

## Public Sector Information Commons

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### 1. INTRODUCTION

The goal of the present paper is to assess the congruity of current legal schemes applicable to data and information held by public bodies. In particular, the democratic and economic foundations of current regimes applicable to Public Sector Information (PSI) will be examined and compared. Specifically the legal title claimed by Public Bodies for applying terms and conditions of use upon the information they detain will be examined. The foundations of the copyright and *sui generis* rights which are usually deemed to apply on Public Sector Information will be evaluated considering other concurring interests on PSI. This examination will contribute to offer an assessment on whether current legal schemes are over-balanced in favour of Intellectual Property Rights (IPR), safeguard all interests insisting on such information and in any case are necessary to fulfil the goals for creating and disseminating PSI in an efficient and sustainable way.

To achieve this, the present paper will investigate the compatibility of copyright ownership on PSI with the traditional justifications of IPRs and subsequently explore alternative protection schemes for PSI which are neutral to access to and freedom of information rights.

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## 2. COUNTERBALANCING INTERESTS ON PSI

### 2.1. *PSI Commercial and Democratic Value: From the European Digital Single Market to the European Public Sphere*

PSI is considered to be one of the key utilities of the knowledge economy and various measures to exploit its potential have been adopted at European and national level<sup>1</sup>. Because of its peculiar nature, PSI might be considered as a public asset serving at the same time social and democratic goals as well as commercial interests.

More recently the Digital Agenda points at unlocking the potential of public data across Europe towards the realisation of the so-called Digital Single Market<sup>2</sup>. The commercial significance of PSI is twofold: not only are public bodies by far the largest producers of information in society, but as PSI is created, managed and distributed to fulfil the goals of an organised society, PSI also enjoys a presumption of reliability, validity, accuracy, authority and timeliness. Hence PSI has been subject to a European action to enhance its commercial role as an invaluable resource for Research & Business entities, which are well-placed to capture and realise its value by developing and deploying novel technologies and services based on PSI.

At the same time, PSI is also valued for its highly relevant democratic and social potential<sup>3</sup>: the policies for e-Government, which include among the rest the digitisation of processes and services of public bodies, are in fact based on the assumption that transparency mechanisms together with the

<sup>1</sup> To mention a few of them, Directive 98/2003/EC is a milestone in European legislation on commercial re-use of PSI; the INSPIRE Directive has set the ground for establishing an infrastructure for spatial information in Europe [Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community]; also see the Digital Agenda, Europe's strategy for a flourishing digital economy by 2020, which includes the creation of a fully functioning digital single market by 2015, *A Digital Agenda for Europe*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Region, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:REV1:EN:HTML>.

<sup>2</sup> See also "Digital Single Market: Action 3, Open up data resources for re-use" available at [http://ec.europa.eu/information\\_society/digital-agenda/](http://ec.europa.eu/information_society/digital-agenda/).

<sup>3</sup> As Recital 16 of the PSI Directive explicitly provides: "Making public all generally available documents held by the public sector – concerning not only the political process but also the legal and administrative process – is a fundamental instrument for extending the right to knowledge, which is a basic principle of democracy".

involvement of citizens in the decision-making processes can contribute to the realisation of the European public sphere<sup>4</sup>.

## 2.2. Access to and Re-use of PSI: Two Linked while Distinct Concepts

For what relates to access, it is a constant of democratic systems to implement statutory rights to stimulate openness of government information and, by doing so, to foster the democratic participation of citizens. The policies of dissemination adopted are usually of two kinds: the so-called passive dissemination implies an (enforceable) right for a subject to access information on request. Active dissemination means that the information is publicly available on the basis of a direct initiative of the public body.

The legal systems of most European Member States already have in place a range of mechanisms to access the information detained by public bodies which usually go under the names of transparency or freedom of information laws: these norms may provide a right to interested parties to require access to specific materials and/or oblige public bodies to publish certain categories of information<sup>5</sup>. In addition to that, a new trend appeared also in

<sup>4</sup> The contribution of PSI for citizens to achieve their democratic awareness might be attained by the creation of something described as “community centric information systems”. In fact public data should not be considered only as a tool “to measure people, control and govern them and then provide them with that information [...] [I]t is supposed to be helping the local communities to have their own information systems which then they can use both to claim entitlements and rights and to self government for micro planning, community generated systems for deepening democracy, increasing their engagement with local government processes with self governance for micro planning and on the other side we use this work to influence the design of the public sector information systems”. See the minutes of the workshop “Public sector information online: democratic, social and economic potentials”, hosted by the Internet Governance Forum meeting in Vilnius, September 2010, available at [http://www.intgovforum.org/cms/2010/schedule/WorkshopSchedule\\_Vilnius201009.htm](http://www.intgovforum.org/cms/2010/schedule/WorkshopSchedule_Vilnius201009.htm)

<sup>5</sup> One of the ambits most deeply influenced is the one of environmental information, affected first by the Directive 2003/4/EC implementing UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998), and then by INSPIRE Directive 2007/2/EC on Spatial Information, according to which a cross-border infrastructure should be established for the purposes of EU environmental policies and policies or activities which may have an impact on the environment. On a different level, communication policies, including access to EU information, are considered an essential tool for the very realisation of the European project and overcome, among the rest, claims from euro-sceptical or fill the democratic deficit sometimes perceived in relation to European institutions and community policies. See on this P. CRAIG, G. DE BURCA, *EU Law. Texts, Cases and Materials*, Oxford, Oxford University Press, 2003, p. 168 and G. MAJONE, *Dilemmas of European Integration:*

the European Union where Member States are exhorted to implement so-called e-Government policies, and create information infrastructures both to offer services, to give access to public information and to enhance civil participation to the decision-making processes<sup>6</sup>.

