

A BRIEF ESSAY ON THE IMPORTANCE OF TIME IN INTERNATIONAL CONVENTIONS ON INTELLECTUAL PROPERTY RIGHTS*

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“Time has an unusual limitation,
It must begin and end at
some real points or it must be
conceived of as cyclical in nature,
endlessly allowing the repetition
of patterns of possibilities”¹

I) INTRODUCTION

This essay will briefly address the issue of time in some fundamental international conventions on Intellectual Property Rights (IPRs). I will concentrate primarily on four of the numerous international conventions according to the importance the time factor assumes within this framework, and to the relevance these conventions assume in regard to IPRs in the international arena.

In the first part I will introduce two characteristic ideas of time that we have inherited from philosophical thought. I will also describe how the “linearity,” one characteristic time can assume,

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¹ Vine Deloria Jr, Yankton Sioux. Inscription at the entrance of the “Pearsalo Collection of American Indian Art”, Florida Museum of Natural History, Gainesville, FL, U.S.A., last visited: October 2004.

might be a possible way to think of the law system. I will not delve into philosophical aspects of this issue, because they are merely a cue to analyze the issue of time in this context.

In the second part I will detail some of the most important international conventions on IPRs only as far as the relevant time-related aspects are concerned, and I will leave all other aspects and details of the subject matter to the existing literature.

In the third and last part, I will ask if time, as implemented in the IPR conventions, might be construed as circular rather than as a unidirectional straight line. I will suggest that time, whatever the shape carved out by these conventions, is a fundamental part of IPRs and not a mere ancillary element of it. All IPRs are deeply embedded in the time factor. Rights and time are so related that rights would be abridged if the role played by time was underestimated.

II) TIME AND LAW

a) Lightness and Heaviness of Time

The concept of Time always has been central in human thought, and different ideas and conceptions of time have been developed in the fields of philosophy, science and literature. For example, in the philosophical field time has been considered as a gauge of the movement: “time is the numeration of continuous movement”² according to what comes before and to what comes later.³ On the other hand, time has been thought by St. Augustine to be “*distensio animi*,” the internal flow of the conscience.⁴ Furthermore, in literature time has been thought by M. Proust, in the wake of the French philosopher H. Bergson, in terms of an interior experience that can be

² See Aristotle “*Physics*” Book 4, 223b:1 (Robin Waterfield trad., Oxford University Press Ed., 1996) See generally: <http://www.phy.syr.edu/courses/modules/LIGHTCONE/aristotle.html> (last visited November 12, 2004.)

³ See Sergio Peroncini, “La Formula ‘ora per allora’ nel Diritto Pubblico: le diverse tipologie di provvedimenti ‘ora per allora’” [‘nunc pro tunc’ Doctrine in Public Law I: Different Kind of ‘nunc pro tunc’ Judgements] *Collana problemi attuali di diritto Amministrativo*, 11, Ed. Scientifiche italiane, 1995.

⁴ *Id.* at 11

grasped only by intuitive memory; as with the field of science, it is dominated by the contra position between the Newton's Universal time and the Einstein's theory of relativity.⁵

It is common to employ metaphors, such as "linearity" and "circularity," to describe Time. In fact, time can be thought of as running ahead in a straight line or, on the other hand, time can be thought of as a bent line that turns in a circle.

Milan Kundera referred to this dichotomy using the metaphors of lightness and heaviness.⁶

The circular time is heavy because if

"every second of our lives recurs an infinite number of times, we are nailed to eternity as Jesus Christ was nailed to the cross. It is a terrifying prospect. In the world of eternal return the weight of unbearable responsibility lies heavy on every move we make. That is why Nietzsche called the idea of eternal return the heaviest of burdens."⁷

Every action a person takes is destined to recur repeatedly, and since the event is going to recur inexorably, the moment, in which a choice must be taken, will bear a "heavy" responsibility.

By contrast, time may be thought to run ahead in a straight line, which does not loop back into itself.

