

10-9-2019

Developing the Civil Law of Incorporeal Things

Ricardo Bethencourt

Aniceto Masferrer

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/jcls>



Part of the Civil Law Commons

Repository Citation

Ricardo Bethencourt and Aniceto Masferrer, *Developing the Civil Law of Incorporeal Things*, 12 J. Civ. L. Stud. (2019)

Available at: <https://digitalcommons.law.lsu.edu/jcls/vol12/iss1/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

DEVELOPING THE CIVIL LAW OF INCORPOREAL THINGS

Ricardo Bethencourt,* Aniceto Masferrer†

I. Introduction	55
II. The Roman Law Legacy	57
III. The “Idea” Here is Not the Idea of Judge Learned Hand	60
A. Nature of Intellectual Property.....	61
B. The Fictional Existence of Ideas: The Juridical Thing	63
C. Reason for Fictions	67
IV. The Notion of Use	70
V. Use of Intellectual Property	72
VI. Practical Applications of the Juridical Thing	74
A. As with Legal Entities.....	74
B. One Same Formula in the Civil Code for All Kinds of Property Rights	76
C. The “Licensed, Not Sold” Exception to the First Sale Doctrine on Computer Programs is Implied with the Juridical Thing	77
D. Law School Curricula	78
E. Arbitration, Mediation, and Alternative Dispute Resolution	79
VII. Ideas and Rights	79
A. Unlike Legal Rights, Ideas Need Not to Be Classified as Movables and Immovables	79
B. Ideas Warrant Expiration; Rights Do Not	81
C. Ideas Do Not Warrant the Distinction Between Pledge and Antichresis (and Mortgages), Whereas Rights Do.....	82
VIII. Prospects of a Legal Update.....	83

* Ph.D., Institute for Social, Political and Legal Studies, Valencia (Spain).

† Professor of Legal History and Comparative Law, University of Valencia (Spain).

ABSTRACT

This article offers the legal profession a method to effectuate on behalf of authors, designers, or inventors who are residents of Louisiana (or for Louisiana transactions) the rights recognized by federal law on intellectual property (IP) and unfair competition by activating the civil law on incorporeal things. Additionally, it offers a way to enhance the civil law practitioners' stock of solutions with the regular notions of property, contracts, and torts in IP and unfair competition law for fascinating results. Also, it enables civil law academia to teach IP and unfair competition law through regular courses such as property, contracts, and torts and cease to label them as special or sui generis fields of the law.

With the adoption of the legal fiction of the juridical thing, the legal notions and solutions of the Louisiana Civil Code become readily available for the practitioner who may handle cases in a more competitive way. If one removes the words "right of" from the Louisiana Civil Code article 461 by replacing it with "things consisting," this subtle but significant change would make the point: "Incorporeals are things that have no body, but are comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and things consisting of intellectual property."¹

Very importantly, the juridical thing creates wealth in the individuals and activates private economy for an economic development that grows bottom up. The individual becomes aware of possessing a tradeable asset in a cooking recipe, a sales procedure, a builder's drawing, or a tailor's design. It creates wealth like other legal figures did in history; for example, "property" allowed individuals to own land simultaneously with the king; "mortgage" gave many the ability to own property where cash flow was lacking; and "wills" allowed the continuation (and distribution) of property beyond the life of the property owner. Also, "consensual contracts" permitted the outburst of massive business transactions in Rome and "security interests" made possible the overwhelming trade that arose from the recently discovered Americas.

Last but not least, by intelligently understanding the correlation between common law and civil law notions relating to IP, we secure

1. LA. CIV. CODE ANN. art. 461 (2019) (alteration added).

the success of international treaties and prevent misunderstandings that lead to frustration and conflicts among nations, many of whom have so often felt unfairly treated.

Keywords: Roman law, civil law, comparative legal history, incorporeal goods, intangible goods, intellectual property, software, license agreements, franchises, good will agreements, trade, secrets

I. INTRODUCTION

Intellectual property (IP) law has been highly developed in the common law in a manner consistent with its substance and procedure. Yet, a comparable development is missing in the civil law, which has imported almost literally the common law on the matter.² The civilian practitioner has consequently come to label it a *sui generis*³—one of a kind—area of the law, without a consistent

2. Thomas Nägele, *Intellectual Property Protection in Germany and the EU*, 5 *WORLD COM. REV.* 40 (2011):

German intellectual property law is an aggregate of the Copyright Act (UrhG), Patent Act (PatG), Trademark Act (MarkenG), Utility Model Act (GebrMG) and Design Rights Act (GeschMG), flanked by some provisions of the Civil Code (BGB) and the Act Against Unfair Competition (UWG); and the Federal Act on the Statute and Tasks of the Swiss Federal Institute of Intellectual Property (1995).

Further, a review of the intellectual property laws of France (codified in 1992 in the CODE DE LA PROPRIÉTÉ INTELLECTUELLE, [C. PROP. INTEL.] [INTELLECTUAL PROPERTY CODE]) and Switzerland shows that they are an aggregate of regulations separate from their countries' civil codes. These codes describe the general treatment of the matter by the civil law worldwide. The codes of France, Germany and Switzerland have been the model codes for countries in the world within the civil law tradition, and the latter have also framed their intellectual property laws as a collection of regulations separate from the civil code. For a survey on the laws in the world, see *WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)*, <https://perma.cc/4ZNK-L8BN>.

3. Moni Wekesa, ATPS, *What is Sui Generis System of Intellectual Property Protection?* 3, Technopolicy Brief Series No. 13 (African Technology Policy Studies Network 2006): "In intellectual property rights discourse (IPRs) the term refers to a special form of protection regime outside the known framework;" see also John M. Griem Jr., *Against a Sui Generis System of Intellectual Property for Computer Software*, 22 *HOFSTRA L. REV.* 145, 148 (1993) (describing *sui generis* as "a new statutory framework . . . specifically tailored . . .").

understanding of it.⁴ Such a mechanism backfires on all, common law and civil law parties alike, a misunderstanding of the:

4. For example, a common law “License Agreement” is frequently imported to civil law as a “License Contract.” Such translation is a contradiction in terms because in civil law an act will be either a contract or a license but not both. See ELOY MADURO-LUYANDO, CURSO DE OBLIGACIONES § 815 (Universidad Católica Andrés Bello 1967); see also “Contrato” and “Licencia,” in GUILLERMO CABANELLAS DE LAS CUEVAS, DICCIONARIO DE DERECHO USUAL (Heliasta 1976) [hereinafter DICCIONARIO DE DERECHO USUAL]. A reason for such a translation is consistent with Schlesinger’s finding of the legal principle of the “supremacy of the will” (codified in the 19th century); this principle has made almost every agreement or promise a transaction enforceable as a contract. RUDOLPH SCHLESINGER ET AL., COMPARATIVE LAW 279, 660 (Foundation Press 1988). Furthermore, the common law notion of “property” includes (apart from things) rights other than the fee simple absolute, which is by and far the main meaning of property in civil law. See Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 1 (2012): “Common law and civil law property appear to be quite different, with the former emphasizing pieces of ownership called estates and the latter focusing on holistic ownership.” See also RENÉ DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS § 312 (Aguilar trans., Dalloz 1973) [hereinafter DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS]: “The English jurist has a hard time conceiving [the Civil Law’s] ownership rules and does not understand why we cannot support a combination [of rights].” Compare the Common Law property rights (fee simple absolute, fee defeasible, fee tail, life estate) with the following German provisions:

- (2) A contract by which one party agrees to transfer his future property or a fraction of his future property or to charge it with a usufruct is void (4) A contract relating to the estate of a third party who is still living is void. The same applies to a contract relating to a compulsory portion or a legacy from the estate of a third party who is still living

BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 311b. See also Thomas Dreier, *How Much ‘Property’ is there in intellectual property? The German Civil Law Perspective*, in CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW 116-117 (Helena Howe & Jonathan Griffiths eds., Cambridge U. Press 2013) [hereinafter CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW]. So, when the term “property” is imported without qualifications from the common law, the civilian counterpart may wrongly assume it is an absolute right when, in fact, it may be nothing more than a for-term lease or a revocable license. Finally, the common law term “patents” introduced as property, turns out to be misleading in civil law, because for the civil law a patent is a title to a right (*Título*, DICCIONARIO DE DERECHO USUAL, *supra*) and transactions including rights over rights are not permissible. While this may not be a hurdle for the common law attorney, the civilian attorney is compelled to ascertain the patent subject matter (an invention, a process or a model) and not the “patent” in a transaction. See CODE CIVIL [C. CIV.] [CIVIL CODE] (Fr.), art. 516; BGB (Ger.), art. 90. The Bello Code is an exception to the general rule prohibiting rights over rights but only in a limited way (CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] (Chile), art. 565). René David explains that:

To translate ‘legal rule’ to *norme juridique* is not exactly appropriate; it is a wrong translation of the true nature of the [Common Law] ‘legal

. . . subtlety and complexity of the differences between the two legal traditions . . . can affect all forms and phases of international dealings . . . They get in the way of international negotiations . . . They cripple foreign aid programs [,] . . . limit the effectiveness of cultural exchange . . . [,] misdirect effort and misallocate resources.⁵

II. THE ROMAN LAW LEGACY

Roman law serves as the basis for articulating common law and civil law, and also as a means to articulate both IP and unfair competition law within each of these legal traditions.⁶ However, two caveats are pertinent. Civil law is not Roman law, and Roman law is not the expression of the political organization of the Roman Empire. A first impression may lead the reader to equate civil law with Roman law. The reason lies in that civil law has indeed adopted Roman legal principles and solutions and made them its own. Nevertheless, it has not adopted the Roman rules entirely or unqualifiedly⁷ and its method for finding and applying the law is foreign to the Roman legal practice (which English common law

rule.’ From the [Common Law] perspective, the French legal rule is rather in the rank of a legal principle; it considers the French legal rule more as a moral precept than a true legal rule. The [Common Law] legal rule for us instead looks more like a specific application by the judge of a legal rule.

DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS*, *supra*, at § 321. *See also* Alvaro D’Ors: “The English, since the end of the Middle Ages, call legislation ‘statutes,’ while Europeans call local law ‘statuta.’” ALVARO D’ORS, *ELEMENTOS DE DERECHO PRIVADO ROMANO* § 4 (EUNSA 1991); the list of examples may go on and on.

5. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 151 (3d ed., Stanford U. Press 2007).

6. *See* PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW* (Hambledon Press 1988); *see also* MICHAEL H. HOEFLICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY* (U. of Georgia Press 1997); D’Ors, *supra* note 4; ANDRÉS BELLO, *DERECHO ROMANO* (La Casa de Bello 1959); FRITZ SCHULZ, *CLASSICAL ROMAN LAW* (Clarendon Press 1951).

