

## Intertextuality and Metaphorical Constructions in the Narrative of Intellectual Property Discourse

### Intertextualitate și construcții metaforice în limbajul juridic al dreptului proprietății intelectuale

Simona Catrinel Avarvarei<sup>1</sup>, Nicoleta Rodica Dominte<sup>2</sup>

**Abstract:** Starting from Jackson's belief that "rules are themselves meaningful as socially-constructed *narratives*"<sup>3</sup>, this paper sets out to explore the projections of figurative intarsia onto the legal language of IP; thus, *another text* comes to life, versatile and precise enough to explain "complex or abstract ideas"<sup>4</sup> (Berger 2002: 34). Concerned with the "creations of the mind, inventions, literary and artistic works"<sup>5</sup> (WIPO), the legal language of intellectual property opens its complex and cryptic discourse to metaphorical constructions, mostly "ontological"<sup>6</sup> (Lakoff & Johnson 1980: 25), but not only, that pour in its semantic vessels a "precious lifeblood" (Milton). We intend to explore the narrative of intellectual property discourse through the lens of allegorical constructions and travel from John Locke's "sweat of the brow" doctrine to Daniel Defoe's description of the author's rights to artistic ownership "as the Author's Property, 'tis the Child of his Inventions, the Brat of his Brain"<sup>7</sup> (Review 1710), to the Berne Convention of 1886 as well as to other legal texts in search of that rich intertextuality that lends itself to inquisitive perusal.

**Keywords:** metaphor, legal language, intertextuality, transfer

<sup>1</sup> Lector univ. dr., Universitatea „Ion Ionescu de la Brad” din Iași și cercetător postdoctorand, Facultatea de Litere, Universitatea „Alexandru Ioan Cuza” din Iași, catrinelsimona@gmail.com.

<sup>2</sup> Lector univ. dr., Facultatea de Drept, Universitatea „Alexandru Ioan Cuza” din Iași, nicoleta\_dominte@yahoo.com.

<sup>3</sup> See Bernard S. Jackson. *Law, Fact and Narrative Coherence*. Merseyside: Deborah Charles Publications, 1988; (b) *Making Sense in Law*, Liverpool: Deborah Charles Publications, 1995.

<sup>4</sup> Benjamin L. Berger. "Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text". *Court Review, The Journal of the American Judges Association*, Vol. 39, no 3, Paper 133, 2002: pp. 1-9. <http://digitalcommons.unl.edu/ajacourtreview/133>, accessed on 12.03.2019.

<sup>5</sup> See also <https://www.wipo.int/about-ip/en/>, accessed on 12.03.2019.

<sup>6</sup> George Lakoff, Mark Johnson. *Metaphors We Live By*. Chicago and London: The University of Chicago Press, 1980, pp. 25-26.

<sup>7</sup> See also <https://babel.hathitrust.org/cgi/pt?id=msu.31293027061526&view=1up&seq=95>, accessed on 12.03.2019.

**Rezumat:** Pornind de la convingerea lui Jackson conform căreia „regulile sunt ele însele semnificative ca narațiuni construite din punct de vedere social”, această lucrare își propune să exploreze proiecțiile intarsiilor stilistice în limbajul juridic al proprietății intelectuale; astfel se naște un alt text, suficient de versatil și precis pentru a putea explica „idei complexe sau abstracte” (Berger 2002: 34). Preocupat de „creațiile minții, invențiilor, operelor literare și artistice” (WIPO), limbajul juridic al proprietății intelectuale își deschide discursul complex și criptic construcțiilor metaforice, în special, dar nu exclusiv, celor „ontologice” (Lakoff & Johnson 1980: 25), care îi aduc un „sânge prețios” (Milton) în vasele sale semantice. Intenționăm să explorăm narațiunea discursului proprietății intelectuale prin obiectivul construcțiilor alegorice și să călătorim de la doctrina „sweat of the brow” susținută de pragmatismul utilitarian al lui John Locke, la viziunea lui Daniel Defoe asupra drepturilor patrimoniale ale autorului în raport cu opera sa „Copilul Invențiilor sale, Odrasla minții lui”, spre Convenția de la Berna din 1886, în căutarea acelei bogate intertextualități care se migălește prin aplecată căutare de sens.

