KNOWLEDGE AS A PUBLIC OR PRIVATE GOOD? A NEW TWIST TO AN OLD TALE.

A Comparative human rights analysis of the protection of knowledge creation and diffusion.

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1. Introduction

The disagreement on the nature of knowledge and, consequently on the most just and efficient model of protecting its creation and dissemination can be traced back to the theories explaining the *raison d'être* of copyright. The Lockean labour-desert concept treats products of mind on a par with the fruits of physical labour as the creator's private property. It recognises the natural property right that authors acquire in their work by mixing their labour with the material object, through which their idea is expressed.[1] By contrast, Kant's theory differentiates between the external things that could be owned or disposed of, which are regulated by the rules of private property, and the intellectual works perceived as *"continuing expression of [the creator's] inner self"*[2], that constitute an inherent part of the author's personality and therefore are regulated by personal rather than patrimonial rights (e.g. property rights).[3] In addition to the author's rights, the Kantian approach recognises certain rights of the public to access intellectual creations, therefore it perceives knowledge as exhibiting characteristics of public goods.[4]. The middle-ground is represented by the Hegelian theory, which despite regarding creative ability as an inalienable part of the self, treats expression of the intellectual work in an external medium as an alienable good, thus capable of being the subject of private property.[5]

This polemic as to the nature of knowledge goods has always been present in the doctrine of intellectual property law. Nowadays, it still divides academics, policy-makers and judges. Obviously, the discussion is most vivid and aggressive between the right- and stake-holders using their argumentation to support lobbying and litigation. The proponents of the knowledge-as-private-property approach argue that it offers the only efficient mechanism to encourage creation and innovation and they employ the rhetoric of *free riding* and *theft* to discourage unauthorised use. In answer to this, those in favour of the knowledge-as-a-global-public-good approach, have developed an abundant critique, supported by various arguments comprising *inter alia* philosophical and economic analyses.

This paper proposes a distinct perspective on this problem by using the concepts that have already been elaborated on and placing them in a new comparative scheme. It will show that it is possible to reconstruct the discourse on the nature of knowledge goods in the domain of human rights law, where the same two divergent stances have been taken[6]. At one extreme lies the approach represented in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, which recognises the global-public-good nature of knowledge and focuses on providing safeguards for the general public's access. At the other extreme lies the case law of the European Court of Human Rights as well as the regulations of the Charter of Fundamental Rights of the European Union that seem to approach knowledge as a private or at least a club good. This analysis will attempt to prove that, although primarily these two perspectives

seem to be contradicting, at least in the human rights domain, they might be reconciled through a proper adjudication process based on the social function of the right to property.

2. KNOWLEDGE AS A GLOBAL PUBLIC GOOD.

2.1 Article 27 of the Universal Declaration of Human Rights

For the decades human rights[7] law and intellectual property rights[8] law have developed in the *"splendid isolation"* from one another, notwithstanding the fact that the foundational document of human rights law – the Universal Declaration of Human Rights[9] - expressed the first attempt to protect creation and diffusion of knowledge.

The issue of the protection of interests in intellectual creations is dealt with in the Universal Declaration in Article 27, which reads as follows:

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.

The dualistic construction of this provision indicates that the drafters of the Universal Declaration perceived human creativity from two different perspectives: as a right of the public to access the results of artistic and scientific works and as a right of creators to have the moral and material rights in their works protected. The structure of Article 27 also contains the assumption that the right of creative individuals, as regulated in the second paragraph, should be subordinated to the right of the whole of humankind to enjoy the results of all the intellectual work of others, which is enshrined in the first paragraph. The same interpretation may also be derived from the drafting history.

2.1.1 Historical Context of the Drafting Process

a) Preventing future misuse of science and abuse of scientists' work

The most important historical factor triggering the drafting process and shaping the negotiations of the Universal Declaration of Human Rights was the experience of the World War II. The acts of aggression against human dignity committed during that global conflict constituted the actual reason for the states to draft a document which would assure that *"disregard and contempt for human rights [that] have resulted in barbarous acts which have outraged the conscience of mankind"*[10] would never be repeated. Although never mentioned explicitly in the document, the World War II and the Holocaust clearly motivated the framers of the Declaration.[11] Thus Article 27 should primarily be regarded as a reaction to the Nazi's and Stalin's massacres which were committed with the wide instrumental usage of science and technology[12] through the acts of the scientists and engineers conscripted and forced to work without remuneration by the totalitarian regimes, which were *"seeking to exploit the applications of science for purposes of power aggrandisement"*[13]. The content of this article was to a large extent shaped by the post-war public debates, attracting active participation of many eminent scientists[14], who highlighted the urgent need to protect science and technology from misuse in the future.[15]

According to the drafters, the recognition of the right to a just remuneration of intellectual creators and the right of every individual to enjoy the benefits of scientific and technological development as well as of artistic creativity was the best legal instrument to avoid the future misuse of science in a way contrary to human dignity,[16] and so this should be perceived as the primary aim of Article 27 of the Universal Declaration.

b) Expanding access to science and culture

In the years preceding the negotiations of the Universal Declaration, scientific and artistic activities were highly elitist in their nature[17], and so was the access to its fruit[18]. It was only after the end of World War II that higher education was opened to the masses and the artistic creations of various peoples started to be widely appreciated on par with the so called *high culture* thanks to an awakening of the interest in traditional folk culture.[19] It was exactly at the time when the Universal Declaration was being drafted that the democratisation of both science and culture started. This process was universal around the globe.

