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There is More of a Difference than Many Think

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ABSTRACT

Apart from technology, the information age has up to now badly served its idol. It has failed sufficiently to recognize specific features of information. This is shown with respect to the question whether legal rights on information can take the form of ownership. The answer is negative considering that communication by its very nature is free and constitutes a basic value, and furthermore that law is itself information and cannot systematically dispose of information flows. Analyzing the phenomenon of information, the differences of its properties as compared with those of a physical object are illustrated and assessed as fundamental; ownership would therefore be for information a Procrustean bed leading to mere arbitrariness. Intellectual property, although granting exclusive rights concerning information is not by itself opposed to these findings. But the conflict arises, if its purpose of shaping competitive advantages is spoiled to the detriment of information flows by lack of neutrality in two senses: the lack of balance between the title holder's value generation and the reward, and of neutrality towards the various kinds of communicative relationships.

Keyword: Information properties, free communication, intellectual property, ownership of information

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1. The basic function of information law: Deciding on disclosure or non-disclosure

Ownership of information, which I propose to examine here, looks as a rather fundamental issue. But the basic legal question lies still one further step behind. Ownership means attribution of an object to a subject by the law. This is a matter of legal technique, meaning that rights to information should have the form of ownership. This question of *attribution* implies a previous decision on *distribution*. It is the question on the merits of claims with respect to information.

That there are such claims already implies that the law in fact *has* to do with information. The alternative would be that information is simply free and irrelevant for the law. Indeed, this radical proposition will never be able to be repelled in principle, because there will always be at least *some* information which will evade the worst legalism; I will revert to that and will suggest that the solution is to be sought not by differentiating the substance of the information, but by placing the layer of regulation on the relational level (infra #2). But the fact which we are not able to change is that the law, in an immense and ever-growing amount of instances, seeks to steer information. That is to say, it decides upon opening or maybe closing certain information channels, i.e. it determines who may claim or may (or must) withhold an information. Guiding lines upon which to make those decisions are almost entirely missing all over the world. Look, e.g., how claims for disclosure of government files are handled by legislators: the rules tend to build on basic concepts which are

unsafe altogether, be it the relevance of information and similar standards on which to base the claim, or privacy and secrecy and the like to be put forward against it.

Thus, the guiding criteria must work as a switch which determines "on" and "off" of information channels. The criteria for disclosure and for non-disclosure being, as I say, unsafe themselves, it is obvious that those for settling the confrontation cannot be better, and the maximum which the various legal systems offer in that respect is some very general and unsubstantial formula like weighing social or individual importance of interests. There is no standard deciding upon the position of the switch, be it only because the motives of the law for providing a flow of information are of a different nature compared with those allowing information to be withheld. Disclosure of information is serving specific purposes like transparency for the functioning of a certain market, or instructions for safe and optimal use of a device, etc. On the other hand, withholding information can from the legal point of view be just a matter of allowance, not of ordinance; that means that the idea behind simply is to grant the individuals an area of freedom.

It seems, therefore, that we are asking from the law something which it is just not capable to provide, namely the rationale behind its decision to open or close information channels. Another line of thought indeed confirms the finding fundamentally – you may call it a "philosophical" approach, although I prefer the term "theoretical", because "philosophy" is good, but theory is the indispensable basis for the law's authority. *The argument is that law itself is information*. Therefore, law by definition is just a segment of all existing information, there will always be information "beside" the law. These are the great masses of information, of which the law is not aware, because it has been generated before independently from the generation of the law, or thereafter. Of course, the law can do what it forbids others to do, namely selling the blue sky and ruling on things the law does not grasp. But this makes law arbitrary in content and enforcement.

2. The criterion is "only" relational; hence, information in a general legal sense is a movement (the flow), not a message

The keyword, in my view, is communication. If not by the state, the rules on distribution are set by the persons and entities themselves as they are in the exchange of information, i.e. in communication. Communication has three features which determine its legal position:

- First, communication is free. By definition, it is an interaction of *individuals*.
- Second, communication is a value. This opposes it to information, the positive or negative effect of which entirely depends on the case (infra #3). Interaction of human minds is a vital aspect of human existence. Law therefore not only has to leave it free, but has to protect this freedom.
- Third, communication has a norm-setting capacity. It not only transfers information, but also rules on how to treat it. Think only, for example, what human voice is able to indicate beyond the words: "Just among us", "Incidentally", "I expect an immediate answer", "Danger lies ahead", anger, love, irony, each calling for a respective treatment of the words transmitted. By standardization, these primarily individual norms become to a certain degree more generalized cultural norms. For example, in a formal gathering there is a right of utterance of the participants which at least in Western cultures does not depend on specific paragraphs in any laws of the specific country.