**Cuvinte-cheie:** metafora, limbaj juridic, intertextualitate, transfer

*Ploughing the field / for cherry-hemp—/ storm echoes.* It is with one of Matsuo Bashō's *haikus* that we begin to unfold our thoughts on reflections of the metaphorical constructs onto the canvas of legal language related to the grand specialism of Intellectual Property Law. Professor Stephen L. Winter, in his book, *A Clearing in the Forest: Law, Life and Mind*, sees metaphors as indispensable tools “without which we cannot even begin to understand the complex regularities of the products of the human mind”<sup>8</sup> and this thought has encouraged us to turn to such an *unorthodox incipit* of an article that approaches legal aspects otherwise renowned for their analytical, rigorous and cryptical nature; nevertheless, it is the original Greek roots of this figure of speech which read ‘*carrying from one place to another*’ and the linguistic approach that we intend to develop which permeate our endeavor with flexibility and ‘lateral’ outlooks. The words of Lakoff and Johnson, two reputed cognitive metaphor scholars, have helped us initiate this journey of ours, “*The essence of metaphor is understanding and experiencing one kind of thing in terms of another*”<sup>9</sup>, since our intent is to prove that intellectual property metaphors subtly shape our understanding of the entire intellectual property legal construct: “metaphor is pervasive in everyday life, not just in language but in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature”<sup>10</sup>. The choice, however, has been attentively pondered, for “Despite the fact that it is conventional to think of imagination as random, unpredictable, or indeterminate, it is actually orderly and systematic in operation”<sup>11</sup>, and the three-line poem

---

<sup>8</sup> Stephen L. Winter. *A Clearing in the Forest: Law, Life and Mind*. Chicago and London: The University of Chicago Press, 2001, p. 43.

<sup>9</sup> George Lakoff, Mark Johnson. *op. cit. supra* note 4, p. 5 (original emphasis).

<sup>10</sup> *Id.*, p. 3.

<sup>11</sup> Stephen L. Winter. *op. cit. supra* note 6, p. 259.

recommends itself as a most profound quintessence of artistic labour, based on agricultural analogy, one of the earliest (recorded) matrixes of cosmogonic creation. Antiphon the Sophist, in a political treatise entitled *On Concord*, uses this agricultural analogy for the first time: “Whatever kind of seed one plows into the earth, this is the kind of harvest one ought to expect. And whenever one plows a noble education into the body of a young man, it lives and thrives throughout his life” (DK 87 B60).<sup>12</sup> The world of ideas has been frequently associated with the mesmeric process of *germination*, a concrete and vivid representation of the otherwise abstract processes of cognition, a most plastic translation of the mystery of creation. It is through the words of Diotima, as reported by Socrates, in Plato’s *Symposium*, that we discover that a philosopher can ‘be pregnant’ (κνέω) or ‘give birth’ (τίκτω) to children, immortal beings, superior in destiny and essence to ordinary, human offsprings:

“Now, some people are pregnant in body, and for this reason turn more to women and pursue love in that way, providing themselves through childbirth with immortality and remembrance and happiness as they think, for all time to come; while others are pregnant soul – because there surely are those who are even more pregnant in their souls than in their bodies, and these are pregnant with what is fitting for a soul to bear and bring to birth. And what is fitting? Wisdom and the rest of virtue, which all poets beget, as well as all the craftsmen who are said to be creative. [...] In my view, you see, when he makes contact with someone beautiful and keeps company with him, he conceives and gives birth to what he has been carrying inside him for ages. [...] And in common with him he nurtures the newborn; such people, therefore, have much more to share than do the parents of human children, and have a firmer bond of friendship, because the children in whom they have a share are more beautiful and more immortal. Everyone would rather have such children than human ones, and would look up to Homer, Hesiod, and the other good poets with envy and admiration for the offspring they have left behind – offspring, which, because they are immortal themselves, provide their parents with immortal glory and remembrance. For example, she said, “those are the sort of children Lycurgus left behind in Sparta as the saviors of Sparta and virtually all of Greece. Among you the honor to Solon for his creation of your laws. Other men in other places everywhere, Greek or barbarian, have brought a host of beautiful deeds into the light and begotten every kind of virtue. Already many shrines have sprung up to honor them for their immortal children, which hasn’t happened yet to anyone for human offspring.”<sup>13</sup>

One important detail for our story is that Diotima refers not only to the towering epic poets Homer (c. 750 B.C.E.) and Hesiod (c. 700 B.C.E.), she also mentions two

---

<sup>12</sup> David Leitao, *The Pregnant Male as Myth and Metaphor in Classical Greek Literature*. Cambridge: Cambridge University Press, 2012, at 134; Diels, H., Kranz, W., eds., *Die Fragmente der Vorsokratiker*. 10<sup>th</sup> edition. Berlin, 1952.