In the United States, as noted by Lea Shaver *"*[t]*he Roosevelt Administration explicitly called on science to solve pressing human challenges and serve the nation's collective war effort. After the war in particular, a new enthusiasm emerged within the scientific and academic community to put its efforts at the service of the humanity."*[20] The economic programmes of the New Deal provided public funding for the diffusion of science and culture *inter alia* by financing public libraries and theatres.[21] They were also highly sympathetic to the growing interest in folk art and oral history[22] that gave the floor to so-far unheard, often marginalised social groups such as peasants, racial minorities, immigrants, women etc.

Similar democratisation processes, although in different circumstances, were also present in the post-colonial world[23], where the recent collapse of empires completely changed the scientific and cultural arena by allowing native languages and cultural heritage to enter the scene.

An analogous situation was observed in the communist countries, where it fitted perfectly with the general ideology of empowering the masses at the expense of the hitherto privileged social elites. The democratisation of science and culture in the countries behind the Iron Curtain was epitomised by the public funding for libraries, cinemas, theatres and so-called *houses of culture*, with the largest of them called, *palaces of culture and science*, offering the possibility to the masses to participate in the scientific and cultural life of the community. In the socialist countries the post–war enthusiasm mixed with the novel slogans of the as yet not fully discredited communistic ideology, created massive popular movements for the benefit of science and culture. The democratisation of science also took the form of empowering young people from the lower classes, especially from workers' and farmers' families, through special quotas assuring their presence at the universities. The democratisation of culture in this region was also exemplified by multiple artistic initiatives in the public sphere (the aesthetic value of which is nowadays widely questioned), such as the huge paintings on the walls of buildings illustrating communist slogans, sculptures and monuments praising the communist regime etc. Very specific for this region was also the introduction of scenes from the life of the so-called *simple people*, such as farmers and workers, as the themes in artistic works in all genres of art.

As the aforementioned examples illustrate, the democratisation of science and culture at this time proceeded in two directions. The first was focused on enabling active participation in the artistic and scientific life to the wide masses (university quotas, support for folk culture). The second was providing the general public with the right to benefit from the artistic and scientific work of others (public funding for libraries and theatres). Although it may seem that scientific and cultural development is an independent natural phenomenon, scientific discovery, the introduction of a new technology or the creation of an artistic work *per se* do not necessarily entail general access to such developments. At the time when the Universal Declaration was born, the widespread access to art and the benefits of scientific development were far from obvious.[24]

The willingness to democratise science and culture should therefore be perceived as another crucial factor shaping the wording of Article 27 of the Universal Declaration.

2.1.2 Drafting History

The historical context in which the negotiations of the Universal Declaration took place sheds important light on the aims guiding the drafters when incorporating Article 27. This understanding would however be incomplete without a closer analysis of the document's drafting process itself.

The dualistic construction of Article 27, as mentioned above, indicates that the drafters approached human creativity from two different perspectives: as a right of the public to access the results of artistic and scientific works and as a right of creators to have the moral and material rights in their works protected[25]. The most important fact, essential for the proper interpretation of this provision, is that these two perspectives, represented in the document by two separate paragraphs, triggered completely different reactions amongst the drafters and, consequently, followed divergent histories.[26]

The right to enjoy the benefits of scientific and artistic advances as regulated in the first paragraph of Article 27 UDHR did not create much controversy for it was supported by all the delegates favouring the aforementioned arguments of the democratisation of science and culture as well as the prevention of future misuses contrary to human dignity. The drafters shared a common sentiment*"that even if all persons could not play an equal part in scientific* [and artistic] *progress, they should indisputably be able to participate in the benefits derived from it"*[27] as was aptly stated by the French delegate René Cassin.

By contrast, the creators' rights, as expressed in what became the second paragraph of Article 27, triggered a hot debate.[28] The French proposal to include the protection of moral and material interests of authors in the Declaration raised multiple objections from other drafters, who either regarded the rights of authors as lacking sufficient importance to be given the status of a basic human right[29] or thought those rights had already been adequately covered by the provision protecting the right to property[30] and other international regulations outside human rights law,[31] or even claimed that special protection for intellectual property would entail an élitist perspective[32] in the otherwise egalitarian document, that was supposed to implement the concept of universal human rights. The second paragraph of Article 27 was repeatedly rejected and even after its eventual passing, it failed to be regarded by the drafters as a pure right of creative individuals, and was more perceived as an additional element of protecting the public, an attitude strengthened by the increasingly voiced arguments that *the moral rights* part of the regulation should also strive to ensure universal access to works in their original form[33].

The strong opposition to the second paragraph of Article 27 UDHR[34] expressed throughout the whole negotiating process was not moderated even at the final stage; hence the eventual adoption of this provision was hardly articulation of the consensus, with merely 18 votes in favour as opposed to 13 votes cast against, and 10 abstentions.[35]

What follows from the structural logics of Article 27 as well as the historical interpretation of this provision is that the human rights' protection of interests in intellectual creations expressed in the UDHR seems focused mostly on providing universal access to the results of human creativity. The protection of the rights of individual creators was treated as instrumental and subservient to the needs of the general public. The drafters not only failed to recognise the results of intellectual work as the exclusive property of their creators, but also perceiving it as necessary to maintain a proper balance between the rights of individual authors and inventors on the one hand, and the public on the other, they attached paramount importance to the general welfare.

2.2 Article 15 (1) of the International Covenant on Economic, Social and Cultural Rights

The same attitude was expressed in the International Covenant on Economic, Social and Cultural Rights[36], which was introduced, together with the International Covenant on Civil and Political

Rights, to give force to the unenforceable political declarations expressed in the UDHR. At no stage of the drafting process of the two Covenants did an automatic inclusion of the compromises previously achieved in the Universal Declaration take place[37]; however, Article 15 (1) (1) of the ICESCR, which is devoted to the protection of interests in intellectual creations, closely resembles Article 27 of the UDHR, as does the history of its drafting.