These norms governing the handling of information are not by themselves of a legal nature. As far as they are not, they are of course not legally enforceable. And contrary to the law promulgated by the agencies of the state, they are of a relational nature. They are created by individuals for themselves.

One consequence, out of many, of this view is that, legally speaking, information is seen as an act. The law protecting communication does not deal with the respective content of information exchanged, but only with the exchange as such. The abstraction from content characterizes the law in this respect as procedural – see, e.g., freedom of speech, but also, as an example of closing a channel, the professional privileges in court. Rule-making within this framework is delegated to the parties. These rules, in turn, are dealing with information which is *shared*. In the categories of rules, they are not attributive and therefore are not property-related, but they regulate a relationship of the kind of a partnership on how to handle the shared information.

3. Information has no intrinsic value

The era of the information society has brought about an enlightening consciousness for information – a term which hardly existed previously and which flooded thought of the 20th century beyond all field boundaries. Never since the middle-ages was there such a sweeping movement, and it would be entirely insufficient simply to link the discovery of information as a phenomenon of its own to the new technology – rather is the technology itself a fruit of that discovery. But now precisely this new consciousness of information as being "something" could in turn cause the loss of the intellectual trophy by treating it just as a good alike others.

Physical goods have a long legal history focusing around the concept of ownership. This triggers an enormous temptation to find a place in this well-established building for the newly discovered and legally homeless phenomenon called information. But information is too different from a physical object to be treated legally as if it were one. Information is not by itself a good. We will then add

(infra #4) that, as far as it does constitute a good, it nevertheless has no sufficient similarity with other goods protected by law to draw the analogy.

Information is (for legal purposes, letting aside economical aspects) not by itself a good: it has no imprinted value. We see examples everywhere of the belief in the curing value of information being disappointed or at least requiring more differentiated analyses and more sophisticated systems. Neither seems discovery to have helped peace or truth in civil procedure nor capital market disclosure to have reduced the volatility of security rates, nor free speech or freedom of information to have strengthened trust into governments or governmental institutions. But also a course you have attended and which you could have covered much more clearly and in one fourth of the time just by reading the materials, cannot actually be called a value for you. How ever it be, the basic consideration relevant here is that all information which is not useful is counterproductive. Any information has to be opened like a nut, and the opening requires efforts, which very much risk to absorb energies, desperately short anyway, to the detriment of dealing with other and more useful information. It is the problem of information overkill. Furthermore, information only is worth something if the recipient draws the right conclusions. And how to apply information is not simply to be taken from an instructions booklet, but is to be decided anew for each piece of information and each setting into which it falls. Misunderstandings are not of a generally minor likelihood than good understandings.

Information therefore depends in its positive or negative value on the situation of the participants. The sender may be more or less skilled to express himself, and even more crucial are the circumstances on the side of the addressee. He is more or less fit to receive the information (he knows the language, he can assess the message's impact from his background knowledge, etc.). And the context in which he lives gives it very much differing importance (a notice on the imminent

bankruptcy of an airline has a different weight for its employees, for a ticket-holder or a schoolboy at the other end of the world).

This is not the same as saying that for example a car has different values for the individuals, fulfilling a need more for the ones than for others, and that the value may even be assessed negatively when the car's deficiencies cause an accident. Nevertheless, in the case of a car, certain expectations can be attached to buying it. The reason is that a car is a standardized item, whereas information, as we have seen, is not. Of course, it is not logically impossible to imagine that despite its extreme volatility and possible negative value property rights are attached to information. But it would not make sense, since the main function of property rights is to render the respective values viable for market transactions, which very much require the standardization.

There *is*, however, standardized information. This is, for one, information of the recipe kind, which promises a certain positive effect when its instructions are followed: how to make Coca-Cola or bigger and better elephants. The same is true, if a company announces the forthcoming disclosure of an important event with a bearing for the exchange rate of its shares. These types of information might here and there have something like a market. But the question remains, whether on such a market the typical action is a transfer, with a title passing from one person to another, which would call for property rights as the adequate instrument. The following suggests that information is no such object.

