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Copyright and Freedom of Expression: An Ambiguous Relationship

VINCENZO ZENO-ZENCOVICH

1. Copyright from Artists to Enterprises

In the past years, in front of the irresistible expansion of copyright laws and, in general, of exclusive rights over intangible entities, one of the barriers that has been tried to be risen is that of freedom of expression, both in its active sense (freedom to express one's opinion) and in its passive sense (freedom to access the expression of others).

This tendency has manifested itself in the first place in the United States¹ and, more recently, in Europe,² and represents a natural reaction to what is felt as an unacceptable privilege of certain industries limiting individual liberties.³

Although the aim of this reaction may appear justified and can rely on the age-old rhetoric of the fight for individual freedoms against those who hold the power, its grounds do not appear to be very solid and when not used appropriately the remedy may be worse than the disease.

¹ See among the vast literature on the subject the many and very stimulating contributions by Pamela Samuelson, listed at <http://www.ischool.berkeley.edu/~pam/papers.html>, among which can be cited here as a full illustration of the argument, "Copyright and Freedom of Expression in Historical Perspective", 10 J. Intell. Prop. L. 319 (2003), and "The Constitutional Law of Intellectual Property After *Eldred v Ashcroft*", 50 J. Cop. Off. Soc'y 547 (2003). See also J. Ginsburg, "Copyright and Control Over New Technologies of Dissemination", 101 Columbia Law Review 1613, (2001); S. Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, (New York, NYU Press, 2001); the "Public Policy Report" on "The Progress of Science and Useful Arts": Why Copyright Today Threatens Intellectual Freedom" (Brennan Center for Justice at NYU School of Law, 2004); W.W. Van Alstyne, "Reconciling What the First Amendment Forbids with What the Copyright Clause Permits: A Summary Explanation and Review", 66 Law & Contemp. Probs. 225 (2003); C. E. Baker, "First Amendment Limits on Copyright", 55 Vand. L. Rev. 891 (2002); N.W. Netanel, "Locating Copyright within the First Amendment Skein", 54 Stan. L. Rev. 1 (2001).

² L. Guibault & P. B. Hugenholtz (eds.), *The Future of the Public Domain – Identifying the Commons in Information Law*, (The Hague, Kluwer, 2006); P. L.C. Torremans (ed.), *Copyright and Human Rights. Freedom of Expression – Intellectual Property – Privacy* (The Hague, Kluwer 2004); M.D. Birnhack, "Acknowledging the Conflict between Copyright Law and Freedom of Expression under the Human Rights Act", 14 Ent. L. Rev. 24 (2003); P. B. Hugenholtz, *Copyright and Freedom of Expression in Europe*, in R. Cooper et al. (eds), *Innovation Policy in an Information Age*, (OUP 2001). For the first contributions to the subject see H. Cohen Jehoram, *Freedom of expression in copyright and media law*, 1983 GRUR Int. 385; and ID. "Freedom of Expression in Copyright Law" (1984) EIPR 3.

³ The debate is open also in other jurisdictions: see D. Fewer, "Constitutionalizing Copyright: Freedom Of Expression And The Limits Of Copyright In Canada" 55(2) U.Toronto Fac. L. Rev. 175 (1997).

To put things in a correct perspective it is essential to point out that at a certain point – which can be placed sometime in the second half of the 20th Century – copyright ceased to be *mainly* a form of legal protection of artists and interpreters and became, increasingly, a privilege of certain industries, commonly called “cultural industries”. Artists protected – and still protect – their economic rights through contract, and only indirectly were (and are) interested in copyright which is the legal instrument by which the industry maximises the revenues from the use of its products – whether films, books, music etc.

The cultural industry has operated like any economic group upon which a privilege is bestowed: it has organised itself in order to preserve and enlarge its position through a constant pressure on the legislature and the courts.