Article 15 (1)(1) of the ICESCR reads as follows:

1. The States Parties to the present Covenant recognise the right of everyone:
   a) To take part in cultural life;
   b) To enjoy the benefits of scientific progress and its applications;
   c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2.2.1 Drafting History

Article 15 (1)(1) of the ICESCR, like Article 27 of the UDHR, consists of the same three components dealing with the right to culture, right to scientific advancement and protection of rights in intellectual creations. Similarly to the drafting history of Article 27 UDHR, there was a strong support of all the representatives throughout the negotiations for the right of everyone to share in the benefits of science and to participate in the cultural life of the community, viewed as *"the determining factor for the exercise by mankind as a whole of many other rights"*[38]. However, the rights of authors and inventors did once again trigger a heated debate.[39] The strongest objections to incorporating those rights were raised by the Soviet Union together with the whole Eastern bloc, which argued that the people's right to benefit from science and culture should not be intermingled with property rights. The opposition subsided only after assurances that the rights of intellectual creators were not equal to the right to private property and their primary purpose was to prevent others from altering the original expression of intellectual and artistic creations and that they should be regarded as essential preconditions for cultural and scientific freedom and wide public participation in scientific and cultural life.[40]

Hence, similarly to Article 27 UDHR's case, the provision concerning the rights of individual creators was finally accepted only because its initial critics were eventually convinced to perceive it as crucial for safeguarding the interests of the community as a whole. Once again it was claimed that the protection of authors' rights was vital for assuring public access to the authentic works[41] and furthermore that it was critical to *"give effective encouragement to the development of culture"*[42].

The drafting history of the ICESCR proves, exactly as the UDHR's, that the provision on authors' rights was eventually included only because of its instrumental character in meeting the needs of the community as a whole, which were perceived as having a stronger moral justification than the privileges of individual creators[43]. Hence, the three elements comprising Article 15 (1) (1) of the ICESCR must be seen as intrinsically interrelated[44] and therefore the protection of the results of human creativity as provided by the ICESCR cannot be viewed as constituting the monopoly property rights of creators and inventors but primarily as safeguarding access to scientific and artistic developments.

It is also worth mentioning that the drafters of the Covenant seemed to have been thinking of authors exclusively as individuals and did not mean to protect the interests in intellectual creations of legal entities.[45] Such an understanding of Article 15 (1) has recently been confirmed by the Committee on Economic, Social and Cultural Rights in the General Comment No.17 to Article 15 (1)(c) of the ICESCR which states that corporate entities are not protected at the level of human rights as they remain outside the safeguards of human rights system[46].

The interpretation of both Article 27 of the Universal Declaration and Article 15 (1) of the Covenant seems to prove that, to the extent they approached the wide public access to the benefits of artistic and scientific development as universal human right, superior to the rights of individual creators to have their interests in intellectual creations protected, the drafters of these documents anticipated the vision of knowledge as a global public good[47], which was later developed and analysed in depth by both economists and lawyers.

3. What are global public goods?

The concept of *public goods* is traceable back to the 18th century, when David Hume discussed the difficulties inherent in providing for *the common good* in his *"Treaties of Human Nature"*, first published in 1739.[48] Since then the literature on that topic flourished, nevertheless, it was only in the second half of the 20th century that economic, and subsequently legal, scholars started to recognise knowledge firstly as a particularly valuable resource, capable of improving the welfare of humankind[49], then as also having the qualities of a public good[50], and only very recently as being a global public good[51]. What are then the features of the global public goods that are also borne by knowledge and which were foreseen by the foundational documents of universal human rights law?

The ideal public goods, the so-called *pure public goods*[52], have two main qualities: their benefits are non-rivalrous in consumption and non-excludable. The non-rivalrousness of the good means that the consumption of the good's benefits by one individual does not reduce the availability of the good for the consumption of others. The non-excludability, on the other hand, means that no one can be effectively excluded from using the good. Some scholars claim that public goods *"can be thought of as special cases of externalities"*[53] in that they have an advantageous (in case of *public goods* or detrimental in case of *public bads*) impact on a party that is not directly involved in the transaction.

Private goods, on the contrary, are excludable and rivalrous in consumption. The buyer gains access to private goods in exchange for the price set by the market. The price mechanism allows the reaching of a state of maximum efficiency in which resources are used in the most productive way. The access to the good is conditional on the payment of its price and cannot be enjoyed by those who fail to pay the price (excludability); at the same time the consumption by one individual reduces the availability of the good for the consumption by others (rivalrousness).

Few goods are purely public or purely private - most exhibit mixed characteristics. Goods that only partly meet either one or both criteria are called *impure public goods*,[54] and could be divided into two categories: *club goods*, i.e. goods that are non-rivalrous in consumption but excludable;[55] and *common pool resources*, i.e. goods that are mostly non-excludable but rivalrous in consumption[56].

TABLE No 1.

	RIVALROUS	**NONRIVALROUS**
EXCLUDABLE	Private goods	<u>Club goods</u>
NONEXCLUDABLE	<u>Common Pool Resource</u>	*Pure public goods*

Note: Public goods in italics, impure public goods underlined; [*Source:* Kaul I., Grunberg I. and Stern M. A., (eds.) (1999), p.5.]

Global public goods are those public goods, the benefits of which can be enjoyed by the global *publicum*, i.e. that are not limited to any specific population defined by geography, socio-economic status or generation.[57] This multidimensional attitude towards the *globality* of some public goods

emphasises the fact that they benefit all of humanity, notwithstanding the nationality, age, sex or socio-economic status of the person etc.,[58] in which they resemble universal human rights.[59]

Knowledge has recently been identified by economists as one of the global public goods[60], since due to its non-rivalrousness, non-excludability and universal worth it can benefit simultaneously all humankind. Moreover, according to network externalities, the value of knowledge increases in the process of sharing: ideas may become more valuable to the society as a whole if they are used to the largest possible extent[61].