7. “[N]o Civil Law country has ever received the entire body of the Roman Law. Modern codes have discarded obsolete doctrines, rules, and institutions and have introduced new rules based on indigenous ideas.” JACK DAVIES & ROBERT P. LAWRY, *INSTITUTIONS AND METHODS OF THE LAW* 172 (West 1982) (quoting ATHANASSIOS NICHOLAS YIANNPOULOS, *LOUISIANA CIVIL LAW SYSTEM* 38 (Claitor’ s 1971)).

resembles instead).⁸ The method of civil law finds the law in legal principles, which are applied in a mathematical way to the case,⁹ while Roman law finds the law after the analogical analysis of the cases and offers it to the decision-maker (or praetor) as opinions.¹⁰

On the other hand, Roman law is not the expression of the political organization of the Empire.¹¹ Roman law was instead the outcome of a private professional development carried out during a continuous period of some 300 years (150 BC–150 AD) sharing in both the republican and imperial periods of Rome by people like the Scaevola generations (133 BC–95 BC), Labeo (30 BC), Papinianus, Paulus, and Julian (100 AD) among many others.¹² It was a quiet and relatively far reduced number of people in contact with the praetors and authorities reflecting a superior spirit and invisible authority.¹³

The development of Roman law was a unique event in history, and it was followed by the work of the glossators in the 11th and 12th centuries of our era, the commentators in the 14th century and much later the national codification movement of the 19th century.¹⁴

Here is what Roman law suggests to the civil law today on this point: *Idea est ens per se!*, meaning that “the idea is a self-existing thing”—a thing. The reason to claim ideas as things (i.e., self-existing things)

8. See DAVIES & LAWRY, *supra* note 7 (quoting Athanassios Nicholas Yiannopoulos):

In contrast to modern civil law, common law is basically case law, as Roman Law was; the development of equity jurisdiction in England had a counterpart in Rome; and both common law and Roman Law are characterized by adherence to tradition, strong individualism, the practical approach, and by the absence of a separate body of commercial law.

See also “England has a peculiar legal tradition which is distinct from the Romanistic of Europe, although [England] turns out to be more faithful to the procedures of the Roman jurists.” D’ORS, *supra* note 4, at § 4.

9. See STEIN, *supra* note 6, at 37.

10. *Id.* at 37-41; JAMES HADLEY, INTRODUCTION TO ROMAN LAW IN TWELVE ACADEMICAL LECTURES 77 *et seq.* (Forgotten Books Publ’g 2012).

11. HADLEY, *supra* note 10, at 51 *et seq.*

12. See D’ORS, *supra* note 4, at 58.

13. See LUIS LEGAZ Y LACAMBRA, FILOSOFÍA DEL DERECHO 439 (Bosch 1979); D’ORS, *supra* note 4, at 99.

¹⁴ Ricardo Bethencourt, Knowing Justice for Sure, *in fine*, <https://perma.cc/9ZKN-MFNV>.

lies in the mechanics of Roman law, which rests on the notion of things.¹⁵ Roman law and its textbooks make this evident.¹⁶

In contrast, the mechanics of the common law rest upon the duties or actions of individuals rather than on things,¹⁷ as does the civil law, although to a different extent.¹⁸ It is from there that terms arise in common

15. “The law, strictly conceived [and as compared to public law or moral, political, economic, sociological or other perspectives of the law], seeks an order in property,” that is, “among people towards benefiting from the possession and use of things.” ALVARO D’ORS, *UNA INTRODUCCIÓN AL ESTUDIO DEL DERECHO* § 39 (Rialp 1989) (alteration added). “The role of [the law] is to ‘point out’ the share of each individual: this ‘thing’ or such debt that belongs to x.” MICHEL VILLEY, *1 PHILOSOPHIE DU DROIT—DÉFINITIONS ET FINS DU DROIT* § 54 (Daloz 1975). See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA II-II*, Q. 58, art. 10; see also ARISTOTLE, *NICOMACHEAN ETHICS* bk V. Were the subject matter of the roman law to involve matters other than things, such as social order and rulings of the Prince which are subject to change at will or by factors foreign to justice, the roman law could hardly had achieved its model role, one which has made law quantifiable and certain, a technique and a profession, as commonly recognized. See Andrés Bello, Inauguration Speech of the University of Chile (Sept. 17, 1843):

Roman Law has no equal: some of its principles may be objected; but its method, logic and scientific system have made and preserved it superior to all other legal traditions; its texts are the masterpiece of legal style; its method is the geometry applied in all its rigor to moral thought. So, says L’ Herminier.

16. THEODOR MOMMSEN & PAUL KRUEGER, *CORPUS IURIS CIVILIS* (Lawbook Exchange 2010); D’ORS, *supra* note 4; SCHULZ, *supra* note 6; BELLO, *supra* note 6; SAMUEL PARSONS SCOTT, *THE CIVIL LAW* (Lawbook Exchange 2013).

17. “[The Common Law’s] immediate concern is to reinstate peace . . . it appears as essentially a Public Law . . . arisen from procedure,” DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS*, *supra* note 4, at § 14; See *also id.* §§ 274, 276, 295-6, 315. See VILLEY, *supra* note 15, at §§ 42, 54 *in fine* (alterations added):

[M]ost of our contemporaries [Civil Law and Common Law] confuse law and morality. You have been often explained that the law is a set of rules of conduct. The ‘legal proposition’ would be responsible for stating what acts are permitted or prohibited; to which we are ‘forced.’ The ancient science [Greek-Roman] of the relationships of the law is overshadowed by the [modern] science of behavior, which seems to come from Morals But . . . the role of a judgment or an article of our civil code is to ‘point out’ the share of each individual: this ‘thing’ or such debt that belongs to x. The law is to aim first to this ‘object,’ a relationship between citizens; and the primary function of a lawyer is to ‘measure’ its consistency.

18. See DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS*, *supra* note 4, at §§ 13, 321:

[In the Civil Law tradition] the rules are conceived as rules of conduct closely linked to concerns of justice and morals The rule of law [in the Civil Law], closely connected to moral theology . . . is a rule susceptible to orient the conduct of the citizens in most cases

law, with French origins, like “license” (from the Latin, “to authorize”), “lease” (from the Latin, “to let go”), “easements” (from the old French, “to ease”), and “sale.” The Roman law instead will use terms like “loan” or *commodatum* (instead of license), “rent” or *locatio conductio* (instead of lease), *servitutes* (instead of easements), and *emptio venditio* (instead of sale). All these Roman terms relate directly to the disposition of the thing involved in the transaction.¹⁹

III. THE “IDEA” HERE IS NOT THE IDEA OF JUDGE LEARNED HAND

In *Nichols v. Universal Pictures Corp.*,²⁰ Judge Learned Hand delivered an opinion, where two plays—the first for the stage and the second for the big-screen—had in common the idea of a mixed religious marriage between members of an Irish family and a Jewish family. The plaintiff sued that the film had copied the idea of the play.

As the idea in the film was expressed very differently than in the play, Judge Hand replied that although the parties shared the same idea—the idea of a mixed religious marriage—its “expression” by each party was very different and therefore was not an infringing copy. Consequently, Judge Hand distinguished the “idea” from its “expression” and determined that only a copy of the expression—not of the idea—would constitute a violation of property (i.e., copyright). This distinction is now a classic principle of law.

Because we propose here the use of the term “idea” as a thing that may be owned, running against a copyright axiom that says that

See also VILLEY, *supra* note 15, at §§ 42, 54.

19. Rent involved *locare*, that is, “the very act of ‘placing—*locare*—’ the thing . . . in the Roman conception ‘rent’ was precisely this act of ‘locare.’” As for “the ‘emptio venditio’ [sale] . . . the ‘emptor’ . . . takes for itself—emit—the thing purchased.” D’Ors, *supra* note 4, at § 499. Further, “‘*iura praediorum* or servitutes’ are the names for certain realty rights which the owners of neighboring lots set voluntarily so that one lot—called servant lot—would ‘serve’ another lot—called dominant lot—.” D’Ors, *supra* note 15, at § 190. For more such terms, see N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 LA. L. REV. 1265 (1994).

20. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

ideas are not things, it is necessary to qualify the term “idea” in this article. For Judge Hand, an idea is “too generalized an abstraction”²¹ within copyright law, whereas “idea” as we mean it includes the very intellectual operation, such as sense perceptions, analogies, distinctions, and conclusions. These operations also include patents, trademarks, trade secrets, and every other intellectual property. The word “idea” in civil law would then become a term of art.²²

It is necessary to have a particular word available for every form of intellectual property, so that IP rules may be consistent and applicable to all such forms. It will also allow the existing rules on property, torts, and contracts (sale, lease, agency, partnership, etc.) and guarantees (bonds, pledge, and mortgage) to apply to every IP and not just exceptionally to some of them (in which event, a general theory would become ineffectual).

A. Nature of Intellectual Property

A reason for the lack of a consistent development of IP rules in the civil law may be found in the existential nature of the intangible property. For instance, under the intellectual framework of the civil law, the notion of technology does exist, but technology does not exist *in and of itself*. This principle can be analogized to color. The color “green” is not suspended by itself in a “mine of green,” and the color “blue” is not there by itself in a “quarry of blue.” The green color is always found in something else: the green in a plant or the green in a chemical solution; the blue in the sky or in the ocean.²³

21. *Id.*

22. If at all, “idea” here shares more with the copyright term “original works of authorship.” We could use the term “work,” but we prefer “idea” because this word directly evokes an intellectual activity, while “work” can also refer to material realities.

23. ARISTOTLE, METAPHYSICS I.8, V.7, XI.8, XIV, 1; ARISTOTLE, THE CATEGORIES *passim*; ARISTOTLE, PHYSICS A 3: 186 a 28-31. ST. THOMAS AQUINAS, DE PRINCIPIIS NATURAE 1: 39 b 32-33 and 1: 39 a 1-4; *see* AQUINAS, *supra* note 15, at I, Q. 3, art. 6; ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES lib. 1 cap. 23 and lib. 2 cap. 52; ST. THOMAS AQUINAS, DE ENTE ET ESSENTIA, cap. 5; *see* AQUINAS, *supra* note 15, at I, Q. 28. art. 1 and I, Q. 50, art. 1 *et seq.*; ST. THOMAS AQUINAS, DE SPIRITUALIBUS CREATURIS a. 1. JOSEPH DE TORRE, CHRISTIAN

In descriptive manuals, or in devices built with the help of a manual, technology does exist (like “green” in a chemical solution) and that is why protective measures are taken for the use of such things. However, little does it take for the practitioner to find himself lost again in his or her efforts to segregate and individualize technology in manuals or devices. As soon as a technology is found present in the device by which it is built or in the manual that describes it, it will also be simultaneously existing in as many devices or manuals as there may be later produced. How then could legal interests be controlled when so many samples are handed over from one party to another, or to a third party who is a total stranger to the inventor, or to even a multitude of users?

