); Abraham Drassinower, *What's Wrong with Copying?* (Harvard University Press, 2015); Laura Biron, 'Public Reason, Communication and Intellectual Property', in Annabel Lever (ed), *New Frontiers in the Philosophy of Intellectual Property* (Cambridge University Press, 2012) at 225–60; Paul E. Geller, 'Copyright History and the Future: What's Culture Got to Do With It', 47 *Journal of the Copyright Society of the USA* 223 (2000); Rosemary Coombe, *The Cultural Life of Intellectual Properties, Authorship, Appropriation and the Law* (Duke University Press, 1998).

<sup>28</sup> Immanuel Kant, 'Beantwortung der Frage: Was Ist Aufklärung?', *Berlinische Monatschrift*, 1784. See also, *ibid.*, 'Von der Unrechtmäßigkeit des Büchernachdrucks', *Berlinische Monatschrift*, 1785, 5, available in English, 'on the Unlawfulness of reprinting', available at: <http://www.copyrighthistory.org>, where Kant more explicitly addresses the need to protect the author against the unauthorized reproduction of his writings and elaborates on the relationship between the author and his publisher in respect to the communication of the work to the public.

<sup>29</sup> Barron, *supra* note 27, at 3.

<sup>30</sup> Drassinower, *supra* note 27.

<sup>31</sup> *Ibid.*

<sup>32</sup> Barron, *supra* note 27, at 22–3.

<sup>33</sup> See the analysis of Barron, *ibid.*, at 16 ff.

My personal position is to bring Kant and his emphasis on the public speech of authors in relation to the study of the public sphere carried out by Jürgen Habermas in 1962.<sup>34</sup> Starting from the public expression of reason that Kant related to the production of writings and to the relationship between an author and a public,<sup>35</sup> the German philosopher theorizes the *Öffentlichkeit* as a ‘liberal model of bourgeois public sphere’,<sup>36</sup> historically rooted in the evolution of industry and trade, of the development of the press and of the bourgeois class,<sup>37</sup> and constituted of private persons gathered in a public sphere, who use their reason, as stated by Kant.<sup>38</sup> The public sphere creates a new political space that subjects the authority of the state to a public and rational critique.<sup>39</sup>

The paradigm of the public sphere posits, in my view, a normative model of copyright that purports to contribute to the constitution of a public space for discussion and creation. It supplements the Lockean justification of a right grounded in the labour of the author, but qualifies an overly strict property right by inserting a public dimension therein.

This relational and communicative justification of copyright is not in contradiction with a qualification of copyright as property, to the extent one sees property not as a unidimensional legal relation between the owner and the resource but as including and regulating various interests pertaining to the asset. This is precisely what, on the property side, a bundle-of-rights perspective could provide for.

## **B. Copyright Legally Defined as a Property Right**

Intellectual property rights taking the shape of the legal category of property could and have also been debated. For property finds its legal form in different modes in different jurisdictions, no generalization could easily be made here. In civil law traditions, property is defined as an absolute right in a thing that confers the exclusive powers to use, benefit from the fruits and

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<sup>34</sup> Jürgen Habermas, *Strukturwandel der Öffentlichkeit*, 1962, published in English as *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity Press, 1989).

<sup>35</sup> Kant, *supra* note 28 .

<sup>36</sup> Habermas, *supra* note 34.

<sup>37</sup> *Ibid.*, at 31.

<sup>38</sup> *Ibid.*, at 38.

<sup>39</sup> A few scholars have explored the implications of the public sphere of Habermas for copyright, see Mark Rose, ‘The Public Sphere and the Emergence of Copyright: Aeropagitica, the Stationers’ Company, and the Statute of Anne’, in R. Deazley, M. Kretschmer, and L. Bently, (eds) *Privilege and Property: Essays on the History of Copyright* (Cambridge: Open Book Publishers, 2010); Coombe, *supra* note 27, at 5, who develops a critique of the public sphere as theorized by Habermas, notably for its gender and minorities bias. I have developed the argument in Séverine Dusollier, ‘Realigning Economic Rights with Exploitation of Works: the Control of Authors on the Circulation of Works in the Public Sphere’, in B. Hugenholtz (ed.), *Copyright Reconstructed: Rethinking Copyright’s Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International, 2018), at 163–201, spec. at 177; Dusollier, *supra* note 9, at 220 ff.



dispose of a thing (*usus, fructus* and *abusus*), enshrined in article 544 of the French Napoleon Civil Code. During the 20<sup>th</sup> century, French legal scholars have considered copyright<sup>40</sup> either as a right of property right, like *Recht*,<sup>41</sup> or as belonging to a specific category of rights, like Roubier, Renouard or Picard.<sup>42</sup>

The notion of property in common law is more diverse and encompasses different legal entitlements in resources. The more restricted notion of ‘ownership’ could be said to come close to the civil law notion of *propriété*. The broadness of the ‘property’ category in common law maybe explains why attributing IP to this category is less contested; it seems to be more open to welcoming a broader range of relationships to resources.

Many legal arguments have been forwarded challenging the qualification of copyright as property, particularly in its civil law form. They range from the limited duration of those rights which stands at odds with the normal perpetuity of property, the limited list of exclusive rights forming the scope of IP,<sup>43</sup> and the inclusion of IP limitations, such as fair use, specific exceptions, or the principle of exhaustion, within the IP regime itself, and not, as in property, as external legal rules that could have a limiting effect on the exclusive right. Some argue that the peculiarities and differences of IP are not compatible with or have been ‘obscured’<sup>44</sup> by the property terminology. Amongst such differences are the frequent need to exploit IP assets cumulatively or in combination, the non-rival nature of the IP subject-matter, the decisive role of intermediary institutions, such as collective rights management organizations or patent pools, as well as the importance of public access to the protected resources.<sup>45</sup>

### **C. What ‘Property’ does to Copyright**

The demonstration of the property nature of IP mainly serves to argue in favour of the principle of a potentially expansive control of the owner over the work, invention or protected sign. As suggested by Julie Cohen, ‘the term ‘property’ is a label that does important performative work:

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<sup>40</sup> The European law maker has been less hesitant in labelling intellectual property as being ‘property’, see the recital 9 of the Directive 2001/29 on copyright in the information society.

<sup>41</sup> Pierre Recht, *Le droit d’auteur, une nouvelle forme de propriété*, Paris, LGDJ, 1969.

<sup>42</sup> See Strowel, *supra* note 7 at 102ff.; Dusollier, *supra* note 9, at 309 ff.; Pierre-Emmanuel Moyse, ‘La nature du droit d’auteur: Propriété ou monopole?’, 43 *Revue de droit de McGill* 531 (1998); Kamina, *supra* note 6; Chapdelaine, *supra* note 8, at 38 ff.

<sup>43</sup> In countries that provide for an analytical list specifying the privileges of the holder of IP, such as in the US, it is difficult to argue that the IP owner benefits from the most absolute control over the subject-matter. Even in France, where the exclusive rights of copyright are defined synthetically (whereas patent or trademark rights include a list of uses that are considered as infringing), the rights so conferred do not exhaust all possible acts of use of a work.

<sup>44</sup> Cohen, *supra* note 4, at 14.

<sup>45</sup> *Ibid.*

it announces the gravity of its subject-matter and mobilizes a particular way of thinking about how that subject matter ought to be managed'.<sup>46</sup> In civil law, the *droit de propriété* is considered as providing for the most absolute control a legal subject may obtain over an asset: any act of use would be in principle encompassed within its spectrum. When confronted with a new question regarding the scope of copyright, a property rhetoric helps to achieve an easy solution: in principle, any act of use is reserved to the copyright owner.