Anyhow in the recent debate, the discourse around re-use of PSI seems to have been highly influenced by the aspirations of the broader movement of the all-embracing Open Data philosophy<sup>7</sup>. It is worth noting, however, that access to PSI stands on different legal foundations than the right to re-use such data, the former being the premise for the latter to be possible. The two policies are in fact pursuing different aims only partly overlapping, being access to data considered to be directed more to nurture the civil rights of citizens than the commercial benefits stemming from the actual re-use.

*The Ambiguities and Pitfalls of Integration by Stealth*, Oxford, Oxford University Press, 2004, p. 40.

<sup>6</sup> The European initiatives on e-Government aim at supporting Member States in creating cross-border electronic infrastructures for an improved deployment of public services and information. The EU gives a lot of consideration to the constitution and government of electronic infrastructures available to the civil society and public administration (including broadband and electronic signatures, for instance); several legislative initiatives are already enacted to regulate some legal and economical issues raising from the use of such digital infrastructure (privacy, intellectual property, competition, security issues) and of the nature of the contents, products and services circulating through it (e-commerce, public procurement, eHealth, eDemocracy). For a list of the policies implemented see the [http://ec.europa.eu/information\\_society/activities/egovernment](http://ec.europa.eu/information_society/activities/egovernment) and for a first comment on the main questions cfr the monographic issue no. 12 on Open Government of the ePractice journal available online at <http://www.epractice.eu/en/journal/volume/12>.

<sup>7</sup> Among the many European events on PSI hosted, in June 2011 the workshop “Open Data and re-use of public sector information” expressly recently combined the review of the PSI Directive with the development of a strategy for Open Data for the EU. See also *Big Idea no. 3: Beyond Raw Data: Public Sector Information, Done Well*, in [http://ec.europa.eu/information\\_society/events/cf/dae1009/item-display.cfm?id=5257](http://ec.europa.eu/information_society/events/cf/dae1009/item-display.cfm?id=5257). Moreover see the converging goals of the Open Knowledge movement and the Digital Agenda “[PSI] is an important source of potential growth of innovative online services. The re-use of these information resources has been partly harmonised, but additionally public bodies *must be obliged to open up data resources* for cross-border applications and services” (emphasis added). Digital Agenda Communication, (COM), 2010, 245, pp. 9, 10. The Open Definition, on the other hand, lists “Access” as the first condition for open knowledge, pointing out this feature can be summarized as ‘social’ openness – not only are you allowed to get the work but you can get it. See the Open Definition at <http://www.opendefinition.org/okd/>.

In fact transparency and its mirroring counterpart – ie. access to information – are in fact long established principles<sup>8</sup>: since the late XVII century they are the expression of a two-way communication flow between the newly affirmed *societas civilis* and the State<sup>9</sup> when publicity also starts to be seen as an unavoidable requisite of public law<sup>10</sup>.

On the other hand, re-use of public data seems to be at the centre of the legislative debate since relatively recent times<sup>11</sup>, also as a result of the interest of the market of the “knowledge society” for the so-called commod-

<sup>8</sup> More “recently”, The Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly on 10 December 1948, grants to everyone the right to seek, receive and impart information and ideas through any media and regardless of borders (art. 19). The International Covenant on Civil Political Rights of 1966 repeats art. 19 but concedes that the exercise of this right may be subject to certain restrictions, which are provided by law and are required for the respect of superior rights or necessities. The same right is guaranteed by the European Convention on Human Rights of 1959.

<sup>9</sup> According to Habermas’ theories, the *critical public opinion* starts in the age of struggles between the Crown and the Parliament of England, when the political writers were first referring to the notion of public spirit pointing at the moral consciousness of the multitude of citizens, opposite to the will of few. The new emerging middle class became therefore the conscience of the public consciousness and common sense, in favour of which it urged for the publicity of the Parliament activity. Public opinion is, at this moment, at the same time, a way to control the establishment and also a way to gather the common will (which identifies the moral spirit of the multitude in opposition to the arrogance of the few). J. HABERMAS, *Bourgeois Public Sphere: Idea and Ideology*.

<sup>10</sup> “The Governments will be forced to act according to justice only if their actions could be constantly challenged through the publicity: there won’t be any justice if the political action cannot be publicly known” Immanuel Kant was writing back in 1795 in his *Perpetual Peace. A philosophical sketch*. The principle, which might look easily acceptable in modern times, was in fact the first open overtaking of the principles of *arcana imperii*, as the only and usual decisional method of the absolute monarch. See, also, J.E. STIGLITZ, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, The World Bank Oxford Amnesty Lecture, January 27, 1999.