Likewise, technology is also intangibly present in individual people (like the color blue in a piece of cloth), such as when the individual learns it or invents it. In this case, the legal practitioner is also confronted by a similar situation. If I “individualize” the presence of a technology in Mr. Doe, who invented it, how then will I individualize it when Mr. Doe discloses it to Mr. Joe and Mr. Joe further discloses it to Mr. Roe? Technology is now present not in one individual or two, but in three. And, if the technology is filed with the Patent and Trademark Office and is available to the public at large, then such technology is no longer present in a restricted

PHILOSOPHY 82 (Palabra 1985). TOMÁS ALVIRA, LUIS CLAVELL, & TOMAS MELLENDO, *METAFÍSICA 53 et seq.* (EUNSA 1982). ANTONIO MILLÁN PUELLES, *LÉXICO FILOSÓFICO 7* (Rialp 2002). Gaven Kerr, *Aquinas: Metaphysics* § 4, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://perma.cc/KWS7-CSBS>. See also ETIENNE GILSON, BEING AND SOME PHILOSOPHERS (PIMS 1952); Kathrin Koslicki, *Substance, Independence and Unity*, in *ARISTOTLE ON METHOD AND METAPHYSICS* (Edward Feser ed., Palgrave MacMillan 2013); JOHN F. WIPPEL, THE METAPHYSICAL THOUGHT OF THOMAS AQUINAS—FROM FINITE BEING TO UNCREATED BEING 198 *et seq.* (CUA Press 2000). Thomas Rego, *Materia, forma y privación en el opúsculo de “Principiis naturae” de Santo Tomás de Aquino*, 64 *SAPIENTIA* (2008), <https://perma.cc/DLJ5-7YUN>. For recent perspectives on the Aristotelian doctrine of accident, see PAUL SLOMKOWSKI, ARISTOTLE’S TOPICS 90–93 (BRILL 1997). On work opposing the substance-accident distinction, see Willard Van Orman Quine, *On What There Is*, *REV. METAPHYSICS* (1948) (allowing for the proposition that all reality is accidental); see also Saul A. Kripke, *A Puzzle about Belief*, in *MEANING AND USE* (Avishai Margalit ed., Reidel 1979) (allowing for the proposition that no reality is accidental).

circle of people (so as to arguably resort to a joint tenancy), but it is available to the public at large, a fact that alone excludes individual property.²⁴

If technology is present “in” material things, and “in” individuals, and simultaneously in all of them at once, it is not possible to individualize it theoretically in one singular thing or person alone, and thus appropriate it. Nevertheless, because the law demands that technology be separately individualized to be appropriated, we find ourselves confronted by contradicting terms. First, there is a technology that cannot exist by itself and typically not in one thing alone. Second, there is a requirement for justice that demands that technology does exist in such a way and that it belongs to someone. How, then, can this contradiction be reconciled, if ever? And because every other kind of intellectual property, such as copyright and trademark, consists of *idea*—as defined herein—they share in the same existential nature and same question.

B. The Fictional Existence of Ideas: The Juridical Thing

Under the given premises, if we face a contradiction here, it is also true that these situations, rather than being unusual, are all the more frequent in the law. The legal solution that may be given to

24. See Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in THE WRITINGS OF THOMAS JEFFERSON (Andrew A. Lipscomb & Albert Ellery Bergh eds., Thomas Jefferson Memorial Association 1905), <https://perma.cc/PR8F-MHKL>:

By a universal law, indeed, whatever, whether fixed or movable, belongs to all men equally and in common, is the property for the moment of him who occupies it, but when he relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. 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 an 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 every one, 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.

such contradiction consists of ignoring the natural reality—what is—and stressing instead the legal reality—what for. This then warrants a fiction: *that objects having no existence of their own be treated as having one*. Based on this fiction, we are able to say that technology will exist legally as if it had an independent existence; i.e., as if the color blue would stand alone in a department store or the color green in a mine of green, even if this is physically impossible. We may now also come to speak of juridical things just as we speak of certain legal entities as “juridical persons,” which are entities also created by way of legal fiction.

Intangible property encompasses more than the sole legal rights prescribed in the codes. In this day and age, it also includes companies’ goodwill, business relationships, public figures’ celebrity, works of authorship, aesthetic works, architectural drawings, trademarks, technology, technical information, processes, and generally any idea with legal value.

The difficulty we find in treating intangible property as things comes not from the fact that they do not exist but, again, from the fact that they do not exist in and unto themselves. There can be no “goodwill” without a business owner, “business relationship” without contractors, “fame” without a character, “idea” without an inventor, author, or artist. The difficulty we find in taking these intangible things as self-existing things is due simply to the fact that it is not (physically) possible.

We submit that for the law it is a general assumption that a thing must be a self-existing thing. This conclusion is elicited directly from the foundational notions of the law.²⁵ Further, modern scholars explain that, from a legal perspective, things must be (i) individual, (ii) valuable, (iii) divisible, and (iv) licit.²⁶ Scholars also have

25. ARISTOTLE, *supra* note 15; AQUINAS, *supra* note 15, at I, Q. 28. art. X; MOMMSEN & KRUEGER, *supra* note 16; See VILLEY, *supra* note 15, at § 54; SCHULZ, *supra* note 6; D’ORS, *supra* note 15, at § 190; BELLO, *supra* note 6. See *also* discussion throughout notes 14-18 herein.

26. GERT KUMMEROW, BIENES Y DERECHOS REALES 34 (Universidad Central de Venezuela 1969) (quoting Biondo Biondi); MARCEL PLANIOL, TRAITÉ

emphasized that among the Roman classic jurists, things are entities composed of matter, i.e., tangible things;²⁷ this is because matter meets those conditions and are certainly self-existing.

However, currently, not only tangible things are valuable, also intangible things are.²⁸ Precisely because ideas have a surpassing value in

ÉLÉMENTAIRE DE DROIT CIVIL (F. Pichon 1904); ALAIN BÉNABENT & DENIS MAZEAUD, LES GRANDS ARTICLES DU CODE CIVIL Tit. I (Dalloz 2014); HENRI MAZEAUD, LEÇONS DE DROIT CIVIL (Montchrestien 1976); AMBROISE COLIN & HENRI CAPITANT, 4 COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS (Librairie Dalloz 1942); LOUIS JOSSEAND, COURS DE DROIT CIVIL POSITIF FRANÇAIS (Sirey 1939); JEAN DOMAT, 1 THE CIVIL LAW IN ITS NATURAL ORDER Tit. III (Little & Brown 1850); ROBERTO DE RUGGIERO, CARLO MAIORCA, & FULVIO MAROI, ISTITUZIONI DI DIRITTO CIVILE (Giuseppe Principato 1961); FRANCESCO MESSINEO, MANUALE DI DIRITTO CIVILE E COMMERCIALE (Giuffrè 1965); ALBERTO LA ROCHE, II DERECHO CIVIL 26 (Impresora Nacional 1981); 6 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PROPERTY AND TRUST Part 5 (Athanasios Nicholas Yiannopoulos ed., JCB Mohr Publisher 1994).

27. Angel Cristóbal Montes, *La “Res Extra Commercium” en el Derecho Romano*, 32 REVISTA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD CENTRAL DE VENEZUELA (1965). Montes denies further that the term thing in roman classic law could have included legal interests or intangible entities even though the justinian codification did so later. *Contra* Luis René Viso, *Las cosas y los derechos reales en el Derecho Romano y en nuestra legislación*, 40 REVISTA DE LA FACULTAD DE DERECHO, LA UNIVERSIDAD DEL ZULIA (1974). Yiannopoulos says that “in deference to the terminology of the Code, the word ‘things’ will apply narrowly to physical objects and rights having a pecuniary value, susceptible of appropriation, and broadly to physical objects in space regardless of their pecuniary value and their susceptibility of appropriation.” Athanasios Nicholas Yiannopoulos, *Introduction to the Law of Things: Louisiana and Comparative Law*, 22 LA. L. REV. 759 (1962), available at <https://perma.cc/P5YN-UWVU>. See also Pottage and Sherman describing that the term “res” or thing in roman law did not intend to require materiality or exclude intangibility but the “matter of concern” to the jurist. Alain Pottage & Brad Sherman, *On the Prehistory of Intellectual Property*, in CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW, *supra* note 4, at 14.

27. A myriad of statements has been made to this effect. Let us quote two made more than 20 years ago. See ST. JOHN PAUL II, CENTESIMUS ANNUS § 32 (emphasis in original):

Whereas at one time the decisive factor of production was the land, and later capital—understood as a total complex of the instruments of production—today the decisive factor is increasingly *man himself*, that is, his knowledge, especially his scientific knowledge, his capacity for interrelated and compact organization, as well as his ability to perceive the needs of others and to satisfy them.

See also Philip J. Carroll, CEO of Shell Oil Corp., Address at the Conference on Owners and Contractors—improving Process and Performance (Nov. 15, 1994):

For two centuries after the Industrial Revolution, the success corresponded to those who owned or controlled natural resources or knew how to use them better. But in recent decades, we’ve been part of an

today's economy, the emergence of them as substantive things—or just plainly as things—in the law is inevitable. The legal fiction we submit here solves the problem that its contingent existence poses to the law. Further, by distinguishing strict property interests from “moral” interests, the hurdles resulting from the legal commingling of the two may be overcome by the use of this legal fiction.²⁹ Evidently, this fiction seems plain and simple—in fact, it is.

That the thing has to be self-existing and not contingent (for the law) is what is not explicitly said in the textbooks. This may certainly have been because there was no practical need, but now the need is compelling. The individual person is now an economic component of wealth. In addition, because a human being must not be the property of another, an abstraction is mandated: to segregate intellectually from the individual what is inherently his or hers and is relevant economically: an idea.

This segregation (and materialization) is made plain in everyday transactions. Why not do the same in the law? It is possible, provided that the thing be a self-existing thing; and so, as a solution, we submit the fiction of the juridical thing.

admirable transition to a knowledge economy . . . We will have to move beyond corporate hierarchical structures, strongly centralized and supervisory that worked so well in the past. We will have to reinvent our organizations so that we can ensure our success in the future. We must move the decisions to be located close to where the action takes place; this is where it belongs. We must encourage people to develop a sense of membership for its part of the work and our companies as a whole. We must give them the tools, especially information, to succeed in the new economy in which they are our main resource.