<sup>13</sup> Marc S. Cohen, Patricia Curd, and C.D.C. Reeve, editors. *Readings in Ancient Greek Philosophy. From Thales to Aristotle*. Fifth edition. Indianapolis/Cambridge: Hackett Publishing Company, Inc, 2016, p. 225, 209d4-e3.

important statesmen and lawmakers (νομοθέτης), Lycurgus (c. 800-730 B.C.E.), credited with authoring the oligarchic and stern laws of Sparta, and Solon (c. 640-560 B.C.E.), both poet and founder of the Athenian constitution; thus, we come to understand that authorship and the immortal act of creation accommodate not only the fictitious and enticing world of poetry, but also the inexorable kingdom of law, as mighty expressions of superior creative energies. *Ploughing the fields, begetting children* into the world, mortal or immortal, echo the same metaphor of the *fruitful seed* that meets the life-engendering creative matrix, an inwardly-inverted pneuma, whose magic distills the hidden depths of universe in a myriad of expressions.

Anaxagoras of Clazomenae, a Greek philosopher of the 5th century B.C.E. (born ca. 500–480), claimed that *nous* (intellect or mind) was the motive cause of the cosmos and it too was a metaphorical projection of fertile embryos, as “everything that has life, both greater and smaller, all these Mind controls.”<sup>14</sup> According to Theophrastus (371 - 287 B.C.E.), philosopher and pupil of Aristotle, Anaxagoras thought that the seeds plants originate from are carried down with the rain, whereas Irenaeus, a late second century Christian bishop, attributed him the belief according to which “Living beings were created by seeds falling from the sky.”<sup>15</sup> Thus, we have plants (φυτόν) and animal organisms (ζῷον) that sprout from seeds, just as poems, laws (νόμοι) and arguments originate in thoughts – the invisible and unique germs of intellectual creation, treasured and fostered *ab initio*, long before their very first echo would challenge and ‘storm’ the world. In a metaphorical *regressus ad uterum* perspective, the language of Intellectual Property law ponders on the idea of legal protection of the metamorphosized fruits of the mind from their very first conception, almost ontological in its destiny and future becoming.

David Leitao argues that the first transfer of biological generation towards the masculine element was contrived by Athenian writers (431-421 B.C.E.) who would refer to man’s efforts to formulate laws or write poems as to a form of ‘giving birth’, building, thus, a link between the intellect and the ‘buds’ of its creation<sup>16</sup>, an organic extension to the act of cosmogonic creation through thought or mind that dominated the 500s B.C.E. In Euripides’s *Andromache* (427-425 B.C.E.), the chorus voices the poetry-as-birth metaphor: “When two craftsmen (ἐργάται) *give birth* (τεκόντω) to a hymn, the Muses tend to promote strife.”, an idea replicated in another tragedy of his, *The Suppliant Maidens* (423 B.C.E.): “Whenever the composer of hymns *gives birth* (τίκτει) to songs, he must be in a good mood to give birth (τίκτει).”<sup>17</sup> In Aristophanes’ *The Clouds* (418-415

---

<sup>14</sup> For details, Constantine J. Vamvacas, *The Founders of Western Thought – The Presocratics: A Diachronic Parallelism between Presocratic Thought and Philosophy and Natural Sciences*. Springer, 2009, pp. 197-209.

<sup>15</sup> See Sue Blundell, *The Origins of Civilization in Greek and Roman Thought* (Routledge Revivals), Routledge, 2016 (1986), pp. 45-47; David Leitao, *op. cit. supra* note 10, p. 37.

<sup>16</sup> David Leitao, *op. cit. supra* note 10, pp. 100-17.

