

SELECTED INTELLECTUAL PROPERTY ISSUES AND PSI RE-USE*

by

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Intellectual Property Rights (IPRs) interfere with Public Sector Information (PSI) access and re-use. Therefore the PSI covered by IPRs needs to be identified and the management of IPRs needs to be analyzed for exploring different policy options in the area and possible legislative amendments. In particular the issue for which LAPSI's contribution is sought can be described as follows: "How can PSI re-use be fully enhanced without creating any prejudice to existing IPRs? What are the IPRs best practices of management for fostering the re-use? Who would decide in practice on the best practices (Member States, public sector bodies...)?". Accordingly, the analysis presented here specifically focuses on the interfaces between PSI and IPRs, with particular attention to PSI covered by IPRs which belong to PSBs. As to the exercise of PSI covered by IPRs, more exhaustive hints can be found in both the LAPSI position paper and conceptual framework on licenses.

KEYWORDS

Public Sector Information (PSI) - Intellectual Property Rights (IPRs) - Protection - Ownership – Exercise

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ENHANCE PSI RE-USE AND RESPECT OF IPRS: HOW IPRS CAN BE MANAGED TO FOSTER THE PSI MARKETS AND OPEN DATA STRATEGIES?

This work focuses on the exercise of Intellectual Property Rights of Public Sector Bodies. In order to understand this core issue it is crucial to clarify what are the rights, subject matters and the subjects involved.

1. INTRODUCTORY REMARKS

Intellectual Property Rights (herein after IPRs) are traditionally justified in two different ways. According to the giusnaturalist approach the IPRs are natural rights and they therefore find place in fundamental charts and constitutions. According to a utilitarianism perspective IPRs are tools for promote the social, cultural and economic development. Whatever is the accepted justification some considerations deserve to be made. First, in IPRs it is always possible to find an economic component, enabling creators, inventors and investors to cost recover and be rewarded for their intellectual initiatives. In some cases it is also possible to find a moral component, enabling mainly creators to satisfy their extra-economic interests. Second, it is traditionally argued that IPRs indirectly promote the cultural and social development and therefore boost the market. Recently, commentators revealed to be sceptical as to IPRs as a tool for development in particular with reference to their authorization-based paradigm. This scepticism leads commentators to express reluctance as to the exercise of IPRs and to encourage the circulation of information according to other paradigms, such as a wide information sharing and re-using based models¹. So far about the private sector.

Public Sector Bodies (herein after PSBs) produce, collect, reproduce, make available and disseminate a wide range of information, data and documents in many areas of activity while accomplishing their institutional tasks. The set of all this information is generally referred to as Public Sector Information (herein after PSI). PSBs daily question how to deal with PSI in order to handle their public task and achieve their institutional purposes efficiently. PSBs may question how to deal with PSI covered by some IPRs; in particular they may wonder 1. whether the existence of IPRs may somehow

¹ Among the most meaningful scientific contributions: Benkler, Y. 2006, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, Yale Press, New Haven; L. Lessig, L. 2008, *Remix. Making Art and Commerce Thrive In The Hybrid Economy*, The Penguin Press, New York.

interfere with PSI availability and exploitation and 2. which IPRs management would be the most appropriate for achieving institutional purposes efficiently: would an exclusive management as the one often exploited by private sector bodies be efficient for self-financing purposes? Would such a model be indirectly functional to the achievement of institutional purposes? Or would non-exclusive or open licenses-based methods favour the PSBs implementation of their public task? Therefore, in order to understand how PSBs can use IPRs for implementing their public task, the interface between IPRs and PSI needs to be studied. In other words, it is important to understand whether and in which way IPRs management may serve institutional missions of PSBs.

In addition to this, a broader and more articulated approach should be adopted. The main aim of the Directive 2003/98/EC (herein after the PSI re-use Directive) is to enhance re-use of PSI for enhancing the market. In other words making PSI available would not only serve to achieve institutional missions of PSBs (if any in these terms) more efficiently, but it would also be a component of a broader strategy for implementing the single EU market². This approach seems to suggest that the market can take advantage from a broad circulation and re-use of information-based models. Differently the norms on copyright and related rights seem to suggest that a high control over IP assets enable the economic growth³. Of course a high level of protection of immaterial assets is in conflict with a wide circulation of the information. This macro-tension between the two different and complementary rules and protected interests certainly deserves to be analysed. The LAPSI Thematic Network considers that a wide circulation and re-use of PSI based policy would create a more competitive and fair market compared to an exclusive right management based model⁴. According to this position a wide PSI re-use would benefit both PSI producers and holders on one hand and re-users on the other hand, social costs would be recovered in the long term. Differently when PSBs invest substantially in the control of the PSI dissemination and intend to create self-financing mechanisms for instance by ex-

² And therefore serve the implementation of free flow of goods and services.