The non-rivalrousness and non-excludability of the fruit of human mind, however, were much earlier perfectly described by the first U.S. Patent Commissioner, Thomas Jefferson, who aptly stated:

"If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.

Inventions then cannot, in nature, be a subject of property."[62]

The *globality* of most knowledge should also be beyond any doubt as *"a mathematical theorem is as true in Russia as it is in the United States, in Africa as it is in Australia"*[63].

The vision of knowledge present in Article 27 UDHR and Article 15 (1) ICESCR alike recognises its *pure global public good* attributes. Any regulations extending the rights of individual creators beyond what is provided for by the human right to the protection of interests in intellectual creations are contrary to the aforementioned provisions insofar as they change the nature of knowledge into a *club good*, which not everyone is entitled to access, or even into a *private good*, of which not only excludability but also scarcity is artificially created by legal regulations[64]. To be in line with the human rights' provisions of Article 27 UDHR and Article 15 (1) ICESCR on the access to knowledge, all instantiations of the protection of individual authors must respect the vision of knowledge as characterised by its *pure global public good* attributes, meaning that its benefits in form of the artistic, scientific and technological advances can be shared by all humanity regardless of race, sex, age, socio-economic situation, etc.

4. KNOWLEDGE AS A PRIVATE GOOD?

4.1 Case law of the European Court of Human Rights

The recent case law of the European Court of Human Rights adopted divergent attitude towards protection of knowledge creation and diffusion. The European Convention for the Protection of Human Rights and Fundamental Freedoms[65], contrary to the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, does not include separate provisions on the access to knowledge and protection of interests in intellectual creations. Moreover, until the early 1990s intellectual property right holders did not claim violations of their

rights based on the European Convention, and when they eventually commenced, until recently the European Commission and the European Court of Human Rights have repeatedly denied to adjudicate directly on the protection of interests in intellectual and artistic works. It was not until the 1990s[66] that the European Commission finally held that Article 1 of the Protocol No. 1 to the European Convention applies to intellectual property, which was confirmed as late as 2005[67] by the rulings of the European Court of Human Rights.

Article 1 of Protocol No. 1 to the European Convention that was successfully invoked by the intellectual property right holders reads as follows:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The question of the protection of intellectual property was firstly assessed by the European Commission which consistently held in its three decisions dating back to the 1990s that **patents** [*Smith Kline & French Lab. Ltd. v. Netherlands* (1990) and *Lenzig AG v. United Kingdom* (1998)] and **copyrights** [*Aral v. Turkey*, (1998)] fall within the subject matter scope of Article 1 of the Protocol 1 to the European Convention. The same line of reasoning was applied by the European Court of Human Rights in its trio the recent decisions.

The question of the protection of copyrighted works under the European system of human rights was dealt with directly by the European Court of Human Rights for the first time in *Dima v. Romania* (2005)[68], where even though the ECHR didn't decide whether under the circumstances of the case the claimant indeed had a possession as the author of the graphic design, it did state that Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms protects copyrighted works. Similar logics was applied to the issue of trademarks in *Anheuser-Busch Inc. v. Portugal*[69], where ECHR held that both registered trademarks and sole applications for having a trademark registered amount to *possessions* as covered by Article 1 of Protocol No. 1. Finally, in *Melnychuk vs. Ukraine* (2005) the Court held that intellectual property in general is protected by Article 1 of Protocol No. 1 to the European Convention of Human Rights.

4.1.1 Intellectual Property equated with other *possessions*?

As the examples above illustrate, according to the case law of both the European Commission of Human Rights and the European Court of Human Rights intellectual property is protected by the European Convention's right to property. This reasoning is in line with the earlier decisions of the ECHR, which have repeatedly been giving a wide interpretation to the scope of Article 1 of the First Protocol stating that the notion *">>possessions<< has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as >>property rights<<, and thus as >>possessions<<, for the purposes of this provision"*[70]. Intellectual property has thus joined other intangible assets[71], held by the ECHR to amount to *possessions* protected by the Convention's right to property.

The position that, in case of trademarks[72], and supposedly also patents, not only registered rights, but also mere applications for registration are protected by the Convention's right to property is also consistent with the earlier well-established case law of the ECHR for the Court has extended the temporal scope of Article 1 to both current and future proprietary interests by stating that the

“>>possessions<< can be either >>existing possessions<< or assets, including claims, in respect of which the applicant (...) has at least a >>legitimate expectation<< of obtaining effective enjoyment of a property right”[73].

What is then the nature of the human right to property to which the status of the protection of intellectual property has been elevated by the case law of the European Court of Human Rights and what are the implications of such an approach for the vision of knowledge creation and diffusion in European human rights law?

The previous section of this paper has already indicated that the human right to property as regulated in Article 1 of the Protocol 1 to the European Convention differs significantly from the right to property derivable through comparative research in private law. The very wording of the provision itself, using interchangeably the expressions: *possessions* and *property*, suggests it varies considerably from the private law regulations on property. Firstly, it is the result of the discrepancy in this respect between the common-law and the continental legal traditions that are both represented by the parties to the European Convention.[74] Secondly, it is due to the specific function of the protection of property on the human rights level, which is a constitutional type of protection. Contrary to the norms on property in private law, it does not regulate legal relations between individuals with regard to commodities, but instead protects a private party's right to property against the state.[75] By the same token, the human rights' definition of property is considerably broader than its private law equivalent and covers all patrimonial rights that have economic value[76]. Moreover, it protects all pecuniary rights arising from private and public law relationships and legitimate expectations of those rights of both natural and legal persons.