The 'property' tag is an important building block of the law and economics of IP as well. Following the influential article of Coase on *The Problem of Social Cost*,<sup>47</sup> property is considered a prerequisite to ensuring transactions that are needed to create proper incentives for creation and innovation.<sup>48</sup> For reasons of efficiency, all potential uses of a work should enable the owner to control and license them. Hence, in a traditional law and economics discourse, non-property spaces in copyright or patent protection, such as limitations or fair use, are seen as market failures.<sup>49</sup> The proper boundaries of property do not matter much, what counts is that rights defined as property can trigger transactions.

In a nutshell, the property machinery captures all utilities of the work for the sole benefit of the copyright owner. Only exceptions and limitations that are strictly defined by law (at least in regimes not opting for an open provision such as fair use) limit the monopoly of the copyright holder.

## II. THE BUNDLE-OF-RIGHTS CONCEPT OF PROPERTY

The bundle-of-rights approach of property is not a theory of property,<sup>50</sup> but an analytical and descriptive tool<sup>51</sup> that was built at the beginning of the 20th century and is now dominant in common law perspectives of property. What follows will appear evident to anyone educated in a US law school, but might still seem extravagant to civil lawyers more accustomed to a very monolithic and absolutist conception of property.<sup>52</sup> First the notion of the bundle of rights will

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<sup>46</sup> Ibid.

<sup>47</sup> Ronald Coase, 'The Problem of Social Cost', 3 *Journal of Law and Economics* 1 (1960); see also, Robert Merges, 'Of Property Rules, Coase and Intellectual Property', 94 *Colum. L. Rev.* 2655 (1994).

<sup>48</sup> MacKaay, *supra* note 5; William Landes and Richard Posner, 'An Economic Analysis of Copyright Law', XVIII *Journal of Legal Studies* 357 (1989).

<sup>49</sup> See Landes and Posner, *ibid.*; Wendy Gordon, 'Fair Use As Market Failure: A Structural And Economic Analysis of the Betamax Case and its Predecessors', 82 *Colum. L. Rev.* 160 (1982). Wendy Gordon has eventually attenuated her position on fair use as market failure in Wendy Gordon, 'Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives', in Neil Netanel and Niva Elkin-Koren (eds), *The Commodification of Information* (Kluwer Law International, 2002), at 149–92.

<sup>50</sup> On this, see Schlag, *supra* note 19, at 222–3.

<sup>51</sup> As recognized even by one of its detractors, see Henry Smith, 'Property as a Law of Thing', 125 *Harvard L.Rev.* 1691(2012), at 1694.

<sup>52</sup> Some civil law property scholars are starting to look at the bundle of rights, see Fabienne Orsi, 'Réhabiliter la

be explained (A.). Second, its history in the legal scholarship of property will be unfolded and its recent critiques will be explained (B.).

### **A. The Notion of a ‘Bundle of Rights’**

The bundle-of-rights approach characterizes property as a bundle of entitlements regulating relations among persons as to a resource, i.e., as a collection of rights (sometimes also said of sticks), such as the right to use, to exclude, to alienate, and so on.

Conceiving of property as a bundle of rights or legal entitlements radically contrasts with the ‘sole and despotic dominion’ figure of the property owner developed by Blackstone,<sup>53</sup> but known also in civil law, where it was the main depiction of property developed by Pothier or Savigny. Such idea of dominion rests on a monolithic and archetypical figure of property where the diversity of legal regimes of property is reduced to a unique model: that of a comprehensive and unitary right in a resource, whatever its type.<sup>54</sup> This latter view is still dominant in civil law systems<sup>55</sup> that generally make property synonymous with ownership, defined as the most extensive regime of property interests, where the property owner has all rights to use, get revenue and dispose of her asset (*usus, fructus, abusus*).

A bundle of rights or of sticks has a twofold dimension: it is both distributional and relational. Its distributional dimension allows to disentangle the monolithic aggregation of entitlements that composes the dominion-inspired property into many discrete rights, entitlements or sticks that can be rearranged and distributed in the many ways that different regimes or types of resources may require. Hence, that bundle is ‘malleable’, meaning that private actors, courts, and law makers may add or remove sticks.<sup>56</sup> This potential for rearranging an owner’s entitlements helps pursuing the regulatory and redistributive objectives that might be needed to accommodate different property and public interests,<sup>57</sup> the many combinations

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propriété comme bundle of rights: des origines à Elinor Ostrom, et au-delà?’, 3 *Revue internationale de droit économique* 371 (2014); Fabien Girard, ‘La propriété inclusive au service des biens environnementaux. Repenser la propriété à partir du bundle of rights’, 6 *Cahiers Droit, Sciences & Technologies* (2016), available on line at <http://cdst.revues.org/505>.

<sup>53</sup> *Commentaries on the Law of England*, 1765, Liv.2, Ch.1. For a historical account of the different theories of property in US legal thought, see Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (1997). In French law, Demolombe also notes the despotism of the property owner, see Charles Demolombe, *Traité de la distinction des personnes et des biens*, in *Cours de Code Napoléon*, t. IX, Paris, Durand, 1870, no 543, p. 462. For property understood as possessive individualism see more generally MacPherson, *supra* note 24.

<sup>54</sup> Xifaras, *supra* note 20, at 8.

<sup>55</sup> For a critique, see Jean-Pascal Chazal, ‘La propriété: dogme ou instrument politique ? Ou comment la doctrine s’interdit de penser le réel’, *RTD Civ.* 763 (2014).

<sup>56</sup> di Robilant, *supra* note 10, at 871.

<sup>57</sup> Gregory S. Alexander, ‘Pluralism and Property’, 80 *Fordham L. Rev.* 1017 (2011).

still being property. In that sense, the pluralism advocated by Dagan can already find a place within a property regime that is adaptable to the many realities of the resources it protects.<sup>58</sup>

The relational facet of the bundle-of-rights concept highlights that, instead of consisting of a legal and direct relation between an owner and a thing, property connects different legal subjects concerning a given resource.<sup>59</sup> Hence, property is not strictly speaking the right of a person over a thing, but a legal organization of relationships amongst persons as to the use of a thing. It immediately introduces two qualifications of the power an owner would have over her possessions: it is not absolute but others have to be taken into account; and the rights of the owner will come with entitlements of others and entail duties, absence of rights, privileges or rights of others.

## **B. A Historiography of the Bundle of Rights**

One of the first scholars describing property right as a bundle of rights<sup>60</sup> was a progressive institutional economist, John Commons, who belonged to a first wave of writers about law and economics, 70 years before the Chicago school pretended to start the discipline.<sup>61</sup> In *The Distribution of Wealth*, published in 1893, Commons affirms that ‘Property is, therefore, not a single absolute right, but a *bundle of rights*. The different rights which compose it may be distributed among individuals and society –some are public and some private, some definite, and there is one that is indefinite.’<sup>62</sup> As all property rights are created by law and given by the state by virtue of its sovereignty, there is no such thing, in his view, as an absolute and unlimited right of property. On the contrary, restrictions and limitations of property are built in the very rights granted to individuals, a certain share of the control over material objects being reserved for the state and the public at large.<sup>63</sup>

This vision of property as a bundle entails that property is not a natural and absolute right, it is granted by the state and limited, which underlines the social purpose and dimension of property. Both aspects were to seduce the progressive property lawyers and legal realists of

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<sup>58</sup> Dagan, *supra* note 11.