Copyright became – from a legal realistic point of view – simply a system for allocating wealth in an economic sector which begins with the raw materials produced by individual artists and ends with the use of the product by the public at large. One could question the efficiency of the system, investigate on the winners and the losers and why they were such, discuss on whether the market was fair or there was an abuse. There seemed to be little space for significant constitutional issues, in the sense that at a first glance there was scarce evidence of a conflict between fundamental values placed on an equal standing. This is, probably, the reason why, for many decades, the constitutionality of copyright laws has been rarely challenged, especially in Europe.

The system however started going out of track owing to two events, related to each other, but one mostly political, the other technological. The first event – in the mid seventies of the 20th century – is the decision made by the US legislature, strongly spurred by powerful pressure groups which could easily play on the fear of an “American decline” (the Vietnam wound was still open) and of a Japanese technological supremacy, to extend copyright protection to software (the result was the Computer Software Copyright Act of 1980). The point is not so much the nonsense (to which pages and pages of legal scholarship have been devoted) of considering computer programs as a “literary work”, which is tantamount as saying that a motor-truck, as it can pull a cart just like a horse or a couple of oxen, belongs to the animal world.

The CSCA made it clear to whoever wanted to look at things how they were and were being shaped, that copyright had nothing to do with artists or, even, with individuals but essentially with industry the way it organizes itself, how it competes with other industries, stressing the role of technical innovation.⁴ From this point of view the CSCA – and the “copy-act” effect it had in Europe (Directive 91/250) – although completely wrong on a conceptual basis and a gateway to monopolistic

⁴ According to N.W.Netanel, “Locating Copyright”, cited at note 1 “ the Copyright Act entails a government allocation of speech entitlements to politically powerful speakers” (at page 85). The statement can be agreed upon, provided one does not go on to the conclusion that “not-powerful-political-speakers” should be free from copyright restrictions (see a critique to this argument further at note 21).

industries (Microsoft), put an end to the enchanted world of the Artist and to the rhetoric of copyright as his magic wand.

The second event is digitalization of everything that can be represented by words, numbers, sounds or pictures and its dissemination through telecommunication networks⁵. In a digital world there are no “copies”, and, inevitably, copyright – which implies control over the original – enters a serious crisis. The reaction to this is a trench war of certain industries against other industries which simply enable their products to be disseminated and, therefore, reproduced at no – or very small – cost. Digitalized networks cut out intermediaries – the news-stand, the book-store, the music and dvd shops, movie-theatres – reducing dramatically distribution costs. But those intermediaries were essential in the business model of cultural industries because they enabled to control the final user and be sure that he paid what he was using. In the digital carrier business model it is not really important what he is carrying on his network – whether a bulky official record or a just released movie: he will receive a flat rate for the connection, whatever its content. The battlefield therefore moves towards – and against – final users to prevent them from free riding. Harsh legislative measures are asked for and promptly granted, technological tracing devices are implemented. Copyright laws – or rather what continues to be called in such a old fashioned way – are no longer a defence against unfair competitors but the shield and the sword against the rest of the world.⁶ And here constitutional issues *do* arise.

2. Legitimate Interest in Profit-Making is Not a Fundamental Right

Distinguishing is however essential. First of all from a geographical point of view. Although western countries share cultural, religious, linguistic and political traditions there are – at least in the western legal tradition – significant differences between the US and Europe, and differences that are even more striking between the US and Great Britain than with continental Europe.⁷ One of these – and here we come to the topic of this paper – is the approach to freedom of expression. Whilst the 1st Amendment, in the US, has been constantly and firmly interpreted as conferring a privileged status to the Press,⁸ in Europe – whether insular or continental

⁵ For a detailed illustration of this aspect one can refer to the many works of Lawrence Lessig, among which *The Future of Ideas: The Fate of the Commons in a Connected World*, (New York, Random House, 2001); and specifically on the topic of this paper, “Copyright’s First Amendment”, 48 *UCLA L. Rev.* 1057 (2001).