"Putting it negatively, the myth of eternal return states that a life which disappears once and for all, which does not return, is like a shadow, *without weight*, dead in advance, and whether it was horrible, beautiful, or sublime, its horror, sublimity, and beauty mean nothing. We need take no more note of it than of a war between two African kingdoms in the fourteenth century, a war that altered nothing in

⁵ *Id.* at 11-12

⁶ See Andrea Giansanti, "Tempo Leggero / Tempo Pesante. Tempo dell'economia, tempo della fisica: irreversibilità, omogeneizzazione", Feb 11, 2003, unpublished hand out for ISUFI's PhD classes.

⁷ See Milan Kundera, "The Unbearable Lightness of Being", 5 (Michael Henry Heim Trad. Perennial Classic Ed. 1984)

the destiny of the world, even if a hundred thousand blacks perished in excruciating torment.”⁸

This means that if the stupidity of a war such as the above mentioned is not going to repeat itself, then it can be conscientiously forgiven and forgotten, because is never going to happen again.⁹

“[I]s heaviness truly deplorable and lightness splendid?”¹⁰ As the author writes: “the only certainty is: the lightness/weight opposition is the most mysterious, most ambiguous of all.”¹¹

b) The System of Law and its Time

Is it possible to apply the metaphor of the opposition lightness/heaviness to the legal system¹²? If so, is it the legal system itself linear or nonlinear and how does the legal system deal with time¹³?

A *system of law* is a possible group and arrangement of bodies of laws, rules and prescriptions.¹⁴ The “system of law” is an ideal rational ordered group of laws. Of course, different kind of systems of law, different orders, may be envisaged.

Linear conception is a way, among others, to think of a legal order, of a system of law.¹⁵ The basic idea is to conceive the law as a science, such as Physics is deemed a natural science. To accomplish this goal, the legal system is (thought and) arranged *more geometrico*, in a complete

⁸ *Id. at 3*

⁹ *See Giansanti supra n. 6 at 2.*

¹⁰ *Id. at 5*

¹¹ *Id. at 6*

¹² *See* Achille de Nitto, “Diritto dei Giudici e diritto dei Leegislatori”, 127, Argo Ed., 2002.

¹³ *See* Prof. A. de Nitto, address at a PhD class, hold at ISUFI, Lecce, Mars 11, 2003. *See also e.g.* Lorenzo Carnelli, “Tempo e Diritto” [Time and Law], (Erico Maciel trad., José Konfino Ed., 1960).

¹⁴ *See e.g.* BLACK’S LAW DICTIONARY (8th ed. 2004), Legal Order.

¹⁵ *See* de Nitto *supra n. 11 at 132, 137* (“il comando si presume chiaro, ed il flusso prescrittivo ininterrotto, rapido e, soprattutto, lineare.”)

ordered system, in a taxonomic order.¹⁶ According to Prof. Langdell, dean at Harvard University Law School at the end of the XIX century, “it is indispensable to establish at least two things: first the law is a science. Secondly, that all the available materials of that science are contained in the printed books.”¹⁷ In others words, law is “a complete, formal, and conceptually ordered system that satisfies the legal norms of objectivity and consistency.”¹⁸ The same idea underpins all the civil law codes (which have their roots in the French illuministic civil code) claiming completeness and no flaws, gaps or lacunas whatsoever. All the answers to every practical problem and cases are - Prof. Langdell would say - in the civil code.

One way to think about a nonlinear order may be through a metaphor employed by Fredrick von Hayek.¹⁹ According to the economist, a contra position exists between systems he calls “Taxis” and other ones he calls “Cosmos.”²⁰ The former is a system with a specific aim; all the components of the system are coordinated to contribute to that aim. On the contrary, the “cosmos” is a *spontaneous order*, a “humoured” system.²¹ It is not a system geometrically and rigidly regimented by strict rules with specific aims.²² It is a kind of order in which – because its nature - non rational elements find a proper arrangement therein, such as the *trust* of the market²³ and the *goodwill* of businesses.