³ See for instance recital 4 of Directive 2001/29/EC.

⁴ Recently the open data trend interferes with the current legal framework on PSI and underlines that an intense PSI re-use would not only serve market purposes, but also a more transparent and democratic society. Some first considerations on the evolution of the protected interests related to access and re-use at the European level are developed by Cerillo, A., Galan, A. 2006, *La reutilización de la información del sector público*, Comares, Granada. More recently see the documents of the European Commission: 'Digital Agenda 2020: Turning Government data into Gold', http://europa.eu/rapid/press-release_IP-11-1524_en.htm?locale=en

exploiting their IPRs in a traditional way, costs may be recovered in the short term; however social benefits would hardly show up in the long term, because of too high barriers to enter some markets. This position explains why a re-use paradigm should be favoured compared to a control based model in both, a macro-tension (re-use v. control) and PSI re-use (from PSBs) perspective. In order to implement such a framework, PSBs and public undertakings need to be aware of PSI re-uses norms and of the overall advantages deriving from a wide re-use or possibly open data strategy. In other words, PSBs should be given the awareness, the technological and financial tools to implement (open data and) re-use strategies and they particularly should be taught that their control over the information they possess is more costly than the release of this information for its re-exploitation from the society. It is crucial to raise the PSBs awareness regarding these points. Anyhow, in case the widest re-use becomes the priority-benchmark, the respect of the existing fundamental⁵ secured interests, such as those protected by IPRs⁶ over some PSI should, however, be ensured. Therefore, the analysis of the interfaces between PSI and IPRs management is crucial to strike the balance up between the circulation of information-based market and transparency on one hand and the protection of interests of creators and investors on the other.

Having said this, the main challenge derives from the fact that the PSI re-use Directive covers the PSI of 27 Member States (and applies to 30 states, including the EFTA countries) and potentially much of the information of all PSBs is covered. The PSI re-use Directive operates in a field marked by great diversity in terms of size, structure and organization of the bodies it addresses. It can affect information policies of both small local municipalities and large national information producers. Therefore, in order to foster the market according to a wide re-use paradigm, it is important to identify (interferences between PSI and IPRs at first and) the general principles applicable to all PSBs as to the IPRs management; finally it is essential to define tailor-made IPRs management policies able to answer to the specific needs of PSBs. In order to identify best management practices, it is crucial to determine when PSBs are IPRs holder over the PSI they possess and, pre-

⁵ See art. 17.2 of Nice Charter of Human Rights. This reference is stressing the nature of IPRs as fundamental rights. The Charter is a binding document for all the EU Member states. It has to be added that art. 17.2 imposes that IPRs are protected, but it does not indicate how. This legal tool has to be read together with the other international binding provisions for EU member states, such as TRIPs, imposing an authorization paradigm, i.e. IPRs as exclusive rights.

⁶ As suggested in recitals 22 and 24 and art. 1.5 of Directive 2003/98/EC.

liminarily, when PSI is covered by IPRs. This last statement is closely related to the wording of the PSI re-use Directive (see below n.3), which applies only to the PSI not covered by IPRs and to the PSI covered by IPRs held by PSBs. PSI covered by third parties IPRs is excluded from the specific re-use regime⁷.

2. THE NOTION OF PUBLIC SECTOR INFORMATION

In order to fully understand the issue, it is important to define what PSI is composed of, who is producing it and in which context. This information also helps to identify when PSI is covered by IPRs and which ownership rules apply.

The LAPSI Thematic Network is referring to PSI in its broadest sense from several perspectives. As to the subject involved, PSI is composed of data, information and content generated or managed by any PSB and by public undertakings directly flowing from, at least to the extent the latter are not exercising their economic functions⁸. As to the subject matter, PSI may include (among others) legal, judicial, administrative, social, economic, geographical, cadastral, weather, tourist, business and cultural information⁹. As to the territorial coverage (geographical perspective), the LAPSI Thematic Network is referring to PSI circulating within the EU and EFTA boundaries, generated or managed by EFTA or EU based PSBs or public undertakings.