<sup>17</sup> *Id.*, at 102.

B.C.E.) we are told that when Strepsiades turns to Socrates's Thinkery in search of some sage arguments and knocks on the door, he disrupts the stream of thoughts of one of the students who sharply reproaches him to have caused "the miscarriage of an idea (φροντίδ ἐξήμβλωκας) that had not yet been discovered."<sup>18</sup> In *The Frogs* (405 B.C.E.), the Athenian playwright deploys the same metaphor of biological generation in reference to the poetic art, a form of "giving birth to verses that are well matched to the great thoughts and ideas."<sup>19</sup> *Intellectual parturition* may be considered a sort of a commonplace reference in the Ancient Greek literary and philosophical arena whenever the act of artistic creation fell under close scrutiny; equally used are the metaphorical allusions to the germination of seeds in the fertile soil of the mind, congruent attempts in imagining the 'heavenly *aithēr*, of which *Olympus alone is father*', as Sophocles wrote in *Oedipus Tyrannus* (430-425 B.C.E.?).

Renaissance, generally defined as the rebirth of Classical Antiquity, continues to perpetuate the time-honoured 'book-as-child' topos as the ultimate, most sublime metaphor of conception, that conjugates 'pregnancy' not only in its fundamental, biological dimension, but also in its intellectual extension. The concept of *intellectual pregnancy* travelled from Plato's *Symposium* and managed to impregnate an entire era of amazing, scholarly achievement. Once the foetus-like thought has achieved a life of its own – 'I have a young/Conception in my brain;' (*Tro.* 1.3.307-8), the moment its echo pursues the mind of the reader – a new, somewhat independent existence is articulated, as Shakespeare suggests in his tragedy, *Troilus and Cressida*, when the latter appeals to Troilus: "My thoughts were like unbridled *children*, grown / Too headstrong for their mother. See, we fools!" (3.2.111-12) Michel de Montaigne (1533-1592) constructs a unique two-way relationship between his thoughts/essays and himself, and in more than one occasion he turns to the metaphor of 'self-portrait' in order to describe the consubstantiality of his work and himself:

"In modelling this figure upon myself, I have had to fashion and compose myself so often to bring myself out, that the model itself has to some extent grown firm and taken shape. Painting myself for others, I have painted my inward self with colors clearer than my original ones. I have no more made my book than my book has made me – a book consubstantial with its author, concerned with my own self, an integral part of my life; not concerned with some third-hand, extraneous purpose, like all other books."<sup>20</sup>

In the closing pages of his essay '*De l'affection des pères aux enfants*'/'*Of the Affection of Fathers*', the French philosopher refers to both books and children as 'our other self', but does not hesitate to underline the undeniable superiority of the mental offspring: "For what we engender by the soul, the children of our mind, of our heart

---

<sup>18</sup> *Id.*, at 102.

<sup>19</sup> *Id.*, at 123.

<sup>20</sup> Montaigne, Michel de. *The Complete Works of Montaigne*. Translated Donald M. Frame. Stanford: Stanford University Press, 1957, at 504.

and our ability are produced by a nobler part than the body and are more our own. We are father and mother both in this generation.”<sup>21</sup> John Donne (1572-1631), in his dedicatory epistle *Devotions upon Emergent Occasions to Prince Charles*, writes of a third birth of his, besides the natural birth into the world and the vocational one into priesthood, the most amazing of all, the blessed birth into creation/authorship, the only one that allows human beings to touch immortality:

“To the Most Excellent Prince, Prince Charles.

Most Excellent Prince,

I Have had three Births; One, Naturall, when I came into the World; One, Supernatural, when I entered into the Ministry; and now, a preternaturall Birth, in returning to Life, from this Sickness. In my second Birth, your Highnesse Royall Father vouchsafed mee his Hand, not only to sustaine mee in it, but to lead mee to it. In this last Birth, I my selfe am borne a Father: *This Child of mine, this Booke, comes into the world, from mee, and with mee.* And therefore, I presume (as I did the Father, to the Father) to present the Sonne to the Sonne; This Image of my Humiliation, to the lively Image of his Majesty, your Highnesse. It might bee enough, that God hath seene my Devotions: But Examples of Good Kings are Commandments; and Ezechiah writt the Meditations of his Sicknesse, after his Sicknesse. Besides, as I have liv’d to see (not as a Witness onely, but as a Partaker), the happinesses of a part of your Royal Fathers time, so shall I live (in my way) to see the happinesses of the times of your Highnesse too, if this child of mine, inanimated by your gracious Acceptation, may so long preserve alive the Memory of

