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The Impact of Digitalization on Ways of Thinking about the Right of Property: Are We All "Owners" or "Users"?

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Abstract

The paper analyzes how emerging technologies, and especially the Internet, can affect the national and European legal system, transforming the fundamental rights and freedoms involved, challenging the traditional categories and qualifications of property, and, in more general terms, stimulating, if necessary, a re-thinking of the man-thing relationship in the light of parameters and references other than those that have been classically used. More specifically, the idea of creating a regulatory framework that accompanies the evolution to which the concept of property is exposed in a digital age pushes us to carry out an analysis of the framework referable to copyright, especially as far as it concerns the F/OSS software with non-copyleft effect, to understand more clearly if the present conceptual apparatus has problematic features or if the issues that the internet poses can be managed in the already existing normative-conceptual framework.

Keywords

dematerialization, digital age, digitalization, F/OSS, IPR, regulation, software, technology.

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Introduction

The thoughts here expressed aim to analyze how emerging technologies, and especially the Internet, can influence national and international legal frameworks:

transforming fundamental rights and freedoms; for a classic analysis of relationship between human freedom and ownership see [Reich C., 1964: 733 ff.],

challenging traditional categories and qualifications of property[1] and, in more general terms [Rodota S., 2013],

stimulating, if necessary, the development of a tool-box of remedies that is applicable to the relationship between humans and objects because it contemplates parameters that have never been considered before.

The aim is to provoke awareness of the possibilities offered by the internet for overcoming the traditional distribution-use model, as well as profoundly changing the relationship between owner and digital good — and, therefore, the idea of property itself [Mokyr J., 1990]; [Irti N., 1998]. The need is to develop and maintain, at both local and global levels, infrastructures composed of secure information that are able to improve the use of resources, reduce costs and incentivize the application of technological measures intended to assure standardized protection to operators.

In this regard, back in the 1990s, Samuelson argued that the digital world had six qualities capable, with perspective, of modifying the law in depth [Samuelson P., 1990: 324]. According to his theory, these features were: the ease with which works developed in digital format could be reproduced; their facility of transmission; their ease of modification and manipulation; the perfect identity with each other of any goods realized in digital format; their compactness; and the aptitude of digital goods to favor the study of new methods of interconnection and research into digital space.

However, taking a step back, what exactly does "technology" stand for, and does "technology" represent a tool in itself? Moreover, what does "digital good" correct actually mean?

[1] It is worth underlining that the difference between "ownership" and "property" is that the first noun indicates the state of having complete legal control of the status of something, while the second one relates to something that is owned.

1. The Impact of Technologies on Traditional Concepts and Categories of Law

Technology is unquestionably a powerful tool, both for improving human life and for contributing to changing (traditional) approaches and conceptual categories. Indeed, if law aspires to stability, new technologies seem to constantly question the maintenance of the established order.

In the legal field, in fact, ever-increasing technological development leads us to consider new technology not as an isolated and autonomous monad, but as a force that plays an increasingly important role in numerous legal fields. Therefore it would seem to be essential to identify those principles and those rules, also via the use of technologies, to better understand the incidence of τέχνη (techne) in all the sectors under consideration[2].

It is therefore necessary to evaluate the extent that technology, even in its disruptive features, can have on the existing legislative-regulatory framework. In this regard, two types of technological evolution can be understood, being able to speak, on the one hand, of sustaining technology[3], and, on the other, of disruptive technology[4].

This last notion therefore concerns technological tools which, in a first phase, appear to be of uncertain application, and which, once a certain recognition has been acquired, can profoundly affect the reality in which they are applied, and, consequently, on the operating methods. of the economic models that are in place. It is at this stage that the distorting effects arising from the new technology are produced and the new business management models, which benefit from the innovative technological application, begin to threaten the existence of the traditional models that have hitherto been drawn upon [Katual N., 2014: 1685 ff.].

[2] If "technique" changes rapidly, the new perception of legal situations that individuals have and their affirmation could require long adaptation times — that should always assure respect for human dignity, health, identity and the needs of data protection and the environment — so that the gap existing between technological innovation and legal change may affect legal certainty and force the holders of the interests involved to operate in a (legal) environment characterized by a more or less high level of uncertainty, where rights and responsibilities may be devoid of clear limits and definitions.

[3] This concept makes reference to a technology that either evolves gradually or simply improves existing technologies.

[4] This concept makes reference to a new type of technology that, as soon as it is introduced, could appear less reliable than those already existing, but that would tend to acquire swift credibility.

