Inclusivity in property

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My project during this NYU stay is to consolidate the research that I and my team of 5 researchers have carried out during the first three years of an ERC (European Research Council) project called INCLUSIVE\(^1\). This paper gives the outline of this project and of some of its outcome. Please do not circulate without permission.

Introduction

This research project characterises an increasing number of situations where a resource is shared and such sharing is a thriving element of the preservation or usefulness of the resource. When exclusivity could be seen as an effective tool to manage to allocate and incentivize the production of resources, today, it should be complemented by a reverse concept of “inclusivity” that could describe legal entitlements that would be organised to be both non-exclusionary and collective. I posit that such inclusivity ought to receive a legal recognition, that could make it enforceable and sustainable. This research intersects with the scholarship around commons, without aligning with it completely. It aims at enriching our legal vocabulary, particularly in property.

I. Exclusive and inclusive properties

Evocation of a so-called “inclusive property” looks like a anomaly, for exclusivity is considered as a key hallmark and an indispensable element of property. Installing inclusivity on the side of exclusivity in the property legal discourse hence requires to study the meaning of exclusivity in property law, and the recent discussions surrounding the concept (A.), then to give an

\(^1\) ERC funding, 2014-2019.
overview of the scholarship that introduces some dose of inclusion or inclusiveness in property (B.) before unfolding the precise meaning that I attach to the notion (C.)

A. What is exclusivity in property

Exclusivity is generally presented as one of the key elements of property\textsuperscript{2}. In French civil law notion of property, the property right is an absolute right in the sense that all utilities of the thing are owned by and benefit to the owner, which gives her the right to exclude anyone else from any benefit of the thing. In common law, the majority of property scholars consider the right to exclude as an essential part of property\textsuperscript{3}, even if it is mitigated by many exceptions.

The right to exclude is the first manifestation of the exclusivity and inherently entails its second consequence, the individuality of the right of property: if the owner can exclude anyone else from the benefit of the resource she owns, it means that she is the only one enjoying such benefit. In his legal dictionary, G. Cornu defines “exclusive” as “what bars anyone other than the owner of the right from the enjoyment thereof”\textsuperscript{4}. The exclusive property, in its classical understanding, does not admit any sharing of the utilities of the owned thing. Exclusivity then refers to the uniqueness of the owner-subject as to a thing considered as a whole\textsuperscript{5}.

In property theory, exclusivity is also sometimes equated with the absolutism of property. However, the two notions differ as exclusivity reflects the absolutism of property in the relationship between the owner and third parties. Whereas the ‘absolute’ property considers the wholeness of the right the owner has to a thing (the owner is deemed to benefit from all utilities of the thing to the broadest extent possible), the ‘exclusivity’ indicates the relationship between this absolute power and others, who are excluded and deprived from the enjoyment of any utilities of the resource by the very property right and the private reservation it entails. The exclusivity aims at “preserving the integrity of the proprietor’s relation to the thing”\textsuperscript{6}.

When a right is exclusive, it comports two dimensions: exclusivity enables to exclude others from the use of the resource (exclusion), and it affirms the individual right of use (individuality). Exclusivity inherently includes the enforceability of the right. Though the seminal example of exclusivity is the property right, other types of rights as to a thing or to a person are equally exclusive.

\textsuperscript{2} Exclusivity is not limited to property right and could endow other subjective rights when their holder has the power to exclude anyone else from its benefit. As underlined by Dabin, legal protection granted on things can only be against someone else and it is from competing pretentions that the right emerges. Any subjective right is exclusive in relation to others. However the theoretical construction of exclusivity is particularly linked with property where it is doubled by individuality, which explains that our analysis focuses on property right.


\textsuperscript{4} G. Cornu, Vocabulaire juridique, PUF, 2007, v° « exclusif ».

\textsuperscript{5} M. Xifaras La propriété – Etude de philosophie du droit, PUF, 2004, at 145.

\textsuperscript{6} Xifaras, op. cit., p.135
L. Katz challenges the predominant view of exclusivity in the US scholarship that equates it with a *jus excludendi*. She distinguishes the exclusion (i.e. the power of owner to exclude) from the exclusivity (i.e. the power of owner to decide without interference of others) and argues that “ownership, like sovereignty, is an exclusive position that does not depend for its exclusivity on the right to exclude others from the object of the right”. Exclusivity is defined by L. Katz as the agenda-setting authority enjoyed by property owners.