Your Highnesse

Humblest and

Devotedest,

JOHN DONNE”<sup>22</sup>

The English poet proudly builds his artistic genealogy around the image of a literary *child* of his, an artistic manuscript which has been forged by the fecund imagination of the author, and which has also played a consistent part in modelling the soul and mind of its creator; a twofold outlook opens onto the act of conception, bringing both parties involved, creator and creation alike, within the same welcoming matrix of becoming through art(istry). While biological offsprings come into the light *from* their genitors and their existence develops another trajectory which is not organically linked to that of the parents, spiritual offsprings remain always inseparably connected *with* their originators.

Ben Johnson (1572-1637), playwright, poet, and literary critic, generally regarded as second in reputation only to Shakespeare<sup>23</sup>, flaunted almost the same ideas as his gifted contemporary in what the act of poetic creation was

---

<sup>21</sup> *Id.*, at 291.

<sup>22</sup> Elizabeth M. A. Hodgson, *Gender and the Sacred Self in John Donne*. Newark: University of Delaware Press, 1999, p. 28; John Donne, *Selected Letters*. P.M. Olivier, (ed). New York: Routledge, 2002, p. 103.

<sup>23</sup> Clifford Leech. *Ben Johnson*. Encyclopedia Britannica. [Online] at <<https://www.britannica.com/biography/Ben-Jonson-English-writer>, accessed on 19.06.2019.

concerned; he resorts to the 'womb' metaphor, the best stylistic strategy to approach in order to capture the consuming effort of delivering and expressing an interior plenitude that 'springs out of the most retired, and inmost parts of us.'<sup>24</sup> In that, he is not alone, as John Milton (1608-1674), too, builds analogies between the world of thoughts and the trope of the womb, a fact reflected in the lines of the second Book of his epic poem *Paradise Lost*: "And that must end us, that must be our cure:/To be no more. Sad cure! For who would lose,/Though full of pain, this intellectual being,/Those thoughts that wander through eternity,/To perish, rather, swallowed up and lost/In the wide womb of uncreated night/Devoid of sense and motion?"<sup>25</sup> We (re)turn to the same *regressus ad uterum* perspective to try to comprehend the inscrutable roots of genesis, when thoughts moulded shapes of utterance and sensitivity, defying time and reversing its flow, unremittingly longing for immortality. Entering the world with a life of their own, books, pure expressions of concrete transposition of the thought born from creative magmatic travail onto the derm of the page, enjoy the same (birth)right to life and freedom. "The experience of birth provides a grounding for the general concept of CREATION, which has as its core the concept of MAKING a physical object but which extends to abstract entities as well."<sup>26</sup> Presented as a speech 'to the Parliament of England' in the reign of Charles I, Milton's pamphlet *Areopagitica*, published in 1644, takes its 'force' from the idea of Greek democracy its title so clearly and powerfully resonates – *Areopagitica* comes from the Greek topos *Areopagus*, a hill of the Acropolis in Athens where the council of elders of the city would meet – and dedicates its ambitus to an impassionate plea against the censorship of books: "books were ever as freely admitted into the world as any other birth; the issue of the brain was no more stifled than the issue of the womb."<sup>27</sup> It is their birthright to be free, for they too come to light from a 'womb' of creation, superior in terms of imperishability to the biological cradle of life humans come into the world from – for theirs is the realm of eternity, whereas ours, alas, only the narrow path of transience. In this special architecture of blood and intellectual lineage, books carry the genetic code of the mind and soul that beget them, not lesser a child to their parent than any biological offspring:

---

<sup>24</sup> Kate Aughterson, (ed.). *The English Renaissance: An Anthology of Sources and Documents*. London and New York: Routledge, 2002 (1998), p. 324; Douglas A. Brooks, ed. *Printing and Parenting in Early Modern England*. London and New York: Routledge, 2016 (2005); Katharine Eisaman Maus, *Inwardness and Theater in the English Renaissance*. Chicago: University of Chicago Press, 1995, pp. 182-209.