⁶ For a much more detailed illustration of the evolution of copyright law see P. Samuelson, “Copyright and Freedom of Expression in Historical Perspective” (cited at note 1) at pages 326–337.

⁷ The differences are clearly set out by E. Barendt, *Freedom of Speech*, (Clarendon, Oxford 1987), at pages 67 ff.

⁸ See however, with specific reference to copyright issues the critical remarks of D. McGowan, “Why the First Amendment cannot Dictate Copyright Policy”, 65 *U. Pitt. L. Rev.* 281 (2004); and “Information

– the theory of freedom of expression has been built as an individual right that could live side by side with wide administrative, civil and criminal laws regulating the establishment and running of a printing activity, at first, subsequently extended to the theatre, the cinema, radio and television.⁹ And it has been frequently stressed – often against attempts to introduce replicas of 1st Amendment theories – that the industries in the field of mass communications do not have more rights than citizens and, at the opposite, are burdened with “public service” obligations.¹⁰ Although these principles have been laid out mostly in defamation or injury to other personal-ity rights cases, their influence in copyright cases is – or should be – clear.

Let us examine the examples that usually are brought to illustrate the latent conflict between copyright protection and freedom of expression. In nearly all of them the defendant – or the party that invokes a freedom of expression exemption – is a media industry, which therefore is operating for a profit. The objection that is usually moved is that the media print or broadcast news that are of public interest and therefore are – or should be – authorised to do so in order to foster such a public interest. It is easy to reply – by copyright holders but also by a neutral observer – that also those who own the rights over the work are pursuing a the public interest in disseminating culture. If media could freely access copyrighted materials, they would rapidly be out of business. The truth of the matter is that industry – whether in the “cultural” domain or in the media – holds a double and ambiguous position. On the one hand cultural industries live on the centuries old principle that works of art, and not the ideas underlying them are protected. The broadness of the principle is regularly debated by those industries, mostly in the courts. They appear in front of them, from time to time, as plaintiffs recriminating over the unfair appropriation of their works, or as defendants claiming that they are new works devoid of plagiarism.¹¹ On the other hand they resort to all legal

Regulation and the Freedom of Expression: Some Realism About the Free-speech Critique of Copyright”, 74 *Fordham Law Rev.* 435 (2005).

⁹ I have tried to present these arguments in a wider context in *La libertà di espressione. Media, mercato e potere nella società dell'informazione* [Freedom of expression. Media, market and power in information societies], (Bologna, Il Mulino 2004).

¹⁰ This point is sometimes caught also in the American debate: “This trend in First Amendment law of the information economy – towards protecting corporations broadly, even at the expense of very real and immediate constraints on the expressive autonomy and democratic speech of individuals – is unstable because it represents a moral inversion of the First Amendment. The First Amendment is not a technical rule of law stating that government shall not make any law regulating information flows regardless of their source or nature. Rather, it is a constitutional provision central to the functioning of our democracy and the security of our individual autonomy” (Y. Benkler, “The Public Domain: Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain” 66 *Law & Contemp. Prob.* 173 (2003) at 204).

¹¹ This seems to be confirmed by the case-law cited to support the argument that freedom of expression should prevail over copyright: in *Dior v Evora*, a Dutch case, the parties were the French perfume producer and a retailer; in the *Mai-feiern*, *Bild Zeitung* and *Terroristenbild* German cases, the parties are two broadcasters and two publishers; and in another German case, *Monitor*, the parties were a broadcaster and a pharmaceutical company; and in the *CB-Infobank* cases the parties were a commercial research database

instruments and technical devices in order to protect the works they own; a typical example is the combined deployment of copyright, trademark and unfair competition protection. There is no substantial constitutional issue, but simply the question of where to strike the fair balance between the competing reasons. There are, obviously, public interest issues but this a common feature in all types of property rights: here the main public interest is to avoid monopoly over artistic expression granting adequate remuneration to those who produce the works.¹²

It is not at all clear why the media – but what stands behind the catch-all word: press, cinema, Internet, television? – who use all the legal opportunities to protect their works, should be given a special right to infringe other parties' copyright, beyond the general, but limited, principle of fair use.¹³

3. The Inapplicability of Article 10 of the ECHR and Article 11 of the Nice Charter

The reply to this objection is that the media are making use of their freedom of expression which is granted by Article 10 of the ECHR and by Article 11 of the European Charter of Fundamental Rights (the Nice Convention). If one considers it carefully, however, it is far from satisfactory.