29. United Nations Universal Declaration of Human Rights, art. 27 (2), Dec. 10, 1948: “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.” On the discussion of property vs. moral rights, see MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (Cambridge U. Press 2008); Mike Masnick, *If Intellectual Property Is Neither Intellectual, Nor Property, What Is It?* TECHDIRT (Mar. 6, 2008), <https://perma.cc/4VSC-2YEQ>; Richard A. Spinello, *Intellectual Property Rights*, 25 LIBR. HI-TECH. 12 (2007); Stephan Kinsella, *Against Intellectual Property*, 15 J. LIBERTARIAN STUD. 1 (2001); and Beatriz Busaniche, *¿Por qué no hablamos de propiedad intelectual?*, in *Monopolios artificiales sobre bienes intangibles*, Vialibre (2007), at <https://perma.cc/MB3M-YCUQ>.

C. Reason for Fictions

The juridical thing satisfies the intellectual effort to make ideas a legal asset while respecting their existential nature, without forcing a reduction of them to material objects.³⁰ Yet, are legal fictions a simplistic and artificial resort to an otherwise insoluble issue? Are fictions a fictitious easy way out, which would not stand serious legal professional practice? We answer in the negative: legal fictions are and have always been a true legal resource.³¹

30. In an effort to claim legal protection for ideas as granted to material things, Prof. Carosone, for example, sought to materialize the idea in an electrochemical reaction. See Oscar Carosone, *L'opera dell'ingegno, quale bene immateriale: una teoria controversa*, 143 RIVISTA DI GIURISPRUDENZA ITALIANA 387 *et seq.* (1991). Moreover, in an effort to overcome peripheral, exceptional and analogous forms of intellectual property and secure it the same legal standing than property in material things, Pottage and Sherman explain that the historical justification of property rights in material things are all the more evident with intellectual property today. See Pottage & Sherman, *supra* note 27, at 28, *in fine*.

31. JOSÉ PUIG BRUTAU, LA JURISPRUDENCIA COMO FUENTE DEL DERECHO 159 *et seq.* (Bosch 1952):

J. W. Jones points out that for people generally the legal fiction is generally the characteristic feature of the mental process most akin to the legal profession. This forms the basis for much of the criticisms to the legal profession. But, resorting to fictions is in fact part of legal mechanics. Put in another way, the law may use fictions as a means but not as an end. Such a condition operates similarly with language where its sense or power of conveying meaning stems out from the use of fictions; especially with the metaphor. The law is like a metaphor at the service of justice. Law, as an order of rules, is not alien to reality, even though it may not be readily translatable to a reality apprehensible by the senses. Law does not affirm anything that relates to a given reality; it limits itself to establish the legal consequences that must adhere to a series of facts that are, indeed, existing. Fictions are of means and not of ends; that is, fictions never consist of results but rather in crediting results to facts which did not have such results credited to them in the first place; in this way, securing justice to the case. As Julius Stone puts it, it is not that restitution proceeds because there is a contract but rather that a contract is assumed because a restitution is appropriate.

A valuable survey of legal fictions going back to roman law is found in PIERRE J.J. OLIVIER, *LEGAL FICTIONS IN PRACTICE AND LEGAL SCIENCE* (Rotterdam U. Press 1975). Also useful, is Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L. J. 1 (1990). The classic defense of legal fictions remains with LON LUVUOIS FULLER, *LEGAL FICTIONS* (Stanford U. Press 1967). Earlier efforts to justify legal fictions include WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 43 (Clarendon Press 1768); RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* (Isaac Husic trans., Boston Book Co. 1914); RUDOLF VON JHERING, *GEIST DES RÖMISCHEN RECHTS*

Evidence that fictions are a valid resource for the law, includes the great number of fictions that exist in it. No one thinks of them as simplistic or tampered solutions. For example, the law has developed many fictions, like that of legal entities or quasi contracts. The latter establishes certain liabilities as if they had arisen from a contract where there is nothing more than a factual situation. Additional fictions consist of “constructive trust,” “adoption,” and the very assimilation in the civil law of certain things to legally become movable and/or immovable assets.³²

There are several rules that are born out of legal fictions. In fact, legal rules are not born solely out of common sense, plain evidence, or habits, but require ingenuity as well as thoughtful and creative intellectual activity. In developing intellectual property, fictions constitute a valid resource. René David expresses that “[i]t has taken centuries of doctrinal effort to reach the formulas, which now seem so simple and obvious in our Civil Code.”³³

Louisiana Civil Code article 3440 on the protection of precarious possession can serve as an example. It reads: “Where there is a disturbance of possession, the possessory action is available to a precarious possessor, such as a lessee or a depositary, against anyone except the person for whom he possesses.” This provision was

AUF DEN VERSCHIEDENEN STADEN DER ENTWICKLUNG (7th ed., Breitkopf & Hartel 1923); and PIERRE DE TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW (Martha McC. Read trans., Macmillan 1922). For more on justifying legal fictions, see JEROME FRANK, LAW AND THE MODERN MIND 41-45, 338-350 (Brentano 1930); HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 25-26 (John Murray 1861); and Alf Ross, *Legal Fictions*, in LAW, REASON AND JUSTICE: ESSAYS IN LEGAL PHILOSOPHY 217-231 (Graham Hughes ed., NYU Press 1969).

32. E.g., LA. CIV. CODE ANN. arts. 470, 473, 475 (2019); CÓDIGO CIVIL [Civil Code] art. 259 (Puerto Rico). See *Legal Fiction*, BLACK'S LAW DICTIONARY (9th ed. 2009). For a review of fictions on modern history, see Maksymilian Del Mar, *Introducing Fictions: Examples, Functions, Definitions and Evaluations*, in LEGAL FICTIONS IN THEORY AND PRACTICE (Del Mar & Twining eds., Springer 2015).

33. DAVID, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS, *supra* note 4, at § 70, *in fine*.

introduced by the 1982 revision of occupancy and possession. Though comment (a) says that it is new,³⁴ this provision has a correlation with the situation in which the praetor Quintus Publicius was engaged in 67 BC. Appearing before him was a citizen without the legally required two-year possession of a property, who had been evicted by a person who had possessed the property for a shorter time. The former had no title nor action against the latter, but clearly, the latter had less of a right. Should the latter party still prevail?

The Roman *praetor* had no legal recourse to allow the aggrieved citizen to claim relief. Since he was not a *dominus*, he needed to show that he had at least one other right over the property from which he had been evicted. Alternatively, he needed to demonstrate that he had a minimum of two years possession, which he did not have. Therefore, the *praetor*, not having any legal recourse available, contrived a solution by granting this citizen:

an action . . . the formula of which instructed the judge to pretend that the legal time required for the usucapio or adverse possession [2 years] had elapsed Thus, the praetor managed to allow an action for whomsoever had received possession in good faith, but had lost it to a dispossessing party before the completion of the legal time for usucapio or adverse possession was achieved. The grieved citizen could avail himself of an action just as if he were a legitimate owner.³⁵

Justice was done.

So, when is legal fiction fake? First, when it is unnecessary, but also when it is disproportionate to the case.³⁶ An example of an inadequate fiction is precisely the one in connection with the legal treatment of computer software. Is it necessary in civil law to equate computers to people or legal entities—here lies the

34. LA. CIV. CODE ANN. art. 3440 cmt. a (2019).

35. D'ORS, *supra* note 4, at § 176.

36. On questioning the admission of new legal fictions, see Peter J. Smith, *New Legal Fictions*, 95 GEORGETOWN L.J. 1435-1495 (2007). On vindicating legal fictions from pejorative claims, see Frederick Schauer, *Legal Fictions Revisited* (Virginia Public Law and Legal Theory Research Paper No. 29, 2011). On an evaluation of fictions on modern history, see Del Mar, *supra* note 32.

fiction—to treat computer programs under *le droit d’auteur* (copyright)?

IV. THE NOTION OF USE

Now, how are ideas used? We can wear, ride, or consume tangibles. Yet, intangibles do not allow for this kind of use. Should the use or *ius utendi* of intangibles be denied? Should intellectual property be limited to the right to dispose of and receive profits from it, i.e., the classic *ius abutendi* and *ius fruendi*, excluding the *ius utendi*?³⁷ Certainly not. The nature of the property rights relating to intangibles we submit here is not one consisting of an exception—a *sui generis* property right—but an ordinary kind, one that includes all three *iusus*. The notion of use is not only about the physical occupation of a thing or any similar act involving a physical possession.³⁸ The *ius utendi*, or right-to-use, has been identified traditionally with the physical use of things. Yet, we believe that this reflects only the nature of the goods on which those uses have been exercised for centuries—i.e., tangible goods—not the nature of the *ius utendi* or right-to-use.

37. HENRI Y LEON MAZEAUD & JEAN MAZEAUD, DERECHO CIVIL IV—La evolución del derecho de propiedad y la propiedad de los bienes incorporales, 22-29 (Ediciones Jurídicas Europa-América 1960). From another angle, Josseland sees three different characteristics in the right of property, namely: 1) the direct relationship between the legal interest and the property; 2) the full use of the property; and 3) the exclusive or universal enforceability under the law. These three characteristics are also to be found in the ownership of intellectual property: the first because the right rests on the idea and not on a right to the idea (thereby producing an arguably uncertain property right), the second feature is realized for the aforesaid, and the third feature is fulfilled by way of public recordings. LOUIS JOSSERAND, CONFIGURATION DU DROIT DE PROPRIÉTÉ DANS L’ORDRE JURIDIQUE NOUVEAU 95 *et seq.* (Mélanges juridiques dédiés à M. le professeur Sugiyama 1940). See also KUMMEROW, *supra* note 26, at 229-230. See *Propiedad*, CABANELLAS DE LAS CUEVAS, DICCIONARIO DE DERECHO USUAL, *supra* note 4, at § 2.

38. “‘Use’ is the application or employment of something.” BLACK’S LAW DICTIONARY (8th ed., West 2004) [hereinafter BLACK’S LAW DICTIONARY 2004]; see THOMAS PATRICK BURKE, THE CONCEPT OF JUSTICE: IS SOCIAL JUSTICE JUST? 173 (Continuum 2011); see also PETER LINDSAY, CREATIVE INDIVIDUALISM: THE DEMOCRATIC VISION OF C. B. MACPHERSON 142 (SUNY Press 1996).