<sup>25</sup> John Milton. *Paradise Lost. To which are Prefixed the Life of the Author by Elijah Fenton and a Criticism on the Poem by Dr. Johnson*. London, 1821, Book II, p. 38.

<sup>26</sup> George Lakoff, Mark Johnson. *op. cit. supra* note 4, p. 74 (original emphasis).

<sup>27</sup> John Milton. *Areopagitica*, with a Commentary by Sir Richard C. Jebb and with Supplementary Material (Cambridge at the University Press, 1918). [Online] at <<https://oll.libertyfund.org/titles/103>>, accessed on 19.06.2019.

"I grant that the behaviour of books, like that of men, must be watched. Books are not absolutely dead things; they have a potency of life in them to be as active as that soul was whose progeny they are. But then they are more than living; a good book is the precious life-blood of a master-spirit, embalmed and treasured up on purpose to a life beyond life. The destruction of a good book ends not in the slaying of an elemental life, but strikes at that ethereal and fifth essence, the breath of reason itself, slays an immortality rather than a life."<sup>28</sup>

A most powerful voice that joined the chorus of its illustrious predecessors and which has unceasingly pleaded for the recognition of this sacred bond between author and book was Daniel Defoe (1660-1731), the renowned journalist, writer and pamphleteer. Known as one of the most fervid defenders of the concept of literary property, he authored an article in his journal, *A Review of the State of the British Nation*, that came out on February 2, 1710, in which he dwelt on the idea of artistic authorship and intellectual theft:

"A Book is the Author's Property, 'tis the Child of his Inventions, the Brat of his Brain; if he sells his Property, it then becomes the Right of the Purchaser; if not, 'tis as much his own, as his Wife and Children are his own-But behold in this Christian Nation, these Children of our Heads are seiz'd, captivated, spirited away, and carry'd into Captivity, and there is none to redeem them."<sup>29</sup>

He argues that there is an undeniable bond between the author and the book, described as the *brainchild* of its creator, a bond that almost establishes an indissoluble rapport between the two parties involved. Interestingly enough, when this bond is translated in terms of financial agreements, another name is assigned to the book, no longer referred to as the child; instead, its identity slips into a far more pragmatic paradigm assigned to a mutually consented commercial agreement. He asks for a law to prevent "Barbarity and Piracy", strong words that live on the marginalia of any honest and civilized society, impactful through the vivid resonances they open. Powerful cultural constructs in an age that accommodated both notions, and not only in pages of manuscripts. Defoe is credited with having first associated the idea of intellectual theft with the phenomenon of piracy, linking the two terms for centuries to come, for nowadays intellectual property laws deal with the concept of counterfeiting and piracy, and the latter has become a commonplace reference in current debates on the topic; simply skimming through *The European Union Council Resolution of 25 September 2008 on a comprehensive European anti-counterfeiting and anti-piracy plan (2008/C*

---

<sup>28</sup> John Milton. *op. cit. supra* note 25.

<sup>29</sup> Daniel Defoe. "Miscellanea", in Defoe's *A Review of the State of the British Nation* 515, 515-16 (1710), reprinted in Secord, Arthur Wellesley. Daniel Defoe and Facsimile Text Society. New York: Columbia University Press, 1938. [Online] at <<https://babel.hathitrust.org/>>, accessed on 25.06.2019.



253/01), to give just a random example, will reveal the term ‘piracy’ mentioned nineteen times.<sup>30</sup> We turn thus to Richard Rorty who believes that:

“Old metaphors are constantly dying off into literalness, and then serving as a platform and foil for new metaphors. This analogy lets us think of “our language” – that is, of the science and culture of twentieth-century Europe – as something that took shape as a result of a great number of sheer contingencies. Our language and our culture are as much a contingency, as much a result of thousands of small mutations finding niches (and millions of others finding no niches), as are the orchids and the anthropoids.”<sup>31</sup>

