

Intellectual property, freedom of information and expression

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Introduction

There is an ongoing discussion about the role of intellectual property in modern life, where the digital technologies and the Internet have made easy to access and re-produce human work. Under the light of modern technological developments, the argument, that intellectual property rights limit people's right to information and creates barriers in the cultural and social development, becomes more significant. Intellectual property rights were induced as a form of control of expression and censorship. The protection of the intellectual property was established in England in 1709 with Queen Anne Act (soon after Bills of Rights in 1689), in France with the laws of 1791 (loi Le Chapelier) and those of 1793 (loi Lacanal - soon after the establishment of the freedom of speech with the Declaration of human rights in 1789), in USA with the adoption of copyright clause in the American Constitution of 1787 (before the adoption of the first amendment of 1791).

It is believed that the freedom of speech not only includes an active aspect (freedom of expression), but also a passive one (freedom of information). This is absolutely essential so that people may be able to form their own opinions which, in consequence, they are free to express. If someone had to ask for the creator's permission (and pay the price) in order to have access to (or the right to re-use) an original idea, or to refer to a prior work and submit it to criticism, or even satirize it, the possibility of producing new works would be excessively limited. Each intellectual creation is based on the exploitation of elements that come from previous intellectual creations, what is called intellectual inheritance or intellectual tradition. Furthermore, the creations with the most radical originality include, even as irritation of denial, elements, from the intellectual world they were created in. If the intellectual property had given the beneficiary the authority to bind all his work's elements, in order to exclude their future "exploitation" from other creators, then, this act, would, irrevocably, end up to function as an obstacle to intellectual creation. In reality, of course, in these cases an (alternative, perhaps) right to information would still be there, but, rather, it would affect the possibility to generate more ideas and increase the production of culture.

In all legislative levels (national, communal and international) the intellectual property has concrete limits:

1. Object of protection of intellectual property constitutes the form of the original intellectual work, that is to say, its particular configuration, which is perceptible from the human senses and not some accidental original idea on which this form relies on. In order to facilitate the free circulation of ideas and to make possible further growth of intellectual production, the right of intellectual property founds a discrimination between elements of work that are protected as objects of intellectual property and elements of work that are found outside the circle of protection. This discrimination is, usually, expressed with the distinction of "form" to the "idea" or "the content".
2. The period of time during which intellectual property is protected isn't unlimited. When a certain amount of time passes, the intellectual work ceases being the subject of protection and it's rendered "common property", a cultural good freely accessible to everyone.
3. International Conventions like Berne's and Paris' allows the possibility to withdraw restrictions regarding intellectual property, in cases like that of scientific research, and educational purposes (such as the reproduction in approved school books or teaching in class or during exams).

Consequently, we can distinguish two categories of restriction of intellectual property: the conceptual restrictions (right on the form, restricted duration) and the classic restrictions; restrictions based on international experience, build upon international agreements and now they constitute "sine qua non" content of intellectual property laws.

The freedom of expression, though, provides to the individual the right to give and receive information. Firstly it allows people to collect the information they need to help them decide and make choices in their lives, as part of the democratic process. Secondly, the results that are produced by the previous process encourage any person to lead herself to the truth. Finally the freedom of expression can be a means to an end in itself, because it promotes the self-realization. Although intellectual rights usually agree with the goals of the freedom of expression, their main concern is the protection of the expression of ideas in various cultural forms. But, protection of ideas could restrain the freedom of expression.

Sometimes, the motivations created by intellectual rights promote the freedom of expression encouraging the creation of new intellectual work. However, access to certain ideas is not allowed by law because of the gradual transformation of intellectual rights, by a number of motives, for the increase of creativity to an inflexible system of information's property. The economic side of intellectual property has serious results on the freedom of expression in two separate levels: the process of publication is a commercial process and the publishers are those who, first of all, decide if, and

when a work will be published.. In this case, there is the possibility that important information will not reach society (Torremans 2004).

