

# ETHICAL CONSIDERATIONS REGARDING THE PROTECTION OF INTELLECTUAL PROPERTY IN ALBANIA

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## Introduction

The intellectual property law has always aimed to protect the private rights of the different authors. Recently, however, we are witnesses of the rise of another way of thinking which has challenged the priority of the absoluteness of the rights of the author, the character of which is being now the theme of a vast discussion. Too many other interests, chiefly of ethical and moral character, come now to play, and, despite the protectionist ideas still existing, make it the centre of new developments of the property rights in the world.

Since 1705 Christian Thomasius (1655-1728) had underlined the differences between law, moral and politics. In his writing *Fundamenta juris naturae et gentium*, he states that *honestum* is the moral (do to yourself what you would like other people do to you), *justum* is the just, the law (do not do to the other what you do not like to be done to you) and finally *decorum*, or the policy, (do to the other what you would want the others do to you). Later, Immanuel Kant in his *Metaphysics and Customs* and *The Perpetual Peace*, states that morality means to abide the laws which ask people that given acts to be understood. In his book *The Doctrine of the pure law* (1960) Hans Kelsen writes that the distinction between *law* and *morality* cannot be grounded on the kind of behaviour a man is obliged by the norms of both systems, which means that the same behaviour may be object of law and/or moral norms. According him, it is not true that morality refers to inner while law the exterior aspects of a phenomenon.

Anyway, after the dictatorships, in Europe now is developed a self-consciousness way of thinking which we may call “the era of the rights” (R. Dvorkin has labelled it the era where the rights are being considered seriously). Since 1990 we realize that new constitutional concepts are developed, the public law is draining in favour of *lex mercatoria*, a law which is more commercial than state one. The law is imposed by the human beings therefore the first demand for a just law is to respect the human rights. Consequently, justice demands that the legal norms be first considered axiologically.

But which would be the real situation of the protection of the intellectual property in Albania nowadays?

Concerning the protection of Intellectual Property in Albania there are two principal laws: Law of 28 April 2005, n° 9380 “On copyright and other related rights with it” (which is amended by two other laws of 2008 and 2009) and law of 7 July 2008, n° 9947 about the Industrial Property (now is being prepared a new law).

My intention is to discuss these two Albanian laws just having especial concern the moral and ethical considerations of these laws.

## A BRIEF HISTORY ABOUT THE DEVELOPMENT OF INTELLECTUAL PROPERTY LAW IN ALBANIA

Albania was the latest of the ex-communist countries that entered on the road of economic transformation. It was one of the poorest, most isolated, most repressive and most inscrutable country in Europe. There are now 20 years that Albania is undergoing a long transformation from a communist, centrally planned economy to a liberal free market economy. The picture of the Albanian economic situation that emerged in the early 1990 was dramatic. But during these years our country has implemented many economic, politic, legal and institutional reforms and the progress has been made on many fronts.

The ongoing changes in the economy are characterized by growing services in this sector and in 2003 Albania adopted specific legislation about the protection of competition and its market was open to the foreign investments. Consequently, the level of protection of investor’s rights increased and Albania’s Foundation of economic freedom undertook the protection of property rights. These changes also concerned intellectual property too, including the copyright and related rights and the industrial property.

The concept of intellectual property in Albania is a new born concept because during the communist era the private property was constitutionally abolished and was substituted by the concept of “personal property”. It’s for this reason that the intellectual creations couldn’t were private property. The authors of intellectual works were obliged cede their “rights” only to the State under provisions and rules established by the State only and against royalties fixed by the State. According to these rules the payment to the author was given only once time, when the creation was published for the first time. For further editions no royalty was foreseen. If the work was published, interpreted and executed abroad, the authors were paid by the Government 20% of the sum collected. The rest of the money was handled by the State. For the publication of works not only the authorization of the authors but also that of the publishing of authorities was needed which applied strict ideological control. It was forbidden to publish a book even with the authorization of the author, or, by himself, that has not received official clearance.

But the decentralisation of economy and especially the constitutionally recognition of the private property in the beginning of the years 1990, inevitably made obligatory the change of the legislation for the authors and inventors too. On 19<sup>th</sup> May, 1992 the Parliament of the Republic of Albania passed the Law nr.7564 “On the Copyright”, which may be considered as the first law on Copyrights. This Law has had different amendments in order to adapt it as much as possible to the needs of a situation which was changing continuously and to update it with international modern standards of intellectual property rights.