Aristotle considered that the primary function of metaphor was figurative and ornamental<sup>32</sup>, and that has been the case for centuries of rhetorical stylistics, but following contemporary perspectives in the philosophy of language and its pragmatic perspective, metaphors have travelled a long and beautiful journey from mere ornamental tropes to figures of thought, as George Lakoff interprets them.<sup>33</sup> In the taxonomy of legal fiction, metaphors have played their part in enriching the language through evocative and thought-provoking analogies. We have already seen how ontological metaphors have deeply permeated the rhetoric of literary authorship discourse, weaving a special texture within the legal text, of blood lineage between author and *brainchild*; hence, there should be little surprise that the consolidated British *Copyright, Designs and Patents Act* of 1988 mentions the so called “orphan work” which is minutely described as: “a relevant work is an orphan work if - (a) there is a single rightholder in the work and the rightholder has not been identified or located, or (b) there is more than one rightholder in the work and none of the rightholders has been identified or located, despite a diligent search for the rightholder or rightholders having been carried out and recorded in accordance with paragraph 5”<sup>34</sup>, or that *The Berne Convention for the Protection of Literary and Artistic Works* of 1886, the first international agreement governing copyright, in Article 6B regarding the protection of moral rights of authors, uses the noun ‘mutilation’ with reference to the alteration of any piece of work. It is the convoy of side-connotations that echo brutality, almost savage assault onto the ‘being’ of that particular work of art that projects a most distressing and

---

<sup>30</sup> [Online] at [https://eur-lex.europa.eu/legal-content/ EN/TXT/?uri=CELEX:32008G1004\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008G1004(01)), accessed on 20.07.2019.

<sup>31</sup> Richard Rorty. *Contingency, Irony, and Solidarity*. Cambridge: Cambridge University Press, 1989, p. 16.

<sup>32</sup> See Albert N. Katz. *Metaphors: Implications and Applications*. Edited by Jeffery Scott Mio. New Jersey: Lawrence Erlbaum Associates, Publishers.

<sup>33</sup> George Lakoff. “A Figure of Thought”, in *Metaphor and Symbolic Activity*, I:3, 1986. <metamorphical-issues-a-figure-of-thought-lakoff-1987.pdf>, accessed on 28.06.2019.

<sup>34</sup> *British Copyright, Designs and Patents Act of 1988, Consolidated, Schedule ZA1, Certain Permitted Uses of Orphan Works, Part 1, General Provisions, Article 3, Meaning of “orphan work”*, p. 250. [Online] at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/772818/copyright-designs-and-patents-act-1988.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772818/copyright-designs-and-patents-act-1988.pdf), accessed on 15.07.2019.

forlorn response to the word itself: “*Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification.*”<sup>35</sup>

The hermeneutics of Intellectual Property Law grafts itself onto millennia of roaring spiritual fervour, making the world’s corolla of wisdom, artistry and soul its divine legacy. It is the noblest and most refined dowry any juridical field could ever dream about, let alone defend and protect. There is little doubt that the cultural dimension has played a significant part in shaping, encrypting and later, decrypting the large contextual framework that accommodated the various areas of law practice, and, as Zoltán Kövecses argues, metaphors are at the very heart of the process of construing cultural models.<sup>36</sup> Current legal philosophy concerning copyright law has been shaped by the view on the moral rights which interprets works as the extension of the author’s self, and the Lockean theory of the natural right of an individual to control the fruits of his labour (1690)<sup>37</sup>; although the latter, as Adam Mossoff asserts, has been lately “relegated to the dustbin of the history of philosophy”<sup>38</sup>, there is substantial overlap in the 21<sup>st</sup> construction and understanding of the copyright law between the utilitarian approach, specific to the Anglo-American system, and the moral rights based-rhetoric of Continental legal systems. Regardless of the cultural and, implicitly, juridical context, the metaphor is the shuttle that ties the yarns of the legal fabric and not only embellishes it, but also imprints it with a unique dynamic of expression:

„(...) a cultural investigation of the nature and functions of metaphors belies the idea that metaphors are merely ornamental or literary devices rather than inferential, creative, and constitutive ones. While purporting merely to represent their respective target domains, metaphors arguably shape the prevailing view of cultural phenomena and of theories. One might even go so far as to argue that they serve to construct cultural models and theories. They not only popularize certain values, biases, and epistemological habits, they also provide agreed-upon codes of

---

<sup>35</sup> Article6Bis, *Moral Rights, Berne Convention for the Protection of Literary and Artistic Works*. [Online] at [https://www.wipo.int/treaties/en/text.jsp?file\\_id=283698#P123\\_20726](https://www.wipo.int/treaties/en/text.jsp?file_id=283698#P123_20726), accessed on 20.07.2019.