Certainly, the invention of the Internet and the affirmation of intelligent technologies have produced evident distorting consequences, as is well demonstrated, for example, by e-commerce, which the market, in the first instance, approached timidly, meaning it as a form merely alternative to the material exchange mechanisms that see the physical store as their point of reference, to become, in a short time, a new and winning way of trading which, built on the use of the web, has meant that online exchange seriously competes, often even supplanting them, with bodily stores (so-called "bricks-and-mortar stores")[5]. Since that time, the use of the internet and digital technology has enormously expanded, stimulating the emergence of ever new business models that make the digital world their own, and causing the emergence of interesting problems in numerous branches of law.

Therefore, the problem that arises is to assess the impact that the changed socio-economic framework may have on the concept of consumer-investor, as conceived so far, simultaneously encountering the increasingly felt need to develop a homogeneous and systematic approach. The latter need, in fact, at least at a theoretical level, could facilitate the overcoming of both the possible structural gaps and the application difficulties related to disruptive technologies and which are expressed in the adoption of fragmented and differentiated solutions[6].

It can be assumed, then, that, where technological developments take on an authentic distorting character, it may be necessary to proceed with a change also at the normative-categorical level that makes it possible to deal with the lack of stability of the rules that refer to a given institution and, therefore, the impossibility of their mere adaptation to problems created precisely by the distortion produced by the new technology.

Alternatively, and provided that the changes produced by technological innovation are not such as to lead to excessive alterations in the system, one could hypothesize the maintenance of the existing settings, clarifying their application in the context of a new framework: the distortion effect

[5] In this regard, it should be noted how the distorting effect of e-commerce has become increasingly evident over the years. Indeed, it has caused cause either the disappearance of numerous brands that were famous in the past or the transformation of their presence in the market (from a physical reality to an online one).

[6] A valid help, in this sense, could be get from an appropriate cost-benefit analysis, especially with a view direct to introduce a unitary regulatory framework to make reference to and to achieve an appropriate balance between opposing and conflicting interests referable, on the one hand, to the subjects who put digital goods on the network, and, on the other hand, to the users themselves.

would be minimal, testing the organic and flexible structure of the existing regulatory system and its potential extension to the new system that has been created[7].

Finally, if technological change, while causing a distorting effect in the conduct of business, does not reverberate on the legal world and make minor changes sufficient, it would represent a further possibility: evaluating whether proceeding with contained reforms is sufficient to face the new and specific issues that technological change has generated[8]. Consequently, if such an approach were not possible or sufficient and it seemed appropriate to proceed with the development of a new set of rules, expression of new principles and normative-doctrinal guidelines, technological innovation would be the harbinger of an authentic distortion of the regulatory system.

From the outlined perspective, the need to conceive the right of the consumer-investor and of the subjects who populate it (the consumer-investor and the professional) is clear, in such a way as to consider the effects linked to the changes in the market that also originate in the gradual affirmation of digital platforms [Alpa G., 2014: 14].

In this perspective, the collaborative nature that is often perceived in these platforms conditions an essential profile of consumer law, because if this regulatory "corpus" presupposes the presence of a "professional" and to provide the service (for example, Airbnb) or selling the good (for example, Etsy) is a "private person", that is a person who does not operate in the context of an activity organized in an entrepreneurial manner, the professional-consumer relationship fails in favor of an inter-pares or peer relationship. to-peer, where the purchaser could be orphan of the protection provided by the consumer protection law.

It is in this perspective that the phenomenon of hybridization brought about by the sharing economy between professional and consumer figures, who are increasingly confused in the intermediate concept of "prosumer" or "consumer", which brings with it a fundamental question that is linked

[7] Consider in this regard, and just as an example, the updated guide that the European Commission has issued throughout Unfair Commercial Practices Directive. See: European Commission. Guidance on the Implementation/Application of Directive 2005/29 / EU on Unfair Commercial Practices — SWD (2016) 163 final, Brussels, 25.5.2016. Available at: http://ec.europa.eu/justice /consumer-marketing/files/ucp_guidance_en.pdf. (accessed: 11.05.2018)

[8] A principle commonly invoked, in this sense, is that of "functional equivalence", according to which, for example, once the essential characteristics of the new approaches developed in the light of existing legislation have been identified, we proceed to consider how these can be extended to any other new situation that requires regulatory intervention.

the possibility of placing legal obligations of conduct on the "private" if he decides to offer a good or service in a certainly not "professional" but also not occasional way.

The problematic features now reported are accentuated, then, if, as often happens, the platform includes both private individuals or operators and professionals, this generating a possible perception error in which the (supposed) consumer-investor could fall into error. evaluating the identity of the counterparty and seizing a trust in the platform that does not allow it to realize that it is moving in an area potentially without protection[9].