In the past, the law has confronted historical changes such as these. When in the ancient world immovable things became assets subject to property, Romans developed the notions of *ius abutendi*, *ius fruendi*, and *ius utendi*.³⁹ Also, when over 500 years ago, the exercise of the *ius abutendi* in a market economy could not be served with the ritual forms of earlier centuries, negotiable instruments and bankruptcy were introduced.⁴⁰ Thus, the word use, in itself, does not mean or implicate things or actions of a necessary tangible nature (such as possession, occupation, or seizure), and even tangible use involves different types of content because use relates mainly with actions we perform:

[The] tangible use has legal consequences; and so the use of a jewel is to put it on and wear it, though one may lose it or expose it to theft; the use of a garment is to wear it and eventually take it off; while the use of edibles, is to obviously eat them, which means their extinction. Hence, (also) the classifications of goods in consumable and non-consumable; and the existence of different rules for the usufruct of consumable or perishable things⁴¹

Use is a word denoting work, exercise, practice, or action. In other words, use indicates demeanor.⁴² In case law, the word use (with the same Latin root *usus*) includes “to execute or

39. FRITZ SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* (Clarendon Press 1946). PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* (Cambridge U. Press 1999). D’Ors, *supra* note 4. BELLO, *supra* note 6.

40. *Bill of Exchange*, 3 *ENCYCLOPÆDIA BRITANNICA* (Hugh Chisholm ed., Cambridge U. Press 1911). CARMEN M. REINHART & KENNETH S. ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* 30 (Princeton U. Press 2009). Layton B. Register, *The Dual System of Civil Law and Commercial Law*, 61 *U. PA. L. REV.* 240, 245 (1913). Rafael Ernesto Bedoya Rivas, *El Derecho Mercantil y la Búsqueda Moderna de sus Orígenes* 8-9 (U. de la Sabana 2009). See Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 *U. TORONTO L.J.* 265-304 (2003).

41. *Uso*, CABANELLAS DE LAS CUEVAS, *DICCIONARIO DE DERECHO USUAL* (Heliasta 1976), meaning “f.”

42. *Use*, BLACK’S LAW DICTIONARY (8th Ed., West 2004). See also *Use*, BARRON’S LAW DICTIONARY (BARRON’S EDUC. SERIES 1984); *Uso*, CABANELLAS DE LAS CUEVAS, *DICCIONARIO DE DERECHO USUAL* (Heliasta, 1976). References to the very legal definition of the word “use” adopted by scholars—such as “use things for your convenience or to fulfill your needs,” or use as the “action or effect of using a thing,”—clearly reveal that “use” also denotes a human behavior, an action.

accomplish” a goal.⁴³ Not surprisingly, the term “customary law” was coined after the word use, as customary law is the law established after people’s customs, conducts, and actions.⁴⁴

A further illustration of the meaning of the word use as human behavior can to be found in the Latin term *ius abutendi*, which translates literally into “right-to-abuse,” which, in turn, is derived from the terms *ab* and *usus*. Such “abuse” is to be understood as the act of disposal and not as an excessive behavior. Prefixed with *ab* (meaning “away from” in Latin), abuse means alienation or separation of a thing from one’s *usus* or actions.⁴⁵

Also, the word use has generated multiple meanings—presumably because it refers to a reality as basic as human actions—one of which is “time.” Thus, the term “make use of” (or “have no use of”) is defined by the Webster’s College Dictionary as “to have occasion to use.”⁴⁶ Also, the Cambridge Advanced Learner’s Dictionary refers to use as “a period of time something is being used or can be used.”⁴⁷

V. USE OF INTELLECTUAL PROPERTY

In this context, it seems plain to us that while ideas do not allow for a physical use, they allow for intangible use. What is this use like? Also, what type of acts do we exert over this property? The law describes this use with terms like “making, using, selling, offering for sale, . . . [and] importing”;⁴⁸ also, reproducing, deriving, distributing, performing, displaying, transmitting,⁴⁹ and “identifying

43. *Use*, BLACK’S LAW DICTIONARY (6th ed., West 1991), meaning “v.”

44. *Customary Law*, BLACK’S LAW DICTIONARY 2004, *supra* note 38.

45. *Id.* at *Abusus* and *Abuse*. See also *Abuse*, WEBSTER’S COLLEGE DICTIONARY (Wiley 2004) [hereinafter WEBSTER’S COLLEGE DICTIONARY].

46. *Id.* at *Use*.

47. See CAMBRIDGE ADVANCED LEARNER’S DICTIONARY (Cambridge U. Press 2015), <https://perma.cc/35JH-JJ2Z>.

48. Patent Act, 35 U.S.C. § 154 a (2019). WIPO, *Intellectual Property Handbook: Policy, Law and Use* 17 (Switzerland 2008) [hereinafter *Intellectual Property Handbook*], <https://perma.cc/5QMH-8RAD>.

49. Copyright Act, 17 U.S.C. § 106 (1976). *Intellectual Property Handbook*, *supra* note 48, at §§ 2.178 *et seq.*

and distinguishing.”⁵⁰ All of these terms disclose the one common feature of reproduction.⁵¹ This is so because reproduction is the one act that transfers the possession of ideas; possession being a pivotal aspect of property law.

Consequently, we succinctly define the wide range of uses described in three essential types of reproduction gathered by the case law⁵²: exhibiting, copying, or applying;⁵³ like in: (i) exhibiting a sculpture or a painting, or presenting a play; (ii) copying a script, a movie, a musical, literary work, a scientific report, a trademark, etc.; and (iii) applying a formula, a design, a computer software.

The specific use of ideas determines their kind. For example, the use of applied ideas is realized by their application in nature. This includes formulas, procedures, models, and the subject matter of patent law. Computer programs are interesting: their use is their application; yet such application is exercised in the form of copying, which is the use proper to speculative ideas. They still qualify as an applied idea. However, because their copying does not pursue an intellectual appreciation, but a useful application within a computer.

Regarding speculative ideas, their use is realized not in their useful application, but in their intellectual appreciation. Here, the acts legally relevant consist of copying that allow or restrict their intellectual appreciation. Speculative ideas include the works of authorship and the subject matter of copyright law (excluding computer software).

We are left with a third category: incorporated speculative ideas, the usefulness of which is also realized in their appreciation (rather

50. Cf. *Intellectual Property Handbook*, *supra* note 48, at §§ 2.318 *et seq.*; Trademark Act, 15 U.S.C. § 1115 (2012); UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO), <https://perma.cc/A83M-2DVU>.

51. See Copyright Act, *supra* note 49.

52. See *Intellectual Property (IP) Policy*, USPTO, <https://perma.cc/F9Z3-KQYB>. See also *Intellectual Property Handbook*, *supra* note 48.

53. Yet, and due to the fiction of the juridical thing, it is also possible that intangible assets be “occupied” or “possessed.” To this end, consider how the rules on deposit and sequestration in the Louisiana Civil Code are applicable to intellectual property once the juridical thing is suitably included.

than in their application), but they require a material support; examples of this are sculptures and paintings.

The objects produced by 3D copying are not incorporated speculative ideas but are the matter of possession and/or tangible property rights. The intellectual property rights that arise from 3D copying are vested instead in the computer programs and/or designs (i.e., applied ideas), which produce the 3D objects. Making the distinction between the idea and the object containing the incorporated speculative ideas is irrelevant because these ideas exist only in these objects. These ideas cannot be reproduced in other objects and the reproduction rights will consist of the ability to exhibit them. They cannot be reproduced even by the author himself who will, at best, produce a new work of art, or an imitation, or a development thereof.

There is also the intangible use of the business goodwill, as we find it in franchise agreements; and the use of a character's name or appearance. These assets are non-intellectual incorporeal property. Other uses of ideas include the very ability of perceiving or understanding them, and their logical and experimental verification. However, because these operations are personal to the individual, having no exposure towards third parties (unless otherwise exhibited, copied, or applied), such uses become legally irrelevant despite the relevance these uses may have in fields like psychology or ethics.

Finally, intangible use involves overcoming the natural tendency and centuries-long practice of identifying property rights with tangible things and coming instead to perceive property rights only in themselves—a rational abstraction—regardless of the thing to which it refers. Only then can intellectual property be fully understood in the civil law.

VI. PRACTICAL APPLICATIONS OF THE JURIDICAL THING

A. As with Legal Entities

It should be noted now that there exists a construct available to a lawyer who would come to apply the notion of the juridical thing.

When the lawyer needs to affix the subject matter in transactions over intangible assets (such as a formula, a method, or a model) that is sold, encumbered, or donated, the lawyer can operate just as he or she does when operating with a legal entity.⁵⁴ The lawyer knows that, in fact, the legal entity does not actually exist, but the lawyer also knows how to conceive or imagine it as if it did exist and to act accordingly.⁵⁵ The same goes with the juridical thing.

With this common practice in mind, we can then truly speak of a sale (*emptio venditio*) or lease (*locatio conductio*) of technology, and categorize transactions involving technology with the well-known nominate contracts. In this way, a host of solutions and possibilities hitherto not applied yet are made available to the civil law jurist. Without attempting to restrict transactions including intangibles by application of legal formulas and rules for transactions over tangible assets, we may now also speak of a sale, lease, deposit, loan, mortgage, servitude, barter, rent, pledge, possession, and prescription over subject matter such as technology, computer programs (e.g., Adobe, Microsoft Office, Kaspersky Antivirus, etc.), trade secrets, trademarks (e.g., Coca-Cola, Mickey Mouse, Google, etc.), works of art and authorship (e.g., Tolkien's *Lord of the Rings*, Rodgers and Hammerstein's *The Sound of Music*, Picasso's *Guernica*, etc.), and businesses' goodwill (e.g., AT&T, Hilton, or American Express franchises). We can convert transactions in the following ways:

- software license agreement into a computer disk sale agreement;⁵⁶
- joint research agreement into a limited partnership;
- authorship development agreement into a rent of authorship;

54. Although the legal entity is an acting agent and not a subject matter of transactions like the juridical thing is, the analogy works because what matters here is not the nature of either an entity or a thing, but the intellectual exercise of conceiving or imagining such fiction.

55. These mechanics are also useful for distinguishing the intangible from the material that contains it, or the individual that conceives it. It allows understanding that the material or individual is not the IP subject matter, but the intangible thing alone. Similarly, as with legal entities when someone represents it, the distinction between the legal entity and the representative is clear, and the latter is not taken as to be the legal entity itself at any time.

56. See Annex A.

- confidentiality agreement into a mandate of confidentiality;
- franchise agreement into a goodwill lease agreement.⁵⁷

These conversions require a code revision to implement them properly. Therefore, we must bear in mind that awaiting such code revision and a rent remains restricted to realty, a “rent of authorship” is only a device to work with (and not a nominate contract enforceable as such by the courts). There is no rent of intangibles yet codified. Further, the prior list is not exhaustive and a “software loan agreement” may convert into a “lease” or “deposit”; and a “mandate of confidentiality” may convert into a “promise” or “declaration,” or otherwise be deemed a “natural obligation.”