Although primarily the right to property regulated in Article 1 of the Protocol 1 to the European Convention refers only to the vertical relationship between private parties and the state, it does also concern the horizontal dimension in as much as the state is responsible for regulating private relationships.[77] Due to this influence on the relationships between private parties, the adjudication of the ECHR recognising the *human-right-to-property* status of intellectual property and equating it with other protected *possessions,* treats the works of human ingeniousness as private or at least club goods.

The attitude of the European Court of Human Rights towards the protection of interests in intellectual creations must therefore be regarded as completely different from the regulations of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights analysed above. Unlike these two instruments of universal human rights law, the European Convention does not provide a mechanism that would expressly balance the rights of individual creators, on the one hand, and the right of the public, on the other. In its rulings, the European Court of Human Rights refers directly to various types of IP rights as regulated in intellectual property law. Unlike the mechanisms of the UDHR and the ICESCR, the case law of the European Court of Human Rights, not only refers directly to intellectual property rights, but it also equates them with the right to property in tangibles. By doing so the Court raises the rank of intellectual property to the level of a human right to property. Accordingly, it has taken the opposite approach to knowledge compared to those of the Universal Declaration and the Covenant. Whereas the two documents of the universal human rights law recognise global public good's qualities of knowledge, the case law of the European Court of Human Rights seems to approach knowledge as a private or at least club good.

4.2 Article 17 of the Charter of Fundamental Rights of the European Union

A similar approach to that present in the case law of the European Court of Human Rights was adopted in Article 17 of the Charter of Fundamental Rights of the European Union[78] which reads as follows:

Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Here the equation of intellectual property rights with the right to property in tangibles is even more evident: the notion of *intellectual property* is expressly used in the provision unambiguously titled *the right to property.* As the regulation of the Charter is similar to the reasoning of the European Court of the Human Rights, and bearing in mind the fact the Charter has just entered into force and hence the lack of significant case law in this field, this provision will not be analysed separately. Nonetheless, the vision of knowledge present both in the European Convention on human rights and the Charter of Fundamental Rights of the European Union will be jointly discussed in the following paragraphs.

5. Knowledge as a public or private good? A new twist to an old tale.

The opposition between the two approaches, with the Universal Declaration and the International Covenant on one hand, and the case law of the European Court of Human Rights and the regulations of the Charter of Fundamental Rights of the European Union on the other, closely resembles the discourse that has long been present in the domain of intellectual property law. The common question the two approaches pose is whether the most just and efficient model of protecting knowledge creation and dissemination should treat the works of human ingenuity as private or public goods. As mentioned in the introduction, the disagreement on this issue may be traced as far back as to various philosophical theories explaining the role, function and nature of intellectual property law. All the arguments developed afterwards in this dispute within intellectual property doctrine are equally valid for the human rights approach towards the protection of interests in intellectual creations and hence should be explored here. Nonetheless, due to the nature and constraints of this text, only the most crucial observations will be mentioned.

As described beforehand, private goods as opposed to public goods are excludable and rivalrous. The access to a private good is allowed only on the payment of the price, which is set by the seller. Those not paying cannot enjoy the benefits of private goods. This system leads to some inefficiency by excluding those individuals who cannot afford the price and who would otherwise have benefited from the resource. This seems, however, justified and even inevitable, in case of goods which by their nature are scarce and their consumption is characterised by rivalrousness. Nevertheless, the opponents of the commodification of knowledge claim that this feature is not borne by the knowledge goods, which they perceive as a perfect example of non-rivalrous goods. On the contrary, due to network externalities, ideas may become more valuable to the society as a whole if they are used to the largest possible extent[79]. Moreover, unlike tangible assets, the products of the mind that are protected by intellectual property rights are also non-excludable in nature, as the substance of sharing the ideas, particularly in the digital era, is such that no one can easily be excluded from enjoying the information. Furthermore, as the marginal cost of the knowledge goods reproduction in digital era is close to zero, they are also not scarce in their nature - it is intellectual property law that artificially creates this scarcity. Therefore, such profound protection of the results of human ingeniousness, going as far as to equate it with the protection of property in tangibles, may not only be dangerous for the rights of the general public but also completely inadequate with respect to the nature of the intellectual creations.

Arguably, the monopoly in intangibles, as opposed to tangibles, is artificially created by the legal system and does not stem from the immanent features of those goods. Since products of mind are neither scarce and rivalrous nor excludable in themselves, it is intellectual property law that creates scarcity and excludability where neither existed before[80]. At the same time, it redefines the characteristics of knowledge from those of a global public good into a private/club good. Due to the differences between tangible and intangible assets, and subsequently to the dissimilar social functions of the protection of property and intellectual property, these two legal concepts vary in their scope and temporal duration. Unlike the right to property, lacking temporal limitation and granting complete control over the owned items to possess, use and alienate them, intellectual property rights are both limited in time and scope[81].

The essential divergences between the nature of tangibles and intangibles also confirm the completely different *raison d'être* of the right to property on one hand and intellectual property rights on the other. Whereas the objective of the right to property is to prevent the over-use and depletion of scarce resources as well as to internalise the negative externalities connected with the owned good[82], the aim of intellectual property protection is the enhancement of creation and innovation[83] together with a just recognition of the effort put into the creation of a knowledge good. The externalities stemming from knowledge goods are mostly positive, hence need not be internalised in the same manner as the negative externalities of the tangibles are internalised through the mechanisms of the property right.[84]

Consequently, intellectual property rights should not be equated with the right to property only because of the coincidence in nomenclature. At this point it should also be noted that the term *"intellectual **property**"* is of quite recent origin, dating back to 19th century and is much younger than the legal concept itself[85]. As argued by Fritz Machlup and Edith Penrose, its coining was *"a very deliberate choice on the part of the politicians working for the adoption of a patent law in the 19th century. This period was for liberty and equality and against privileges and monopolies of any sort. Patent law on inventions based upon a >>monopoly privilege<< would be rejected, but as a >>natural property right<<, the patent law would be justified or accepted."*[86] Therefore, as Jakob Cornides appropriately notices, the sheer nomenclature cannot misleadingly allow the *"name of something influence* [the] *idea of what it* [really]*is."*[87]