This picture comes as no surprise for a scholar who is more versed in intellectual property than in tangible property. It is generally understood that intellectual property rights, such as copyright, trademark, patent right, confer exclusive rights to their holders, such exclusive rights being defined as the right to authorize or prohibit some forms of exploitation of the works, signs or inventions in which they own rights. Incidentally, intellectual property confers a right to exclude others from the use of such subject-matter, but as the essential purpose of intellectual property is to enable exploitation of intellectual creations or assets, complete exclusion of others would generally not make sense. Exclusivity in intellectual property rather conveys the decision power of the owner as to the exploitation and use of the subject-matter. Hence it is a perfect example of the agenda-setting authority theorized by Katz.

Intellectual property also provides a scenery where exclusion and inclusion are constantly intermingled. On a first hand, exclusivity, once exercised to authorize the use and exploitation of the protected asset, would include others in the benefit of the property. Those others might also be many, due to the non-rival nature of intellectual creations. Indeed, whereas the owner of a building can include someone in the enjoyment of her property, by renting or providing the place for free, it could only be for a limited number of people. A potentially unlimited number of persons could conversely be conferred a right to exploit a work or an invention, the benefit of one not depriving or reducing that of another.

On a second hand, intellectual property regimes have many built-in limitations to accommodate public or private interests, such as exceptions (fair use, teaching exceptions, library privileges in copyright, private use and research use in patent, limitation of the intellectual property in time, exhaustion rule, …), which entails that the property would never mean a complete exclusion.

A first outcome of this research could be to assert that property is a mix of exclusion and inclusion, a complete exclusive property being only rhetorical. In other words, different regimes or cases of property could be placed on a continuum from exclusivity to inclusivity.

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9 This could be disputed for trademarks where the owner does not generally grant license of exploitation to others, and for some patents who are solely exploited by their holders. But one could not imagine a piece of music whose performance, distribution or making available is never allowed, or a patent in a smartphone component that is never licensed to manufacturers of such devices.
10 Contrary to tangible property regimes where limitations exist too but are generally coming from legal regimes external to property.
B. Inclusivity

The notion of inclusion or inclusive property is not new in property scholarship. B. MacPherson, in 1978, has argued that “Property (…) need not be confined, as liberal theory has confined it, to a right to exclude others from the use or benefit of some thing, but may equally be an individual right not to be excluded by others from the use or benefit of some thing”\(^{11}\). Inspired by McPherson, the Italian legal scholars have been particularly active in the last years to look for an inclusive property, by which they refer to a property regime that would have to include others in the access to the resource\(^{12}\). In their view, limitations of property are transformed into an inclusive property, i.e. into a regime of property that requires including others in the benefit of the thing. Such trend in Italian legal writings could be traced back to the Italian Constitution that provides, in its article 42 that “private property is recognized and protected by law, that determines its modes of acquisition, enjoyment and its limitations in order to guarantee its social function and make it accessible to all”\(^{13}\). The access to property by non-owners is hence introduced at the core of the property regime.

In the US, D. Kelly has emphasized that the exclusionary power of property comprises of both the right to exclude and the right to include\(^{14}\) and has particularly assessed the benefits and costs of the exercise of the right to include in different forms. Contrary to the Italian scholars, such inclusion would not be imposed by law, but would come from a voluntary choice of the property owner. Others underline similarly that the right to include is a counterpart of the right to exclude in property. These opinions all rely on the waiving of the right to exclude to include others in the use and provide examples such as division of property rights by contract or easements.

The notions of ‘inclusivity’ and ‘inclusive’ also appear in recent intellectual property scholarship\(^{15}\). G. van Overwalle creates a notion of ‘inclusive patent’\(^{16}\), explained as “a one-sided right geared to include rather than to exclude others, and encompasses as an attribute the right to enforce sharing behaviour and take non-sharing users to court”. Van Overwalle insists on the right to include encompassed by the inclusive patent that substitutes to the right to exclude: “it empowers the owner to include others, to control licensing conditions and to enforce alignment with the open source like commitments”. The patent right she suggests would not allow its owner to exclude any user from the use of the invention but would lead to authorising anyone from using the patent.