<sup>59</sup> Jane B. Baron, ‘Rescuing the Bundle-of-Rights Metaphor in Property Law’, 82 *Univ. Cincinnati L. Rev.* 57 (2013), at 58–9.

<sup>60</sup> He was forestalled by John Lewis who seems to be the first to refer to a ‘bundle of rights’, see John Lewis, *Treatise on the Law of Eminent Domain in the United States*, 1888, at 41 (quoted by Chazal, *supra* note 54).

<sup>61</sup> I am indebted to my colleague Dina Waked, Professor at Sciences Po Law School, for having revealed to me the archaeology of the law and economics in her remarkable (still unpublished) historiography of this scientific discipline (‘Paradigm Shifts in the History of Law and Economics: Tracing Its Unfolding Through the Genealogy of the Public Interest in Utility and Market Regulations (1870–1970)’, Sciences Po Law School, January 2018, unpublished).

<sup>62</sup> John Commons, *The Distribution of Wealth* (MacMillan and Co, 1893) at 92.

<sup>63</sup> *Ibid.*, at 110.

the time, who would eventually adopt and develop Commons' proposition. What seduced the Legal Realists was the political dimension of property and the realization that property creates power in labour and other markets. Scholars like Tony Honoré and Felix Cohen would build their property theories on this bundle concept.<sup>64</sup> The social dimension of property was also developed by Duguit in France,<sup>65</sup> in a legal environment that was very hostile to any limitation of property, which explains why his ideas were not successful at the time.<sup>66</sup>

Through his influential article on *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, published in two parts in 1913 and 1917, Hohfeld contributed the relational dimension of the bundle. In his structuralist analysis, he reduces the many 'jural' interests, including property, that are protected by law, to a set of legal entitlements organized in a logical manner.<sup>67</sup> His key objective was to explain better what could be the different entitlements that the common understanding of 'having a right' would encompass. The strategy was to distinguish eight categories of 'jural' relationships and to structure them in pairs of correlatives and of opposites. The correlatives are:

Right  $\leftarrow \rightarrow$  Duty

Privilege  $\leftarrow \rightarrow$  No-Right

Power  $\leftarrow \rightarrow$  Liability

Immunity  $\leftarrow \rightarrow$  Disability

A correlative establishes a necessary relationship between two entitlements: having a right entails that someone else has a duty to respect that right. The same is true for the privilege that means that someone else has no right over the use so privileged.

As to opposites, they are organized by Hohfeld as follows: right is opposed to no right, duty to privilege, power to disability, and liability to immunity.

The taxonomic ambition of Hohfeld might disconcert as it intentionally avoids any substantive analysis of the content of the rights but focuses instead on the way and extent a legal subject can act in regard to others. As explained by Pierre Schlag, 'all [Hohfeld] offers is

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<sup>64</sup> A.M. Honoré, 'Ownership', in A.G. Guest (ed.), *Oxford Essays in Jurisprudence* (1961); Felix S. Cohen, 'Dialogue on Private Property', 9 *Rutgers L. Rev.* 357, 371 (1954); see also Morris R. Cohen, 'Property and Sovereignty', 13 *Cornell L. Q.* 8 (1927).

<sup>65</sup> Léon Duguit, *Les transformations générales du droit privé depuis le Code Napoléon* (Librairie Félix Alcan, 1912).

<sup>66</sup> For a recent restoration of Duguit and his social accent of property, see Chazal, *supra* note 56; Orsi, *supra* note 53, at 374.

<sup>67</sup> Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale L.J.* 16 (1913) [hereinafter 'Hohfeld, 1913']. Wesley Newcomb Hohfeld published a second part a few years later, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', 26 *Yale L.J.* 710 (1917) [hereinafter 'Hohfeld, 1917'].

an analytical method. If one unreflectively morphs Hohfeld's method into a substantive theory about how 'property' or any other jural composite is constructed, difficulties will ensue—fast'.<sup>68</sup> Indeed, even though the Hohfeldian analysis is regularly related to a conception of property as a bundle of 'rights',<sup>69</sup> he himself has never mentioned the term 'bundle' to characterize property and only used examples from property to illustrate its taxonomy.<sup>70</sup>

Fundamentally this typology of entitlements is a story of relations between and among persons. It helps seeing property not in isolation, as an autistic relationship between a person and her possessions, but as creating a social and legal environment between different legal subjects benefitting from or obligated by a right, privilege or power over a resource. Not only property can be decomposed into a number of 'rights', but each of these rights grants its owner many shades of power and capacity of action towards others, sometimes under a duty to respect such right, sometimes only deprived of any right to interfere. We will see that for property regimes dealing with resources that are prone to be enjoyed by many and to circulate widely, as in the case of intellectual property, such a relational approach is key.

From these forerunners, the bundle-of-rights metaphor has largely been adopted by US scholars and has become (and still is today) one of the first things students learn in a property law course. The metaphor has been deployed in many ways and to diverging ends. Some have endeavoured to list the many rights that could compose the bundle,<sup>71</sup> like Honoré who disaggregated property into eleven 'incidents',<sup>72</sup> in a manner that is neither convincing or very useful.

The bundle-of-rights view was equally appealing to law and economics scholars. Considering property as a baseline for contractual transactions, they relied on the malleability of property rights as it helped to foster private ordering and increasing transactions in any part of the bundle.<sup>73</sup>

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<sup>68</sup> Schlag, *supra* note 19, at 190.

<sup>69</sup> In Hohfeldian terms, it would rather be a bundle of jural relations. The closest Hohfeld went to describing property as a bundle was to talk about the 'property-aggregate', see Hohfeld, 1913, *supra* note 68, at footnote 67. See also, for description of the aggregate of claims, privileges, powers and immunities that compose property, Hohfeld, 1917, *supra* note 68, at 746–7.

<sup>70</sup> Schlag, *supra* note 19, at 222 ff.; Grey, *supra* note 21, at 85, note 40.

<sup>71</sup> See for a description of such attempts, di Robilant, *supra* note 10, at 879.

<sup>72</sup> See Honoré, *supra* note 65. Among the incidents are the right to possess, to use, to manage, to prohibit harmful use; also the right to the income, to capital, to transmissibility, and so on.

<sup>73</sup> For a discussion of the bundle-of-sticks concept in Coasean and post-Coasean law and economics, see Yonatan Even, 'Appropriability and Property', 58 *Am. Univ. L. Rev.* 1418 (2009); Eric R. Claeys, 'Bundle-of-Sticks Notions in Legal and Economic Scholarship', 8 *Econ. J. Watch* 205, 206–11 (2011); Thomas W. Merrill and Henry E. Smith, 'What Happened to Property in Law and Economics?', 111 *Yale L. J.* 357, 368, 366–82 (2001).