The idea of a *reasonable* system, as opposed to a *rational* system,²⁴ vigorously sustained by the von Hayek’s *cosmos*, has been sustained by other schools of thoughts in Europe as well as in the

¹⁶ “Reasoning *more geometrico* was the model proposed to philosophers desirous of constructing a system of thought which might attain to the dignity of a science.” See Ch. Perelman, L. Olbrechts-Tyteca, “The New Rhetoric. A Treatise on Argumentation”, 1, (University of Notre Dame press Ed., John Wilkinson & Purcell Weaver Trad., 1958, 1969)

¹⁷ See Gary Minda “Postmodern Legal Movements”, 13, NY Univ. Press Ed., 1995, for an accurate account of the main American jurisprudential school in the twentieth century.

¹⁸ *Id.*

¹⁹ See de Nitto *supra* n.11 at 130

²⁰ See F. A. von Hayek, “Legge, Legislazione e Libertà “[*Law, Legislation and Liberty*], Il Saggiatore Ed, 1986 (Routledge & Kegan Paul Trad., London 1973-1979)

²¹ See de Nitto *supra* n. 11 at 130. See von Hayek *supra* n. 18 (According to Von Hayek a spontaneous orders, such as a legal order as well as an economic system, can only be generated and efficiently run by “abstract norms” of interaction among the “aimed systems.”)

²² See de Nitto *supra* n. 11 at 130. (the author distinguishes between a “rational” positive order as opposed to a “reasonable” positive order)

²³ See de Nitto *supra* n.12 at 141

²⁴ See de Nitto *supra* n 12 at 130

United States. For example, the American Realist Movement in the 1920s and 1930s²⁵ strongly opposed the formalist conception of law and more recently, among the others, the Legal Feminist Movement proposed a *contextual* and *subjective* approach in construing the law.²⁶

In sum, it seems that the contra position formal *versus* non-formal system of law (linear / non-linear) has been always important²⁷ and it resurfaces periodically.²⁸

c) Law and Metaphors

Apart from the contraposition of thoughts within all the possible arrays of variations,²⁹ it seems that the idea of a linear, straightforward system has been “absorbed” and implemented in the *language*, in the legal jargon.³⁰

If one look at the legal *words* that are used everyday, it might be find out that these words express those purposes of *perfection*, taxonomic order before mentioned, heredity of a long past tradition.

The word *right*, as it is used in the law schools and courts, means “a legal entitlement to have or obtain something or to act in a certain way.”³¹ However, *right* also means “conformity with justice or morality.”³² It stands for: “in accordance with fact, reason, or true, correct” and “in a *straight line*; directly.”³³

²⁵ See Minda *supra* n. 15. at 25.

²⁶ *Id. at.* 132.

²⁷ See Michael Steven Green “Hans Kelsen and the Logic of Legal System” 54, Alabama Law Review, 365, 2003, testifying the topicality of the problem.

²⁸ It is interesting that in the same period of time of the Legal Realist Movement, Hans Kelsen wrote his “Reine Rechtslehr“, one of the powerful theories upholding a “tough” legal formalism.

²⁹ See generally Minda *supra* n. 15.

³⁰ See de Nitto, *supra* n. 12 at 127.

³¹ THE NEW OXFORD AMERICAN DICTIONARY, 1467, Oxford Univ. Press Ed., (2001)

³² THE AMERICAN HERITAGE DICTIONARY, 719, Dell Pub. Ed. (2001)

³³ *Id.* (emphasis added)

The word *rule*, as used in the law schools, means “an authoritative direction for conduct or procedure”³⁴ (eventually given by law....) However, it also means “a statement that describes what is *true* in most or all cases.”³⁵

Ruler means “one that rules or governs” (presumably by making laws and bestowing rights) but also means a “straightened strip for drawing *straight lines* and measuring lengths.”³⁶

Standard is used in the legal jargon as to mean “a level of quality or attainment” and “an idea of thing used as a measure, norm or model (...).”³⁷ But it also means “a principle of conduct informed by notions of *honour* and *decency*” or “an object that is supported in an *upright way*”.³⁸

In other words, these lemmas are used in the legal jargon as metaphors. *Metaphor* in Greek means “to transport”, “to convey.”³⁹ In this instance the meaning that *right* (in the legal sense) conveys is given by the other meaning I referred to above: conformity with justice, true, correct. Right sustained by the State power is a “rule”, “edge,” something that neatly divides the right from the awry, the right from the *wrong*.⁴⁰

Interestingly, the same use of the word *right* as a metaphor can be found in the French word “droit,” the Spanish word “derecho,”⁴¹ the German word “recht” and the Italian word “diritto.”⁴² It is not a coincidence. All the terms share the same idea of linearity and all of them share the metaphorical meaning carried by the original Latin word *directum*.⁴³

Thus, “right” is the opposite of *wrong, false, bent, askew, awry* Using a mathematical metaphor, namely that a straight line is the shortest way to link two points on a plane, the rule of

³⁴ *Id* at 728.