Intellectual property in databases and implications for scientific research and freedom of expression

Editors of international conventions took under consideration the freedom of information, when they established intellectual property rights, keeping balance between the creator's profits and the common good. However, is this balance affected by the technological revolution that computer science has brought in the modern society? The concerns of database owners, mainly in Europe and USA, were based firstly on the fact that, digital revolution made easy to copy an entire database. Because of that, their competitors, after copying a database, could easily process the information included in the database and sell a similar product without in fact paying any royalties to the owner of the initial product. This thought, which theoretically seems right because (at least processed) information is, also, an economic good, comes in direct opposition with and offends fundamental freedoms, such as freedom of expression, equal opportunities to access information and education. Only those with solvency can, in the end, have both legal and assured access to information, which becomes more and more expensive and inaccessible to the majority of users. Besides, producers of information will have to face this same problem in the future, because information will become an increasingly expensive process, excluding those with inadequate economic means (both authors and publishers).

When there is overprotection of information in databases, like with *sui generis* right that overcomes the three basic components of intellectual property (originality, certain duration, exceptions for the scientific research), then this overprotection leads to restrictions regarding the freedom of expression. (Torremans 2004)

Any law that refers indirectly "you can't say something without someone's permission, and if you say that something without this permission you are illegal", includes 1 element that are in direct conflict to human rights, especially those pertaining to the freedom of expression and speech. Scientific research is, also, affected because there are no purely original works, but all the scientists and researchers have to use elements of previous studies to move on with their own research and this is the way arts and sciences developed through the centuries. We can safely assume that only a small proportion of a published scientific work is, usually, original. The rest of the elements, on which the new scientific knowledge is based, come from previous works. When the legislation regarding information production doesn't take into consideration originality, availability of information and the time restriction of protection then it, consequently, limits the flow of information. The legislation that gives the right to some people to, obstruct others from having access to the information should keep pace with two constitutional restrictions:

- Exclusive rights that are intended to motivate producers of information or to protect their investments should be provided only to original works. Knowledge and information already available to public and information, or facts known to common people shouldn't be restricted by access rights.
- Private rights that control the use of information, either created inside the frames of intellectual property, or beyond them, are elements related to freedom of speech and expression.

Free flow of information is principal and essential from a political aspect of a democratic self-determination. The policies that restrain access and flow of information or even control the informational environment influence our possibilities to use information both as individuals and as members of any community. The application of policies that object to constitutional freedoms (freedom of expression, information and speech) affect the way democracy works. Also, information, knowledge and culture production along with the development of sciences is an ongoing discussion among people, and restrictions like with the overprotection of information, influence unfavorably the prosperity of societies. The private rights to information include an intense disproportion which is expressed between those who are profited from the barriers and those who suffer the repercussions of them. But the social damage that is caused falls upon the users of information the complete extent of this cost cannot be easily calculated. This damage is bequeathed in the next generations that, naturally, are not represented now in the present processes. Legislative bodies demonstrate inevitable, short-vision when they create private rights to information.

Should, then, legislation concerning information be so absolute and strict, like the one regulating the transactions of any other good? The answer is probably, not, since information as a commodity has repercussions in democracy and people's autonomy. The members of a democratic society should have access to the information in order to express their opinion, and, therefore, information shouldn't be controlled by some groups of people. When information is controlled and access to it is allowed under specific (financial or other) conditions, it is expected to cause a concern for people's autonomy. In order to be autonomous, a person should be capable of determining his own personal successive range of choices. To select our course in the world, we should have the sense of a range of wide choices and the possibility to assess their value. These two facts – knowledge of choices and a context of comparison – are essential to the freedom of expression, so that we can be the ones who define our course of life. In a society where few or some have the access to information, it is obvious that people's autonomy is offended. (Benkler 1999).

Property rights over information have created a context that allows to those who participate in a social environment to manage other people's informational environment in such a way that affects their behavior and choices. When property rights are planned in a way that there will be a greater or a lesser control over information or they systematically favor a group of people – in relation to their ability to access information – over another group, naturally there will be concerns related to people's autonomy. The policy for the management of information and autonomy, in a democratic society, should allow people to have the possibility of experiencing autonomously their lives and act in a way they wish. When the law shifts the centre of control beyond the environment of information through which most individuals make their choices, their autonomy is undermined.

Private rights in information involve restrictions in the progress of sciences as well. Scientists will not have the right to re-use and copy databases in order to create a more updated and complete database. Probably the most important sources of information for any scientist and researcher are databases that include scientific articles. Database owners will not have the right to create a large database in which smaller databases will be integrated and scientists will be compelled to seek information for their research in many smaller databases, the existence of which they might ignore.