In economics, the bundle of rights has also been reinvented to describe the competing entitlements different subjects could have in a resource. The most prominent example is the research by Elinor Ostrom<sup>74</sup> and the authors of commons scholarship who have relied on its distributive dimension for decomposing the management of a resource held in common by a structure of rights and powers. In the analytical model conceived of by Ostrom for investigating in a comprehensive manner all organizations of common-pool resources, a bundle is devised comprising the right to access, the right of extraction or withdrawal, the right of management, the right of exclusion and the right of alienation.<sup>75</sup> Corresponding to the different ‘rights’ of the bundle are different categories of legal subjects, ranging from authorized entrants, authorized users, claimants, and proprietors to full owners, the latter enjoying the full set of prerogatives to a resource including the right to alienate. The matrix organizing the different entitlements of the bundle with the many types of property-rights holders is a central piece of Ostrom’s so-called Institutional Analysis and Development (IAD) Framework that has been transposed to informational commons, and to intellectual property, by Michael Madison, Brett Frischmann and Katharine Strandburg.<sup>76</sup>

A recent opposition to the analysis of property as a bundle has gained momentum in US law schools. Its key leaders are John Merrill and Henry Smith who plead for a return to the vision of property as a right to a thing and insist on the right to exclude that would be its core, and not merely a stick in the bundle.<sup>77</sup> At the centre of their critique,<sup>78</sup> they list the malleability and lack of stability and security the bundle metaphor affords property, its obscure distinction between the property right and other legal relations, the attenuation of the *erga omnes* effect of property into more contract-like use rights, the absence of answers by the bundle-of-rights concept to inherent issues of property. Their ‘in rem’ conception of property comes close to a dominion approach of property and looks a lot like how property is conceived of under civil law.

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<sup>74</sup> Elinor Ostrom, *Governing the Commons. The evolution of institutions for collective actions*, Cambridge University Press, 1990.

<sup>75</sup> Eric Schlager and Elinor Ostrom, ‘Property-Rights Regimes and Natural Resources: A Conceptual Analysis’, 68 *Land Economics* 249 (1992).

<sup>76</sup> Michael J. Madison, Brett M. Frischmann and Katherine J. Strandburg, ‘Constructing Commons in the Cultural Environment’, 95 *Cornell L. Rev.* 657 (2010).

<sup>77</sup> See namely, Smith, *supra* note 52; Henry E. Smith, ‘Property Is Not Just a Bundle of Rights’, 8 *Econ. J. Watch* 279, 280–82 (2011). On the right to exclude, see *infra*.

<sup>78</sup> For other critical views, see Even, 58 *Am. Univ. L. Rev.* 1418 (2009), loc. cit.; Jonathan Nash and Stephanie M. Stern, ‘Property Frames’, 87 *Wash. U. L. Rev.* 449 (2010); J. E. Penner, ‘The Bundle of Rights Picture of Property’, 43 *UCLA L. Rev.* 711, 724 (1996); Thomas C. Grey, 22 *NOMOS* 69 (1980), loc. cit., at 81; Michael A. Heller, ‘The Boundaries of Private Property’, 108 *Yale L.J.* 1163, 1188 (1999).

An intermediate view is formulated by Hanoch Dagan in his many writings about property. He suggests rejecting the binarism that opposes property either seen as one Blackstonian dominion-based monistic form, or as an unstructured bundle of rights. Instead he posits that the property concept should be used as an umbrella for a set of related institutions that organize distinct types of relationships with respect to distinct categories of resources,<sup>79</sup> and, in order to take due regard for the multifaceted manifestations of property,<sup>80</sup> he develops a structurally pluralistic account of property.<sup>81</sup>

I would embrace Dagan's conception, as it does not turn its back on the bundle-of-rights metaphor, but rejects its most radical expression that portrays property as a completely loose and arbitrary aggregation of entitlements. He posits instead that the particular configuration of the entitlements that compose property (or the bundle if he would be in favour of this characterization) is determined by the specific type of property institution at issue and by the values and norms that construct and reflect the persons' interactions with a given category of resources.<sup>82</sup> In that regard, Dagan acknowledges that 'the bundle metaphor prevents the stagnation of these institutions by allowing –indeed requiring– their normative (and properly contextual) re-evaluation and possible reconfiguration'.<sup>83</sup> Elsewhere he concludes that: 'Rather than a uniform bulwark of exclusion or a formless bundle of rights, we should think about property the way it actually is in both law and life: a set of institutions, each of which is constituted by a particular configuration of rights. The composition of entitlements that constitute each such property institution is determined by its character and thus its underlying normative commitments'.<sup>84</sup>

Likewise, the bundle of rights that composes copyright is neither formless nor indeterminate but translates the particular configuration of interests and normative choices that the law maker has made to give it a defined shape.

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<sup>79</sup> See mostly Dagan, *supra* note 11.

<sup>80</sup> Hanoch Dagan, 'Doctrinal Categories, Legal Realism, and the Rule of Law', 163 *Univ. of Penn. L. Rev.* 1912 (2015).

<sup>81</sup> Although limited in the number of property types that might exist due to the *numerus clausus* principle. On the latter, see Thomas W. Merrill and Henry E. Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle', 110 *Yale L.J.* 1, 26–34 (2000). For another account of the standardization of property institutions by this principle, see Hanoch Dagan, 'The Craft of Property', 91 *Cal. L. Rev.* 1517 (2003), at 1565.

<sup>82</sup> *Ibid.*, at 1913.

<sup>83</sup> *Ibid.*, at 1915.

<sup>84</sup> Dagan, *supra* note 16, at 3.



### III. THE KEY LESSONS OF THE BUNDLE-OF-RIGHTS METAPHOR FOR (INTELLECTUAL) PROPERTY

Envisioning property as a bundle of discrete rights or sticks is not only an abstract conceptualization. It influences the normative construction of the property relations regarding different categories of resources.

The major consequences of the bundle metaphor are: (A.) a pluralistic view of property, which sustains the particular construction of copyright and other IP rights; (B.) the rejection of property as a natural right; (C.) the inherently limited nature of property; (D.) a focus on the relationships a particular property institution creates between the owner and non-owners; (E.) a distributive vision of property where entitlements are separable. I would add a modified perception of exclusivity in that it may take the form of a continuum between exclusion and inclusion (F.).

#### **A. A Pluralistic View of Property Regimes**

Adopting a bundle of rights perspective favours a pluralism of property regimes over a monolithic right. Centred around one single concept of property, the legal arrangements of property may vary and depend upon the type of resources concerned, the interests at stake and the policy objectives pursued. Instead of a unique aggregate of rights, i.e., of ‘a property at singular, archetypical form of all *in rem* rights’<sup>85</sup> that would be homogeneous whether it is vested in land, in an invention or a factory, property is best understood as ‘a set of analytically distinct entitlements’<sup>86</sup> that courts or legislatures may shape in a variety of ways without interfering with its property nature.

This heterogeneity does not stand in the way of recognizing a common set of principles that would characterize the institution of property as such. It would equally be misleading to see property ‘as a ‘laundry list’ of substantive rights with limitless permutations’.<sup>87</sup> Julie Cohen rejects too strict a view of the ‘bundle of rights’ terminology that would ignore that ‘property rights are bundles of attributes constructed and assembled for particular purposes, and as such they exhibit systematic patterns’.<sup>88</sup> Therefore the arrangement of a particular bundle is a result of institutional choices that aim at solving issues dependent on the resource in question.

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<sup>85</sup> Xifaras, *supra* note 20, at 10-11.

<sup>86</sup> di Robilant, *supra* note 10, at 876.

<sup>87</sup> Dagan, *supra* note 82, at 1533.

<sup>88</sup> Cohen, *supra* note 4, at 32.

This resonates well with the multiplicity of IP rights, where the entitlements granted to IP owners can be very diverse, from copyright to trade mark rights, from patent rights to rights in geographical indications. Specific features of IP that derogate from what is usually presented as essential tenets of property, such as perpetuity or unlimited scope, could find some solace in a pluralist view of ownership.