³⁵ *Id.* (emphasis added)

³⁶ *Id.* (emphasis added)

³⁷ THE NEW OXFORD AMERICAN DICTIONARY, 1660, Oxford Univ. Press Ed., (2001)

³⁸ *Id.* (emphasis added)

³⁹ See μεταφορα, William Crightor, “NEW GREEK-ENGLISH DICTIONARY”, Zeno Ed., (1966).

⁴⁰ See Federico Spantigati, “Analisi del diritto dell’economia” [Analysis of the Economic Law], 3, forthcoming.

⁴¹ Interesting, in Spanish the word “derecho” means both “straight” and, with a slight correction, “right” (*derecha*). See “THE OXFORD-DUDEN PICTORIAL SPANISH-ENGLISH DICTIONARY”, New York: Oxford University Press, 1985.

⁴² See de Nitto supra n. at 137 (quoting W.Cesarini Sforza, Principio e Concetto”, Enciclopedia del diritto, 630 ss., Milano 1964.,)

⁴³ *Id.*

law is thought to solve a practical case in the easiest and *straight* possible way.⁴⁴ This would be possible so long as the legal order is construed as a systematic, flawless order. Given a hypothetical case in point, knowing the *rule* to apply, one and only one answer will be possible. Accordingly, also time must be thought as linear as the legal system itself. Such an ordered and coherent system leaves no room for other interferences. Therefore, time in the legal system is thought as an irreversible flow of time from the past to the present and from the present to the future, as a unidirectional temporal sequence that cannot return.⁴⁵

III) TIME IN INTERNATIONAL CONVENTIONS

a) The Paris Convention for the Protection of Industrial Property

The Paris convention, of March 20, 1883, came into effect on July 7, 1884 and, since then, has been revised many times, most recently at Stockholm in 1967.⁴⁶

The purpose of the convention was, as its title suggests, formulating principles to accord protection of *Industrial Property*⁴⁷

A major achievement of the convention is the establishing of an international priority system for registration of industrial property.⁴⁸ Before the Paris convention was implemented, finding patent protection outside the boundaries in which the patent was first filed it was almost impossible.

⁴⁴ *Id.* at 138

⁴⁵ See Francesco La Valle, Nss. Dig. It., *successione*, 635, 1971.

⁴⁶ See Paris Convention for the Protection of Intellectual Property, Mar. 20, 1883, 21 U.S.T. 1583 (as revised on July 14, 1967 in Stockholm) See e.g. George Hendrick Christian Bodenhausen, "Guide to the Application of the Paris Convention for the Protection of Industrial Property, as revised at Stockholm in 1967," United International Bureaux for the Protection of Intellectual Property Ed., 1968.

⁴⁷ See Paris convention art 1 (2). "Industrial Property" is a label that encompasses some legal institutions: patent, utility model, industrial design, trademarks, service marks, trade names, indication of source or appellation of origin.. Since the patent may be considered the archetype of industrial property I will employ it as the main example in examining all the international conventions regarding industrial property.

⁴⁸ See e.g. Stephen P. Ladas, "Patents, trademarks, and related rights: national and international protection," Harvard Univ. Press Ed., 1975.