4. Information is not an object

Up to now, we have approached our topic from two sides. We have considered, as a matter of justice, the need to leave the governance of information to the interaction rules to which the parties

submit themselves. Information thus appears in the legal perspective as a movement from an individual to another, and the law is not fit to attribute information as it does attribute physical objects. The other approach was a first step in observing to what extent information is a phenomenon of its own. The individuality of its value makes the legal technique of property rights inadequate.

Consideration of the qualities of information is now to be pursued from "should not" to "cannot".

Property is governed by the principle of speciality; this principle says that the status is determined for each object separately. This means that the law has to determine what an object is. However, regarding information we notice obstacles in identifying information units which are analogous to physical objects. I list three qualities of information resulting in difficulties of this kind.

First: Under property law, identification is made "from outside". A car can be seen as a car by anybody, and therefore respect for another's property can be claimed from anybody. Transferred to information, this would mean that the title on that information has to be respected by persons not knowing it. This cannot be done just be referring to the recipient. You cannot say that everything held in a person's head is just one piece of information, being extremely heterogeneous and furthermore being for the most part shared with others who could claim it as well.

Second: A car remains the same car when it is moved to another garage. Information, on the other hand, very much depends on the persons and the context, as we have already seen. One hearing the fire alarm for the first time reacts otherwise than one who hears it fifty times a day. The legal solution cannot be to strip off all these additional facts and to isolate, so to speak, the information per se. This would mean to miss protection of what is precisely worth protecting in information. To

the fellow hearing the fire alarm for the first time we should explain that there is no reason to flee; otherwise the signal would be seriously misleading. Not the alarm by itself is the relevant information, but its correct interpretation. In addition, and to state it again, abstraction from context would bring about a huge overprotection creating a mass of claims for the same information. The attributive function of ownership, aimed at harmony of rights on the goods of this world, would seriously fail.

Third: The issue thus is the segmentation of information. It has become clear from the preceding that we do not arrive at the "pure" information by granulating it down to its smallest elements, say bytes. In this sense the comparison with the physical object does work: The car is not to be legally split up into its atoms either. For physical things as for information, such a reduction would follow the radically wrong direction; since atoms and bytes are faceless, they do not allow to identify the object. The object, legally, is a composition of the elementary parts in view of a specific purpose, like precisely a car or a wheel to be built into a car, or in view of their consolidation, like a crystal.

But now try to apply this to information. "The" information is just one phase in a long way of processing. With respect to the car it is clear that the manufacturer of the steering wheel is not a co-proprietor of the assembled car. But the generator of pre-phase information which is built into another piece of information cannot loose his proprietary rights, because the information may still serve other purposes. One says "I think", the other says "I am" and the third "I think, so I am". The intellectual fame will go to the third one, but is that the criterion? From a contextual point of view, what the two others said maybe philosophically unimportant, but it is still an information, and, what seems to me to be crucial, a different one: maybe that the first utterance expresses the wish not to be disturbed, and the second the battle of un unwanted child for its position in the family. How ever, all three are messages of their own, and if there should be property on information, there is no reason

to exclude one or the other. This implies that there is no motive to seek a criterion for choice, such as importance or any other. To state it once again, since the value of the information is entirely depending on the individual settings, no standardization as law would require is available.

Another example: One statement is that Caesar was murdered in 44 B.C. Another communicates that Brutus was the murderer. Is there any means to put these statements into a hierarchy with the effect that one would consume the other? The second depends on the first, it refers to it. But *any* information is depending on a lot of previous information. *Both* statements claim interest based on some additional knowledge of the addressees about who Cesar was, but following up the genesis of information is indefinite and leads the dependency argument ad absurdum. And apart from the history of the information: both of these statements use English language, but this enormous dependence on the knowledge of the media will not be a reason to pay royalties to the inventors of English. Could importance be a criterion here? For many, the first statement will be the more important. But for others wanting to go into more depth about the political situation in Rome at that time, the question who murdered may be the more interesting one, and even more so for the one interested in etymology discovering that "brutal" comes from "Brutus". There is no measure to gauge information importance.

All this is based on the chameleon-like quality of information; like this animal, it changes its color with the surroundings. A transfer, but also mere lapse of time or additional learning is a change of surroundings. The value of information depends entirely on what the recipient can and wants to do with it. On the other hand, determination of what "a" information is, requires an objective standard precisely withstanding transfers and other changes of environment. This not being feasible, information is not a thing.

5. Ownership is an inadequate institution for the legal treatment of information

Ownership grants exclusive title to an object. Exclusivity, however, is not obtainable for information, because others may have acquired it independently. These people cannot be barred from claiming the same rights.