\(^{13}\) My translation. La proprietà privata è riconosciuta e garantita dalla legge, che ne determina i modi di acquisto, di godimento e i limiti allo scopo di assicurarne la funzione sociale e di renderla accessibile a tutti.


\(^{15}\) P. Drahos, A defence of intellectual commons, Consumer Policy Rev. , 1996, 16(101) (referring to the dichotomy between exclusive and inclusive to organise a typology of commons)

The concept of inclusivity delineated here is different. It is not only a consequence of the inclusion of others in the benefit of one’s property, be it by law or by decision of the property owner herself, even though it might be related. Inclusivity rather characterizes situations where many persons enjoy some entitlement to use a resource, in a collective and shared manner and without a possibility to exclude others from such benefit. In a mirror definition of exclusivity that I characterize as the right to exclude and the individuality of the benefit enjoyed over the asset, inclusivity could be described by (1) the absence of a power to exclude others, which leads to inclusion of others in the use and (2) the collectiveness of uses, opposed to the individuality of exclusive rights. Inclusion and collectivity would be the two dimensions and indicators of inclusivity.

Firstly, no exclusive rights exist in a resource, either due to the absence of a property right (as it is the case with public domain in copyright) or to the exercise of such property right which is devoid of any exclusivity (as in copyright exceptions or copyleft licensing). However the non-exclusivity is not enough, as my model appears when such lack of exclusivity is replaced by the inclusion of others in the use and by an essential collectiveness of uses as one’s rights or privileges to use are interlaced with rights of others. These two defining features, i.e. non-exclusion and collectiveness, substitute inclusivity to exclusivity in a positive way. In other words, the lack of exclusivity is not only an emptiness or a void, but it is full of something else. This is not a mere negative of exclusivity, as its very absence: it can rather refer to a reverse of exclusivity; the absence of exclusivity is seen positively, as creating some collective space in the hollow left by the retreat of exclusivity. Inclusivity hence refers to the convex side of non-property, leaving the ‘non-exclusivity’ and ‘non-exclusive’ for its concave side.17

More precisely, inclusivity characterises situations in which the benefit of a resource, whether tangible or intangible, is being shared by a number of legal subjects, in a symmetrical and collective way, without any person having the power to exclude the others from such benefit.

The mention of the “symmetry” between the entitlement in my definition echoes the use made by Y. Benkler of the terminology of asymmetry/symmetry to oppose exclusive property and commons: “The hallmark of commons, then, as a legal institutional matter, is symmetric freedom to operate vis-a-vis a resource set, generally or with respect to a class of uses ‘in the commons’. The hallmark of property is asymmetric allocation of calls on the state to determine use, exclusion, extraction, management, disposition of the resource or class of uses of a resources. That is why a common property regime is ‘property’ on the outside, vis-a-vis non-members, and commons on the inside—the interventions and usage rules among the common appropriators do not derive from a right to call on the state to exclude any other among them, even if under formal law they do have that right.”18

17 That might not be always the case as sometimes the lack of an exclusive right of the IP owner will not create an inclusive entitlement to a number of users. For instance a patent holder forced to grant a compulsory license loses his exclusive right but only to the benefit of the person requesting the license and not to undifferentiated users.

In line with Benkler’s use of symmetry to describe commons, my definition of inclusivity indicates that the inclusive entitlements of persons enjoying a collective and non-exclusive use of a resource lie on an equal footing, no one having a right prevailing over others.

A final element is that the benefits of a resource are enjoyed in a non-exclusionary way amongst the community of persons concerned. Whatever the property title in the resource, its dedication to an inclusive benefit entails that no one has the right or capacity to exclude another from its use.

As exclusivity has become a defining feature of property regime, one could say that inclusivity would be a feature, though not essential, of some types of property or non-property situations. In a way, inclusivity would enter the vocabulary of property, or more broadly of legal models of relationships to things, and be situated in a continuum graduating degrees of exclusiveness.

II. Case studies

The research project has analyzed four different situations where many persons share the benefit of a resource, that could illustrate the inclusivity dimension. These have been chosen to reflect heterogeneity as to property/non property, open or closed community of title holders, tangible or intellectual property, organization (or not) of the community and of the common benefit by a contract or system of governance. Such diversity aims at consolidating a legal figure of inclusivity that would not be limited to a specific case but could be applied across many legal contexts.