<sup>11</sup> Various categories of data of the public sector are at the centre of a long established market. Yet an organic legislation aiming at achieving a more uniform and systematic approach to re-use this vast resource is more recent. The roots of the European legislation on PSI re-use, for instance, are to be found in the Green Paper on PSI in the Information Society, COM(1998)58, published in January 1999; other countries such as the United States have a longer re-use experience as an extension of freedom of information regulations dating from late sixties. See The Freedom of Information Act, 5 U.S.C. par. 552 from 1966, as amended by the “Openness Promotes Effectiveness in our National Government Act of 2007” and the “OPEN FOIA Act of 2009, available at <http://www.justice.gov/oip/amended-foia-redlined-2010.pdf>.

ified information<sup>12</sup>. Indeed the promotion of digital infrastructures for the e-Government together with the recent policies for commercial re-use of PSI seem to have added a new momentum to the realisation of access rights: while pursuing the exploitation of the PSI economic potential, the European Union is in fact pressing Member States towards a most extensive effort to pro-actively share public data<sup>13</sup>.

Yet being aware of the political obstacles for implementing it, a dissemination obligation would indeed better fulfil Open Data access aims on PSI, as currently most EU Members States found their re-use regulations upon a distinct, and somehow hierarchically lower, basis than access rights<sup>14</sup>.

<sup>12</sup> The term is widely used to refer to the attribution of an economical value to a resource previously not considered in economic terms: in the capitalist system, the commodification process refers to the expansion of economical exchanges to areas previously not belonging to the market and to resources previously not treated as marketable assets. On this process referred to information see J. BOYLE, *The Second Enclosure Movement and the Construction of the Public Domain*, in "Law & Contemporary Problems", 2003, n. 66, pp. 33, 37: "It sounds grandiloquent to call it 'the enclosure of the intangible commons of the mind', but in a very real sense that is just what is. True, the new state-created property rights may be 'intellectual' rather than 'real', but once again things that were formerly thought of as either common property or uncommodifiable are being covered with new, or newly extended, property rights". For an historical reconstruction see G. RESTA, *L'appropriazione dell'immateriale*, in "Il diritto dell'informazione e dell'informatica", 2004, n. 21; W.W. FISHER III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, 1997, available at <http://cyber.law.harvard.edu/ipcoop/97fish1.html>; J. BOYLE, *Shamans, Software, and Spleens. Law and the Construction of the Information Society*, Harvard-Cambridge-London, 1996; and also E. NOAM, *Two Cheers for the Commodification of Information*, in Elkin-Koren N., Weinstock Netanel N. (eds.), "The Commodification of Information", The Hague, Kluwer Law International, 2002, p. 43 ff., 5

<sup>13</sup> From the Digital Agenda: "This is an important source of potential growth of innovative online services. The re-use of these information resources has been partly harmonised, but additionally public bodies must be obliged to open up data resources for cross-border applications and services" (emphasis added). From the Digital Agenda Communication, (COM), 2010, 245, pp. 9, 10.

<sup>14</sup> In fact the PSI Directive itself explicitly safeguards existing rules on access, as provided in Recital 9 and also art. 1, par.3, both providing that PSI rules build upon the existing access regimes in the Member States and are not meant to change national rules for access to documents. Also, Article 5 provides that there is no obligation for public sector bodies to create or adapt documents in order to comply with a request, nor to provide extracts from documents where this would involve disproportionate effort.

### 2.3. Access to and Control of PSI and Copyright Regimes

An additional layer of concurring interests on PSI relates to the control of PSI through the use of intellectual property schemes.

Copyright and *sui generis* rights on PSI in fact might seem to clash with the public interest to have full access to information and the freedom to use it. As known, the fundamental rights of freedom of expression and access to information have been embodied in various international treaties and instruments; from a European perspective, Article 10 of the ECHR (on freedom of expression)<sup>15</sup> is considered, by far, the most relevant norm. Moreover European bodies are, by force of article 42 of the Charter of Fundamental Rights of the EU<sup>16</sup>, fully accessible upon request by anyone entitled with a right of access.

For what concerns the collocation of copyright in the hierarchy of sources, Human Rights law is considered to be Intellectual Property's new frontier<sup>17</sup>: Human Rights are considered an instrument to guarantee a certain flexibility in Intellectual Property law, and a human right-inspired conception is considered when approaching how modern copyright law should accommodate access to knowledge and development policies<sup>18</sup>. Also, there

<sup>15</sup> See W. HINS, D. VOORHOOF, *Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights*, in "European Constitutional Law Review", 2007, n. 3, pp. 114-126 also available at [http://www.ivir.nl/publications/hins/EuConst\\_Hins\\_Voorhoof.pdf](http://www.ivir.nl/publications/hins/EuConst_Hins_Voorhoof.pdf) and also E. ROBIN, *The Right to Receive Information Under Article 10 of the ECHR: An Investigation from a Copyright Perspective* (March 15, 2011). Tidskrift utgiven av Juridiska Föreningen i Finland (JFT), forthcoming. Available at SSRN: <http://ssrn.com/abstract=1787085>.

<sup>16</sup> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, with a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their *medium*.

<sup>17</sup> "Intellectual property claimants did not file any complaints alleging violations of property rights until the early 1990s. And when these claimants did allege such violations, the ECHR and the European Commission summarily dismissed their challenges. [...] This judicial reticence has now decisively ended. Within the last three years, the ECHR has issued a trio of decisions holding that patents, trade-marks, copyrights, and other economic interests in intangible knowledge goods are protected by the European Convention's right of property." L.R. HELFER, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, in "Harvard International Law Journal", Vol. 49, 2008, p. 3. On this point, further, see C. GEIGER, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, in "International Review of Intellectual Property & Competition Law", 2004, n. 35, pp. 268, 277.