Since 1991 Albania has adhered in many international Convents and Treaties regarding the protection of intellectual property rights. Albania is a member of WIPO (since June 30, 1992), when it ratified the Convention established the World Intellectual Property Organisation. On March 6, 1994 Albania signed one of the major international copyright treaties: the Berne Convention for the Protection of Literary and Artistic Works (Paris-text of 1971) and in 2000 its protocol - the TRIPS Agreement (1994). In 1995 adopted the Paris Convention for the protection of Industrial Property(1883); in 2000 Rome Convention for the Protection of Performers, Phonograph Producers and Broadcasters(1961) and on August 6, 2005 has signed and ratified the WIPO Copyright Treaty(1996) etc. Besides these Convents and Treaties Albania has signed and ratify the most important directives of EU regarding the protection of intellectual property rights and the related rights.

In April 2005 the parliament passed the Law Nr.9380 on “Copyright and other rights relating with it” which abolished all previous parliament and government acts dating since 1992. This Law has provided various administrative measures to make possible the respect of copyright and to penalize any potential infringement of copyrights. It offers better specifications on author’s rights for collective works and requires all parties to certify their contracts with the Albanian Copyright Office which is established since April 2007 and according to the law nr.9380 is a specialised institution in the field of intellectual property of artistic, literary and scientific works. The establishment of this institution was the result of an urgent need to fight the widespread intellectual piracy in the country.

The other branch of intellectual property is the Industrial Property. In Albania the industrial property is developed early in the beginning of the Twentieth century. The Albanians merchants were very sensitive to keep their products safe from counterfeiters and the first registration certificate of the trademark is dated in April, 16, 1920. But during the Communist system, having been abolished the private ownership and private business, the only owner of the industrial property remained the State. The only competent organ for registering the national trademarks and patents was the Chamber of Commerce and Industry, an institution under the Ministry of Public Affair. In 1957 this Institute completed the formalities and respective documentation for the registration of foreign trademarks in Albania on the basis of the legal provisions in force, especially Decree no.2490 dt.22 July 1957 (amended by two other decrees, N.3530 and nr.4254 dt.11 April 1967 “On Marks of Production and Trade”).

After the fall of communist’s regime, the changes in all the legislation made imperative the change of the legislation about the industrial property too. So, on 22 March 1993 was created the Office of Patents under the Committee of Science and Technology which was involved in the registration and the protection of Patents for Inventions, Trademarks, Industrial Designs and the Certificates of Origin. A new industrial property law was entered into force on July 8, 1994: the Law no. 7819 “On Industrial Property” which aimed to provide for the grant and protection of industrial property rights concerning: inventions and utility models; trademarks and service marks; industrial designs; geographical indications. In 2006 was created the General Directorate of Patents and Trademarks as a specialised institution under the Ministry of Economy, Trade and Energy.

As mentioned in the beginning, on 28 April 2005 was approved the law n° 9380 about copyright and the related rights while on 7<sup>th</sup> July 2008 was approved law n° 9947 “on industrial property rights. These instruments were a successful

achievement in the field of the acquaintance, the management and the protection of the rights arising from the intellectual property and had a vigorous influence in the stabilisation and the functioning of the market economy, the conservation and the consolidation of the rules about the faire concurrence etc. The principal aim of these laws is, of course, the approximation of the Albanian law in the field of intellectual property rights to the law of the EC countries having presents also the EC Directives, the European Convention about the Patents, the TRIPS Agreements etc. These laws attempt to harmonise the Albanian law with the ratified international conventions in the field of intellectual property.

In the Official Gazette of the Republic of Albania, No. 163 of 8 December 2010, is published the Decision n° 760, dated 1<sup>st</sup> September 2010 of the Council of Ministers about the approval of the national strategy regarding intellectual and industrial property for the period 2010-2015. According to this decision, the Albanian government intent to guarantee and develop in Albania a contemporary system for the protection of intellectual properties consolidating the socio-economic system and guaranteeing to the subjects equal possibilities to participate in this process. The strategic priorities include the reduction of piracy in the field of intellectual property, the improvement of the means aiming the protection of intellectual properties etc., while as strategic purposes are: the fulfilment of the legal framework, the development and the consolidation of the entities involved in the field of intellectual property, the consolidation of the cooperation and collaboration of the national entities with the regional and international ones, and the increase of awareness (knowledge) of people in Albania about the intellectual rights. However, on 22<sup>nd</sup> November 2001, the Ambassador the European Community in Tirana, Mr. Ettore Sequi, explicitly stated: “regarding copyright and the protection of industrial property we observe a poor progress concerning the approach of the law with the European Community law. Albania must still fulfil the obligations undertaken with the Association-Stabilisation Agreement”.