In the light of the above, it should be asserted that treating the protection of intellectual and artistic works on equal footing with the right to property in tangible goods creates the risk of overprotection to the detriment of the general public, especially when it is expressed in the strong and overarching paradigm of human rights. Particularly challenging for the welfare of the community as a whole is the attitude of the European Court for Human Rights due to the fact that *"*[w]*ithin the European regional human-rights system, powerful companies no less than wealthy individuals may bring, and have indeed brought claims of violations of their >>human<< rights before the European Court of Human Rights"*[88]. In fact, unlike the UDHR, ICESCR and CFREU, the European Convention protects not only intellectual and artistic creations of individual authors and inventors, but covers also interests of legal persons, including potent multinational corporations.

Hence, the attitude of the European Court for Human Rights could be regarded as significantly different from those present in the Universal Declaration and the Covenant, and further, as less suitable for the maintenance of the fragile balance between the rights of creators and inventors on the one hand and the rights of the general public on the other.

However, it should be stressed that the right to property enshrined in Article 1 of the Protocol No. 1 to the European Convention is not absolute and unlimited. This conclusion could be drawn from the very wording of the provision, recognising the public/general interest as the limit of the right to property. This reasoning is confirmed also by the drafting history of this Article, well illustrated by the statement of the Belgian MP, De la Vallé-Poussin, who described the prevailing attitudes of the

drafters towards the notion of property as follows: *"No longer does any party defend the absolute right to own property, as it was understood by Roman law, and I do not think there is anyone either who is in favour of the completeness of the Communist theory."*[89] Further confirmation of this stance may be found in the well-established case law of the ECHR recognising *"functional importance of particular rights in democratic societies, the rationales governments advance for restricting those rights, the arguments for and against deference to domestic decision makers, and the need for the Convention to evolve in response to legal, political and social trends in Europe"*[90].

The *social conception* of both the state and the function of property[91] present in the case law of the ECHR[92] therefore may well achieve the same goal as the mechanism inbuilt in the UDHR and ICESCR. Analogous reasoning is equally valid for the Charter of Fundamental Rights of the European Union, as its Article 17 clearly limits the right to property by the general interest of the community. Consequently, both property right and intellectual property rights, though much different in substance, are not *"an end in* [themselves and] *must be used in a way that contributes to the realisation of the higher objectives of human society."*[93]

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1 This approach is reflected e.g. in the American system of copyright which is based on the principle of the unlimited alienability of copyrights. *See:* Natanel Neil (1994), *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 Cardozo Arts& Ent LJ 1.
2 Ibidem, p. 7.
3 This approach, called monist, is illustrated e.g. by the German copyright law, that treats authors' rights as unitary, personal and inalienable. *See:* Ibidem, pp. 7-8.
4 Ibidem, p.7.
5 This attitude is present in the dualist theory of the copyright which assumes that the author's personal and economic interests are each protected by a legally and conceptually distinct set of rights. *See:* Ibidem, pp.8-9.
6 In this paper I will approach human rights from the positivist perspective i.e. as recognised in the international human rights documents, rather than from the naturalist paradigm which claims that human rights should be primarily seen as ethical demands. Moreover, I will limit my analysis solely to the instruments of international human rights law relevant for the European region.
7 Hereinafter HR's.
8 Hereinafter IPR's.
9 Universal Declaration of Human Rights, GA Resolution 217 A (III), UN Doc. A/810 (1948) [hereinafter UDHR or the Declaration].
10 Preamble of the UDHR.
11 For detailed history of the UDHR's drafting process, *see e.g.:* Glendon M. A. (2001), *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Right*, Random House; Morsink J. (1999), *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pensylvania Press.
12 *See e.g.* Proctor R. N., *Nazi Doctors, Racial Medicine, and Human Experimentation*, in: Annas G.J., and Grodin A. M. (eds.) (1992), *The Nazi Doctors and the Nuremberg Code, Human Rights in Human Experimentation*, Oxford University Press; Josephson P. R., (2005) *Totalitarian Science and Technology*, Prometheus Books.
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14 Among the strong supporters of the Declaration to protect the science and technology from misuse were inter alios: Julian Huxley, the British biologist and writer who served as the first director of UNESCO, W.A. Noyes, the American chemist and J.M. Burgers a member of the Netherlands Academy of Science, *See:* Chapman A.R., (2009), *Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications*, Journal of Human Rights, 8:1, 1-36, p.5.
15 Ibidem.
16 *"*[A]*t the signing of the Universal Declaration, the United Nations had come to envision the sharing of scientific and cultural knowledge as something that could unite an international community; a common task that would contribute to cross-cultural understanding and yield a more secure world than that which characterised the 1930s and early 1940s."* Shaver L.B, (2010), *The Right to Science and Culture*, Wisconsin Law Review, p.25
17 *See e.g.:* Chapman A.R., (1998) *A Human Rights Perspective on Intellectual Property, Scientific Progress, And Access to the Benefits of Science,* Panel Discussion to Commemorate the 50th Anniversary of the Universal Declaration of Human Rights, WIPO, Geneva, November 9, 1998, p.7.
18 *See:* Shaver, (2010), p.5; Shaver L.B., and Sganga C., (2009), *The Right to Take Part in Cultural Life: On Copyright and Cultural Rights,* Wisconsin International Law Journal, Vol. 27, p. 637.
19 Ibidem, p.23.
20 Ibidem, p.43.
21 Ibidem, p. 23.
22 Ibidem.
23 Ibidem, p. 25.
24 See the examples of the electrification process in the United States and the discovery of the polio vaccine as described in depth by Lea Shaver, stating that, at the time when the Universal Declaration was being drafted the enormous and outstanding effort of the massive popular movements was necessary for both assisting the discovery of new technologies in the spheres neglected by the mainstream science and diffusing the existing ones for the benefit of the general public in: Shaver, (2010), pp. 26-27.
25 As it was argued by the Chinese delegate calling for inclusion into the provision of the additional phrase *"share in benefits"*: *"in the arts, letters and sciences alike, aesthetic enjoyment has two sides: a purely passive aspect when one appreciates beauty and an active aspect when one creates it." See:* Claude, p. 253.
26 Moreover the first draft of the Declaration prepared by the director of the Division on Human Rights at the United Nations, John Humprey, did not include the right to the protection of interests in intellectual creations and it only referred to *"the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science"* which eventually was transformed into what became Article 27(1) of the UDHR. The protection of the rights of the creators was added only at the later stage by the French delegate René Cassin, who introduced a new provision which initially stated that *"[t]he authors of all artistic, literary, scientific works and inventors shall retain, in addition to just remuneration for their labour, a moral right on their work and/or discovery which shall not disappear, even after such a work or discovery shall have become the common property of mankind." See:* Yu P. K,