B. One Same Formula in the Civil Code for All Kinds of Property Rights

The notion of juridical thing overcomes the stilted inclusion of intellectual property as an incorporeal right in the code. If we incorporate the notion of the juridical thing into Louisiana Civil Code article 448 and add the words “and intellectuals,” the article would read as follows: “Things are divided into common, public and private; corporeals and incorporeals; and movables, immovables *and intellectuals*.”⁵⁸ Note that intellectuals are distinguished from incorporeals, although intellectual things are also incorporeal.

Likewise, if one removes the words “right of” from article 461 by replacing it with “things consisting,” it would read as follows: “Incorporeals are things that have no body, but are comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and *things consisting* of intellectual property.”⁵⁹

Additionally, article 475 reads that, “[a]ll things, corporeal or incorporeal, that the law does not consider as immovable, are movables.” Thus, because the Code does not establish rights of intellectual property as either movable or immovable, they shall be deemed

57. See Annex B and C.

58. Emphasis added.

59. Emphasis added.

movable things. If we take the rights of intellectual property as the subject matter of property, then this classification is admissible. However, it is not if we take as subject matter—as we should—the very goods in themselves: the works of intellect. The reason being that this property is not composed of matter and does not occupy space; consequently, it is not subject to transportation or allocation (sculptures, paintings, and works of this genre are “incorporated” intellectual property that do not raise an exception).

Legal rights may be identified as movable or immovable things because their legal existence is essentially related to an individual or a corporeal thing that takes up space and is subject to movement. Intellectual things as juridical things instead exist by themselves and do not need this relationship to another entity. It is irrelevant to qualify them as movables and immovables.

The Code could include the amendments above and additional ones may be suggested. First, however, we use the term “intellectual property” over the Code’s term “incorporeal property” because objective incorporeals (which are not of an intellectual nature)—to wit, “legal rights, obligations and actions”—are included in the Civil Code already in articles 461, 470, and 473. Also, because the legal implications derived from intellectual incorporeals are clearly different from those derived from objective incorporeals (movable and immovable incorporeals) as we will discuss in section VIII A.

C. The “Licensed, Not Sold” Exception to the First Sale Doctrine on Computer Programs is Implied with the Juridical Thing

The juridical thing allows to clearly distinguish a computer program from the medium containing it. In such a case, both properties coexist in one same tangible asset without confusing the rights that belong to each. An example of such a condition is reflected in a computer disk sale agreement provided here as Annex A. The sale of a disk will not imply the sale of the intellectual property rights of copying and distribution.

There is no need to find the “licensed, not sold” exception to the first sale doctrine.⁶⁰ In *Bobbs-Merrill*, the Supreme Court established that copyright owner’s distribution rights were limited to the first sale of the copyrighted work and copyright owner could not restrict book owners to re-sell or otherwise dispose of the book. Under this rule, a software transfer could be sold upon transferring the disk (or a medium that contained it) and the purchaser would be entitled to resell the software or medium at will. To prevent this, software owners implemented the so-called End-User License Agreements (EULA) to avoid the operation of a sale in these cases. Software owners could do this based on the Copyright Act revision of 1976 that provided for software license agreements.⁶¹ Again, the “licensed, not sold” exception to the first sale doctrine is served with the notion of the juridical thing because it allows from the start to distinguish medium from software and the rights to each (corporeal and intellectual, respectively).

In this matter, curiously, the civil law in Europe is at odds with itself. This is because the European Court of Justice ignored the distinction between the juridical thing and the medium and allowed the first purchaser of a disk to grant a subsequent purchaser the use of the computer program (a right an owner of a disk does not have by solely purchasing the disk) via the resale of the disk.⁶²

D. Law School Curricula

Typically, intellectual property is taught as a course separate from property law, but the juridical thing will allow the civilian

60. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) codified in the Copyright Act of 1976, 17 U.S.C. § 109. In this case, the defendant prevailed on his claim to rightfully put different prices on books priced for resale by plaintiff based on that the exclusive statutory right to “vend” applied only to the first sale of the copyrighted work.

61. See Copyright Act, *supra* note 49, at § 117.

62. Case C-128/11, *UsedSoft GmbH v. Oracle Int’l Corp.*, 2012 E.C.R. I-0000.

to understand that intellectual property is not a *sui generis* law but one that stems from, and is part of, the regular notions of property. A separate or special course on intellectual property will take a close look at property law in that area just as, for example, a separate course on real estate does.

E. Arbitration, Mediation, and Alternative Dispute Resolution

The fabulous stock of alternative solutions provided by Roman law can be immediately applied in the private practice of the law. For example, rent of authorship can be agreed upon if jurisdiction is given to arbitration or mediation. Arbitration and mediation centers will expand their practice vigorously.

VII. IDEAS AND RIGHTS

A. Unlike Legal Rights, Ideas Need Not to Be Classified as Movables and Immovables

Had we adopted the term incorporeal things in the foregoing sections instead of intellectual things, we would have had to further distinguish those incorporeal things into objective and subjective things because ideas or intellectual things cannot be treated as movables and/or immovable things. Instead, rights not only can, but should be treated as such. Objective incorporeal things would include rights that refer to individuals (by law or contract), but are not originated with the individual, and subjective incorporeal things would include ideas that originate with the individual.

Rights include essentially relationships between a person and a thing, or between two or more persons in reference to a thing (certain or ascertainable).⁶³ Rights always refer to something and it is this reference to something that gives the right its value and use. Other relationships would lack any legal interest if there were no

63. D'ORS, *supra* note 15, at § 48. See VILLEY, *supra* note 15, at § 54. AQUINAS, *supra* note 15.

property interest involved. For example, a family relationship (siblings, in-laws, cousins, etc.) would not in itself (i.e., by the mere bond) have legal significance, except when a common ancestor dies, and a succession is opened.

Ideas are operations or productions of the mind (the etymology of term *idea* suggests the notion of an image or representation⁶⁴) that, under the law, are useful and/or original in and of themselves. Ideas make no reference to anything else to exist and are not in a relationship other than with its author. The benefit that an idea yields derives from its own capacity to give an advantage or to allow a useful application. In this sense, one could say that an idea is more of a thing (at least legally) than a right or a bond because the idea does not require a thing different from it to have value or legal significance.

The moment we categorize rights as things, they must be categorized as movables or immovables. Indeed, if a right relates to a movable, it would not make sense to treat it as an immovable, and vice versa. There should not be a taxonomic uncertainty regarding intellectual things. If intellectual property is neither movable nor immovable, this should be affirmed positively; otherwise, intellectual property will be mistaken for one or the other. Thus, the movable and immovable classification should not apply to intellectual property, even though this classification has prevailed for every property throughout history. After all, never have immovable things been classified as fungible or non-fungible.⁶⁵

64. See the following meanings of *Idea*: WEBSTER'S COLLEGE DICTIONARY, *supra* note 45: "Form or appearance of a thing as opposed to its reality." See also DICCIONARIO LATINO-ESPAÑOL (Spes 1950): "prototype." LE PETIT LAROUSSE (Larousse 1998), at 1: "Représentation abstraite d'un être . . . d'un objet."

65. See Yiannopoulos, *supra* note 27, at 756.

The Louisiana Civil Codes have adopted this distinction only by implication. The word 'fungibles' occurs in the French Civil Code and in the French text of the Louisiana Civil Code in connection with compensation. In several other articles reference is made to fungibles by description rather than by use of this term.

If the legal character of ideas remained uncertain at this point or if ideas could simultaneously qualify as movables and immovables, one same idea could be subject to contradicting privileged rights of creditors. A debtor's intellectual property would not be enforceable by a creditor because it is a movable idea, but it could turn out to be enforceable by another creditor if an immovable.

Because the ideas are incorporeal and because they do not need to connect to something else to have legal significance, ideas should not be classified into movables and immovables. Having no physical matter, incorporeal things occupy no space and are not subject to motion. Rights, however, although they are also incorporeal, can give up legally the incorporeal status precisely because their legal value depends on another corporeal entity.

In time, we may also be able to hold and exercise rights relating to ideas (i.e., intangible property over intangible property). In this example, we can see a further distinction between these two types of incorporeal things and their different legal effects: although rights over rights are generally dismissed by the law for good reasons,⁶⁶ rights with respect to ideas are direct and clear and so they may be allowed under the same rationale that denies rights over rights (i.e., a misleading treatment of rights and exposure to forfeiting property).

B. Ideas Warrant Expiration; Rights Do Not

Rights are not subject to expiration because, in most cases, they expire with the thing or the alienation of the thing to which they refer Ideas warrant extinctive prescription (cf. statutory limitation) or expiration because just as they do not make use of space, they are not subject to time and are imperishable.

66. C. CIV., art. 516 (Fr.); BGB, art. 90 (Ger.); Cód. CIV., art 565 (Chile) (the Code of Bello is an exception to the general rule prohibiting rights over rights, but it does not include intellectual things or other incorporeals as the goodwill of individuals or business entities, business relationships).

It is legally unreasonable to grant perpetual existence to intellectual property when this property has to be harmonized with the public interest on the dissemination of ideas, science, and culture. It is then necessary to point out limits to the legal existence of intellectual property. Something similar already happens with the acquisition of property by acquisitive prescription (cf., adverse possession); and so, the uncertainty of the title for a property should not prevent a lawful holder of a property for twenty years or more to become its owner.⁶⁷

C. Ideas Do Not Warrant the Distinction Between Pledge and Antichresis (and Mortgages), Whereas Rights Do

The incorporeal nature of things (such that it does not make the use of time nor space essential to their existence) dismisses the classification of guarantees in either conventional pledge (if the subject property is moveable) or antichresis (if the subject property is immovable). For intellectual property, there would be no essential distinction between pledge and antichresis; the guarantee can be established with either name.

It is not just that intellectual property may be simultaneously subject to a pledge and/or a mortgage—like when specific legislation may establish an unconventional mortgage over a moveable thing or an unconventional pledge over an immovable—it is that the distinction between pledge and mortgage disappears altogether when it comes to establishing guaranties over ideas. This should not come as a surprise; something similar already occurs concerning corporeal property, when it is not necessary to distinguish in the sale, as in the lease, a residential from an agricultural lease.⁶⁸

67. LA. CIV. CODE ANN. art. 3486 (2019): “Ownership and other real rights in immovables may be acquired by the prescription of thirty years without the need of just title or possession in good faith.”

68. LA. CIV. CODE ANN. art. 2671 (2017):

Depending on the agreed use of the leased thing, a lease is characterized as: residential, when the thing is to be occupied as a dwelling; agricultural, when the thing is a predial estate that is to be used for agricultural

Privileges may be enforced uniformly over intellectual property, together with movables and immovables. A legislative drafting will be able to provide for that in articles 3186–3189 of the Louisiana Civil Code (on the several kinds of privileges), combining movable, immovable and intellectual things indistinctly pursuant to the execution of privileged rights over them.