<sup>18</sup> See the Draft Treaty proposed by Brazil and Argentina for a development agenda to facilitate the transfer of knowledge to developing countries: by 2004, WIPO was in fact

have been more and more references to fundamental-rights values in the recitals of the latest directives on Intellectual Property<sup>19</sup> and since some years European courts have been establishing some human rights boundaries on intellectual property protection standards<sup>20</sup>. Yet since 2005, the European Court of Human Rights started to issue decisions applying Article 1 (on the applicability of the Chart) to Intellectual Property disputes<sup>21</sup>.

The conflict between copyright and freedom of expression is usually considered as internalised in the copyright structure of limited rights and exceptions (the idea/expression dichotomy, the limits to the economic rights, the limited term of protection and, particularly, the fair use-alike doctrines). However, more recent European literature on copyright has begun to recognise the independent relevance of the Freedom of Expression in relation to Copyright<sup>22</sup>.

facing increasing demands from developing countries for intellectual property regimes to reflect a more appropriate balancing of interests, to better serve health, education and culture. These demands are summarised in the Draft Access to Knowledge Treaty (2005) available at [http://www.cptech.org/a2k/a2k\\_treaty\\_may9.pdf](http://www.cptech.org/a2k/a2k_treaty_may9.pdf).

<sup>19</sup> See for instance Recital (3) of Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC), see also Recitals (2) and (32) of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property right; see Recital (16) of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions. For more references, see C. GEIGER, *The Constitutional Dimension of Intellectual Property*, in Torremans P. (ed.), "Copyright and Human Rights", The Hague, Kluwer Law International 2008.

<sup>20</sup> According to HELFER, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, cit., "No comprehensive study of the European human rights tribunals' intellectual property jurisprudence under the Convention's property rights clause has ever been attempted". Anyway, for more details on this developments see C. GEIGER, "Constitutionalising" *Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, in "International Review of Intellectual Property and Competition Law", 2006, n. 37, pp. 371, 382, 390, where he analyzes recent intellectual property cases from European and countries outside of Europe that raise non-trivial freedom of expression issues; from the same author, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, cit., pp. 268, 277 analyzing "decisions in the field of copyright in which the freedom of expression has been invoked to justify a use that is not covered by an exception provided for in [intellectual property] law".

<sup>21</sup> See *supra* note 16.

<sup>22</sup> The few existing analyses of intellectual property in the European human rights system focus on treaty provisions that restrict intellectual property – such as the right to freedom of expression – or emphasize the European Convention's influence on the intellectual property laws of a specific country. See P. BERNT HUGENHOLTZ, *Copyright and Freedom of*

The relation between copyright and access right is fundamental to understand the debate around the mixed nature of PSI. In fact, in the specific case of PSI, copyright and access regimes are supposed to coexist without overlapping, being copyright norms employed for boundaries only on further re-use. However in the case of passive dissemination, even if copyright and access are not hierarchically ordered, IPRs may still affect the terms of disclosure of public contents<sup>23</sup>.

Copyright and freedom of expression regimes in relation to PSI, on the contrary, do seem to overlap: the norms on PSI re-use specifically safeguards copyright exclusives.

The typical consequence is that PSI Holders are entitled with a discretionary right to regulate the terms of re-use of PSI.

#### 2.4. Intellectual Property Rights on PSI

In Europe, information or documents produced and/or managed by the State or other public bodies are governed by rules of various nature. For what relates to copyright, national legislations of European Member States may vary sensibly, offering different terms of protection for the information produced, held and managed by public bodies<sup>24</sup>.

*Expression in Europe*, in Dreyfuss R.C., Zimmerman D.L., First H. (eds.), "Expanding the boundaries of Intellectual Property: Innovation policy for the knowledge society", Oxford, Oxford University Press, 2001, p. 343; see also T. PINTO, *The Influence of the European Convention on Intellectual Property Rights*, in "European Intellectual Property Review", 2002, n. 24, p. 209.

<sup>23</sup> As known, a large part of the PSI proactively shared by public bodies might already be in Public Domain on the basis of the rule of exclusion for official acts. However this is not always the case: see for instance the case of a *sui generis* right on a collection of raw data preventing or in any case regulating the flow of information which would be otherwise free. S. DUSOLLIER, Y. POULLET, M. BUYDENS, *Copyright and Access to Information in the Digital Environment*, a study prepared for the Third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace, in Copyright Bulletin, 2000 – available at [webworld.unesco.org](http://webworld.unesco.org).

<sup>24</sup> The Bern Convention (Art. 2 (4)) leaves Member States the freedom to determine the protection to be granted to official texts of a legislative, administrative or legal nature, and their official translations. The vast majority of Member States have used this provision to exclude these texts from any copyright protection. Some Member States have extended the exclusion for official acts also to PSI with a different official nature, while some others apply copyright regulations tailored, where appropriate, on the nature of the governmental document. "On the whole, it can be said that national laws exempt mainly the 'end products' of the legislative and judicial branch of government. A vastly greater amount of information is,

Contrary to U.S. federal information which is all placed in public domain<sup>25</sup>, European legal systems usually provide that only some of PSI contents might enter the public domain (as defined within a copyright regime) through the effect of the rule of exclusion for official acts, while much other governmentally-produced information might still be copyrighted, and thereafter licensed to further users<sup>26</sup>.

of course, held by the executive arm, whether it concerns administration at the State, regional or local level, or (other) bodies governed by public law, such as mapping agencies, national meteorological services or public registries (companies, vehicle, land, etc.). This information may either fall under the default rules or be subject to a ‘lighter’ copyright regime”. M. VAN EECHOU, *Friends or Foes? Creative Commons, Freedom of Information Law and the EU Framework for Re-Use of Public Sector Information*, in Guibault L. (ed.), “Open Content Licensing: From Theory to Practice”, Amsterdam, Amsterdam University Press, 2011, p. 9. Available at SSRN: <http://ssrn.com/abstract=1722189>.