Most of the PSI is produced by PSBs or public undertakings, i.e. by employees or contractors. This category of PSI covers official texts of a legislative and administrative nature, which can be defined as the documents produced by PSBs or public undertakings closely connected with their institutional mission, such as laws, regulations, cases, decrees and also databases¹⁰. It also covers other documents produced by the PSB or public undertaking which are not necessarily official acts, such as reports, green papers and sur-

⁷ As to the encouragement to re-use this kind of PSI, solution should be studied in the specific IPRs field, with particular attention to fair uses and contractual solutions or to antitrust measures applicable to the IP field. This issue is subject matter of research studies. See the EVPSI research contributions on this issue.

⁸ See LAPSI Paper on Public Undertakings, available at www.lapsi-project.eu/materials

⁹ See Recital 4 of Directive 2003/98/EC, referring to patent and educational information as well. As to cultural information, in line with the documents produced by the OECD in 2006, the LAPSI Thematic Network has always included it within the PSI for avoiding any unjustified discriminatory treatment among PSI of different nature. The proposal for review of Directive 2003/98/EC changes the approach as to the exclusion of cultural institutions per se and therefore seems to be in line with this position. More details on this specific issue are in the LAPSI WG5 draft policy recommendation on cultural institutions, available at www.lapsi-project.eu/materials.

¹⁰ Galli, P. 2012, sub art. 5 l.a., in the *Commentario breve*, ed. L.C. Ubertaini, CEDAM, Padova.

veys. Most of this information is eligible as work and, therefore, in principle it is copyrightable. This because EU law does not exclude government information from copyright or database protection; generally for copyright the required creativity is not very high, so many texts, visual works or data collections are able to attract copyright or (in the case of data collections) the sui generis database right. Some of this information can *ab initio* be in public domain either because it is not eligible as creative work of art (mere data, facts, information) or because the (economic) protection has already expired.

Part of the PSI is not generated by PSBs or public undertakings but collected, held (or assigned to) and managed by them. In particular works collected by libraries, museums or archives fall in this category, but also other databases or other data, information of different nature. This category is composed of information which may or may not be eligible as copyrightable subject matter. Some of this information can *ab initio* be in public domain either because it is not eligible as creative works (mere data, facts, information) or because the (economic) protection has already expired¹¹.

3. REFERENCES TO IPRS IN THE PSI LEGAL FRAMEWORK

IPRs are intensively referred to at different levels in both Directive 2003/98/EC and in the Proposal for Review of this Directive (herein after the proposal) issued by the European Commission on the 12th of December 2011.

A first reference has to do with the scope of the Directive 2003/98/EC. In particular art. 1.2 lett b) of the PSI re-use Directive states that the re-use regime shall not apply to documents for which third parties hold IPRs. Recital 7 of the proposal is in line with that. Two specifications need to be added on this issue. First, the IPRs referred to only concern copyright and related rights (including sui generis database rights), as indicated in the current recitals 22 and 24 of Directive 2003/98/EC. This means that on one hand, the PSI re-use Directive does not affect the other IPRs of PSBs, e.g. trademarks, trade names, designs, patents¹². On the other hand, the sui

¹¹ In such a case moral rights may still protect the information and create a “controlled public domain”. The expression is due to P. Sirinelli.

¹² However the LAPSI Thematic Network is not neglecting the analysis of some industrial property rights, as showed by R. Dinca, ‘Policy Recommendation of WG1 on Commercial Secrecy’, available at www.lapsi-project.eu/materials. In addition some consideration on PSI and distinctive signs are developed within the EVPSI research project, of which research team is constantly in contact with the LAPSI Thematic Network. See www.evpsi.org/materials.