This pluralism also explains the presence of some ‘oddities’ of IP regimes. For instance, moral rights in copyright are somewhat incongruous in a system of property in that they focus more on the personality of the owner than on her control over the creation. Without bothering to find intricate grounds for the relationship of moral right to property, it can be presented as one institutional choice whose role in the bundle is to grant the creator a specific and personal entitlement in her creation.

Likewise, the peculiar rules pertaining to IP rights held in common, as laid down by collective trade marks or geographical indications, result from the need to organize differently legal relationships with and control over a resource whose use is necessarily shared without giving up the property label.

## **B. Property, a Social Construction**

A second outcome of the bundle of rights framing is to defeat the equation of property with a natural right. The owner’s entitlements are not derived from natural law but are granted by the state and result from a distributive allocation. As Dagan puts it, ‘the bundle metaphor captures the truism that property is an artifact, a human creation that can be, and has been, modified in accordance with human needs and values’.<sup>89</sup> It was the very purpose of the scholars and legal realists at the turn of the 20th century to suggest a characterization of property that would promote a social and political agenda,<sup>90</sup> whereas the despotic dominion image and its natural origin do not care about the social dimension of property.

Legal realism leads to the view that property may not be ‘essentialized’. Consequently, a mere recourse to the property label as a way of resolving legal questions will not exclude the need for on-going scrutiny into the values, the objectives of a property right, and the rules they sustain in a given property institution.<sup>91</sup> As K. Aoki, referring to John Singer’s influential book

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<sup>89</sup> Dagan, *supra* note 82, at 1532.

<sup>90</sup> Chazal, *supra* note 56.

<sup>91</sup> Dagan, *supra* note 82, at 1533:

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Rather than resorting to internal deductive reasoning, decision makers must ask whether it is justified that a certain category of people (i.e., owners) will enjoy a particular right, privilege, power, or immunity over a category of resources (land, chattels, copyrights, patents, and so on) as against another category of people (spouses, neighbors,

on property,<sup>92</sup> remind us, there is no transcendental package of entitlements that constitute a universal idea of ‘ownership’ — there are simply many contingent potential ‘rights, powers, privileges and immunities’ that may be combined to comprise what we legally come to understand as ‘property rights,’ and such choices are inherently political.<sup>93</sup> One could also say, again with Dagan, that such possibility of repackaging is ‘an exercise in legal optimism, with lawyers and judges attempting to explicate and develop existing property forms by accentuating their normative desirability while remaining attuned to their social context’.<sup>94</sup>

For IP, this means that the natural right discourse does not stand. It was particularly present in copyright, where some scholars justified the property right by the natural right a creator would have in the fruits of her labour or as an extension of her personality.<sup>95</sup> No need either to squirm around Lockean theory of property (who considers property as a ‘pre-political right’ to use Merges’ words<sup>96</sup>) to find limitations in his famous provisos. Finding the normative value of property in labour could still be an option, but it does not necessarily induce a natural and unlimited right to the products of one’s labour.

Additionally, it does not suffice to have recourse to the property label to justify any extension of owners’ control over new forms of exploitation or uses of works. Each time, a careful reflection about the function of copyright, its normative purposes and the interests of non-owners should be carried out.

The divergences between IP and an ideal type of property in tangibles could also have as a cause the malleability and social construction of the aggregation of the legal entitlements in a work, an invention, a design, a sign. The limited term of IP rights, the limitations of the exclusive rights around a concept of exploitation, the inherent exceptions enjoyed by users, convey the social forces, public interest and values that IP seeks to protect. Yet, even when recombined in a way that differs from property in land, when politically fabricated,<sup>97</sup> the bundles of rights of which copyright, patent right or geographical indications consist, are property.

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strangers, community members, and so on.

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<sup>92</sup> Joseph William Singer, *Entitlement: The Paradoxes of Property* 32 (Yale UP, 2000).

<sup>93</sup> Keith Aoki, ‘Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)’, 40 *University of California, Davis*, 717 (2007), at 721.

<sup>94</sup> Hanoch Dagan, ‘Property’s Structural Pluralism: On Autonomy, The Rule of Law, and the Role of Blackstonian Ownership’, 3 *Brigham-Kanner Property Rights Conf. J.* 27 (2014), at 30.

<sup>95</sup> For an extensive discussion of the *ius naturalis* justification of copyright in France, the US and Germany see Strowel, *supra* note 7, at 136 ff.

<sup>96</sup> Merges, *supra* note 2, at 72.

<sup>97</sup> Aoki, *supra* note 94, at 721.

Amongst the many regimes of IP, the different arrangements of rights, no-rights, powers and duties of IP owners also convey different values, social objectives and functions of the right.<sup>98</sup>

The overall principles that could guide the composition of the bundle in copyright could notably be the delimitation of the economic rights around the function of exploitation,<sup>99</sup> the need to protect the personal and moral link between the author and the work, the authorization of some social, cultural, public-interest or *de minimis* uses to enhance access to the work.

### **C. The Limitations of Property**

The narrative of the bundle of rights in property equally transmits a message of limitation of property to the effect that property should not be thought as absolute nor expanding to every corner where the ‘thing’ could be used and turned into value. Contrasting with the dominion tale of property, where such unlimited control (but subject to strictly defined legal limitations) could be justified, the ambit of property depends upon the combination of the rights that are bundled in a particular social construction. As pointed out by Nash and Stern, ‘moving from object language to rights language inherently reduces expectations of unlimited control’.<sup>100</sup>

For IP, where each specific regime has its own built-in limitations, this is not surprising. Yet, many IP scholars would challenge such a view of limited property, preferring to consider exceptions and limitations as exceptional circumstances, mere tolerances, or market failures waiting to be cured. And, indeed, envisaging limitations, such as fair use, copyright exceptions, the exhaustion principle, compulsory licensing, patent limitations, privileged uses under trade mark law, as being part of the bundle of entitlements or representing what is left unowned by a particular organization of the bundle, will give more weight to the interests of non-owners so protected.

The balance between IP and other fundamental rights that is advocated by the CJEU or the ECtHR could also reflect the free rein given to law makers and judges to rearrange the bundle in order to promote or privilege some socially beneficial activities.

On another note, a bundle can encompass diverse ‘degrees’ of rights, from exclusive rights to mere rights to get a remuneration. In IP, and in copyright mostly, rights owners enjoy only a right to remuneration in some cases, with no possibility to exclude others from the use. Such remuneration rights are sometimes decried and denounced as rampant collectivization of

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<sup>98</sup> Vivant, *supra* note 15.

<sup>99</sup> Dusollier, *supra* note 39.

<sup>100</sup> Nash and Stern, *supra* note 79, at 5.

copyright or as undue limitations of an exclusivity that should be the norm.<sup>101</sup> I would rather estimate that the tool of remuneration rights does not amount to an unfair erosion of the ownership that a copyright holder is entitled to, but could be a proper solution to cases of systemic transaction failures, thus a separate entitlement in the bundle that answers to a specific objective.

For instance, the remuneration rights that neighbouring rights holders enjoy in regard of some public transmissions of their performances, phonograms or broadcasts, are probably more efficient in yielding revenues than a proper exclusive right. This pragmatic approach equally justified the invention of a remuneration right in copyright by the German Copyright Act of 1965, when the German lawmaker was confronted with the increasing use of reprography devices for copying copyrighted works.<sup>102</sup>

#### **D. A Relational Approach**

The relational dimension of the bundle-of-rights metaphor, and its Hohfeldian roots, includes otherness in property. Legal relationships, including those created by property, are seen as social relationships between persons.