In fact, it was very difficult and expensive (put in context at the end of the XIX century) to apply for a patent, at the same time, in two or more different countries. Moreover, failure to file simultaneously in all the countries where protection were sought, could have (and often did) deprived the invention of the required novelty⁴⁹ in countries other than the one in which the application was made.⁵⁰

The Paris Convention solved this problem establishing the “right of priority”:

“Any person who has duly filed an application for a patent (...) in one of the countries of the union (...) shall enjoy, for the purpose of filing in the other countries, *a right of priority* during the periods hereinafter fixed”⁵¹ “Consequently, any subsequent filing in any of the other countries of the Union *before the expiration of the periods referred to above* shall not be invalidated by reason of any acts accomplished in the *interval*, in particular, another filing, the publication or exploitation of the invention, the putting on sale of copies of the design (...).”⁵²

These provisions mean that, for example, if X applies for a patent in country (A), she will retain, for one year, her right to apply for the same invention in all the other countries of the Union, despite what might happen after the first date of application in country (A), such as the publication or the exploitation of the work. This means that all the activities that would normally defeat the novelty of the invention, in the absence of any agreements, are irrelevant.

The first application, the one that triggered the process, is considered to establish the date on which the application was filed. Interestingly, that effect of the application is retained “*whatever* may be the *subsequent fate* of the application”.⁵³ It means that when a new application is completed in one country of the Union, it is deemed *as if* it had been filed on the date the first application was filed, although the original application had been withdrawn or cancelled.

⁴⁹ “Novelty” is, along with “utility” and “non-obviousness,” one of requirements for patentability. “The novelty test determines whether the claimed invention is unpatentable because it was made before, sold before (...) or otherwise disqualified by prior use or knowledge.” See Robert P. Merges, Peter S. Menell, Mark A. Lemley, “Intellectual Property in the New Technological Age” 112, Aspen Publisher Ed, 2003.

⁵⁰ See Paul Goldstein, “International Intellectual Property Law”, 333, Foundation Press Ed., 2001.

⁵¹ See Paris convention art 4 (a, 1), (emphasis added.) (The period of priority is fixed, for the patent, in twelve months.)

⁵² *Id.* art 4 (b) (emphasis added.)

⁵³ *Id.* art 4(a),3

Is this an example of circular time or, instead, is a *fictio juris* implemented here⁵⁴? A *fictio juris* is an assumption that considers as true something that cannot be true.⁵⁵ Is it here implemented to assure coherency to the linear idea of time? Or is it the idea of linearity that forces us to think in term of *fictiones*?

b) Patent Cooperation Treaty

The need to improve and strengthen the international patent system was one of the goals of the President Johnson's administration, back in the mid 1960s. The President appointed a special commission to study the United States patent system and the commission came up with the recommendation that, *inter alia*, "the United States [should] promote direct interim steps toward the ultimate goal: a universal patent including harmonization of patent practices."⁵⁶ That was the starting point that led to the diplomatic conference in June of 1970 where the Patent Cooperation Treaty (PCT) came to light.⁵⁷

Once again, the time factor here plays a fundamental role.⁵⁸

In Professor Paul Goldstein words: "The most significant advantage [of the PCT] is the *additional time* provided before a final decision has to be made on the filing of individual application in different countries."⁵⁹ Hence, there is here no particular or original application of *time factor* but, still, time is one of the most important features that is "manipulated" in this treaty since it is acknowledge that time is a key element that greatly affect the right holder's interest.

⁵⁴ See La Valle *supra* n. 45 at 637 (quoting K. Helwig and S. Pugliatti)

⁵⁵ See THE BLACK'S LAW DICTIONARY (8th ed. 2004), *fictio*.

⁵⁶ Interesting but not surprisingly the same interest has prevailed in the international arena leading, years later, to the worldwide harmonization of IPRs through the Agreement on Trade Related Aspects on Intellectual Property Rights (TRIPs) (available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs.) See Goldstein *supra* n. 50 at 353.

⁵⁷ See Patent Cooperation Treaty, with Regulations, June 19, 1970, 28 U.S.T. 7645.

⁵⁸ The PCT sets forth in art 4 that the applicant, beyond the year provided for by the Paris Convention, has bestowed with eight additional months (plus a preliminary search report) upon which grounding the decision on whether or not complete the filing in the designated countries. Since art. 27(7) and rule 4(7) does not compel to appoint a national attorney or agent until processing of the international application has started in the designate national patent office, the saving of money is huge. Lot has been written about the PCT. See *e.g.* Goldstein *supra* n. 41 at 353.