A. Open collaborative creation

New forms of creation occur on the internet notably by ways of multiple authors, each of them contributing to a work, in a successive and unorganized manner. The typical example is a wiki page, where contributions succeed to one another, correct or delete one another, with no synchronized or collaborative intervention, but in a dynamic and social process. Fan fiction websites or other forms of online creation that calls upon internet users to intervene in the creation, provide other examples of open and collaborative process of creation by many co-authors. Such creations (or creations processes) could be said being inclusive under our definition, for it relies on the collectiveness of authorship and creation. No contributor is allowed to exclude another from participating to the creation and all will have to share ownership of the work.

The ensuing work is a complex legal subject matter. It will generally not be considered as a joint work of authorship, where the different co-authors own jointly the copyright, as the many contributors have not acted through concertation or simultaneously. The legal figure of the derivative work is equally ill-suited to capture the intended interlacing of the different contributions over time. Another issue is the distinction copyright will draw between contributors having added something original to the work and contributors only bringing small

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unoriginal additions, corrections, deletions, subtractions. Only the former will be eligible to copyright protection and the status of co-authors, while the latter will be completely wiped out from the creation legally speaking.

Copyright law is hence inadequate to embrace the inclusiveness of that process of creation and would be unable to confer rights in the dynamic work to the community of its authors.

This inability, that one could relate to some extent to the prominent narrative in copyright law of a unique and individual creator, solely deserving the exclusive rights of copyright protection, leads to some practical issues in enforcing protection against possible infringements of copyright in those types of creations.

A few years ago, a famous French writer was accused of having “borrowed” some content in Wikipedia and having inserted it in his new novel without the proper credit to the online encyclopedia, which is also an infringement of the license by which the encyclopedia authorizes anyone to reproduce its contents. Let’s say that this story would have had a judiciary follow-up. Who would be entitled to sue for copyright infringement? Not the Wikipedia foundation itself that does not acquire copyright for its many contributors. Under copyright law, it should be the authors of the page that has been reproduced in violation of the license. But who are they? A quick look to the history of the page may indicate hundreds of contributors whose inputs range from the writing of one paragraph to the deletion of a mistake. Only the original contributions (i.e. the contributions demonstrating, under US law, some spark of creativity and under EU law, the own intellectual creation of the author, meaning (for the CJEU) the possibility to make creative choices) would deserve copyright protection. The list could be reduced to a hundred of contributors or even less. In some countries only a joint action of all co-authors, if it is initiated collectively, would be received by courts. That would be evidently illusory in most cases. The copyright in such forms of creation is thus existing but ineffective and partial, at least on the enforcement side.

B. Copyleft licensing

Exclusive rights conferred by intellectual property are sometimes exercised to decline such exclusivity but grant others large freedoms of use. Free or copyleft licenses, such as open source licenses in software or Creative Commons licenses, are a seminal examples of such reversion (subversion, some would say) of exclusivity.

Free licenses create a double absence of exclusivity. There is first a lack of exclusivity as the copyright owner deprives herself from her exclusive rights to include others in the use (and, should the license be viral\textsuperscript{20}, prevents any reconstitution of exclusivity on creations derived from hers). That engenders a non-exclusive entitlement to use the work or invention for all licensees (who are all potential users as the license can be said to run with the software or work\textsuperscript{21}). To that extent, licensees share inclusive entitlements as to the work or invention

\textsuperscript{20} A license is said to be viral when it applies automatically —along the chain of distribution— to each new copy or derivative version of a work.

governed by the free license. Compared to a classical copyright license that is generally concluded with a defined user\textsuperscript{22}, the copyleft license is available to any user and grants equal and symmetric rights to anyone. Thereby, the rights so conferred by the license can be said to be inclusive in several regards. Users are included in the use and exploitation of the work, that the copyright owner has decided to collectivize. All licensees are on an equal foot as to the rights to use they enjoy. And last but not least, the scheme is conceived as to perpetuate such inclusivity as its built-in mechanism aims at affixing the license to any derivative version of the work, expanding the sharing and collectiveness of the use.

Including the legal entitlements enjoyed by copyleft licensees in our reflection might seem useless as they are certainly rights. Therefore the issue created by copyleft licenses is not that the users do not enjoy enforceable rights in the work. However, the construction of that peculiar contractual model might in extreme cases weaken the effectiveness of the rights so granted.