The complexity of the problem is such as to require clear and uniformly recognized coordinates in the territory of the European Union, despite the awareness of possible reservations on the possibility of dictating a Euro-unitary discipline that is capable of establishing, according to the various product sectors, who is professional and who is not[10].

In particular, while maintaining the competence of the Member State to trace the boundaries of professions, including those of a financial nature, the platform is expressly required to specify whether the third party offering goods, services or digital content is a professional or not, on the basis of the statement he made on the online marketplace; whether or not the rights of consumers deriving from Union legislation on consumer protection apply to the concluded contract; if the contract is concluded with a professional, which professional is responsible for ensuring, in relation to the contract, the application of consumer rights deriving from Union legislation on consumer protection.

The proposed solution would seem to increase the level of consumer-investor awareness, but the path appears only partially completed when reference is made to the remedies that arise from any non-compliance with these obligations. In this regard, the proposal for a New Deal Directive 1 is linked to the civil consequences deriving from any unfair commercial

[9] The need to draw a clear and clear boundary between profession and occasional or amateur activity can overlap with issues related to safety, public order, health hygiene and which, by virtue of the principle of subsidiarity, can be addressed either by individual Member States or the Community institutions.

[10] *The New Deal Communication* and the consequent proposal for a *New Deal Directive 1*, aimed at amending the directive on unfair terms in consumer contracts, the directive on consumer protection in the indication of the prices of products offered to consumers, the Directive on unfair business-to-consumer commercial practices in the internal market and the Directive on consumer rights appear to be moving in the right direction by ensuring better application of EU consumer protection rules and their adaptation in the light of digital evolution.

practice that legitimizes the Member States, in the presence of similar behaviors, to resort to contractual and non-contractual remedies, recognizing, among the first, at least the right to terminate the contract, and, among the latter, at least the right to compensation for damages.

In fact, not every violation of the contractual rights of consumers, such as, for example, the omission or inadequate identification of the counterparty, constitutes an unfair commercial practice, since it is necessary to demonstrate that the contested behavior can significantly distort the consumer's choice. On the other hand, considering the remedial contents more strictly, an equivalent protection might appear more appropriate which allows the consumer, like the rules on the guarantee of conformity, to choose between the satisfactory remedy and the liberating or compensatory remedy.

In this way, there would be a remedial framework that would require the platform, responsible for omitted choice or identification of registered users, to make up for the lack by configuring a sort of *culpa in vigilando* even if applicable, following a path of rigor, to the professional and not to the private, or, alternatively, to make every effort, at the request of the injured consumer-investor, to make him obtain an equivalent service, as some platforms already do.

In the light of the above and of its role, law also deals with all aspects of technology as an expression of the factual or real world and re-elaborates them in legal language [Cockfield A., Pridmore J., 2007: 475]; [Tranter K., 2007: 449]. Therefore, on the one hand, law can be considered a tool to regulate also technological issues when they are related to the "society of technologies", and, on the other, it can be evaluated as an entity that has technological nature, because law both stands as a technic to operate and it coexists with and is surrounded by technological tools (see, for example, the legal databases that are present on the web) [Moses L., 2007: 589 ff.].

In light of the above, it seems right to affirm that today, human life develops in a highly technological habitat, even with respect to law, and consequently talking about technology *per se* is meaningless, in a juridical and technical sense at least[11].

As a consequence, new technologies, more than in past times, enter in a deep and differentiated manner into human life by conditioning its de-

[11] Development and "wild" diffusion of constantly innovative technologies can affect the user's behavior, creating new and different needs, stimulating a growing demand and leading to the affirmation of factual rather than legal situations, especially because very often they are not subject to a regulation that reflects their fast evolution.

velopment and by amplifying nature through electronic devices, computer programs, machines and software [Mokyr J., 1990]; [Cafeggi F., 2011: 20 ff.].

If we want to understanding the nature of digital good/digital content, it is worth noticing that the digital asset, because it is a *res intra commercium* and therefore represents a tradeable commodity, "impacts" on the classic scope both of the contract and of the right to property, raising new issues that may require specific answers.

It is no coincidence that the Directive 2011/83/EU on consumer rights, for example, already provides a special framework for the protection of digital content, which Article 2 (11) defines as «data which are produced and supplied in the digital form», and provides the right to withdraw from the contract when the digital content is provided online in respect of distance and off-premises contracts (Articles 9 and 16 [m]).

At the same time, Article 2 (j) of the Common European Sales Law (CESL)[12] defines digital content as «[...] data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalize existing hardware or software».