⁵⁹ *Id.* at 356 (emphasis added).

c) The “Madrid Agreement” and “Madrid Protocol”

The purpose of the “Madrid Agreement Concerning the International Registration of Marks” (Madrid Agreement)⁶⁰ is to simplify the international registration process of Trade Marks (TM).⁶¹

This pact enables - through the “application for international registration”⁶² - a trade mark owner, who is a national of any of the contracting countries, to secure protection for her TM, in all the contracting parties, through a single filing in its country of origin.⁶³ The international application is received by the World Intellectual Property Organization (WIPO)⁶⁴ that issues international registration and transmits it to the designated countries for examination.⁶⁵

The United States did not adhere to the Madrid Agreement,⁶⁶ and one of the reasons was the provision for “central attack”: if the home country registration is cancelled (or otherwise invalidated), registrations in all designated foreign countries will fall with it.⁶⁷

The Protocol relating to the Madrid Agreement (Madrid Protocol),⁶⁸ adopted in 1989, has modified the most objectionable features of the original agreement. The protocol now allows a TM owner, whose registration has been cancelled in the country of origin, to retain her international application and, thus, to fill a registration application in the designated countries, *as if* it had been filed on the date of the international registration.

As in the Paris Convention, is a *fiction juris* employed, or may it be considered as an example of circular time?

⁶⁰ See Madrid Agreement Concerning the International Registration of Marks, April 14, 1891, (as revised at Stockholm, July 14, 1967) available at <http://www.wipo.int/clea/docs/en/wo/wo015en.htm>.

⁶¹ The term Trade Mark includes any word, name, symbol, or device, or any combination thereof, the producers use to identify and distinguish her goods, including a unique product, from those manufactured or sold by other and to indicate the source of the goods. For a definition of “service mark” the definition of TM must be applied, *mutatis mutandis*, to a service. See Merges, Menell, Lemley, *supra n. 49 at 537*.

⁶² See Madrid Agreement art. 1(2).

⁶³ *Id.*

⁶⁴ *Id.* To be sure, the application is received by the International Bureau of Intellectual Property

⁶⁵ *Id.* art 3(4)

⁶⁶ See Goldstein *supra n. at 471*

⁶⁷ See Madrid agreement art 6 (3) See Goldstein *supra n. 50 at 472*

⁶⁸ See Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 28, 1989, available at <http://www.wipo.int/clea/docs/en/wo/wo016en.htm>

d) The *nunc pro tunc* and the *related back* doctrines

Both in the Paris convention and in the Madrid Protocol, something that had ceased to exist (the first application or the international registration, respectively)⁶⁹ is deemed as a point of reference for the new application in the designated countries. Both in the Paris Convention and in the Madrid Protocol a no-longer-existent act is used as point of reference for the validity of a subsequent act.⁷⁰

A different process happens with the *nunc pro tunc* and the *relation back* doctrine.

The *nunc pro tunc judgment* means “a procedural device by which the record of a judgment is amended to accord with what the judge actually said and did, so that the record will be accurate.”⁷¹ Something similar happens with the doctrine of relation back. In fact, it states that “an act done at a later time is, under certain circumstances, treated as though it occurred at an earlier time. In federal civil procedure, an amended pleading may relate back, for purposes of the statute of limitations, to the time when the original pleading was filed.”⁷² In these instances, the application of these two doctrines is employed only if there is a mistake on a pre-existent document and this document is still legally existent.

According to these two doctrines, those past events, through a *fictio juris*, are considered *as if* they were effective and qualified in the way the present judgment does. Therefore, the problem of the effect of a past act is surmounted, again, by a *mental construction*. However, a characteristic of

⁶⁹ See art. 9quinquies, (first sentence)

⁷⁰ But see *supra* Peroncini n. 3 at 144 ff

⁷¹ See under “Nunc pro tunc”, THE BLACK’S LAW DICTIONARY, 8th Ed., 2004. See also 49 C.J.S. Judgments § 123, according to which the purpose of the ‘nunc pro tunc’ judgement is “to alter a judgment actually rendered, or to correct an erroneous decision or judgment; and, generally speaking, the object or office of the entry is only to supply matters of evidence or to correct clerical misprisions, and not to supply omitted judicial action.”