The copyleft trick is an hybrid tool relying on exclusivity to refuse it, and relying on contract, thus on a relative relationship between parties, to grant an absolute status to the very thing governed by the contract\textsuperscript{23}. The non exclusive rights created to the benefit of the user of the work or invention are only enforceable against the licensor (and not \textit{erga omnes} or against the world), which weakens the process of freedom-granting.

Yet, this relative enforceability is strengthened by the specific mechanics of contract (its acceptance being based on the use of the work) that results in the contract being more attached to the work, than to contracting parties\textsuperscript{24}. As a consequence, any subsequent user will encounter the license when she desires to use the licensed material. As Margaret Radin has described this process, it is an “attempt to make commitments run with a digital object.”\textsuperscript{25} Therefore, the copyleft transforms a mere private ordering effect –normally applicable only to the parties to the private ordering tool (i.e., the contract)– into a feature applicable to the work itself and to any user thereof. The protection transforms a contract to what oddly resembles a property right\textsuperscript{26}.

Despite this virality and embedding of the contract in the work itself, the right to use is still bound by the contract and is only enjoyed by a party to the copyleft contract, not by any user. Furthermore, the copyleft licensing scheme does not rely on sublicensing and each derivation of a copyrighted work will be governed by a separate license. To put it differently, one piece of software A would be governed by a License A granted by the creator of that software to any user. If B adds some code to software A or modifies, the modification or addition will be governed by License B, granted by B. At the end of a chain of successive derivations or modifications, a software composed of parts A, B, C, D, all created by successive authors, will

\textsuperscript{22} This could be qualified for End User License Agreements that is open to any user. Such licenses are however outside of our scope as they tend to grand a very limited right to use the copyright work, but a mere access and consumption thereof, so not really granting any right to the user.


\textsuperscript{24} Which is not specific to open source license though, see M. Radin, \textit{supra note 33}.

\textsuperscript{25} Margaret Jane Radin, \textit{Human, Computers, and Binding Commitment}, 75 \textit{Ind. L.J.} 1125, 1132 (2000).

\textsuperscript{26} More on this process in S. Dusollier, \textit{Le jeu du copyleft entre contrat et propriété}, \textit{Cahiers du droit de l’entreprise}, nov.-déc. 2015, p. 49-56.
be governed by an addition of four licenses A, B, C and D. User X of ABCD work enjoys a contractual right to use that she can oppose respectively to A, B, C and D.

The extent and success of such a procedural contamination requires that the chain of contracts distributing copies of the work or derivative works not be broken at some stage. Continuity enables the copyleft feature to smoothly propagate beyond the first contract. This intricate contractual design would have an unexpected consequence if one contract is revoked or held invalid. Any hole in this web of contracts would defeat the right of X to use the whole work ABCD, hence shattering the sharing and collectiveness pursued by the copyleft licensing project. For instance, B could be a minor when developing her piece of software and the contract she attaches to it would be in many jurisdiction not valid. Therefore, user X, when using software ABCD, would enjoy a bundle of contractual rights against A, C and D but would lack any authorization to use code B. Or C might have not owned the copyright in the software she developed as a work made for hire or under an employment contract.

There is then a contradiction in affirming users’ rights in copylefted works but grounding them on relative contracts. The issue is still largely rhetoric but the recent *SCO v. Novell* case illustrates the risk that such contractual design entails. This is a series of disputes finding its source in an attempt by SCO to assert ownership rights over parts of the Linux kernel. SCO had acquired rights in UNIX operating software from Novell and claimed that Linux incorporated parts of it and offered to sell UNIX licenses to Linux users, threatening them of legal actions for copyright infringements. Novell then claimed back ownership of copyright in UNIX, both companies ended up in a litigation that could jeopardize the Linux project. The court finally found that Novell owned the copyright. Should SCO has won, it would have constituted a hole in the copyleft licenses constituted the web of rights in the Linux software.

C. **Public domain**

The public domain in intellectual property is composed of works or inventions that are not protected by a copyright or a patent, or not any more due to the expiration of the term of protection. Public domain in copyright encompasses ideas, unprotected by the key principle of idea/expression dichotomy, unoriginal works, excluded works (which could be official texts and governmental works, works lacking fixation) and works whose protection term has lapsed.

Public domain has always existed in copyright for it is the automatic counterpart of the private property, that results from the selective conditions for protection and from the limitated duration of the right. Yet, it has been rather neglected in intellectual property regime and discourse.