Therefore it appears significant that Article 5 (b) CESL considers digital data in the same way as any other object that can be purchased, regardless of whether it was obtained online or offline or by downloading, providing that «[T]he Common European Sales Law may be used for: a) sales contracts; (b) contracts for the supply of digital content that is stored, processed or accessed, and re-used by the user, irrespective of the digital content price [...]».

In substance, the approach followed by CESL implies that in digital cross-border transactions digital goods are considered and protected in the same way as all other alienable assets.

A similar approach is evident in the well-known case UsedSoft GmbH v. Oracle International Corp., where the European Court of Justice (ECJ), in applying a line of thought based on Directive 2009/42/EU on the legal protection of computer programs and in ruling on a specific issue (prescription) concerning the sale of software, argues — in accordance with the principles of the European Single Market — that digital goods are fully "tradeable" and shall be considered, in cross-border exchanges, as assets to which a full property right can be transferred.

[12] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0635&from=EN (accessed: 20.01.2022)

As a consequence, the Consumer Rights Directive, the CESL and the underlined approach followed by the ECJ, have all contributed to identifying the discipline to apply to goods in digital format, providing it with the general extension of the contractual and proprietary logics and influencing, in this way, the behavior of the various operators of the Digital Single Market and the consequent commercial practices.

With reference to the issue at stake, technologies are characterized by a relevant capacity to increase the possibility of enjoyment of or access to goods, but also, in broader terms, by a relevant capacity to produce or create new goods. This feature, therefore, theoretically makes it easier for individuals to reach a (multilevel) form of empowerment in the socio-economic community.

Basically, the digital age, because of its evident technological nature, should be subject to flexible and, at the same time, responsive regulation — which is composed of law, social rules, market and legal architecture [Lessig L., 1999: 501–502] — capable of predicting future risks linked to activities in constant evolution (so-called future-proofing) [Copps M., 2005: 309 ff.]; [Moses L., 2007: 589]. In fact, it is necessary to approach the "new" legal figures with a degree of flexibility that is adequate to react to the potentially sudden changes typical of a world that is ever more dynamic and in constant evolution [Teubner G., 2011: 210 ff.].

2. Digitalization and Entitlement de facto and de jure

Until the advent of digitalization and the wide diffusion and utilization of the Internet, humanity was driven by a concept of ownership that enabled change (physically and legally) in the natural and limited forms of reality by allowing the acquisition and sharing of goods among the individuals (physical persons and legal entities) who composed society.

Thus, individuals were always concerned with the best and most efficient mechanism for accumulating (material) capital, for producing physical goods and services, and for distributing ownership. In these terms, property was always conceived as a vehicle for getting something.

In a pre-digital age, the control of natural resources and consequently of work conditioned, on an economic level, ways of allocating property and, on a sociological level, ways of distinguishing communities through social classes. It is clearly absolute centrality of the good in law, because it is the object of subjective rights [Alpa G., 2017: 238 ff.].

Nowadays the world is profoundly digital, and immateriality dominates and dictates its own rhythms, without space and time, both in the distribution of wealth, which is progressively identified with knowledge based on information and data, and in the creation of a «liquid modernity» [Bauman Z., 2012: 60] that is decomposed and reassembled, rapidly, in a continuous, fluid and volatile manner.

In this dimension, then, these institutions related to ownership are impacted by logic of sharing and a distortion, caused by digital technologies, of various aspects of everyday life [Podszun R., Kreifels S., 2016: 33 ff.].

Ultimately — and as already noted — it is always the notion of property that is exposed to economic-cultural and legal influences, affecting its effective scope, especially in terms of membership-accessibility-usability.

Indeed, property becomes the expression of an array of situations related to "things" that shall not lead to a fragmentation of the entitlements that have been traditionally considered as a granitic unicum. On the contrary, a simple acknowledgement that the phenomenon of goods' belonging can also be described in different terms shall emerge.

Indeed, if ownership refers to the subjective positions in which the owner is placed by the legal system to directly satisfy his/her own interest in one or more assets — without the cooperation of other specific subjects — two different criteria can be used by a legal system[13] to define the legal powers connected to the so-called *res*[14].

Considering that a supportive attitude towards an individual is obtained by means of his/her protection, his/her identification as owner can be realized either by attributing some effects to a *de facto* relationship between individual and assets (so-called "entitlement *de facto*"), or some entitlements that require formal procedures to confer a transmittable right on the basis of certain rules (so-called "entitlement *de jure*").

But are these ways of thinking still effective and are they capable of describing the juridical reality of things?

[13] The analysis of different legal systems appears to be of particular importance, also in terms of a marked ethnocentrism that we tend to recognize when dealing with the digital world: often reference is made to a single country. A comparative study, in fact, aims to achieve a dual 2002purpose, trying to improve, on the one hand, the understanding of the institutions considered, and, on the other, the clarification of their causal inference.