generis protection of databases shall be included in the scope of the PSI re-use Directive as a related right because of the main features that this kind of protection has in common with all the other neighbouring rights¹³. Second, it has to be specified that art. 1.2 lett. b) of the PSI re-use Directive and recital 7 of the proposal are referring to economic rights only because moral rights generally belong to the natural person creating the information and they often cannot be alienated or waived in most of the EU countries. Should this reference cover moral rights too, the scope of action of the PSI re-use Directive would be excessively narrowed down. Thirdly, with particular reference to cultural institutions, art. 1.2 and recital 7 of the proposal seem to delimit the PSI ruled by the specific re-use regime. In particular recital 7 of the proposal states *in fine* that: “if a third party was the initial owner of a document held by libraries (including university libraries), museums and archives that is still protected by intellectual property rights, that document should, for the purpose of this Directive, be considered as a document for which third parties hold IPRs”. Should the cultural institution be included in the Directive 2003/98/EC after the revision as suggested in the proposal¹⁴, this provision does narrow down the amount of PSI covered by the specific re-use regime excessively, since initial IPRs owners are mostly third parties.

A second reference has to do with ownership of IPRs of PSBs’ employees. Recital 8 and art. 1.5 (introducing a paragraph *in fine*) of the proposal indicate that the provisions of the PSI re-use Directive are without prejudice to the economic or moral rights that employees may enjoy under national rules. These provisions are a reminder of the fact that the PSI re-use Directive is not suggesting anyhow presumptions of IPRs transfers or licenses from creators to the PSB of affiliation (or to the PSB which ordered the work). Ownership and management principles are ruled by the specific copyright norms and national contract regimes. This interpretation can also be applied to the above mentioned recital 7 and art. 1.2 of the proposal.

A third reference has to do with the charging policies that PSBs may impose. Recital 12 and art. 6.2 (introducing a new *incipit*) state that in exceptional cases, in particular where PSBs generate a substantial part of their operating costs relating to the performance of their public service tasks from

¹³ For an in depth analysis on this issue M. Bertani, M. 2000, *Diritti esclusivi e industria culturale*, Giuffrè, Milan.

¹⁴ See the LAPSI WG5 Policy Recommendation on the Inclusion of Cultural Institutions under the Directive regime, at www.lapsi-project.eu/materials.

the exploitation of their IPRs, PSBs may be allowed to charge for the re-use over and above the marginal costs, according to objective criteria. With particular reference to cultural institutions, according to recital 12 and (the new *incipit* added by) art. 6.3 of the proposal libraries, museums and archives may charge over and above the marginal costs for the re-use of documents they hold. In particular, these references have to do with the exceptions to the marginal cost charging principles suggested by the proposal that the LAPSI Thematic Network is studying¹⁵.

4. WHICH PSI IS COVERED BY IPRS?

PSI and works not covered by IPRs are easily re-usable¹⁶. In the US, the federal governmental information¹⁷. is in the public domain. Differently, in the EU only mere information and works in the public domain are not covered by IPRs (in particular if not included into a database protectable by the *sui generis* right).

Very often also works of art which are official texts are not covered by IPRs, so that the fast circulation of information prevails on the privatization of benefits related to the exploitation of works. This limit to the protection is explained by norms excluding official texts from the protection contained in most of the national Copyright Acts of the EU area¹⁸. These national provisions derive from art. 2.4 of the Berne Convention¹⁹, which leaves member states of the Union free to decide whether or not official texts should be protected. A series of open issues arises. First, these norms generally refer to official texts; however it seems reasonable to apply them to any official acts,

¹⁵ See the LAPSI position paper on charging principles, www.lapsi-project.eu/materials and The LAPSI Conceptual framework on this.

¹⁶ In a IPR perspective. PSI can also be affected by privacy, personal data or other rights.

¹⁷ See 17 USC § 105 : " Copyright protection under this title [17 USCS Sects. 101 et seq.] is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

¹⁸ <http://etherpad.nexacenter.org/copyrightPSBs>. Until recently in many countries no © existed in laws, court decisions, etc, but still there was a factual monopoly of the states printing offices. So having no © does not guarantee easy access, distribution and re-use. What has stimulated this is the decision of governments to make all laws available online for free (so changing the business model of official publications).