First of all, does the privilege cover anything and everything that is disseminated by the media? Unless one accepts the over-broad American view according to which even peep-shows fall under the 1st Amendment,¹⁴ the answer is, obviously, no. Can a newspaper, claiming that there is a legitimate public interest, publish in instalments, without obtaining prior consent by the copyright holder, the last novel of a famous writer? Can a broadcasting station, for the same reasons, re-broadcast

and publishers; in the Dutch *Boogschutter* and in the French *SPADEM v Antenne 2* cases, the issue is the right to receive a fee for the reproduction of work of art and are solved on the basis of fair use principles (all these cases are cited P.B.Hugenholz, *Copyright and Freedom of Expression*, cited at note 2, together with many others in which the parties are always business entities).

¹² Even a supporter of the supremacy of freedom of expression over copyright expresses the view that “perhaps the most convincing of these arguments [against the existence of a conflict between the two values] is that copyright, as codified, already reflects a balance between free speech and property rights. In other words, the conflict between copyright and freedom of expression has been ‘internalized’, and presumably solved, within the framework of the copyright laws” (P.B.Hugenholz, *Copyright and Freedom of Expression*, cited at note 2).

¹³ Quite correctly D. McGowan, “Information Regulation” cited at note 8, at 459,460, points out that “The notion of wide dissemination of information has little relevance here, unless one interprets it to mean that free-speech doctrine protects all those who wish to distribute a work. That meaning is consistent with the facts of the case, but as applied to copyright it implies that the reproduction right itself is unconstitutional. Cogent as it is, few people want to make that claim”.

¹⁴ For a recent summary of the issues behind peep-shows see the Note, “Sex, but not the City: Adult-Entertainment Zoning, the First Amendment and Residential and Rural Municipalities”, 46 B.C. L. Rev. 625 (2005).

the Olympic games or the Champions League final, for which it has not bought broadcasting rights ?

This brings, necessarily, to a case-by-case examination of the content and of the ways it has been re-circulated, in order to establish if there is news-worthiness in that content and if such goal has been pursued *bona fide*. Law reports throughout Europe are full of cases in which defendants claimed that restricted photographs of a marriage or a christening had been published in order to satisfy public interest in the life of VIPs, and the Courts (including the ECHR) replying that there was no contribution to the debate over issues of general interest. As one can see, therefore, the whole issue, at the end, is one of fair use, a principle that has always existed and that can be tailored to new exigencies without invoking constitutional issues.

Secondly – and paramount – it should be seriously questioned that freedom of expression is especially bestowed upon the media. In the European tradition, both continental and British, freedom of expression is an individual right and belongs to the “body politic”: the citizens and their various forms of association (political parties, trade unions, etc).¹⁵ There is a striking difference between the First Amendment to the US constitution (1791) which affirms the principle of “freedom of the Press” and the French Declaration of Rights (1789) where (Art 6) the right to print is clearly instrumental to individual freedom of expression. The European legal and political traditions have always resisted the idea that “the media” should be vested with constitutional rights which belong, instead, to the citizens.¹⁶

Although the ECHR has, in some occasions, taken a stand that echoes US 1st Amendment theories,¹⁷ on the whole, it would be improper to extract from its case-by-case approach something more than a concern that legislative or judicial limitations go beyond what is deemed – upon the circumstances – necessary. Nor do the new provisions change the scene: Paragraph 2 of Article 11 of the Nice Convention – according to which “*Freedom and pluralism of the media are guaranteed*” – is clearly ancillary to the individual right to receive information which is stated in paragraph 1 and should be properly interpreted as requesting that member States eliminate the great number of administrative restrictions to the media business (especially electronic media) such as registration requirements, licences, special liability of editors and publishers, content control (there are striking, and unexplainable, differences between the publishing business, periodical press, radio, television, electronic communications), and introduce specific antitrust rules.