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27 Morsink, (1999), p.219.

28 Green M., (2000), *Drafting History of Article 15 (1) (1)(c) of the International Covenant,* E/C.12/2000/15, para.5. Online at: http://www.unhchr.ch/tbs/doc.nsf/0/872a8f7775c9823cc1256999005c3088/$FILE/G0044899.pdf / accessed 28.02.2011.

29 Morsink, (1999) p.221, (where he quotes Corbet, the delegate from the United Kingdom saying that copyright *"was not a basic human right"* and the Australian representative claiming that *"the indisputable rights of the intellectual worker could not appear beside fundamental rights of a more general nature, such as freedom of thought, religious freedom or the right to work"*.)

30 Ibidem.

31 Ibidem, (recalling Corbet's statement that *"copyright was dealt with by special legislation and in international conventions"*.)

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33 Morsink, (1999), p.221, quoting the Chinese delegate, Chang, arguing that *"the purpose of the joint amendment was not merely to protect creative artists but to safeguard the interests of everyone".* For that reason *"literary, artistic and scientific works should be made accessible to the people directly in their original form. This could only be done if the moral rights of the creative artists were protected."*.

34 Such a strong opposition as that expressed against provisions on the protection of interests in intellectual creations was unique in the whole drafting history of the Universal Declaration. *See:* Shaver, (2010).

35 Morsink, (1999), p.222.

36 International Covenant on Economic, Social and Cultural Rights G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976, (hereinafter ICESCR or the Covenant).

37 *See e.g.:* Yu, (2009), p.1060; Green (2000), paragraph 18.

38 Statement by the representative of UNESCO Havet, cited after Green (2000), para 20.

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41 Official Records, United Nations General Assembly, Agenda item 33, 789th meeting, 1 November 1957, para. 32, p. 183.

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43 Ibidem.

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45 M. Green (2000), para. 45.

46 *General Comment No.17*, para. 7.

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52 Kaul I., Grunberg I. and Stern M. A., (eds.) (1999), p.3.

53 *See:* Cornes R., and Sandler T., (1996), *The Theory of Externalities, Public Goods, and Club Goods,* 2nd ed. Cambridge University Press, p.6.

54 Due to the scarcity of ideal public goods also the *impure public goods* are referred to as *public goods*, and the *pure public* and *pure private* goods should be approached merely as the extremes of the same theoretical public-private continuum.