Progress is a result of human actions that enriches human knowledge. This was, also, the basic idea about progress that was part of the discussion about intellectual rights in 18th century. It is important to understand the idea of progress because private rights in information and knowledge were considered as monopolies and were not adopted by previous legislative bodies relatively to intellectual property. It is, also, important to understand the reasons behind the line of thinking that progress must be protected against any policies that favour oligopolies or monopolies, as this will lead to an increased establishment of exclusive rights at the expense of public welfare.

The significance of progress can be determined through three elements:

- Education is of vital importance to achieve prosperity.
- Progress is by nature accumulative as any subsequent generation builds upon the achievements of their predecessors.
- The product of individual efforts that contributes in the progress of knowledge contributes, also, in social and cultural advancement.

Progress is a common effort for present and future generations, and a policy for this progress should take into consideration the benefits and the disadvantages that exclusive rights to information will bring to present and future generations. Both, the future producers of information as well as all the rest profiting from human progress, are not participating in the current political processes. Thus, policies that determine the flow of information is under a systematic disproportion of representation between present and future participants as well as in the representation of private profits in regard to the common good (Benkler, 1999).

***Sui generis* and implications for libraries**

Directive 96/9/EC institutes a new development for database protection in both traditional copyright frame and immaterial goods, in general. Its most fundamental innovation, which is, also, a word-wide originality is the institution of the *sui generis* right, which protects databases regardless of the legislation that may concern copyright laws. The European Commission instituted the *sui generis* right, which gives the right to own information. The goal of this development was to protect databases and, basically, the private investments in databases. Hence, this enactment doesn't concern the way data are collected and arranged within a database, but its goal is to protect the investor from any "parasitic" use of its content by his competitors or single users.

Copyright protection is not available for databases which aim to be "complete"; where the entries are selected by objective criteria: and these are protected by *sui generis* database rights. While copyright protects the creativity of an author, database rights specifically protect the "qualitatively, quantitatively (or both) substantial investment in either the obtaining, verification or presentation of the contents". If there has not been any substantial investment (not necessary a financial investment), the database will not be protected. The holder of database rights may prohibit the extraction and reutilization of the whole or of a substantial part of the contents. The "substantial part" is evaluated qualitatively and quantitatively and reutilization is subject to the exhaustion of rights.

Database rights last for fifteen years from the end of the year that the database was made available to the public, or from the end of the year of completion for private databases. Any significant change which could consist a substantial new investment will lead to a new term of database rights, which is, in principle, perpetual. Protection is granted if a substantial investment is made to obtain, verify, and present database content. A substantial investment is the deployment of financial resources or the expenditure of time, effort, and energy to generate and present the database content. It should be pointed out that an investment to generate data that goes into the database is not considered an investment in creating the database itself and therefore cannot be grounds for protection. This is meant to prevent monopolisation of the information itself.

Sui generis right, therefore, consists of two rights:

- the right to extract all or a substantial part of the database and
- the right to re-use all or a substantial part of the database.

The former is similar to the right of reproduction, the latter to the right of distribution granted to a copyright holder.

IFLA and *sui generis* right

According to IFLA there is clearly much work to be done before the need for a new international treaty on protection of non-original databases can be established. Considering the potentially severe effects on science, education, research, innovation and access to information generally that conferral of ownership in data may effect, in conjunction with the range of protection mechanisms already available to database producers, there are not enough substantiated, unequivocal evidence of a market failure requiring the adoption of a new World Intellectual Property Organisation (WIPO) database treaty.

In IFLA's view, the need for new property rights in data collections is ambiguous at best; the onus is on those wishing to create these new rights to establish the existence of a global need for them. Evidence of such a global, as opposed to a regional or domestic need, is not, or cannot be proffered, , therefore there is no need for a new WIPO database treaty. If a new database treaty was introduced, it should not require contracting parties to enforce a *sui generis* protection scheme, where existing domestic copyright legislation offers equivalent protection to databases, in line with standards set by any new international instrument

IFLA respects authors' rights as a basic pillar of the copyright regime. However, that limitation and exceptions to copyright are equally part of the fabric of the regime. Successive changes to copyright law have produced the current imbalance, by strengthening authors' rights, without, in parallel, proportionate treatment of the limitations and exceptions. Authors' rights have lengthened in duration, and if they are supported by technical measures (as is often the case in the digital environment), they exist without any effective exceptions at all. Not only can technical measures remove the availability of exceptions - they are themselves immune from practicable legal challenge. A successful copyright regime must take due account of the rights of authors, but it must also properly accommodate other important participants in the knowledge economy - including secondary creators, educators, and researchers - who depend on the exceptions to copyright.