<sup>25</sup> Federal information in the U.S.A. is subject to various legislative and regulatory policies, which include among the rest the U.S. Copyright and the Freedom of Information Acts and the Office of Management and Budget Circular A-130. The Copyright Act provides under Section 105 that information created by the federal government is not protected under copyright rules. The same legal status is not automatically extended for the information at the state and local levels, where different regimes may operate and are in certain cases directed to control or exploit such information to recover the costs of its production. T. VOLLMER, *Topic Report 25, State of Play: Public Sector Information in the United States*, Feb. 2011, [http://www.epsplus.net/topic\\_reports/topic\\_report\\_no\\_25\\_state\\_of\\_play\\_public\\_sector\\_information\\_in\\_the\\_united\\_states](http://www.epsplus.net/topic_reports/topic_report_no_25_state_of_play_public_sector_information_in_the_united_states).

<sup>26</sup> For a reconstruction of the various meanings usually associated to the notion of “public domain”, see P. SAMUELSON, *Enriching Discourse On Public Domains*, in “Duke Law Journal”, 2006, n. 55, pp. 783. The Author, recalling the intuition of prof. Boyle, gathers up to thirteen possible interpretations of “public domain”. The first one focuses on the information *products* on which there are no copyright claims either because the terms have expired or copyright is not operating or else because the artworks do not qualify for protection (for lack of originality or utility). Among the other definitions, the notion of public domain as a constitutionally protected area constitutes a sort of obligatory public area which cannot be privatized – including ideas and other information on which exclusive right should not insist. Prof. Benkler adds another definition including all information freely exploitable regardless of the legal title supporting their legitimate use: in this case the public domain becomes a dynamic notion able to follow the expansion of the technological structure in which the information is circulated. More, public domain may also be the result of a contractual provision – like in the case of the open source and *open data* initiatives, *Creative Commons* licensing or other similar models. Although the information so released strictly speaking does not belong to the realm of the public domain, the terms pursuing goals of sharing and promotion of values intrinsic to it, make this information functionally similar to the traditional definition of public domain. Finally, the notion of public domain as a margin to the government secrecy should also be mentioned: “(...) *injecting information into the public domain is the perfect antidote to government abuses that are carried out by means of secrecy. The*

It appears at this point very relevant to identify which information within PSI might be protected under the harmonised terms of European copyright<sup>27</sup>. To this purpose it might be helpful to distinguish, among the many classifications, two groups of PSI identified according to their nature as information-object and instrumental information<sup>28</sup>.

Information-object, outcome of the normal activity of the public administration, is often a product with an autonomous creative expressive form, which is hence protectable under copyright terms. Instrumental information<sup>29</sup>, on the other hand, usually consists in data – not necessarily highly

*public domain counters secrecy with public scrutiny*". For the first definition see J. BOYLE, *The Second Enclosure Movement and the Construction of the Public Domain*, in "Law & Contemporary Problems", cit., p. 68. For the definition of obligatory public domain see D.L. ZIMMERMAN, *Is There a Right to Have Something to Say? One View of the Public Domain*, in "Fordham Law Review", 2004, n. 73, pp. 297, 312-315. On the third definition see Y. BENKLER, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, in "New York University Law Review", 1999, n. 74, pp. 354, 361-362. On the notion of public domain as a contractual result see J.H. REICHMAN, P.F. UHLIR, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, in "Law & Contemporary Problems", 2003, n. 66, pp. 315, 317-325. For the public domain as a safeguard for the public scrutiny see E. LEE, *The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, in "Hastings Law Journal", 2003, n. 55, p. 91.

<sup>27</sup> We refer in this case to the Directives on copyright and on database as applicable to PSI. For a comprehensive list of regulation and policies on [http://ec.europa.eu/internal\\_market/copyright/documents/documents\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm).

<sup>28</sup> Many approaches have been used to classify public data, by considering their source, typology, the medium they are incorporated in or the goals for their collection. For an extensive research on the matter, see J.M. BRUGHIÈRE, *Les données publiques et le droit*, 2002, Litec, pag. 4, also quoting M. MAISL, *Le droit des données publiques*, Librairie générale de droit et de jurisprudence, 1996, p. 15. In past times, the Green Paper on the Public Sector Information in the Information Society also sketched some criteria to identify types of PSI: "Public sector information may be classified along different lines. A first possible distinction is the one between administrative and nonadministrative information. The first category relates to the function of Government and the administration itself and the second category to information on the outside world that is gathered during the execution of public tasks (Geographic Information, information on businesses, on R&D etc.). Within administrative information a further distinction can be made between information that is fundamental for the functioning of democracy (like laws, court cases, Parliamentary information) and information that does not have such a fundamental character. Another possible distinction draws a line between information that is relevant for a general public (like Parliamentary information) or for a very limited set of persons that have a direct interest.", COM(1998)58, available at [http://ec.europa.eu/information\\_society/policy/psi/docs/pdfs/green\\_paper/gp\\_en.pdf](http://ec.europa.eu/information_society/policy/psi/docs/pdfs/green_paper/gp_en.pdf).