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56 *See e.g.:* Hardin G., (1968), *The Tragedy of the Commons*, Science 162: 1243-48; Wijkman P. M. (1982), *Managing the Global Commons,* International Organisation 36(3):511-35; Stone Ch., (1993), *The Gnat Is Older than Man: Global Environment and the Human Agenda,* Princeton University Press.
57 Kaul I., Grunberg I. and Stern M. A., (eds.) (1999), pp.9-14.
58 Ibidem.
59 This multidimensional approach could be opposed to one-dimension approach that distinguishes only between "global" and "local" public goods in terms of geographical limits.
60 Other global public goods being e.g.: international economic stability, international security (political stability/international peace), international environment and international humanitarian assistance. See: Joseph E. Stiglitz J.E., *Knowledge as a Global Public Good*, in: Kaul I., Grunberg I. and Stern M. A., (eds.) (1999), p. 310.
61 Cornides J., (2004), *Human Rights and Intellectual Property. Conflict or Convergence,* The Journal of World Intellectual Property, 7(2), p. 136.
62 Thomas Jefferson in his letter to Isaac McPherson, of 13 August 1813, cited after: J. Cornides, (2004), p. 149.
63 Stiglitz J.E., (1999), p.310. Of course there are some kinds of knowledge that are of value only *locally* for populations defined by the geography, age or socio-economic status, but it still does not change its *global public good* nature as it could still be enjoyed by all the humanity without exclusion at the same time, just that not all the people would have the same interest in it. Moreover, most of knowledge, especially scientific truths are universal in nature.
64 Marlin-Bennet R., (2004), *Knowledge Power. Intellectual Property, Information and Privacy*, Boulder: Lynne Rienner Publishers, p. 13.
65 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 222, (hereinafter the European Convention, the European Convention on Human Rights or ECHR).
66 *Lenzig AG v. United Kingdom,* App. No. 38817/97, 94-A Eur.Comm'n H.R. Dec.& Rep. 136 (1998) (patent); *Aral v. Turkey*, App. No. 24563/94 (1998) (admissibility decision) (copyright); *Smith Kline & French Lab. Ltd. v. Netherlands*, App. No. 12633/87,66 Eur. Comm'n H.R. Dec. & Rep. 70,79 (1990) (admissibility decision) (patent).
67 *Dima v. Romania*, App. No.58472/00, para.87 (admissibility decision) (copyrighted works protected by Art.1); *Anheuser-Busch Inc. v. Portugal*, App. No.73049/01, Eur. H.R. Rep. 42 [846],855-856 (Chamber 2007) (judgement of 11 October 2005) (registered trademarks protected by Art.1); *Melnychuk vs. Ukraine,* App.No. 28743/03, para.8 (admissibility decision)(2005) (intellectual property protected by Art.1). Cited after Helfer L.R., Intellectual Property and the European Court of Human Rights in: Torremans P. L.C. (Ed.) (2008), Intellectual Property and Human Rights. Enhanced Edition of Copyright and Human Rights, Wolters Kluwer, p. 27.
68 *Dima v. Romania*, App. No.58472/00, para.87 (admissibility decision). The description of the cases of ECHR is based on the paper by Helfer L.R., (2008), p. 25- 76.
69 *Anheuser-Busch Inc. v. Portugal*, App. No.73049/01, Eur. H.R. Rep. 42 [846],855-856 (Chamber 2007) (judgement of 11 October 2005).
70 *Gasus Dosier-und Fordertechnik GmbH v. The Netherlands,* Application 15375/89 (1995).
71 Other intangible assets that amount to *possessions* according to the rulings of the European Court of Human Rights include e.g. various licenses, contractual rights, leases and business goodwill. *See:* Çoban A.R.(2004), *Protection of Property Rights within the European Convention on Human Rights*, Ashgate Publishing Ltd., Aldershot, p.152-155.
72 See: *Anheuser-Busch Inc. v. Portugal*, App. No.73049/01, Eur. H.R. Rep. 42 [846],855-856 (Chamber 2007) (judgement of 11 October 2005).
73 *Kopecký v. Slovakia,* App. No. 44912/98 (2004) Eur. Ct. H.R, p. 139-140, Cited after: L. R. Helfer (2008). FN 39, p.33.
74 Popović D., (2009), *Protecting Property in European Human Rights Law,* Eleven International Publishing, p. 14.
75 Çoban A.R.(2004), p.31.
76 The human right to property in the European Convention on Human Rights could be described as covering *"universality representing the whole of the person's assets and liabilities assessable in monetary terms"*, Lametti D. (1998), *The Deon-Telos of Private Property: Ethical Aspects of the Theory of and Practice of Private Property,* unpublished D. Phil. Thesis, Oxford, p. 33; quoted after: Çoban A.R.(2004) p.13.
77 Ibidem, p.170, (noting that *"[I]f because of a law in force, an individual's property rights are affected adversely in a relationship between private individuals, a state should be held responsible, because there is the state's authority in all laws including that regulating private relationships."*)
78 Charter of Fundamental Rights of the European Union, 18 December 2000, (2000/C 364/1), entered into force 1 December 2009, (hereinafter the Charter or CFREU).
79 Cornides J., (2004), p. 136.
80 Marlin-Bennet R., (2004), p. 13.; *See also:* Lemley M. (2004), *Property, Intellectual Property and Free Riding,*Working Paper no.291, Stanford Law School, p. 31, (*asserting that: "*[i]*ntellectual property, then, is not a response to allocative distortions resulting from scarcity, as real property law is. Rather it is a conscious decision to create scarcity in a type of good in which it is ordinarily absent in order to artificially boost the economic returns to innovation."*)
81 E.g. *fair use* provisions in common-law and exceptions and limitations to copyright in continental law, impossibility of alienating the moral rights in some legal orders etc.
82 *See:* Lemley M. (2004).

83 Cornides J., (2004), p.150.

84 Lemley M. (2004). p. 32, (asserting that: *"the >>problem<< of intellectual property differs fundamentally from the problem of real property law. It is the problem of internalizing positive rather than negative externalities."*)

85 *See: e.g.:* Vaidhyanathan S.,(2001), *Copyrights and Copywrongs: The Rise of Intellectual Property and how it Threatens Creativity,* New York University Press, p. 21; Fisher W.W. III, (1999), *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States* in: *"Eigentum im internationalen Vergleich"* Vandenhoeck&Ruprecht, pp. 2,8.

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90 Helfer L. R., (1998) *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy,* Harv. Int'l L.J. 39, p. 407, emphasis added.

91 Scott C. (2001), p. 564.

92 For examples of the ECHR's decisions based on the concept of social justice and the social function of property *See:* Popović D., (2009) pp. 140-144, (where he lists inter alia: *James and others vs. United Kingdom*, Judgement of 21 February 1986, ECHR (1986) Series A, No.98 (1986); *Lithgow and others vs. United Kingdom*, Judgement of 08 July 1986, ECHR (1986) Series A, No.102; *Gaygusuz v. Austria,* Judgement of 16 September 1996, ECHR Reports 1996-IV; *Oneryildiz v. Turkey,* Judgement of 30 November 2004, ECHR Reports 2004-XII; *Hutten-Czapska* vs. Poland, Judgement of 19 June 2006, ECHR Reports 2006-;etc.); *See also generally:* Tulkens F., *"La réglementation de l'usage des biens dans l'intérêt général. La troisième norme de l'article 1er du premier Protocole de la Convention europé hyenne des Droits de l'Homme"* in: H.Vandenberghe (Ed.) (2006), *"Property and Human Rights."* Brugge die keure la charte- Bruylant; A. van Rijn, *"Right to the Peaceful Enjoyment of One's Possessions"* in: van Dijk P. *et al.* (Eds.) (2004), Theory and Practice of the European Convention on Human Rights 864.

93 Cornides J., (2004), p.143.