⁷² See Fed. R. Civ. P. 15 (c). Even though it’s possible the first document was void, I would argue that it would be *partially* void, only in regard of the mistake that the doctrine wants to correct. In the Paris convention, on the contrary, the application is considered totally void. See also, for an explanation of the rule, Steven S. Sparling, “Relation Back of ‘John Doe’ Complaints inn Federal Court: What you don’t Know can Hurt You”, 19 Cardozo Law Review, 1235, 1997. (Even though it’s possible the first document was void, I would argue that it would be *partially* void, only in regard of the mistake that the doctrine wants to correct. In the Paris convention, on the contrary, the application is considered totally void.)

the *nunc pro tunc judgment* seems to be that it applies only when there is a past legal fact to which apply the present judgment.”⁷³ It seems that it is impossible to produce out of thin air, without the existence of previous fact,⁷⁴ a *nunc pro tunc judgment*. The same happens regarding the relation back doctrine.

By way of contrast, pursuant article 9quinquies of Madrid Protocol (and, *mutatis mutandis*, pursuant article 4 of Paris Convention) there are no past legal events (since they have been cancelled) to which refer the new effect. If thinking about it in terms of *fictiones* is possible, a “stronger” one perhaps is here implemented.⁷⁵

Again, is it possible to think of these provisions as inverting the flow of time? Maybe it is just a fascination, such as the *fictio juris*, and it is possible to qualify these events, one might argue, as an hypothetical fact situations – with facts *in a progressive order* - to which the rule attaches a legal consequences.⁷⁶ In this event, another “tool” is employed to adapt the system to the idea of linearity. As usual, it is a matter of the premises chosen and goals that are set.⁷⁷

e) Berne Convention for the Protection of Literary and Artistic Works and its Application

Time factor also plays a fundamental role in the conventions protecting literary and artistic works.

⁷³ The *nunc pro tunc* doctrine permits courts to enter orders having retroactive effect for the limited purpose of correcting a *previously entered order* which contained an error, omission, or a mistake. *See* Gagnon v. United States, 193 U.S. 442 (1904); Brignardello v. Gray, 1 Wall. 627 (1864). *See also* Matthias v. Railroad Retirement Board, 341 F. 2d 243 (8th Cir. 1965). In a bankrupt case the Supreme Court of Nebraska hold that “Proper function of <<nunc pro tunc order>> is not to correct some affirmative action which court ought to have taken but is to correct record *which has been made* so that it will truly record action which was really had but which through some inadvertence or mistake has not been truly recorded” (emphasis added) Supreme Court of Nebraska, Application of Albert Roy Andrews, etc. Albert Roy Andrews, dba Andrews Transfer & Storage, Norfolk, Nebraska, Appellant, v. Nebraska State Railway Commission, Appellee. No. 35388. April 12, 1963.)

⁷⁴ *But see* Peroncini *supra* n. 3 at 144 ff

⁷⁵ In fact, this provision pegs the new effect not to the past event (the original application no longer existing) but to a certain point in the past time (that only correspond with the period time of the old application).

⁷⁶ This means that all the elements that must be met to trigger the legal protection are straight in the time, one after the other: progressively. (*Fattispecie a formazione progressiva*). *See* DIZIONARIO GIURIDICO De Franchis, *fattispecie* (...).

⁷⁷ *See* de Nitto *supra* n.12at 142

The Berne Convention is the first agreement for the protection of literary and artistic works. It was signed in Berne, Switzerland, on September 9, 1886, and has often been revised, most recently in the 1979.⁷⁸

Berne Convention protects “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlet and other writing (...).”⁷⁹ The Berne Convention (as developed along the time) vests the authors with an array of substantial rights such as the national treatment, the right of translation, reproduction, certain moral right etc.⁸⁰ Moreover, the convention sets forth the minimal period of protection for artistic and literary works.⁸¹

Generally,⁸² a country does not have any obligations, absent international agreements, to protect a work by a foreign national or a work first published in another country. The protection consists in recognizing to the author of an artistic or literary work a bundle of rights that expands its effects in a certain span of time. No protection at all it is granted if the terms of protection will not be turn on in the country where protection is sought. Here, the Berne Convention steps in. According to article 18 the convention shall apply to the works of authorship that have not yet fallen into the public domain at the time of its enactment. Conversely, no protection will be granted to works fallen into public domain in the country where protection is claimed (though the work is still protected in the country of origin).⁸³

⁷⁸ See Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886 (as revised at Paris, September 28, 1979). Available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>.