<sup>36</sup> See Zoltán Kövecses works, (a) “Does Metaphor Reflect or Constitute Cultural Models?” eds. Raymond W. Gibbs and Gerald J. Steen, *Metaphor in Cognitive Linguistics*. Amsterdam: John Benjamins, 1999, pp. 167-88; (b) *Metaphor in Culture: Universality and Variation*. Cambridge: Cambridge University Press, 2005; (c) *Language, Mind, and Culture: A Practical Introduction*. Oxford: Oxford University Press, 2006.

<sup>37</sup> John Locke. *Two Treatises of Government*. Edited by Peter Laslett. Cambridge: Cambridge University Press. Student edition, 1988.

<sup>38</sup> Adam Mossoff. “Saving Locke from Marx: The Labour Theory of Value in Intellectual Property Theory” in *Natural Rights Individualism and Progressivism in American Political Philosophy*. Edited by Ellen Frankel Powel, Fred D. Miller, Jr., and Jeffrey Paul. Cambridge: Cambridge University Press, 2012, pp. 283-317.

understanding and cultural traditions of looking at the world, forging a widespread consensus by drawing upon culturally rooted views and values.”<sup>39</sup>

Descending from the Books of Genesis, from King James’s Bible<sup>40</sup>, the trope of the ‘sweat of the brow’ has percolated into the Commonwealth legal system where it is generally viewed as referring to the traditional position on the matter of copyright and originality. In France, spurred on by Beaumarchais (1732-1799), after the great success with the *Barber of Seville*, performed and published in 1775 as *Le Barbier de Séville*, writers begin to take action and fight for the recognition of their authorial rights, laying down the basis of the first “Society for dramatic legislation” in 1777. The first buds of their struggle bloomed on 19<sup>th</sup> January 1791, when king Louis XVI ratified the law that recognised the pivotal and sacrosanct principle of the authors’ rights<sup>41</sup>, as the bond between creator and the fruit of his mind is so powerful, that in French, an author and his work describe the sublime relationship between earth and sky, body and spirit: „L’auteur d’une œuvre de l’esprit jouit sur cette œuvre, du seul fait de sa création, d’un droit de propriété incorporelle exclusif et opposable à tous” reads Article L111-1 of the ‘Code de la propriété intellectuelle’.<sup>42</sup>

Intellectual labour, hard work, diligence, a very corporeal philosophy of creation - ‘sweat of the brow’ - and the divine, immaterial touch of the spirit - ‘l’esprit’ - alike forge the mysteriously complex phenomenon of creation and its particular expressions. Being overwhelmingly metaphorical, the language of intellectual property law frees the words from what could have remained an extremely hermetic utterance into a heuristic search of hidden meanings, whose trail is ablaze with wisdom and figurative meanings.

---

<sup>39</sup> Ansgar Nünning, Herbert Grabes, and Sibylle Baumach. “Metaphors as a Way of Worldmaking, or: Where Metaphors and Culture Meet” in *Metaphors: Shaping Culture and Theory*. REAL Yearbook of Research in English and American Literature 25. Edited by Herbert Grabes, Ansgar Nünning, and Sibylle Baumach. Tübingen: Narr, 2009, pp. xi-xxviii.

<sup>40</sup> „In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it wast thou taken: for dust thou art, and unto dust shalt thou return.” Genesis 3:19, King James Bible (1611).

<sup>41</sup> In the United Kingdom, it was *The Statute of Queen Anne, An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned* (1710), which formally recognized in statute law the importance of proprietary rights in copies.

<sup>42</sup> *Chapitre Ier, Nature du droit d’auteur, Article L111-1, modifié par Loi n°2006-961 du 1 août 2006 – art. 31 JORF 3 août 2006, Code de la propriété intellectuelle*. [Online] at <https://www.legifrance.gouv.fr/>. Web. 25 June 2019.