¹⁹ (4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts. It shall be added that also art. 2bis (1) CUB states that "It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article *political speeches* and speeches delivered in the course of *legal proceedings*.". At the European level the Directive 2001/29/EC does not contain an exception to the copyrightable subject matter. The list of art. 5 of the said Directive referring to exceptions to the content of protection, does not expressly refer to art. 2.4 CUB; art. 5.3 *letts. c), e), f) and g)* seem related to art. 2bis CUB....According to art. 5 o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

i.e. those acts produced by the PSBs and closely related to the PSBs institutional mission. This broad interpretation would avoid any discrimination between literary works and other works. Second, it is not clear whether this exception could also apply to cultural products covered by related rights which are also official acts, such as non creative photographs (e.g. of archives) or databases in case there is a substantial investment in the obtaining, verification or presentation of the information organized in a systematic way (such as the databases of Patent Offices which may be covered by a related right, if not excluded because of an exception to the subject matter). According to a continental legal norms interpretation, it seems that the exception to copyright subject matter-official text could reasonably be extended to cultural products, such as databases protected by the *sui generis* right. Thirdly, national norms sometimes leave official texts unprotected, but sometimes they refer to specific works. In addition both the notion of official texts or specific works indicated in the national norms can differ from one country to another, since a standardized concept of government works or official texts/acts does not seem to be a priority of the EU legislator. This creates a disharmonized framework in the EU area which has a (negative) impact on legal certainty and therefore on cross-border re-uses. The issue could be solved by introducing a mandatory exception to the protection of official texts at the EU level and to adopt a broad definition of official text. However, even if this desirable legislative choice was implemented, this would only partially solve the hurdles to easily re-use PSI, since official texts are just part of PSI²⁰.

As to the rest of PSI, it is in principle covered by IPRs. Therefore, it is important to understand whether PSBs and public undertakings hold the said rights to enable a broad re-use.

5. IPRS OWNERSHIP RULES AND PSI

PSI should be easily re-usable when it is composed of works covered by IPRs and when the PSB making these works available holds the IPRs needed for its re-use. At a first glance the question would seem to be: are PSBs holding the IPRs over the works of their employees and their contrac-

²⁰ Should we admit that 1. all the PSI generated by PSBs's employees or contractors is an official act and that 2. art. 2(4) of the Berne Convention – as well as the national norms implementing it without making reference to specific works - includes all works created in the course of or for the exercise of statutory public tasks, most of the PSI would not be protected by IPRs. However the PSI collected but not produced by PSBs or public undertakings would remain excluded from this exception to the subject matter.

tors? As a matter of fact contracts and copyright law national general principles and specific rules determine which IPRs are held by the PSBs and for how long. These principles and norms are not standardized. This of course has negative implications in terms of harmonization, legal certainty and therefore cross-border reuses²¹. This approach may encourage to introduce general presumptions stating that PSBs and public undertakings hold the economic IPRs on the works of their employees and contractors for the broadest use and re-use and for the entire copyright and related rights term. According to some internal LAPSI position however, it seems that focusing on the “owning” of IPRs bears the risk of pushing lots of information out of re-use scope, because the IPRs status is uncertain; therefore from an IPRs perspective the real question would be: “do PSBs and public undertakings have enough rights - via licenses for instance - to allow broad re-uses? How flexible should be a licensing system in the public private partnerships era?”. This latter could be the most appropriate approach, provided that the interpretation of art. 1.2 b) of the PSI re-use Directive is not in line with the strict APPSI interpretation according to which a licence is insufficient to state that documents are covered by IPRs belonging to the PSBs and therefore Directive 2003/98/EC does not apply in such a case²².

6. THE EXERCISE OF IPRS COVERING PSI

As to the exercise of PSI covered by IPRs, please see the general position contained in the LAPSI position paper on licenses and in the LAPSI conceptual framework on this issue.

7. THE INTERFERENCES BETWEEN IPRS AND CHARGING PRINCIPLES

As to the interferences between IPRs and charging principles, with particular reference to recital 12, art. 6.2 and 3 of the proposal, please refer to the LAPSI position paper and to the LAPSI conceptual framework on charging principles.

²¹ This is also stressed by the 1.5 in fine of the proposal of the EC.

²² Review Board of the APPSI, Report 30 April 2007, of which report is available at <http://www.appsi.gov.uk/review-board/review-SO-42-8-4.pdf>; see also OPSI, Report on its Investigation of a complaint (SO 42/8/4): Intelligent Addressing and Ordnance Survey, 13 July 2006, of which report is available at <http://www.nationalarchives.gov.uk/documents/so-42-8-4.pdf>.