Finally, it cannot and should not be left to the interested parties, e.g. libraries, to negotiate licence agreements to compensate for legal exceptions. The strength of the parties involved is too unequal for this to be possible. The inequality of strength derives from the exclusive right conferred on the right holder by law. Only the right holder (never the user) may take legal action against other interested parties. By virtue of his exclusive right, the right holder's position, is non-negotiable, if she so wishes. On a matter as important as copyright exceptions, contractual arrangements between unequal parties have no place. Scientific publishing, be it in print or as databases, is an activity dominated by a handful of multinational publishers, who, in reality, can dictate to libraries their terms for using their publications. These terms frequently override exceptions, and user privileges granted by law, e.g. reproductions for private or personal use.

ALA and *sui generis* right

In 2006 the American Library Association (ALA) comment European Commission's policy regarding the *sui generis* right and the Database Directive of 1996 (96/9/EC), in order to urge the E.C. to withdraw the Directive. According to *the Resolution in opposition to sui generis database protection* (CD #20.6, January 25, 2006) ALA urges the European Commission, either to repeal its Database Directive, or to withdraw the *sui generis* right, while maintaining copyright protection for "original" databases. To support its statement, ALA quoted a European Commission's report in December 2005 that concluded, among other things, that:

- There is no evidence that the Database Directive has achieved its goal of stimulating the production of databases in Europe.
- The *sui generis* right for database protection has given rise to legal uncertainty, and to significant litigation in European courts, and the courts of its member countries
- The *sui generis* right for database protection may harm legitimate business, research and education activities and threaten the fair use of information, including information in the public domain.

According to ALA the *sui generis right* gave a novel, unprecedented form of sui generis legal protection to databases even if they are not sufficiently original to be copy-righted. It is, also, pointed out that many databases, which consist of individual pieces of information, that have been organized in one collection, so that the data are easier to access – are protected under copyright law, because of the creative way, that the information in them is selected, coordinated and

arranged. However, under traditional copyright law, basic factual information is in the public domain and is not entitled to copyright protection. That means that databases that do not have a creative or original element – such as phone book white pages – are not protected under U.S. copyright law.

In the years that followed the E.C. Database Directive, large database producers, such as publishing companies, have worked very hard to convince the American Congress to pass a database protection bill, much like EU's. In response, American libraries have been in the forefront of fighting passage of database protection legislation in the U.S. Such protection would reverse the basic information policy of this country that facts are not creative in nature and cannot be owned. ALA continues to insist that any database protection bill must allow "fair use" of databases comparable to that under copyright law, and permit downstream, transformative use of facts and government produced data contained in a database.

Proposals for the legal protection of bases of data

Exclusive rights in information may offend basic constitutional freedoms of any person, can limit her informational environment and create obstacles in the way democratic institutions functions and, finally, they can prevent the creation of future databases. If some sort of regulation should exist, which will protect the interests of database owners, it shouldn't offer any exclusive rights to them. Also, scientists, researchers and instructors should be able to use databases in the way they are free to use any work of interest. In this case, some principles should be taken into consideration:

- Prohibition of database copying and sale in trade, if this action causes damage in the owner of database.
- Databases shouldn't be protected via the theory of "sweat of the brow" which was proved particularly problematic and erroneous.
- There shouldn't be any additional protection for collections of work already protected under intellectual property rights.
- The concept of what consists a database should be narrowed down.
- Each user of any database should be informed about which of the elements of the database in use are still under legal protection and which are not.
- Each new regulation should include a wide exemption from each responsibility, for the case of "fair use".
- It should be ensured that all users' rights are protected, so that they couldn't be forced to resign from them via some conventional clause.
- There should be a different approach for each different "type" of information included in any database.
- Databases manufactured by government agencies with the money of taxpayers shouldn't be protected under any legislation that forbids their use.

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