¹⁵ “The arguments for freedom of the press are arguments for a more general freedom of expression. But it does not follow that whatever supports freedom of speech also supports freedom of the press” (J. Lichtenberg, “Foundations and Limits of Freedom of the Press”, in Ead. (ed.), *Democracy and the Media*, (Cambridge, C.U.P., 1990) at 105.

¹⁶ “On balance, the arguments do not show why the media should be given preferential treatment in the law relating to free speech” (T. Gibbons, *Regulating the Media*, (Sweet & Maxwell, London 1998) at 29); and J. Lichtenberg, “The Foundations”, cited at note 15, at 128 (“*The press appears to be claiming special rights not possessed by the rest of us, and these require special justification*”).

¹⁷ See eg the *Lingens v Austria* decision (July 8, 1986) in which the Court seemed to suggest the adoption of the never-ending confusing criteria of “public figures”.

In a few words, constitutional rights and in particular freedom of expression, cannot be properly applied as a match winning argument in conflicts among undertakings, which confront themselves at arm's length in economic controversies than can easily be resolved through typical private law instruments (*ie* contract). When it comes to regulating economic activity, establish limitations to its complex and free deployment, single out public interests that must be preserved, it is up to the legislature and government to determine and introduce fair, non-discriminatory and proportionate measures. The broad and general principle of freedom of expression as a constitutional principle must not – and does not – serve the purpose and applied in merely economic disputes is apt to bring about distortions.

4. Fundamental Rights in the Information Age: Digital Literacy and Access to Networks

To deny that there are constitutional issues of freedom of expression in controversies among undertakings that hold copyright and undertakings that wish to use copyrighted works, does not mean that there are no constitutional issues with the ever-expanding copyright legislation. But these are to be found not in realm of freedom of expression but in that, which for many aspects is paramount, of access to information and data.

In order to avoid misunderstandings it is necessary to set some basic principles, which obviously are debatable but if accepted bring to certain conclusions and solutions.

Present-day societies are commonly referred to as information societies or, even more properly, knowledge societies in the sense that information (or knowledge, which is elaborated information) is the most precious element of our economic and social systems. Metaphorically, information is, nowadays, the most important raw material for any economic, social, political or individual decision-making process. Without information – rich, detailed, wide-ranged – decisions would be – or would be considered – casual.

There has been a race to appropriation of information which has been defined “the tragedy of the anti-commons”¹⁸: copyright, patent law, software protection, know-how, rights over data bases, personal data protection are some of the many examples of legislative measures, developed or highly strengthened in last few decades, which establish how this most valuable resource is allocated.¹⁹

¹⁸ M. A. Heller, “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets”, 111 Harv. L. Rev. 621 (1998); D. Hunter, “Cyberspace as Place and the Tragedy of the Digital Anticommons”, 91 Calif. L. Rev. 439 (2003).

¹⁹ for a first outline of the different questions see V. Zeno-Zencovich and G.B Sandicchi, *L'economia della conoscenza e i suoi riflessi giuridici* [Economics of knowledge and its legal implications], in *Dir. informaz.& informat.* (2002) at 971.

However economists have pointed out that information is something quite different from land or chattels and is what they call a public good: it is non rivalrous, non consumable, intangible. Its availability depends mainly on political decisions on what, how and for how much time it can be appropriated. The “tragedy” of present regulation is not so much in itself but rather in the fact that there does not seem to be a coherent plan but simply a piecemeal approach which tends to satisfy, or compromise, the most powerful pressure group of the moment. In this scenario, in which undertakings are competing among each other to gain the most and strongest privilege over information, the constitutional issue is not their struggle, but what is left to the public in general. Access to information is an essential aspect of citizenship: without information there cannot be an informed decision over political, social, economic or individual issues.