[14] Within the concept of digital good a large complex of *res* and services must be included, among which, in addition to digital intellectual works, databases, digital archives, as well as any other set of information whose processing and the supply of which are subject to economic evaluation.

3. The Actual Tendencies of Property Rights and their Impact on the Creative Process

The current proprietary phenomenon, in essence, manifests the evident tendency to expand its objective profile and this attitude stimulates change in many traditional features of the property right[15].

The prevision of property (and intellectual) rights [Janich J., 193] in a digital world responds conceptually to the need to ensure the development of a digital market that can meet the demands of innovation and contextual protection. But this kind of prevision must not neglect the peculiarities that characterize the digital world itself.

In this regard, two factors are present in the digital ecosystem, although they are in a potential relationship of conflict: on the one side, a call for protection, and, on the other, a call for sharing.

As for the first profile, the wide juridical circulation that the digital world assures raises questions concerning the protection of the right (its moral side) to the recognition of the authorship paternity of the work and the right to the integrity of the work as a means to prevent modifications or transformations.

As for the second profile, the regime of free sharing of the changes made to the original digital good that represents so much of the free/open source culture seems to evoke the regime of free use.

Applying this logic to the protection of ideas and creations in a sharing perspective that also constitutes the basis for free/open sources results in a legislative exception to the copyright regime. Therefore it may be inferred that — under a copyright regime — creative processes would be allowed only if they did not undermine the existing rights of the original work, without the express consent of the copyright holder.

However, the so-called openness, as a feature of the digital world, represents a mental propensity towards the diffusion of new technologies and the circulation of means aimed at innovation, without forgetting a general need of protection for the sector's operators; see for deeper analysis [Copps M., 2005: 309].

[15] There is no doubt that the advent of the internet has profoundly revolutionized the way the individual belongs to the community of reference, enriching his position in terms of variety and extension of the usable possibilities, but, at the same time, also impoverishing his way of behaving with other users of the network-community due to the continuous depersonalization of the individual relationships involved.

A typical example in this regard is software because it presents the undeniable tendency not to be definitive, deriving from its potential to be updated and modified, even such a way as to lose all contact with the original work. In fact, according to common understanding, any updating or improvement of the program would be subject to the exclusive right reserved to the copyright holder.

4. Software Logic and the Effect on the Proprietary Control Scheme

In light of all the above, can a proprietary scheme that gives importance to the peculiarities of "digitalization" be an instrument used to safeguard the coexistence of the described apparent contrast?

Of course, there are many needs to reflect upon when addressing this primary question, but a correct answer cannot ignore the pressure that permeates the digital era and the consequent culture of sharing.

Therefore, software, being a typical intellectual creation, reflects a stratified and multifaceted legal protection that arises from the tendency to extend the models of classical protection of intellectual property law — copyright and patent — but framed in a gradual protection, such as free/open software with a copyleft effect, that has essentially reversed the operative methods of copyright.

In fact, if copyright is based on user-licenses that channel the exploitation of the work within certain tracks determined by its creator, copyleft focuses on the idea of "no reserved rights" or "no rights reserved" that does not limit but frees the use of the good, without reaching the extreme effect of the public domain.

Compared to the latter, in fact, which would seem to be free from any link with a proprietary scheme, copyleft, even in the milder configuration of non-copyleft, still maintains a relationship between the licensor-author and the user-licensee that can be reported to the proprietary scheme.

Conclusion

To summarize, behind the idea of openness, which appears to be a fundamental ethical value in technological development, there is the same idea of sharing that has given life to the emerging culture of the sharing economy itself.

More specifically, technology has allowed a wider offering and a wider use of goods and services; it has also expanded the range and quality of information about goods and services; finally, it has facilitated the formation in the digital ecosystem of a vast and efficient mechanism of comments and opinions that allows users to have greater awareness of and confidence in the conduct of economic operations.

Basically, the sharing economy, with the underlying philosophy of co-division, is a tool that has so far proved to be capable of ensuring greater efficiency, greater price competitiveness and a higher quality of goods and services.

The perspectives of this analysis, in the attempt to understand the new scope of traditional legal categories, allow us to overcome the artificial relations created between Roman law and modern categories to fully understand contemporary ownership.

Finally, the jurist of any age and time should use the actual content of a legal concept to better understand its juridical essence because, although remaining unchanged in its *nomen juris*, it may have undergone profound changes that have altered its way of being at different levels, as copyright and copyleft, by describing a peculiar relationship with a specific good, can easily prove.

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