<sup>29</sup> Instrumental information includes data collected and/or processed, and possibly shared, by the public service to accomplish its statutory mission. Information belonging to this

elaborated – whose representation, ie. expressive form, often corresponds to the content itself. Consequently, according to the traditional principle for which only the expressive form of a work of art is protectable, it might look difficult to recognise any originality in the mere representation of raw data, if not just by recognizing a *sui generis* right on their structured organisation<sup>30</sup>.

On the other hand, the exclusive rights on the part of PSI on which Copyright protection subsists is usually regulated through specific national norms and managed through a range of agreements, more or less standard-

category include management data, collected for the purposes of an organized administration of citizens and goods (private and public); data produced for the needs of the public to comply with procedures and formalities or in general information of public utility; finally data which relate to all acts that the public administration adopts as part of its institutional activities (in this case the data are oriented in decision-making and largely absorbed by the notion of administrative document). See J.M. BRUGHIÈRE, cit., p. 24.

<sup>30</sup> See on the point J.H. REICHMAN, P. SAMUELSON, *Intellectual Property Rights in Data?*, in “Vanderbilt Law Review”, 1997, n. 50, p. 51. The protection of raw data generally affects several modern practices, as for instance it happens in the case of data aggregators and search engines listing contents produced by others. On this specific issue, a milestone is the decision of the Belgian Court of First Instance “Copiepresse v Google Inc”, Bruxelles, 5 Sept. 2006, available at [http://www.chillingeffects.org/international/notice.cgi?action=image\\_7796](http://www.chillingeffects.org/international/notice.cgi?action=image_7796), along with the previous Danish decision held in “Danish Newspaper Publishers’ Association v Newshooter.com” of 24 June 2002 [Court Journal No F1-8703/2002]. In both cases, the claims of the contestants were dismissed: they not only wanted to be refunded from the alleged loss of profit but also applied to reserve the reproduction of the same information about their activity. The question whether these type of “raw data” shall be protected has been carefully considered: “(i)f the use of a person’s URL were to be infringing, it would undermine the very viability of the Internet. It would be like saying that the inclusion of a street address in the phone book infringed the intellectual property rights of the person whose address it was. Now, of course, there may be other reasons why the use of a third party’s address may be restricted (e.g. privacy), but that is not sufficient to make the use an infringement of copyright”. B. ALLGROVE, P. GANLEY, *Search Engines, Data Aggregators and UK Copyright Law: A Proposal*, 2007, available at <http://ssrn.com/abstract=961797>. Without entering into details on the debate about the database protection, it must be noted that the protection of raw data through the *sui generis* right usually seen as detrimental to the progress of society. On this point cfr. J.H. REICHMAN, P.F. UHLIR, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, in “Berkeley Technology Law Journal”, n. 14, p. 793 where is affirmed that “(…) In sum, putting a strong property right too far upstream too soon could have a disastrous effect on the long-term competitiveness of the U.S. economy and would undermine a key comparative advantage this country enjoys in the high-tech sectors of the global marketplace.”

ised<sup>31</sup>. Copyright is usually used to achieve different goals: on one extreme copyright terms are used to justify the structure of fee charges while on the other one governments or movements from the civil society promote – and in certain occasions get – PSI to be shared under the free schemes falling under the umbrella of Open Data.

### 3. PUBLIC SECTOR INFORMATION COMMONS

#### 3.1. *Traditional Justifications of Copyright Applied to PSI*

The current copyright system is evidently the outcome of various historical exigences on which justifications for exclusive rights were built upon. According to whose interest copyright rules are in fact protecting, arguments supporting the attribution of exclusive rights to the authors are usually grouped as *ethical* or *economical* justifications: the first ones tend to attribute a simil-proprietary control to the author or avoid non-authorized use of the work; the second group is focused on the interests of the community to ensure a constant provision of creations<sup>32</sup>. However, because of its peculiar nature, PSI doesn't seem to need any further incentive for its effective creation or dissemination: indeed PSI is most of the times a by-product of another activity which would be conducted anyway and most of PSI is anyway produced regardless of the exclusive rights just because public bodies do not have the need to compete in a given market or because they are the only possible producers of such information. The dissemination instances on PSI are on the other hand satisfied by the transparency and accountability claims applicable to public bodies.

Finally, from an economical point of view, general theory usually justifies the deadweight loss descending from the attribution of exclusive rights as a means of curing the relevant market failure: intangible assets are in fact described as public goods, ie. non-rival and not excludible, and if not properly protected will risk under-production and inefficient exploitation<sup>33</sup>. Govern-

<sup>31</sup> See, among the others, the Open Government Licence, a standard licence for the re-use of public sector information, including that which is covered by Crown copyright, formulated in the UK, available at <http://www.nationalarchives.gov.uk/information-management/our-services/click-use.htm>.

<sup>32</sup> On this point see extensively M. SPENCE, *Intellectual Property*, Oxford, Clarendon, 2007.

<sup>33</sup> Among the first contributors on the point see P.A. SAMUELSON, *The Pure Theory of Public Expenditure*, in "Review of Economics and Statistics", 1954, n. 4, pp. 387 ff. With specific

ment intervention is described as a typical measure to correcting the tragedy and curing the market failure: hence, also from an economical point of view, exclusive right do not seem to be imperative to ensure the stable creation and provision of PSI.