While in the past much of this information was passed through the media – which in the proper sense of the word were “intermediaries” – now, thanks to the information and communication technologies, these information are accessible directly from the source, or from a variety of sources, and can be re-directed from one individual to many other individuals. In fact, one of the main consequences of the dis-intermediation of information, is that the user is less and less a final user (such as the newspaper reader or the television viewer), and growingly a subject that re-elaborates and re-transmits, the information he has received.

If one looks at the right to have access to information, the first constitutional issue that arises – and that often is overlooked²⁰ – is that of digital education. Only those who are able to use information and communication technologies have an effective – and not only a nominal – possibility to exercise their constitutional rights. Overcoming digital illiteracy is as important a task as was overcoming common illiteracy in the 19th and 20th century.

The second constitutional issue – which often is not considered as such – is creating, maintaining and widening electronic networks. The wide-spread notion of universal service means that everybody must be given the opportunity, at a fair cost, to access the network in ways that must be, according to the state of the art, easy and fast. It is obvious that this has deep economic policy implications, but it is undeniable that the existence of such networks is as essential to freedom of access as roads, motorways, railways, airports are essential for the freedom of movement. There is no freedom of education without a public education policy. There is no right to health if there is no public health policy. There is no right of access to information if there is not a coherent ICT policy.

²⁰ See C. Uyttendaele and J. Dumortier, “Free Speech on the Information Superhighway: European Perspectives”, 16 *J. Marshall J. Computer & Info. L.* 905 (1998).

5. The Paradox of Free Access to Entertainment Contents

The third constitutional issue inevitably regards content: once all citizens are digitally literate and have an equal opportunity to access the electronic networks, does that mean that they have a right to access all the available content? The answer is, quite obviously, negative. Just as it is clear that freedom of movement does not entail free transport, the right to access information has many facets that require different approaches and solutions.²¹

It is important to dispose of, at the start, of what is presented as a capital issue and instead appears more like a *quid pro quo*. The issue of so-called file sharing or peer-to-peer communication inasmuch as it concerns entertainment (music, films, videogames, etc.) has very little to do with freedom of access to information and, in general, constitutional issues. Although entertainment has a undeniable and very important role in human societies it would be uselessly provocative to assert a “right to entertainment”.²² What, very simply, is required are sound public policies to avoid market abuses by those who hold exclusive rights over entertainment commodities. One can tighten or broaden the rights of those who have legitimately acquired an entertainment product, but this does not require constitutional reappraisals of a balance which is in the history of copyright and patent law and that has been gradually shifting in favour of the industry and now needs to be corrected. What must be avoided, in any case, is that corporate interests hide behind public interests adding distortion to distortion.

A good example of potential distortions is given by the proposal – which has been widely discussed in Europe – of introducing in the revision of the Television without Frontiers Directive (89/552) a specific right for broadcasters to retransmit “short extracts” of events of major importance.²³ Apparently the provision – which according to many is supported by the constitutional principles quoted above – would foster dissemination of news. What is not said is that it would be used mainly to re-transmit highlights of sports events. The rule, therefore, by invoking freedom of information would allocate property rights over sports events: a task that the

²¹ D. McGowan’s “Information Regulation”, cited at note 8, at 464, concludes that “free-speech critique trades on the formalistic weakness of free-speech doctrine to avoid dealing with a conflict between speech interests. It takes judicial language out of context and, when pressed, asserts a populist version of realism that insists that the less powerful in society have greater speech rights than the more powerful, because the less powerful have to be able to copy if they are to speak”.