That would speak to many IP scholars. Indeed IP rights generally are an aggregate of rights, powers, privileges and no-rights enjoyed by the IP owner.<sup>103</sup> The exclusive rights are, in the Hohfeldian taxonomy, claim-rights that could serve to prevent any other from exploiting the work. Hence, they create correlative duties for anyone not to use a work in a way that is covered by copyright without the authorization of the copyright owner. Copyright owners have also privileges to use and exploit the work, which entails a ‘no-right’ for others to interfere with such use, except if proper legitimate limitations apply.<sup>104</sup>

Additionally, the regime of copyright, or of other IP rights, guarantees entitlements to non-owners which have an effect on the bundle held by the IP owner. Rules about limitations and exceptions, the exhaustion of the right of distribution, and the mere access and use that does

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<sup>101</sup> Strowel, *supra* note 7, at 630 and the references mentioned.

<sup>102</sup> Bernt Hugenholtz, ‘The Story of the Tape Recorder and the History of Copyright Levies’, in B. Sherman and L. Wiseman (eds), *Copyright and the Challenge of the New*, at 179–96 (Kluwer Law International 2012); Joao Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017).

<sup>103</sup> See for a partial description of the bundle in copyright, Merges, *supra* note 2.

<sup>104</sup> See the debate about the positive right that an IP owner would have in the protected subject-matter from which would ensue that any limitation by the state would constitute an illegitimate encroachment. It is generally agreed that IP rights do not guarantee any positive right to exploit. See WTO Panel Report, *EC-Geographical indications*. Para. 7.210; Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press, 2016), § 7.46.

not infringe any exclusive right, confer privileges on users, and consequently ‘no-rights’ on IP owner.

It would be a mistake, though, to understand the bundle of rights as a distribution of different ‘rights’ to different persons under the label of property. Non-owners are not holders of some sticks in the bundle. But they are present in a different manner. Hohfeld distinguishes many types of entitlements and gives property as an example where the holder of the right, the owner, actually enjoys diverse degrees of ‘rights’. Sometimes she holds only some power or has no right as a correlate of a privilege of another legal subject. In that sense, ‘each owner’s entitlements correspond to other owners’ vulnerabilities’,<sup>105</sup> which could be reversed by saying that sometimes the owner herself is vulnerable in front of an entitlement of a non-owner.

The recognition of copyright limitations as creating genuine rights for users could illustrate that dimension. I argued a long time ago that, notwithstanding my conviction that exceptions are key legal norms in need of being protected against encroachment, properly speaking, they are not rights.<sup>106</sup> Hohfeld would have seen them as privileges, which are not without legal force as a privilege creates a ‘no-right’ for someone else, thus a real legal relation. If I am privileged to make a private copy, a quotation, an educational use of a work, or to use a patent for research or private use, or a protected sign for a referential purpose, the IP owner has no right to prevent me from using the work, invention or sign in such circumstances. In the bundle that constitutes her copyright, patent or trade mark right, this entitlement is a no right. But it does not lead to copyright owners being under a *duty* to refrain from interfering with the benefit of exceptions (e.g., by contract or technological lock), for users have no *right*. Only a right with a correlative duty is a predicate for a legal remedy.<sup>107</sup> That does not integrate my entitlement, my privilege as a user, in the bundle, but the legal signification thereof has an impact on the composition of the bundle and the ‘rights’ enjoyed by the owner.

The ‘nature’ of non-owners’ entitlements may also vary depending upon the social objectives or values at stake. Indeed, copyright exceptions might become, by a law maker’s choice, genuine rights, as shown by the article 6(4) of the Information Society Directive of 2001, which requires copyright owners to leave to third parties the benefit of some exceptions even in the presence of the operation of a technological measure of protection. As a result,

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<sup>105</sup> di Robilant, *supra* note 10, at 878.

<sup>106</sup> One of the objectives of Hohfeld was to counter a common (and still pervasive today) confusion between right and privilege and an error consisting in deducing one from the other. See Schlag, *supra* note 19, at 204. Similarly, the legal importance one wishes to grant to some interest should not necessarily lead to the conclusion that the legal protection that should be vested therein needs to be in the form of a right.

<sup>107</sup> See *ibid.*, at 202.

copyright owners are under a duty to enable third parties to benefit from an eligible exception when affixing technological locks upon their works.<sup>108</sup> The correlative of such duty is a proper right of beneficiaries of exceptions.

A dominion-based property could not explain how the owner would have duties towards others.<sup>109</sup>

### **E. A Distributive Approach and the Separability of Entitlements**

The bundle metaphor inherently provides for a separability of the many entitlements that compose the property. They are diverse legally protected interests that can be distinctly managed and transferred and could be allocated by the law maker to pursue many distributive objectives.

This distributive approach, of which the legal realists were particularly keen, is grounded in the values and normative choices that inform the way property serves to allocate resources. As Dagan points out, ‘because property allocates claims to various scarce resources in society, property must be about distribution, as well as about our conceptions of community and social responsibility’.<sup>110</sup>

That rights follow from social goals and policies<sup>111</sup> is particularly true in IP. All IP rights are the outcome of a society’s choice on how best to protect creation, innovation or marketing of products, while ensuring their circulation and accessibility.

Steering away from the ownership model could even engender a distribution of rights in creation in a way that would foster what Julie Cohen called a ‘cultural landscape’:

<quotation>

The cultural landscape is defined not by ownership status, but by the practical accessibility to creative practitioners of resources within it, including resources that copyright law counts as protectable and proprietary expression. To facilitate creative practice, materials in the cultural

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<sup>108</sup> This should be qualified as the article 6(4) only mandates voluntary measures by copyright owners. In default the lawmaker has to intervene and provide measures to allow for the privileged use

<sup>109</sup> I see the critique, though, that could be addressed at this interrelated vision of rights and responsibilities. As put forward by di Robilant, *supra* note 10, at 930:

<quotation>

the bundle of rights model is also of limited use in theorizing owners’ duties. With its strong rights orientation, critics argue, it cannot sustain an adequate vision of property as shared responsibility. For the bundle of rights model, the duties of ownership are merely the correlatives of rights held by others. For example, the owner of a shopping mall has a duty to allow protesters to distribute leaflets because protesters have a free speech right of access to property that has been opened to the public. This view of property as entitlements held by parties against one another does not allow for an adequate understanding of property.

</quotation>

<sup>110</sup> Dagan, *supra* note 82, at 1519.

<sup>111</sup> Nash and Stern, *supra* note 79, at 454.

landscape need to be legally as well as practically accessible, though they may be partially or differently accessible. Formulating rules that preserve the experiential baseline is copyright law's great challenge.<sup>112</sup>

</quotation>

Such distributive focus of copyright does not mean that it should be transformed into a law of users' rights,<sup>113</sup> and I would again concur with Cohen that copyright should be primarily about authors' rights.<sup>114</sup> That being said, the bundle metaphor requires including in the regime of property granted to authors the protection of other interests, those of non-owners, users of works and the general public.<sup>115</sup> It equally intertwines exclusive rights in the creation with the recognition of privileges in public domain works, privileged uses under exceptions, and mechanisms to enhance access to works.<sup>116</sup>

A distributional analysis of property could also be used as a critique of the law and economics approach, adding non-economic values to the object of exchanges and transactions<sup>117</sup> and substituting for the rational *homo economicus* an owner who might engage in subversive strategies and not typical behaviour, as has been demonstrated with brio in the field of IP by copyleft licensing.<sup>118</sup>

The separability of the entitlements within the bundle might be a key advantage in IP for the IP owner herself. To limit our analysis to copyright, when trying today to ensure a just and effective remuneration of creators one conundrum is to determine, on the one hand, what specific rights an author might have kept for herself when assigning her copyright to a producer or publisher, and, on the other, the ways she could be efficiently remunerated. Let me give a few examples.