VIII. PROSPECTS OF A LEGAL UPDATE

The present article seemingly appears to be challenged by the century-long debate⁶⁹ resulting in the law denying rights over

purposes; mineral, when the thing is to be used for the production of minerals; commercial, when the thing is to be used for business or commercial purposes; or consumer, when the thing is a movable intended for the lessee's personal or familial use outside his trade or profession. This enumeration is not exclusive.

When the thing is leased for more than one of the above or for other purposes, the dominant or more substantial purpose determines the type of lease for purposes of regulation.

69. Since 1942, the debate has continued with notable scholars taking sides. Against admitting intangible things: Henri et Jean Mazeaud (France), André Rouast (France), Fernando Conesa (Spain), José Massaguer (Spain). Favorable to admitting intangible things: Marcel Planiol & Georges Ripert (France), Louis Josserand (France), Friedrich Beier (Germany), Oscar Carosone (Italy) (although by assimilating ideas to an electrochemical component) and José Castán Tobeñas (Spain). Also, scholars Gert Kummerow and Luis René Viso (Venezuela). *See* RICARDO BETHENCOURT, *COMPRESIÓN DE LA PROPIEDAD INTELECTUAL*, 37-63 (*Jurídica Venezolana* 2005). The doctoral thesis of Juliana Gáfaró Barrera and Fanny Lucía Gómez Pryor (Colombia) includes a comprehensive survey of Latin America practitioners (although now in need of update) who are also favorable to admitting intangible things. *See* JULIANA GÁFARO BARRERA & FANNY LUCÍA GÓMEZ PRYOR, *PATENTE DE INVENCION: UN DERECHO REAL DE PROPIEDAD* (Pontificia Universidad Javeriana 1977). Although the law continues to reject a full inclusion and/or development of intangible things, the debate narrowed down throughout the years toward favoring their admission. Pedro Chaloupka (Argentina) stated already in 1983 that:

[t]here is an increasing trend in the world—for the time being reduced almost exclusively to scholars with still few legislative achievements—of encompassing the legal treatment of both categories [works of authorship and patents & trademarks] in a unified universe To that end, the World Intellectual Property Organization . . . has carried out and proposed Uniform Laws.

PEDRO CHALOUPKA, 3 *LA PROPIEDAD DE LAS IDEAS* (*Revista Derechos Intelectuales*, Astrea 1988). Pursuant thereto, the Intellectual Property Act of El Salvador, already in 1996, moved forward and united these rights. The Puerto Rico Civil Code of 2013 has admitted intangible things broadly, although it does not specify which they are (*see infra*, note 76). The Louisiana Civil Code has admitted

intangible property.⁷⁰ This is not the case. This important conclusion of the debate was directed to prevent the dilution of the *direct* object of a right by artificially introducing a right over the direct right in the thing like a “rent of a title” or a “lien in a mortgage.” However, this was at a time when intangible goods were limited to rights, actions and legal interests, and did not include *ideas*; ideas are now the direct object of property.

However, under the same heading of intangible things, this article is an invitation to further debate, hopefully brief and this time aimed particularly at including new intangible things, which remain the direct object of property. The following factors should be considered in such a debate:

1. That intangible things will now also include ideas and abstractions (of the individuals’ skills and qualities), in addition to the subjective rights;
2. That admitting ideas and abstractions will not implicate the risk of disguising the identity of the thing subject to property or a transaction (as with rights over rights in things);
3. That the human factor plays today a preponderant role in the production of wealth as much as land and capital;⁷¹
4. That the balance between the public and private interest has moved to a safe point of coexistence similar to the

intangible things since its adoption in 1870 (art. 460 (1)) but converts them into corporeal for legal purposes (*see infra*, notes 76, 76); *see also* Yiannopoulos, *supra* note 27, at 772. The Bello Code for Chile was the exception in the civil code-drafting era of the 1800s and since 1857, it admitted incorporeal things, although limited to the kind of incorporeal things existing at the time (i.e., subjective rights). A definite conclusion of the efforts to fully develop intangible property is what this article achieves through the juridical thing.

70. *See infra*, note 73.

71. Darrell M. West, *Technology and the Innovation Economy*, BROOKINGS, Oct. 19, 2011, <https://perma.cc/2DE3-GK3A>; Carroll, *supra* note 28; ST. JOHN PAUL II, *supra* note 28, at 31-32. *See also* presentations at the Offshore Europe Conference at Aberdeen, U.K. (Society of Petroleum Engineers 1995) by (i) Richard L. Green, *Partnering and Alliances: Theory and Practice*; (ii) M. Straughen, *Re-Engineering the alliances and Partnerships*; and (iii) Susan Farrell & J. Ray McDermott, *An international Perspective on Risk/Reward Contracting: Comparison of U.S. Middle East and U.K. Alliances*.

comparable coexistence in tangible things (e.g., the balance existing between private property and eminent domain);

5. That intangible things are already admitted in practical life and implied in legal transactions;
6. That there is a gap between the law and practice; and
7. That the availability of clear and strong legal solutions will spur individual wealth and private enterprise.

The development of civil law may be accomplished by the sole implementation of the *juridical thing*. While awaiting legislative change, attorneys and professionals trained in the civil law may come to instantly avail themselves with a host of new solutions already available in their code, empowering their practice of intellectual property and unfair competition. Nothing is more practical than a good theory, as John Delaney points out.⁷²

Further, the legal professional will be enabled to assist and put into practice for authors, designers, or inventors who are residents of Louisiana (or Louisiana transactions) the rights recognized by the federal laws in connection with the civil law on property, contracts, and torts. Unlike other codes,⁷³ the current

72. JOHN DELANEY, *LEARNING LEGAL REASONING* (J. Delaney Publ'g 1989).

73. Compare the relevant provisions of the Civil Codes of France (1804), and Germany (1900), which have modeled the civil codes worldwide: C. CIV., art. 516 (Fr.): "All property is movable or immovable." The code included intellectual property in 2015, but intellectual property continues to be treated as a legal right, and not as property. Prior to that, France had adopted, in 1992, the Code de la Propriété Intellectuelle but again, intellectual property was treated as a legal right, and not as a separate kind of thing.

BGB, art. 90 (Ger.): "Only corporeal objects are things as defined by law."

For codes worldwide denying or restricting the inclusion of intangible things, *see*: CODE CIVIL [CC] [Civil Code] (Switz.) which classifies intellectual property as legal rights but not as a separate kind of incorporeal things. For provisions on traditional knowledge, *see* arts. 196(a) & 210(1bis); on competition, *see* arts. 240(c), 340, 340(b) & 418(d); on inventions and designs, *see* art. 332; on copyrights, *see* arts. 380-393; and on trade secrets, *see* arts. 321(a)(4), 340, 418(d), 697(2)(3), 803(1), 857(2).

CODICE CIVILE [C.c.] [Civil Code] (It.), art. 810. Although incorporeal things may be implicit in art. 810: "Things that may become the object of rights are property"

Louisiana Civil Code explicitly includes incorporeal property,⁷⁴ but only to treat them further as corporeal movables⁷⁵ and immovables.⁷⁶ The law then is called to develop its

(*Sono beni le cose che possono formare oggetto di diritti*), the classification the Code later makes of things omits incorporeals entirely.

CÓDIGO CIVIL [C.C.] [Civil Code] (Spain), art. 333: “All things which are or may be subject to appropriation are considered movable or immovable property.”

CÓDIGO CIVIL [CÓD. CIV.] [Civil Code] (Arg.), arts. 2311-12; *See* GUILLERMO CABANELLAS DE LAS CUEVAS, RÉGIMEN JURÍDICO DE LOS CONOCIMIENTOS TÉCNICOS 274-5 (Heliasta 1984):

The domain protected by the Civil Code and other relevant provisions apply to things or to material objects likely to have a value And so it is the case that the different rules related to the acquisition of ownership lack generally any meaning if there’s an attempt to apply them to intangible things.

CÓDIGO CIVIL [C.C.] [Civil Code] (Braz.), Book II, arts. 79 *et seq.*, do not include the distinction between corporeal and incorporeal things; the latter are regulated by statutes other than the civil code and then as rights and not as property.

Civil Code of Québec, S.Q. 1991, (Can.), art. 899: “Property, whether corporeal or incorporeal, is divided into immovables and movables.”

MINPŌ [MINPŌ] [CIV. C.] (Jap.), art. 85: “The term ‘Things’ as used in this Code shall mean tangible thing.”

74. LA. CIV. CODE ANN. art. 448 (2019): “Things are divided into common, public and private; corporeals, incorporeals; and movables and immovables.”

75. *Id.* at art. 473.

76. *Id.* at art. 470. *See also* art. 461 § 2: “Incorporeals are things that have no body, but are comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and right of intellectual property.” But because art. 475 reads that “[a]ll things, corporeal or incorporeal, that the law does not consider as immovable, are movables,” then all incorporeal things are legally treated as corporeal things.

For codes admitting incorporeal things, *see*:

The Civil Code of Chile operates similarly to the Louisiana Code. It explicitly includes incorporeal property but only to limit it to legal rights. Cód. Civ., art. 565: “Goods consist of corporeal or incorporeal things. Corporeal things are those having a true entity and may be perceived by the senses, like a house, a book. Incorporeal things consist of mere rights, such as rights of credit and active easements.” Art. 584: “The works of talent or wit belong to their authors. This kind of property is governed by separate statutes.”

In Puerto Rico, the Civil Code is broader than either the Louisiana or Chile Codes because it includes incorporeal without limiting them to rights, although without specifying the goods falling into its category. It is an open provision, unique to this code and suited to include the juridical thing. CÓDIGO CIVIL [Civil Code], art. 252 reads: “The term ‘property’ is generally applicable to anything that may constitute wealth or fortune.” This term also relates simultaneously with the term “things” which constitutes the second object of the law, according to which the principles and rules thereof refer to people, things and actions. Further, art. 258 reads:

Things are also divided into corporeal and incorporeal. Those that are tangible are manifest to the senses, can be touched or tasted and have a

solutions over incorporeals to have a standing of their own and, further, to expand its scope (presently limited to rights, obligations, and actions) in order that it includes intellectual things and objective incorporeal things as well.