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28 The Agreement excluded from the sale “[a]ll copyrights and trademarks, except for the trademarks UNIX and UnixWare” and “except for the copyrights and trademarks owned by Novell as of the date of the Agreement required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.”
29 10th Cir., *SCO v Novell*, 30 August 2011
Being only the negative of the exclusive right, it has no intrinsic consistance or dedicated protection, which could be remedied by the introduction of a legal concept of inclusivity.

The lack or expiration of copyright protection results in freedom of use of the element concerned, but such freedom does not appear explicitly in most copyright laws, nor does it receive a dedicated protection against claims to the opposite. As a result of its negative definition, elements belonging to the public domain will only be free from exclusivity by operation of copyright law. *De lege lata*, nothing prevents their reservation or privatisation by other mechanisms, as the public domain so defined does not follow an absolute rule of non-exclusivity and is rather unequipped to resist any encroachments or regained exclusivity. Users are privileged to use, copy or disseminate a work or other element that would belong to the public domain, but such a privilege is rarely seen as a right. For that very reason, public domain is a no-rights land, a fallow land.

The privileges to use public domain material are inclusive entitlements according to my model. It is indeed the perfect reverse of exclusivity, as it consists in elements in which no exclusive rights exist. This default or retreat of exclusivity then creates a common use enjoyed by anyone. All legal subjects enjoy a symmetric entitlement in the resource. No one’s benefit prevails over that of others and all prerogatives to use are equal. The individual entitlements in a public domain work lie on an equal foot, no one having a right prevailing over others.

The use is collective, not in the sense of a community of users, as there is not a properly identified community, but to the extent the public domain resource benefit is shared by anyone.

The last criterion of the inclusivity is the absence of a power to exclude anyone from the use. No person has the power to exclude others from such benefit. That induces that on one hand, the inclusive use results from the absence of an exclusive right, and on the other hand, no person benefiting from an inclusive entitlement in the resource is allowed to exclude other peer beneficiaries. To say it differently, the entitlement to use a public domain work is inclusive of others’ symmetric entitlements.

This inclusivity does not find any room in legal regime of copyright. The legal notion of *chooses or res communes* appearing in Article 714 of the French and Belgian Civil Code, could also

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31 *ibid*.

32 But a negative community at best, as defined by J. Rochfeld in *Dictionnaire des Biens Communs*, v° Communauté, PUF, 2017.

33 No one but the owner of another exclusive right, such as a moral right in some copyright systems or a contractual right, that might subsist in the resource. It should be reminded that the absence of exclusive right in a public domain element is limited to exclusive (economic) rights in copyright. The moral right in the work, in countries where it is considered as perpetual, might subsist in works belonging to the temporal public domain and exclusionary right may flow from other regulations, such as trademark, *sui generis* right in database, real property. As a consequence, the inclusiveness of the relationship in a public domain work can only be considered through the lens of copyright rules and is not absolute or definitive.

34 The notion does not exist in other civil codes such as in Italy even though it originates from Roman law that has inspired many civil codes in Europe.
apply to public domain. They are defined as “goods that are owned by nobody and whose use is common to all” (“Il est des choses qui n’appartiennent à personne et dont l’usage est commun à tous”). This qualification of res communes goes a step further than simply acknowledging the lack of protection as it insists on the common use of public domain. The two key features of res communes, i.e. the lack of (exclusive) property and the common or collective use, echo our inclusivity definition, and particularly the absence of a power to include and the collective use. The reference to choses communes also insists on a positive perspective of the public domain, conceived not as a default regime, lacking any protection, but as positive and collective entitlements to use a resource. Yet, under current law, it does not immunise it from any recapture or appropriation and does not by itself guarantee a collective use of the resource.

Today, no legal actions are available to preserve the free use of the public domain or to impose to others a duty not to interfere with such use. In cases opposing an exclusionary right in a public domain work and any user of that work, the public domain status of the work does not constitute a solid defence against exclusive reservation, as demonstrated by the Place des Terreaux decision in France, or the Golan decision of the US Supreme Court. The latter refused to confer a positive status to public domain works but gave preference to exclusive copyright restored by law in foreign works, when the US adhered to the Berne Convention. Whereas one court of appeal had qualified the public domain as a “bedrock principle of copyright law” with the consequence that “what is in the public domain should remain there”, the Supreme court held that “Neither the Copyright and Patent Clause nor the First Amendment makes the public domain, in any and all cases, a territory that works may never exit”. This is a strong statement in disfavour of the sustainability of public domain.