### 3.2. *The Theory of the Commons Applied to PSI*

Having affirmed that copyright is not necessarily the most suitable legal model for the efficient management of PSI, alternative legal schemes might be investigated, specifically those of the Information Commons<sup>34</sup>.

Pooled resources<sup>35</sup> and big data<sup>36</sup> are at the centre of recent legal and economical debate also for their increasing availability through information technologies mechanisms.

As known, a common arises whenever a given community decides to manage a resource in a collective manner, with a special regard for equitable access, fairness and sustainability. Commons are based on a purely voluntary social scheme, and they require some legal boundaries to prevent misuse, such as privatisation, vandalism and free riding. The management and sustainability of common resources requires indeed suitable conditions, such as appropriate rules, good conflict-resolution mechanisms, and well-defined group boundaries<sup>37</sup>.

regards to the economical characteristics of the information, see the first chapter of W.M. LANDES, R.A. POSNER, *The Economic Structure of Intellectual Property Law*, Cambridge Belknap Press, 2003.

<sup>34</sup> Among many, see on the point D. BOLLIER, *Why We Must Talk about the Information Commons*, available at [http://www.community-wealth.org/\\_pdfs/articles-publications/commons/article-bollier.pdf](http://www.community-wealth.org/_pdfs/articles-publications/commons/article-bollier.pdf).

<sup>35</sup> The legal analysis of common-pool resources is recently debated especially in relation to the cultural environment. See recently M.J. MADISON, B.M. FRISCHMANN, K.J. STRANDBURG, *Constructing Commons in the Cultural Environment*, in "Cornell Law Review", May 2010, p. 657.

<sup>36</sup> Big Data refers to datasets whose size is beyond the ability of typical database software tools to capture, store, manage and analyze – a definition intentionally left flexible and adaptable to the technological evolution and to the specific sectors data refer to. For the challenges Big Data may pose see the recent report *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, McKinsey Global Institute, May 2011, available at [http://www.mckinsey.com/mgi/publications/big\\_data/](http://www.mckinsey.com/mgi/publications/big_data/).

<sup>37</sup> The effects of open access or common ownership has been largely discussed, especially since the renowned work of G. HARDIN, *The Tragedy of the Commons*, in "Science", 1968, p. 162, pp. 1243-1248. More recent studies prospected however a different approach to the management of such environments. See C. HESS, E. OSTROM (eds.), *Understanding Knowledge*

In relation to information, the notion of Commons has been variously employed, also in relation to some uses of the Public Domain<sup>38</sup>. Information commons are typically enforced through the rules of copyright, but the contractual nature of the agreements used to regulate them is also considered<sup>39</sup>.

as a Commons, *From Theory to Practice*, The MIT Press, 2006 and also E. OSTRUM, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge, Cambridge University Press, 1990, and also by C. ROSE, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, in "University of Chicago Law Review", 1986, n. 53, pp. 711-781.

<sup>38</sup> The literature presents various approaches to understand the notion of the commons. As a brief summary see C. HESS, E. OSTRUM, *The Public Domain: Ideas, Artifacts, and Facilities: Information as a Common-pool Resource*, in "Law and Contemporary Problems", 2003, p. 111 who refer to Lawrence Lessig's concept of the commons as a universal, open access: "The commons: There's a part of our world, here and now, that we all get to enjoy without the permission of any." Yochai Benkler sees it as a legal constraints against controlling regimes: "The commons refers to institutional devices that entail government abstention from designating anyone as having primary decision-making power over use of a resource. A commons-based information policy relies on the observation that some resources that serve as inputs for information production and exchange have economic or technological characteristics that make them susceptible to be allocated without requiring that any single organization, regulatory agency, or property owner clear conflicting uses of the resource." Litman identifies the commons with the public domain: "The concept of the public domain is another import from the realm of real property. In the intellectual property context, the term describes a true commons comprising elements of intellectual property that are ineligible for private ownership. The contents of the public domain may be mined by any member of the public." L. LESSIG, *Code and the Commons*, Keynote Address at the Conference on Media Convergence, held at Fordham University Law School (Feb. 9, 1999), available at <http://cyber.law.harvard.edu/works/lessig/fordham.pdf>; Y. BENKLER, *The Commons as a Neglected Factor of Information Policy*, Remarks at the Telecommunications Policy Research Conference (Sept. 1998), available at <http://www.law.nyu.edu/benkler/commons.pdf>; JESSICA LITMAN, *The Public Domain*, in "Emory Law Journal", Vol. 39, 1990, p. 965, 975; J. BOYLE, *The Second Enclosure Movement and the Construction of the Public Domain*, cit.

<sup>39</sup> The different qualification of the agreement's nature affects of course its formation, the remedies, interpretation and termination. The literature on the point is extensive: see among the rest RAYMOND T. NIMMER, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, in "Berkeley Technology Law Journal", 1998, p. 827. Also "A pure licensing agreements should be considered as a one-side obligation for the licensor to tolerate actions that would otherwise be covered by copyright. [...] Crossing the line to mutual obligations would easily bring the licenses to the realm of *lex contractus*" H.A. HIETANEN, *A License or a Contract, Analyzing the Nature of Creative Commons Licenses*, in "Nordic Intellectual Property Law Review", Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1029366>.