Incorporeals do not have a separate standing or section in the code. The development of such a provision, with all its implications, is yet to be done. Indeed, decades ago, Prof. Gert Kummerow pointed out that incorporeal property is one of “unsuspected legal applications.”⁷⁷ And Professors Planiol and Ripert stated that “incorporeal properties are intended to achieve great development”⁷⁸

ANNEX A

(Illustrating Section VI.C)

COMPUTER DISK SALE AGREEMENT (for a Software License Agreement)

When the owner licenses a computer program—as an intellectual thing—he is really not licensing the computer program but quite the opposite: the owner is denying intellectual property rights in it. The owner is only selling the disk, the tangible thing.

In this context, the Computer Disk Sales can secure the intellectual property rights of the owner by providing a warning. *Certainly, the prolific restrictions of the standard Software License Agreements can be included here.*

body, whether animate or inanimate. Of this kind of things are the fruits, cereals, gold, silver, clothing, furniture, land, pastures, woods, house, et-cetera. Incorporeal things are those that are not manifest to the senses and whose existence is only conceived by the understanding, such as inheritance rights, easements and obligations.

77. KUMMEROW, *supra* note 26, at 39.

78. MARCEL PLANIOL & GEORGES RIPERT, 3 TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 489-510 (L.G.D.J. 1952).

CAVEAT

The purchase of this disk does not convey intellectual property rights in its contents. The purchase is limited to the disk (incorporating the program) and the use and benefit obtained therefrom.

Consequently, you are not authorized to reproduce or distribute in any way the computer software contained in this disk, except the right to make a backup or support copy of the software for your personal use and safety procedures.

The violation of these provisions may result in the seizure of the disk and all other materials containing the illegal reproductions of the software, notwithstanding the prosecution of civil and criminal penalties under the law.

Compare to a Software *Lease* Agreement:

LEASE. OWNER hereby leases the computer programs identified above (“Software”) to LESSEE [anywhere] [the territory of] [Industry or markets] for a royalty fee and under the terms contained hereunder. This is a lease of an intellectual property and as such it comprises the reproduction or copying of the Software. Updates and upgrades of Software shall be construed as leased hereunder and by the more specific terms provided for them in this agreement. The use of Software other than the use granted under this agreement shall require OWNER’s consent.

ANNEX B

(Illustrating Section VI.A)

LEASE OF COMPANY’S GOODWILL (or Franchise Agreement)

COMPANY (referred to as Lessor) by this agreement leases to [name of lessee] (referred to as Lessee), the following described goodwill of COMPANY (“Goodwill”):

1. GOODWILL. COMPANY leases its Goodwill to Lessee for the location, time, terms and conditions as provided hereunder. COMPANY’S Goodwill shall consist of its Market Value and/or Selling Capacity [Optional: specify the Market Value and/or Selling Capacity].⁷⁹
2. Royalties/Fees/Rent. This lease is made for and in consideration of a royalty fee or rent of \$ [dollar amount], payable [specification of frequency and terms of payment].
3. Ownership of Company’s System; Standards.
4. Lines of Supply; Customers; Confidentiality; Noncompetition.
5. Use of patents, trademarks, copyrights.
6. Advertising.
7. Training; On-Line Systems Support Guide.
8. Lease of Equipment and Facilities.
9. Merchandising and Inventory; Recommended Vendors
10. Term and Renewal. This lease is for the term of [specification of term] commencing on [date] and ending on [date].
11. Bookkeeping and Financial Matters. Audit Rights.
12. Taxes.
13. No Assignment or Subleases.
14. Representations and Covenants.
15. Indemnity. Insurance.
16. Termination.
17. Mediation. Governing Law. Jurisdiction.
18. Miscellaneous Provisions.
19. Surety.

79. Goodwill, Market Value, Selling Capacity, etc. are terms that describe the Objective Incorporeal thing in franchise agreements; i.e., the one true property being leased.

[Name of surety], who is a party to this contract of lease and is bound with Lessee IN SOLIDO for the faithful execution of all the obligations to be performed on the part of the Lessee, and furthermore waives all rights to a release from this obligation due to Lessor's failure to protest for nonpayment of rent or due to granting of any extensions or indulgences to Lessee or any modifications of this lease, or due to the filing of a bankruptcy, receivership or respite petition by or against Lessee or discharge in bankruptcy of Lessee, or on Lessee's suspension, failure or insolvency, or to the appointment of a receiver for Lessee by any competent court.

This lease is made and signed in triplicate, in [name of city], Louisiana, on [date of lease].

_____ [Name of lessee]
 _____ [Name of lessor]
 _____ [Name of surety]

When the notion of such an incorporeal is not in place, compare the otherwise lengthy descriptions practitioners make to get the point across (if they do).

Statement of Intent⁸⁰

(1) Franchising is a method of distributing goods or services in a consistent manner. The customer expects a similar shopping experience at a franchised business, regardless of its location or operator. By signing this Agreement, you acknowledge the importance of these concepts, and agree to participate in the 7-Eleven System, which promotes a uniform method of operating a convenience store. You recognize that a uniform presentation of a high quality 7-Eleven Image is critical to the customer's perception of the 7-Eleven

⁸⁰ SEC filings, i.e. 7-Eleven, Inc., Individual Store Franchise Agreement, Exhibit 10.(ii)(B)(1), at <https://perma.cc/R8BQ-JGB5>.

System, and that you agree to contribute to that perception by operating your Store in compliance with this Agreement and the 7-Eleven System.

(2) You recognize the benefits to you and the 7-Eleven System (including the benefits of scale that a large chain gets from its high volume of purchases) of purchasing the products and services sold at your Store from common vendors and/or distributors. You agree: (a) to operate your Store in a way that recognizes the right and responsibility of the retailer to provide value to 7-Eleven customers and (b) to order the products and services 7-Eleven customers want, introduce new products, manage frequent deliveries, discontinue offering slow selling items, and provide excellent customer service.

(3) You agree that the 7-Eleven System is subject to modification based on changes in technology, competitive circumstances, customer expectations, and other market variables. Those changes to the 7-Eleven System may include changes in operating standards, products, programs, services, methods, forms, policies and procedures; changes in the design and appearance of the building, signage and equipment; and changes to the Service Mark and Related Trademarks.

(4) We agree to assist you by providing a recognized brand, merchandising advice and operational systems designed to meet the needs of 7-Eleven customers. We also agree to contribute to the value of the 7-Eleven Service Mark and brand by fulfilling those duties and tasks assigned to us in this Agreement as our responsibility within the 7-Eleven System.

(5) You recognize the advantages of the 7-Eleven System and wish to obtain a franchise for a 7-Eleven Store. You understand that an investment in the Store involves business risks and that your business abilities and efforts are vital to the success of the Store. You

agree that the terms of this Agreement are acceptable to you and are material and reasonable.

ANNEX C

(Illustrating Section VI.A)

The following sample is an actual franchise which already makes the point of identifying the objective incorporeal thing—a concept and system (see first sentence)—without referring to the term “goodwill” (it doesn’t have to):

LEASE OF COMPANY’S GOODWILL (or Franchise Agreement)

1. The Franchise.⁸¹ We have the exclusive right to license and franchise a concept and system (the “Hotel System”) associated with the establishment and operation of hotels under the name “HY-ATT® PLACE” and other Proprietary Marks (defined below) (collectively, “Hyatt Place Hotels”). Before signing this Agreement, you read our Uniform Franchise Offering Circular and independently investigated and evaluated the risks of investing in the hotel industry generally and acquiring a Hyatt Place Hotel franchise specifically. Following your investigation and recognizing the benefits that you may derive from being identified with the Hotel System, you wish to enter into this Agreement to obtain a franchise to use the Hotel System to operate a Hyatt Place Hotel located at HOTELADDRESS1, HOTELADDRESS2 (the “Hotel”).

A. The Hotel. The Hotel includes all structures, facilities, appurtenances, furniture, fixtures, equipment, entrances, exits, and parking areas located on the real property identified on Attachment A or any other real property we approve for Hotel expansion, signage, or

81. SEC filings, i.e. Form of Franchise Agreement, Franchise Agreement between Hyatt Place Franchising, LLC and Entity Name Caps, Exhibit 10.46, at <https://perma.cc/5CAS-65V5>.

other facilities. You may not make any material changes to the Hotel's existing or planned construction without our prior written consent, including any change in the number of guest rooms at the Hotel (collectively "Guest Rooms").

B. The Hotel System. We and our affiliates have designed the Hotel System so that the public associates Hyatt Place Hotels with high quality standards. The Hotel System now includes: (a) the trade names, trademarks, and service marks "Hyatt Place" and such other trade names, trademarks, service marks, logos, slogans, trade dress, domain names, and other designations of source and origin (including all derivatives of the foregoing) that we periodically develop and designate for use in connection with the Hotel System (collectively, the "Proprietary Marks"); (b) all copyrightable materials that we periodically develop and designate for use in connection with the Hotel System, including the Manual (as defined below), videotapes, CDs/DVDs, marketing materials (including advertising, promotional, and public relations materials), architectural drawings (including all architectural plans, designs, and layouts such as, without limitation, site, floor, plumbing, lobby, electrical, and landscape plans), building designs, and business and marketing plans, whether or not registered with the U.S. Copyright Office ("Copyrighted Materials"); (c) all materials and other information that we designate as "confidential" orally or in writing or which, under the circumstances surrounding disclosure, ought to be treated as confidential, including all operations information, confidential manuals, revenue information, specifications, procedures, and business, marketing and other plans, as more fully identified in Section 5F of this Agreement (collectively, "Confidential Information"); (d) a national toll-free number for, and other aspects of, the central reservation system, as we renovate and modify it from time to time ("CRS"); (e) a global distribution system, as we renovate and modify it from time to time ("GDS"); (f) the national directory of Hyatt Place Hotels (which, at our option, also may be associated with any other hotel brand or

other business that we or our affiliates own, operate, franchise, license or manage) (the “National Directory”); (g) management, personnel, and operational training programs, materials, and procedures; (h) standards, specifications, procedures, and rules for operations, marketing, construction, equipment, furnishings, and quality assurance (collectively, “System Standards”) described in our confidential manuals, as amended from time to time (collectively, the “Manual”), or in other written or electronic communications; and (i) marketing, advertising, and promotional programs. Although we retain the right to establish and periodically to modify System Standards for the Hotel that you agree to implement and maintain, and to modify the Hotel System as we deem best for Hyatt Place Hotels, you retain the right to control, and responsibility for, the Hotel’s day-to-day management and operation and implementing and maintaining System Standards at the Hotel. In addition, our mandatory System Standards do not include any personnel or security-related policies or procedures that we (at our option) make available to you in the Manual or otherwise for your optional use. You will determine to what extent, if any, these optional policies and procedures should apply to your Hotel’s operations. You acknowledge that we do not dictate or control labor or employment matters for franchisees and their employees and will not be responsible for the safety and security of Hotel employees or patrons.