A first illustration comes from cases in many EU countries where exploiters of audiovisual works, like cable operators, refuse to pay royalties to collective management

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<sup>112</sup> Julie Cohen, 'Copyright, Commodification, and Culture: Locating the Public Domain', in L. Guibault and B. Hugenholtz (eds), *The Future of the Public Domain – Identifying the Commons in Information Law* (Kluwer Law International, 2006), at 158.

<sup>113</sup> L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press, 1991); see also Jane C. Ginsburg, 'Authors and Users in Copyright', 45 *J. Copyright Soc'y U.S.A.* 1 (1997).

<sup>114</sup> Julie Cohen, 'The Place of the User in Copyright Law', 74 *Fordham L. Rev.* 347 (2005).

<sup>115</sup> Drahos, *supra* note 24, at 5.

<sup>116</sup> Séverine Dusollier, 'A Positive Status for the Public Domain', in Dana Beldiman (ed.), *Innovation, Competition, Collaboration* (Edward Elgar Publishing, 2015), at 135–68; Carol M. Rose, 'Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information age', 89 *L. & Contemp. Probs.* 101 (2003), at 107.

<sup>117</sup> Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique', 33 *Stanford L. Rev.* 387 (1981).

<sup>118</sup> Séverine Dusollier, 'Sharing Access to Intellectual Property through Private Ordering', 82 *Chicago-Kent Law Review* 1391 (2007). Generally, on the possibility of subversive strategies in law, see Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!', 15 *Legal Studies Forum* 327 (1991).



organizations representing film directors, arguing that copyright has presumably been transferred to film producers, leaving the collective management organization with no authority to claim such remuneration. This type of position perfectly aligns with a dominion view of property where one and only one owner (in the example, the film producer) can claim remuneration for the use of the copyright work.

In Belgium, the copyright law has been revised recently to the effect that cable operators have become subject to a right of remuneration of authors and performers that collective management organizations may collect irrespective of a contract of transfer (or presumption thereof) between the latter and the audiovisual producer.<sup>119</sup> In a similar way, an independent claim for remuneration was granted in Germany to authors with regard to cable retransmission, irrespective of the possible transfer of their right of cable retransmission to a broadcasting organization or a producer.<sup>120</sup> Both legal adaptations are fine examples of a recombination by the law maker of the rights composing the bundle to the benefit of the author.

A broader protection of creators would be to provide for a similar non-waivable right of fair remuneration for other types of exploitation of the works that could be opposed by collective management organizations or other authors' representatives to economic actors exploiting the works. The bundle-of-rights image of property would give strong support to such rights of remuneration as it could allow conceiving of property in creative works as combining exclusive rights in separate economic activities, which can be transferred or assigned to others to enable them to carry out exploitation of the works, with rights to remuneration that the authors could exercise with the aim of becoming associated in a more permanent and on-going manner to the overall exploitation of works and the financial flows it generates.<sup>121</sup>

This then could lead to a radical revision of economic rights of the authors by which the right would be dissociated in two parts. One would establish the exclusivity of the economic right: the producer or publisher would get the exclusive right she needs to exploit the work in her trade and to authorize others to exploit the work. The other would be a right to a fair share of revenues yielded by any exploitation of the work, such a remuneration right being attached to the author and managed either by her or by her representatives against any person exploiting the work, irrespective of a contract binding such exploiter and the author.

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<sup>119</sup> Article XI.225 Code de Droit Economique (*Economic Law Code*).

<sup>120</sup> Section 20b (2) UrhG.

<sup>121</sup> For more about the contractual protection of creators, see Caroline Ker, Séverine Dusollier, Maria Iglesias Portela and Yolanda Smits, *Contractual arrangements applicable to creators: Law and practice of selected Member States*, (European Parliament, 2014) (recommending such an unwaivable right of fair remuneration to authors).

The separability of the different rights enjoyed by authors could also work against the practice of buy-out contracts whereby publishers or producers acquire all economic rights of copyright and for all possible types of exploitation even if they do not intend to exploit the work in such an extensive way. A perfect example is the copyright waiver that is sometimes required by scientific publishers by which scientific authors are deprived (robbed?) of all their exclusive rights for the whole duration of copyright, for all territories and languages, and for all potential (and sometimes absurd<sup>122</sup>) modes of exploitation.

The separability of entitlements then protects authors against a monolithic property right that, when transferred, would leave them with nothing but their moral right.

## **F. The Variable Degree of Exclusion**

A last dimension of a revised property perspective in IP pertains to the notion of exclusivity. Opponents to the bundle in property criticize the conception of exclusivity, considered in that perspective as only one stick in the bundle.<sup>123</sup> Regaining a central position for the right to exclude and the exclusivity of property is one of the key arguments of recent attempts to come back to a dominion-based narrative. This is particularly prominent in the writings of John Merrill<sup>124</sup> or James Penner.<sup>125</sup>

A slightly different insight has been contributed by Larissa Katz who defends a notion of exclusivity in property, not as a power of the owner to exclude others, but more of a ‘special position to set the agenda for a resource’,<sup>126</sup> i.e., the authority of the owner to decide what she does and what she allows others to do with the object of her property. That would probably not make IP scholars raise an eyebrow, since they are accustomed to see exclusive rights in copyright and other IP rights as powers to authorize or not some acts of exploitation, rather than as exclusion devices. That ‘ownership is not necessarily exclusionary but is essentially an exclusive position of authority’<sup>127</sup> resonates with force in IP.

More fundamentally, the notion of exclusivity and exclusion in IP law tells a lot about how a dominion image seems inadequate to describe the relationship an IP owner entertains with others as to her intangible ‘thing’. Indeed when Henry Smith describes the core of property

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<sup>122</sup> I was once asked to agree to a waiver of copyright in a short contribution to a scientific dictionary to assign my rights for adaptation of my work in movies and plays.

<sup>123</sup> Henry Smith, ‘The Thing about Exclusion’, 3 *Brigham-Kanner Property Rights Conf. J.* 95 (2014).

<sup>124</sup> Thomas W. Merrill, ‘Property and the Right to Exclude’, 77 *Neb. L. Rev.* 730 (1998).

<sup>125</sup> J.E. Penner, *The Idea of Property in Law* (1997), at 68–127.

<sup>126</sup> Larissa Katz, ‘Exclusion and Exclusivity in Property Law’, 58 *U. Toronto L.J.* 275 (2008), at 278.

<sup>127</sup> *Ibid.*, at 310.

as being a right to a thing to which the right to exclude lends force,<sup>128</sup> it does not sound completely right to the ears of an IP expert. True, an IP owner is entitled to exclude anyone from the enjoyment of her work or invention. Such exclusion conveys the no-trespass message that one usually associates with property in land as the paradigmatic case of property. However, exclusive rights in copyright or patent are more about exclusivity than about exclusion for two reasons. The first pertains to the essentially non-rival nature of intangible assets: a work or an invention can be enjoyed by many without depriving anyone else from its benefit. This is the very reason why IP rights create an artificial rivalry and legal exclusivity to remedy the natural impossibility of an exclusive ‘possession’ and control of works or inventions.