²² Even the most influential supporters of open-information society, such as L. Lessig, conclude that “passion for Napster is wrong if it means that artists should not be paid” (“Copyright’s First Amendment”, cited at note 5, at 1064).

²³ See Preamble no 27 and article 3b of the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (COM/2005/0646 final) (and the amendments voted by the EP in its session on December 13, 2006).

market is able to perform much better and that requires intervention only if and when distorting practices arise.

6. Open Issues: News-Gathering, Scientific Information, Standards

Once one has cleared the field from very vocal but groundless instances for constitutional protection, one can discuss open-mindedly over those areas where exclusive rights can effectively hamper access to information. Insofar as news-gathering is concerned a good starting point is offered by the US Supreme Court in the *Associated Press v US* case,²⁴ in which Justice Black, writing a unanimous opinion, pointed out that exclusive agreements preventing the sale of news to non-members of an association (in that case AP and its affiliated newspapers) was against the 1st Amendment. Nowadays we would solve the problem resorting to competition law, and the ECJ decision in the *Magill* case²⁵ has even invoked the essential facilities theory.

It should be clear, however, that neither the US Supreme Court, nor the ECJ by establishing a right to have access to certain information meant free access, but simply banned monopolistic restraints of trade on information.²⁶

This means, in practical terms, that when faced with a constitutional challenge of exclusive rights over information one has to conduct a factual analysis, ascertaining:

- a) the nature of the information withheld
- b) if alternative sources of that information are available or could be easily found
- c) when the general public can have access to that information through only one provider, if that access is free (typically: free-to-air television) or for a fee and what is the amount of that fee (there is a clear difference between the cost of a newspaper and the subscription to an information service)

If, and only if, these requirements are found it would seem proper to impose “must offer” obligations at a certain price and at certain conditions.

Another field of great importance is that of scientific information. Here one should stress the wisdom of 19th century patent law: protection of the law is granted provided that the inventor makes public his invention. Competitors may not copy it, but take advantage of the knowledge incorporated in the invention in order to try to go beyond it. This policy has had lasting positive externalities fostering the step-by-step advancement of scientific knowledge.

²⁴ (326 US 1)(1945).

²⁵ Case C 241/91, *RTE & ITP v Commission*, decided by Judgment of 6 April 1995.

²⁶ Quite correctly, D. McGowan’s caustic remarks: “The point of the passage, to the extent it has any point other than as free-speech frosting on an antitrust cake, was to emphasize Justice Black’s belief that the law should protect small businesses over big ones” (“Information Regulation”, cited at note 8, at 459).

The *status quo* has been significantly modified in the first place by computer programmes which in themselves contain innovative knowledge. There is the right to study the software but it is clearly much more limited in its scope from that existing in ordinary patent law, especially in face of the tendency to apply software protection to software-related inventions and to business processes. One reply could be that this is a concern only for competitors, and therefore should be dealt by competition law. However it is clear that the history of scientific development in the last two centuries is only in part that of industry-made inventions. Most of the discoveries that have changed the face of the world have been made in independent scientific institutions and it is necessary that they be able to continue freely in their mission. What is at stake here is not only freedom of access to information but also freedom of scientific research.²⁷

Another field in which limitations to access to scientific information is that of standard setting organizations (SSO). When these organizations are private, standards are available only to their members. But even when these organizations are public, or publicly funded or endorsed, access to the standards they set is at a fee. One could question the compatibility of such a policy with the fact that these standards are, if not compulsory, strongly recommended, inducing industry to comply with them. The solution is that when there is a *de facto* standard it should be open and accessible to everybody at fees that cover the reproduction costs (which, with digital technology, are practically nil).²⁸

A further area of potential concern is that of public information. The issue has been widely debated²⁹ during the preparation of EU Directive 03/98 on the re-use of public sector information.³⁰

There is a general interest that this information (eg geographical and meteorological data, information stored by libraries, archives, museums) may be made available to largest number of people, without restrictions or creation of exclusive

²⁷ See eg the study promoted by the EU Commission on “An effective scientific publishing system for European research” (presented on June 15, 2004) whose aim is investigate “the future of printed scientific reviews, the risks associated with increases in the price of publications in terms of access to information for researchers, open access to research findings for all and the need to reconcile authors’ rights and the economic interests of publishers”. And the UK House of Commons Science and Technology Committee, *Scientific Publications: Free for All?* (2004) (which discusses thoroughly the author-pays dissemination model).