In an interview of 5<sup>th</sup> December 2011, Dr. Zh. Peto, professor at Law Faculty of Tirana, states that a new law about copyright and the related rights is ready to be approved and are drafted two new articles to be added to the Criminal Law in order to fight more efficiently the piracy in the field of intellectual property. The law amendments aim a full approach of the Albanian law in the field of intellectual property with the Acquis Communautaire and the international ratified instruments in the this field and the cancellation of the existing deficiencies, providing a better and efficient protection to the owners of the rights of intellectual properties. Further, these amendments will create the ground for a control of the internal market concerning the intellectual rights because up to now

there has existed a "law *vaccum*" and nobody was charged to supervise and control the application of the law in the internal market.

In 2010 Albania joined EPO (European Patent Office). But, despite these encouraging reforms there is still much work to be done, especially regarding the level of piracy and counterfeiting which are widespread and the people aren't so conscious to take into consideration the norms of the law. Another major problem is the absence of the law about the protection of some important elements of intellectual property such as moral rights and personality rights.

The key question now is the drafting of the new laws having presents the moral and ethical questions. I feel that the claims of Prof. Joseph Stiglitz and Prof. John Sulston, both Nobel Laureates in 2001 and 2002 respectively, in Economic and Physiology/Medicine, that Intellectual Property Regime stifles science and innovation, must be taken into consideration. According Stiglitz, IP is a public good with two attributes: non-rivalrous competition" and non-excludability. This means that it is difficult to prevent others from enjoying its benefits while IP regimes are worse that exclusion because they create monopoly power over knowledge that often is abused. The social returns from innovation do not accord with the private returns associated with the patent system. The person who secures the patent wins a long-term monopoly creating a gap between private and social returns. He states that developed countries are separated from developing countries by the disparity in access to knowledge and IP is making it harder to close the gap. He suggests, therefore, that IP regimes be tailored to specific countries and sectors. No one believes that the patent system should be entirely abandoned, but the question is whether other tools, such as prizes or government funding, could be used to promote access to knowledge and spur innovation in areas where there are well-defined objectives such as a cure of malaria. –Further, Sulston too, states that science can be driven by need of curiosity, which requires a substantial degree of openness and trust among players. However, research direction is controlled by governments and investors which funnel science into profitable areas. The consequence of this trend is the neglect of research on the deceases of the poor and the production of unnecessary drugs sold through high-pressure marketing. On the other part, counterfeiting has become a major issue. Sulston, therefore, suggests return to the old practice of splitting research and development from production and is critical the privatisation of science. "The world should concentrate on the survival and thriving of humanity and the exploration of universe" states Sulston.

Without fully approving this attitude, I seize the opportunity of this seminar to expose my personal point of view. First of all, as it well known, the ethics and

law are not the same. The former is broader and usually is composed by unwritten norms. As David B. Resnik states, ethics may be defined as a method, procedure, or perspective for deciding how to act and for analyzing complex problems and issues. How to act in case of life-saving drugs, is it fair to prevent other companies from manufacturing the same without the additional cost of research and development? The existing system does not allow this and the immediate consequence, therefore, would be the exclusion from the market of those who cannot afford cost of the product, in this case a life saving drug, having present the fact that the incentivizing mechanism for innovation establishes a direct link between the incentive to innovate and the price of the innovated product.

Having presents the foregoing I am of the opinion that nowadays exists an immediate need to regulate IP laws contemplating new legal provisions regarding banking credits to inventors, in order to give greater opportunities to everyone to develop Intellectual Property rights. The law must acknowledge the owner's right over the innovation, but at the same time must leave ample space for moderation and further development. Article 27 of the Universal Declaration of Human Rights approved by the General Assembly of the United States (Resolution n° 217 A (III) of 10<sup>th</sup> December 1948, recites:

1. *Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
2. *Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

Would we want to fully apply this provision of the Declaration we have to enact laws which would respect both the above two paragraphs of this Article.

Thank you for the attention you paid to my words.

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