Another example of the difficulty to make public domain prevail over exclusive claims is the trademark registration of public domain works. There is no rule in copyright law or in trademark law to prevent public domain works from being registered or used as trademark. The exclusivity conferred by trademark right is however limited and would not in principle impede the free use of the work itself.

A recent reference to the EFTA Court by the Norwegian Board of Appeal for Industrial Property Rights is related to the registration as three-dimensional trademarks of sculptures by a famous Norwegian artist, Gustav Vigeland. The EFTA Court decided against the registration and even

36 Cour de Cassation, Arrêt n° 567 du 15 mars 2005. The Place des Terreaux is a public square in Lyon bordered by 17th century buildings. A few years ago the municipality commissioned the renovation of the pavement to an architect, Christian Drevet, and a contemporary artist, Daniel Buren. On the ground of their copyright the two authors sued a company having reproduced the square in a postcard that included both the public domain buildings and the copyrighted pavement.
In first instance, the court of Lyon (TGI Lyon, 4 April 2001, RIDA, October 2001, note S. Choisy) held that the public domain status of the buildings necessarily constrains and limits the exercise of copyright held by the authors of a derivative work to the extent required by the free reproduction of the public domain. The decision was upheld on appeal, mainly on different grounds, but was eventually struck down by the highest Court, the Cour de Cassation.
affirmed that “the public domain entails the absence of individual protection for, or exclusive rights to, a work. Once communicated, creative content belongs, as a matter of principle, to the public domain. In other words, the fact that works are part of the public domain is not a consequence of the lapse of copyright protection. Rather, protection is the exception to the rule that creative content becomes part of the public domain once communicated.” However, the legal grounds to refuse the registration were found in specific rules of trademark law, such as exclusion for public policy or morality, that could exclude a sign consisting “exclusively of a work pertaining to the public domain and registration of this sign would constitute a genuine and sufficiently serious threat to a fundamental interest of society”.

D. Participatory housing

A last case studied in this research project belongs to tangible property and pertains to new forms of collective housing where families engage in the construction or renovation of a building where they would own a private apartment and share common spaces (eg laundry, kids’ playroom, guestroom, garden, collective room for meetings events or parties, …) and some limited extent of communal living. Depending on the country, such projects are called participative housing (France) common interest communities (US), grouped housing (Belgium). Some related initiatives that could also be included in the study are community-land trust, an inclusive form of property acquisition for low-income families that was born in the US but is now increasingly transplanted in the EU.

Such collective sharing of places to live adds a layer of commons to private and individual property that differs from traditional condominiums by its chosen and central dimension. Inclusivity is what justifies and organizes the common property, not what necessarily accompanies the private property of neighboring apartments. The dimension of inclusivity of this increasing form of cohousing occurs amongst the co-owners, the third parties being (normally) excluded from the commons. Thereby the absence of exclusion is limited to the community formed by the inhabitants, but the property is still exclusionary towards others.

This form of collective housing does not fit well with traditional rules of property and condominiums, which are rather based on concepts of individual property and ancillary and imposed co-ownership of necessary commons. In civil law systems, the normal rules of co-ownership require that decisions are taken at the majority of voting, and each co-owner enjoys a number of votes equivalent to the value of her private property, which is a consequence of the exclusivity of private property and its accessory, the share of each in the communal property. When transposed to cohousing, exclusivity is not a relevant paradigm anymore, since the participation in communal property, chosen and not imposed, is central to the housing project and not ancillary to it. Cohousing’s organizing rule is rather based on consensus-decision making and deliberative democracy.

Participatory housing may also suffer from lack of sustainability. The original owners have opted for community and sharing of resources attached to their private property. The

40 EFTA Court, 6 April 2017, Vigeland, E5/16, §66.
transferability of that private property might threaten the community’s composition and the sustainability of the inclusiveness, as it allows for buyers of the private property to acquire the share in the commons without being interested by the community objective. In most projects, provisions in covenants organize the sale of any private unit by subjecting it to the approval of the community of inhabitants, as to the maximum price that could be asked (in order to sustain the socio-economic composition of the community) and as to the potential buyer. Such conditions are significant restrictions of the right to dispose of one’s property and are at risk of being struck down by courts. Nevertheless, there could be ways, not too restrictive of property, to organize the sustainability of a community in a participatory housing in conformity of the inclusivity that defines the original project.