⁷⁹ See Berne convention art 2(1)

⁸⁰ *Id.* art. 5, art. 8, art. 9, art. 6bis.

⁸¹ In fact, copyright protection is limited in time.

⁸² But see the French and German system of law where, because their philosophical premises underpinning IPRs, protection for at least some “moral rights” is unconditionally and universally extended. See e.g. Goldstein *supra* n 50

⁸³ See Berne convention, art 18,1 “This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” (2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew”.

Overlooking some of the implication of this provision, although important and source of many problems,⁸⁴ it may be useful to briefly refer to a judicial case that may help in the understanding of the scope of this provision and the importance of the time factor in the copyright arena.

The case occurred before the German's Federal Supreme Court in the 1978.⁸⁵ The problem at hand was to decide if - within the legal framework given by the interference of the Berne Convention with other international agreements⁸⁶ - the petitioner's work still had protection in Germany.⁸⁷

The German Supreme Court, holding in favour of the petitioner, recognized, as one of the most important point at hand, the significance of the term of protection in the copyright law. The Court held that "the term of protection [constitutes] a right in a work"⁸⁸ and that the term of protection is *not* "merely a durational limitation of a right"⁸⁹

According to the Court the substantial right conferred by the copyright would be deeply "affected" if the period of protection is miscounted and underestimated in its scope and duration.

IV) CONCLUSION

As we saw, both in the Paris Convention and the Madrid Protocol a *fictio juris* is employed.

I wonder whether *fictio* is like an "intellectual tool" used to explain something otherwise not

⁸⁴ See Goldstein p. 193 (He points out that the retroactive protection is accorded by the convention to foreign works existent at the time the convention came into effect between the protecting country and the work's country of origin so long as the requirements set forth by art. 18 are met.) It is also worthwhile to mention the "copyright in restored works", pursuant 17 U.S.C. § 104A, that solve the problem of the protection of foreign works, when Berne Convention entered into force in the United States in the 1989, that had lost their United States copyright because the copyright owner had filed to comply with renewal formalities.

⁸⁵ Atlas Film & AV GmbH & Co. Verleih u. Vertrieb v. Janus Film u. Fernsehen Vertriebgesellschaft mbh. Case n. I ZR 97/76, 10 International Review of Industrial Property and Copyright Law 358 (1979).

⁸⁶ See Universal Copyright Convention, Paris text, 1971, art XIX. Available at <http://www.cni.org/docs/infopols/US.Universal.Copyright.Conv.html>

⁸⁷ See Goldstein *supra* n. 50 at 188 ff for a detailed comment on this case.

⁸⁸ See. Goldstein *supra* n 50 at 191

⁸⁹ *Id*

explainable; an *escamotage* that must be used to reckon with the idea of linear time, since time in the legal system is usually thought of as an irreversible flow of time, from the past to the present and from the present to the future, as a unidirectional temporal sequence.⁹⁰

Beside the suggestive imagery of the linear/circular time, in light of the aforementioned provisions and the decision of the German Supreme Court, the time-factor comes up to be a fundamental element of intellectual property rights. The matter at hand is substantial and does not concern *how long* the time of protection ought to be. The time-factor (whatever the length) underpins the interest of the IPRs holder and it conspires to shape the scope of protection given by law. Since the particular interest of the right holder is the starting point for the process that leads to the creation of the *rule of law*,⁹¹ the time factor is the essence of the “intellectual bundle of rights.”

⁹⁰ See La valle *supra* n. 45 at 635

⁹¹ Bigliuzzi Geri, Breccia, Busnelli, Natoli, I, “*Diritto Civile*” [Private Law], p. 288, Utet Ed., (1986)