Ownership attributes objects to persons. Following the classical Roman scheme, it has two wings: it prohibits the trespass (actio negatoria) and grants a claim to redeem the object from third persons (rei vindicatio). With respect to information this makes no sense. Information cannot be trespassed; trespass only is conceivable for the walls or other boundaries which protect it. And getting away from the holder (the case of vindication) does not exclude that the holder keeps it as well – unless he has forgotten it, and then he will not be able to identify and to claim it. And the persons having received it cannot give it back; "forget it" cannot be a legal injunction.

Beside these formal considerations, there is a functional inadequacy of ownership for the task which the law has to fulfill concerning information. Ownership attributes goods which in their totality can be overlooked. Information, instead, is in the prospective of law an open mass. Whatever the law does in attributing rights on parts of that mass will necessarily be arbitrary. It will further the one or the other side, the known or the unknown information, without being able to give a reason, because it cannot compare. From your telescope, you cannot aim at targets on the backside of the moon.

Intellectual property, in its traditional understanding, is not opposed to these findings. True, it refers to information and it grants exclusive rights. Nonetheless it is not an exception to the impossibility of reification of information, but rather confirms it. Intellectual property does not *attribute* information; for patents it is even the opposite, their content being published. Copyright as well is

intended not to stop but to further the flow of information by making publication economically interesting. Copyright, according to its basic idea, protects the presentation and not what is presented. Patent is the recipe kind of information which is close to a marketable object (supra #3) even without a patent. What is decisive, however, is that both copyright and patent grant exclusivity on the *use* of information only. In this sense it is not aimed at the flow of information, but at the holder's competitors. It grants a competitive advantage.

6. Conclusion

The sum of these considerations is that information is not an object for ownership. It *should* not be and it *cannot* be. It should not, because communication, being the exchange of information between persons, is an act occurring among these persons and is therefore determined by them, and constitutes one of the highest social values. And it cannot, unless being arbitrary, because it is not possible to form information units by cutting them out from their context with other information (horizontal aspect) or their ties to previous and subsequent information (vertical aspect). An abstraction from the informational situation of the case would create a lot of conflicting titles and thereby miss the attributive purpose of property law. Property law is furthermore inept, because in the case of information exclusivity cannot be granted and because its sanctions are inadequate. More fundamental is the consideration that from the point of view of justice the function of ownership as an institution falls short regarding information. Protective efforts of the law should focus on values, and the chance of a positive value of information is essentially not bigger than of a negative one. And since the mass of information is open, no criteria based on justice are available for attribution.

Professors stop where on TV the commercials start, namely when the drama builds up. "Should not" and even "cannot" are no restraints for legislators wanting to follow any policy. And in the

field of intellectual property we recognize everywhere an eagerness to reward investments by broadening the protection area. This casts doubts on the leverage of reflections as they are presented here.

Indeed, and even more than that: Not only are theories politically weak by nature, but the one offered here is not necessarily an argument against these tendencies. They do not as long as intellectual property law lets the flows of information alive or even enhances them. That a price has to paid by the user, is not an objection from the outset. But it is one, if the law is 'unclean" in the sense that in it goes beyond its purpose of granting a competitive advantage. If no mouse could be drawn and no joke on Mr. X be told without violating a copyright, this copyright is blocking the movement of information, because a price is to be paid beyond the performance to be rewarded by that copyright.

And I think there is another, even more severe test. Information law contains a very strong non-discrimination rule. The subjective character of information value lets fall the respective interests into the black-box. We cannot say that the economic interest is worth more than a purely intellectual one, or (without being elitist) that an interest shared by 1% of a population is worth less than that of 99%, or that gossip is no legitimate interest at all – the spectrum must be similarly broad as under the auspices of free speech.

The expansion of intellectual property rights disturbs this equality, even if the policy of rewarding is sound, because there must also be a place for the "light" dialogue far away from law firms, for contacts orally or on internet or otherwise, where making sure that no property rights are infringed or that permits are granted and royalties paid is contrary to the type of interaction. This is a matter

of freedom of communication, and freedom of communication is, and I am not alone with this view, an element of free speech.

I will end here, at the entrance to a further space. I hope I came close enough to the drama to show that theory is needed precisely when in the turbulence of pragmatic life a firm stand is asked for.

Reference: For more details cf. my book "Information als Gegenstand des Rechts" (Information as subject of the law), Zurich/Baden-Baden 1995.