III. Outcome of the research: Designing a legal notion and model of inclusivity

The concept of inclusivity that this project aims at building would not be a merely descriptive tool of some regimes of property: it would also be endowed with normative consequences that could help resolve some issues and litigations.

First, a model of inclusivity will be devised that would help characterizing and legally acknowledging that relationships persons have to a thing and to each other are inclusive rather than exclusive. Instead of just being a recognition of the absence of exclusivity, this inclusive determination would trigger some legal responses that would depart from exclusivity-based rules in property and intellectual property that tend to be applied indiscriminately.

Then, when legal entitlements, whether considered as being rights or not, are qualified as inclusive, this inclusivity, as decided by the owners themselves or by the law, should be preserved as much as possible. That entails that some enforceability and sustainability should attach to such inclusive entitlements.

The legal notion of enforceability is complex, as it comprises different features. Three meanings may be given to enforceability and will be used at varying degrees in this research:

- A legal entitlement can be said to be enforceable when its holder can be backed up by the State and its courts to oppose it to others. In that sense, enforceability entails legal affirmative actions and remedies. Question of recevabilité of a legal action would be raised at this stage.
- Enforceability may also refer to the civil law notion of opposabilité, i.e. the recognition of the right and its existence by others.
- A last degree of enforceability would mean that the entitlement is binding to other persons, who have to comply with such entitlement.

Assessing the enforceability of the inclusive entitlement implies a scrutiny of the possibility to oppose the inclusive entitlement, either as a community or as an individual, against any person impeding the inclusive use or attempting to appropriate the resource for her sole benefit. The availability of actions or remedies to holders of inclusive entitlements could indicate the
enforceability, as well as the existence of an obligation to comply with the inclusivity characterising the benefit of the resource.

Sustainability in my research frame refers to the capacity of resilience of inclusivity in three ways (that might not be present to the same level in all case studies).

- First, sustainability refers to the resilience to exclusive appropriations of the shared resource. It is the ability of the inclusive entitlement to oppose such private appropriation. Compared to the question of enforceability, sustainability is at stake when the exclusivity reservation would result in substituting exclusivity to the inclusive sharing. On the contrary, enforceability is the capacity to make an inclusive entitlement prevail over an exclusive claim that could disturb it (but not replace it).

- Secondly, sustainability refers to the ability of the inclusive situations to perpetuate over time. By example, transfers of private property units could gradually erode the inclusive project if new owners do not abide thereto. Assessing the sustainability in that regard means to study the rules that could impose such inclusivity to newcomers in the shared property.

- Thirdly, sustainability could include the notion of additivity\textsuperscript{41}, that could be defined as further development and thriving of an inclusive situation. This is an important feature for intangible resources, as demonstrated by copyleft licensing of wiki creations that operate as incentives to contribute to the creation process.

Our incapacity to imagine other enforceable legal entitlements than “rights” is caused by our tendency to conflate a right with the exclusivity it confers against others. A right, and this is particularly true with property right, is a legal entitlement that grant an exclusive power to its holder. Such exclusive power enables both to exclude others from the use and to claim an individual control on the use of the resource. But there are increasingly other ways to enjoy a resource that are lacking exclusivity but produce wealth nonetheless and would deserve some legal treatment conveying such inclusivity.

If Hohfeld envisaged the correlative of a right as a duty to do something, he did not conceive the obligation not to interfere with other types of legal entitlements, for example the privilege, as a proper duty. A common status could be described and developed for such users’ entitlements that could enrich our vision of rights or privileges, and put an end to the centrality of exclusive property that pushes any other legal relationship to the unprotected margins.

This model of inclusivity would be an attempt to add a new legal tool to apprehend new forms of relationships to things, in which sharing and non-exclusion are seen as beneficial features, not as a substitute to exclusivity but as a complementary legal concept. This model is yet to be devised and validated, before convincing the judges and the lawmakers of its usefulness.

\textsuperscript{41} B. Coriat, Communs fonciers, communs intellectuels, comment définir un commun ?, in LE RETOUR DES COMMUNS, Les liens qui libèrent, 2015, p. 44-46.