²⁸ For an appraisal of the issue see the research (in English) by the Fondazione Ugo Bordoni, *Standardization, Intellectual Property Rights and Evolution of ICT Industry in Europe* (Riva, Calderini, Giannaccari, Granieri eds.) (Rome 2003).

²⁹ See the 1999 Green Paper on Public Sector Information in the Information Society: “Public Sector Information: A Key Resource for Europe”.

³⁰ See K. Janssen – J. Dumortier, “Towards a European Framework for the Re-Use of Public Sector Information: A Long And Winding Road”, (2003) *Int’l J. L. & Inf. Tech.* 184; S. Saxby, “Advisory Panel on Public Sector Information Releases: 2005 Annual Report”, 21 *Comput. Law Secur. Rep.* 437 (2005); for an Australian perspective see H. Burkert, “*Public Sector Information: Towards A More Comprehensive Approach In Information Law?*”, 3 *J.L. & Info. Sci.* 47 (1992).

rights³¹. In this domain one can easily see not only an individual right of access but a related duty to disclose bearing upon public bodies. The constitutionalisation of this right of access is well recognized not only in national constitutions but also in the Nice Convention (Article 42) and is widely applied in the field of environmental and health information. This approach is relatively recent and is in sharp contrast with a tradition of restricted access to public documents. It is easy however to detect, once again, a content issue: while certain public information are ever more open, the State strengthens its copyright over works of art (paintings, sculptures, monuments) that it owns.

7. Conclusion

As one can see, waving the banner of freedom of expression against exaggerated privileges of copyright holders may be gratifying from a political point of view, but when the problem undergoes attentive scrutiny the reality is rather less seducing. Very frequently constitutional guarantees are invoked by those who are not entitled to them and only to make a profit. In other cases there is no genuine freedom of information or of expression issue, but simply the aspiration to free entertainment. One is, therefore, forced to distinguish carefully content, medium, rights holder, market dynamics in order to establish if individual constitutional rights are being compressed. In many cases the legislature or the Courts have already intervened taking into account competing values³². In other situations this has yet to be done through thoughtful legislation and attentive case law³³. It is however doubtful that broad-sweeping statements purporting the violation of fundamental rights will do the job.

³¹ For public information detained by the EU see the EU Commission Decision on the Re-use of Commission Information, adopted on 7 April 2006, published in OJEU L 107/38.

³² Y. Benkler, "The Public Domain", *op cit*, bases his article on a four extreme cases (only a few brought to Court and none, at the end of the day, limiting free speech). This approach seems to forget that "hard cases make bad law" (which is the realist antidote to the continental dogmatic approach of trying to nullify a general rule by making weird and unlikely examples in order to prove that, although it may work in most cases, it is incoherent).

³³ The conclusion is not dissimilar for the more open-minded free-speech advocates: see P. Samuelson, "Copyright and Freedom of Expression" (cited at note 1 at 344): "Believers in the modern concept of copyright must work together to develop a more powerful rhetoric with which to preserve constitutionally grounded values in copyright law and policy. Rhetoric alone, however, will not suffice. Policymakers must also receive guidance about how these values can be specifically implemented in copyright rules that will truly "promote the progress of science and the useful arts" and preserve an open and democratic society". This, needless to say, requires a balancing approach (not dissimilarly see L. Lessig, *Copyright's First Amendment*, cited at note 5, at 1073: One can "resist the expansion of copyright at one time, and support its growth at another, all in the name of balance").

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