A second reason is that in order to reap its full benefit others need to be included in the use of the creation or innovation. Compared to property in a piece of land, the typical example of a Blackstonian depiction of property, excluding everyone from the benefit of the asset would not make much sense in IP. Copyright or patents attain their maximal value when the subject matter of protection is exploited, notably by granting licenses to others. In rare cases, the IP owner will reserve the exploitation of her work or invention to herself (e.g., a pharmaceutical company exclusively manufacturing and marketing the medicine its own research lab has developed; a painter or a writer not wishing to disclose her creation to the public). Most usually, the work will be licensed for multiple uses, enabling it to be made available to the public, a patented invention will be licensed to anyone integrating and manufacturing the technology, and the work or the invention will circulate and be used by many persons.<sup>129</sup>

Therefore, one could say that IP is about including others in the use of the asset. Its exclusive rights serve as means to manage the exploitation of the intangible resource, substituting the ‘keep out’ message of a *ius excludendi* by an invitation to be authorized to enjoy the resource. What better illustration of this than copyleft licensing, which is not so much a denial of the exclusionary dimension of copyright, than an exercise of the exclusivity it confers to include others.<sup>130</sup>

That in IP exclusivity is about managing the resource and deciding what could be done with it rejoices the depiction of exclusivity by Larissa Katz as constituting the power of owners to decide without interference by others.<sup>131</sup> Hanoch Dagan advocates for seeing exclusivity

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<sup>128</sup> Smith, *supra* note 124.

<sup>129</sup> The trademark is a specific case as it normally serves to the exclusive benefit of his holder to enable her to distinguish her goods and services from those of other entities.

<sup>130</sup> More on this argument in Séverine Dusollier, ‘Inclusivity in Intellectual Property’, in G. Dinwoodie (ed.), *Intellectual Property and General Legal Principles – Is IP a Lex Specialis ?* (Edward Elgar, 2015) at 101–18.

<sup>131</sup> Katz, *supra* note 127.

more as a governance dimension of property, which highlights the ‘internal life of property, which is often structured by sophisticated mechanisms aiming to facilitate various forms of interpersonal relationships in ways that no contractual arrangement can’.<sup>132</sup> Like Katz, he reduces the centrality of the right to exclude in what property is, considering it as not being robust enough. Governance instead refers to the myriad of rules in property regimes that aim at facilitating interpersonal relationships and at managing the potential conflicts of interests among all stakeholders in the resource owned. Inclusion is another tenet of property for Dagan, for it conveys the many legal provisions that grant a right to entry or access to the resource to non-owners. Remarkably enough, the examples he quotes include the copyright doctrine of fair use.<sup>133</sup>

Without denying that exclusivity is an important feature of property, I would argue that this exclusivity is a matter of degree that can be modulated differently depending on the property institution and across the specific bundle that it consists of. Space is missing here to develop the argument.<sup>134</sup> In a nutshell, I would say that exclusivity is not a stick in the bundle but a quality of each entitlement enjoyed by the owner. And it inevitably varies both in degree and in kind.<sup>135</sup> This is particularly relevant in IP, where exclusivity of access to and use of an IP asset is sometimes reserved to the IP holder, sometimes shared with a specifically defined category of users, sometimes shared with anyone. Intellectual property also pursues the distinct objective of facilitating market transactions and promoting access to the creation and innovation, which justifies a different calibration of the exclusionary control vested therein.<sup>136</sup> In a way, in IP exclusivity embeds the two dimensions of the bundle-of-rights: On the one hand, no-rivalry in the use of intangible assets leads to a necessarily distributive approach; on the other, the right to authorize and prohibit, which expresses such exclusivity, entails a necessarily relational organization of the rights.

#### IV. CONCLUSION

Property semantics refers to what is proper to me, i.e., to ‘*ce qui m’est propre*’.<sup>137</sup> Such possessive instinct immediately entails a conflation or a confusion of the object itself of

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<sup>132</sup> Hanoch Dagan, ‘Inside Property’, 63 *U. Toronto L. Rev.* 1 (2013).

<sup>133</sup> *Ibid.*, at 12, using fair use and other rights of access to copyrighted works as one example.

<sup>134</sup> See Dusollier, *supra* note 131.

<sup>135</sup> Cohen, *supra* note 1, at 32.

<sup>136</sup> *Ibid.* In that article, Julie Cohen develops ‘a general taxonomy of the resource-coordination functions that legal institutions of property need to perform, and she identifies ten functions grouped into three categories: functions pertaining to recognition of interests and owners, functions pertaining to provision of public access, and functions pertaining to facilitation of market transactions’ (at 20).

<sup>137</sup> Xifaras, *supra* note 20, at 18.

property with the set of legal rules and relationships property creates. To say it in the words of Pierre Schlag, ‘the logic of things becomes the things of legal logic’.<sup>138</sup> Such a slippage is regularly present in IP, and in copyright particularly, where my act of creation is rapidly transformed into a rule of property, as it would justify an absolute and solitary control over the work.

The design of IP regimes, however, is much more complex. It endows the creation with a set of rules that organize not only the relationship of the author to her creation, but also the relationship many other legal subjects (exploiters, users, the public) have to the work. Intellectual property is primarily a regulation of the circulation and exploitation of an intangible object that eludes in many regards the possibility of an absolute control and of a robust right to exclude.

The metaphor of the bundle of rights that for many decades has described property in common law scholarship could illustrate such complexity without having to get rid of the property label. It allows for a pluralist view of property institutions beyond the dominion-based image of a property in land. It embraces a relational perspective of property, where others are included in the legal entitlements that compose the bundle, and a distributive approach, by which the many interests and social objectives pursued or considered by IP could find a place.

Renouncing a unitary paradigm of property would be the preliminary condition to characterizing copyright, and other IP rights, as ‘property’, and to adopting an alternative narration where exclusion/exclusivity would be a matter of degree and intensity, graduated in many ways as regards including others.

We are not stuck anymore in front of that wall of property, which forces us to think that the copyright owner has a potential reservation in respect of any use of the work, or that limitations to copyright are only irregular exceptions to her exclusive control. The wall has not disintegrated, as some might have predicted,<sup>139</sup> but can be built in different forms or of different materials, and it has multiple openings, doors that let others enter or windows that let others look inside.

Instead of bringing confusion and insecurity, the irreducible diversity of property regimes, of which intellectual properties are an illustration, could help to provide an alternative normative frame, more capable of capturing the specific situation and needs of protection of

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<sup>138</sup> Schlag, *supra* note 19, at 193–4.

<sup>139</sup> Grey, *supra* note 21.

intangible assets, whose destiny is to escape the sole reservation by its owner in order to circulate and be enjoyed by many.<sup>140</sup>

This essay has tried to demonstrate that the multifaceted bundle-of-rights tale of property could be useful and flexible enough in explaining how copyright organizes intellectual production, circulation and consumption. It does not imply abdicating a story of an exclusive control of the author over her creation, but it would enrich it by adding other scripts that bring users or the public domain into play, or by introducing forms of resistance, including resistance by the creator against the complete transmissibility of the right. Making the author a beneficiary of a set of entitlements, some of them being shared with others, some of them being non-waivable, could actually help sustain a fairer balance in copyright law, to the benefit of the author and of the public alike.

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<sup>140</sup> Cohen, *supra* note 1, at 57.