Information commons intended as a “regulated open access” legal scheme may realise the challenging goal of rebalancing concurrent interests on PSI. In the alternative system, the agreement granting the use of PSI would be non-transactional and non discriminatory, thus fully realising the goals of access to information. Also, the system would switch from royalty-based to compensation for use, by this degrading copyright exclusives in a hypothesis of “paying public domain”: the agreement, similar to compulsory licensing but shaped on the theory of liability rules, would allow a greater accomplishment of freedom of expression claims.

On the basis of the above assumptions, a proposal should be formulated for a European harmonised framework of rules for protection and circulation of PSI. Intended as a harmonised set of rules for EU Member States, also to enhance trans-national re-use of PSI, the legal model might have the character either of “private ordering” (such as a standard set of agreements for access and protection specifically tailored on PSI) or of “public ordering” (providing a European PSI copyright legislation, as it has been previously opted for in the cases of software or database) solutions.

### *3.3. The Private Ordering Solution: A European Standard Agreement for PSI*

Until now, many attempts have been put in place at European and national level to unravel the conundrum of providing the greatest access to PSI yet maintaining some control on further re-use and avoiding market enclosures<sup>40</sup>.

The Commission has started some consultations within the action of a possible review of the Directive on Re-use by 2012. As a result<sup>41</sup>, the Commission together with stakeholders advocate the promotion of the exchange of good practices in measures facilitating re-use between MS, and the application of licensing and charging models that facilitate the availability and re-use of PSI, ensuring equal conditions for public bodies re-using their own documents and other re-users.

<sup>40</sup> See the recent debates hosted, among the rest, by the community around the ePSIplatform. Also refer to M. VAN EECHOU, B. VAN DER WAL, *Creative Commons Licensing for Public Sector Information, Opportunities and Pitfalls*, available at [http://wiki.creativecommons.org/images/2/2c/Creativecommons-licensing-for-public-sector-information\\_eng.pdf](http://wiki.creativecommons.org/images/2/2c/Creativecommons-licensing-for-public-sector-information_eng.pdf).

<sup>41</sup> SEC(2009) 597, /\*COM/2009/0212 final\*/.

Moreover, the targets of the Europe Digital Agenda intend to overcome a series of challenges for generating a European Digital Single Market for creative content. To this purpose, the strategy aims at creating a wide and competitive Digital Content Market consisting of legal services, attractive offers and fair conditions to raise consumer confidence in online businesses and foster access to culture and knowledge across the EU. According to the analysis of the Commission, the development of the internet has brought significant challenges, not least the fact that commercial users often operate across borders. On this ground, the essential policy objective of the Commission now is to simplify the cross-border management of rights for online uses.

To this purpose, the report of the Commission explicitly mentions the creation of a streamlined pan-European and/or multi-territory licensing process as a possible first step towards enhanced licensing efficiency<sup>42</sup>.

This would contribute to the fulfilment of the priorities for a European Digital Agenda as it constitutes a practical solution for encouraging new business models, promoting industry initiatives and innovative solutions, while contributing to the harmonisation of the applicable rulebook of the EU's single market.

For what relates to PSI, several countries, including some EU Member States, already studied the compatibility or have already implemented some Creative Commons (CC) terms for PSI<sup>43</sup>.

The analysis conducted up to the moment, however, has demonstrated that some terms of the existing CC licences could be poorly compatible or able to impair the realisation of the objectives of commercial re-use of PSI as intended by the Directive 2003/98/EC. Among the many revealed legal pitfalls, under CC licenses it is not possible to charge royalties and the regulation of further commercial uses or derivative works is difficult to achieve.

A legal model for the circulation of PSI should be therefore formulated, offering a harmonised standard for Member States with terms compatible

<sup>42</sup> In several occasions, the Commission has explicitly mentioned that the advent of the digital age has improved the manner in which information is disseminated, and has led to the emergence of new licensing schemes, which are seen as a viable alternative to traditional online licensing systems. See among the rest: "Creative Content in a European Digital Single Market: Challenges for the Future", available at [http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_2009/reflection\\_paper.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf).

<sup>43</sup> CC licences are an international legal scheme based on open access, tailored to address access and distribution policies especially for digital and online contents. See <http://www.creativecommons.com>. For their application to PSI, see *supra* note 40.

with European legislation and interoperable with existing solutions such as Creative Commons and Open Data models. The use agreement should be conform to the practices implemented in Member States related to copyright protection, access and re-use of PSI<sup>44</sup>.

#### *3.4. The Public Ordering Solution: A European Copyright Scheme for PSI*

According to the analysis behind the realisation of a European Digital Single Market based on creative contents by 2015, a more coherent licensing framework at European level is sought. Among the solutions proposed to achieve the Digital Single Market, a solution of “public ordering” would be a sort of “European Copyright Law” (established, e.g., by means of a EU legislation). This is maintained to have instant Community-wide effect, and would overcome the issue that each national copyright law, though harmonised as to its substantive scope, applies only in one particular national territory. A Community copyright would enhance legal security and transparency, for right owners and users alike, and greatly reduce transaction and licensing costs.

For what concerns specifically PSI, an alternative set of rules belonging to the “public ordering” realm would aim at creating a tool for the rights management across the Single Market, avoiding to administering a “bundle” of 27 national copyrights. Such a normative scheme would not replace, but exist in parallel to national copyright titles, and would succeed in removing the inherent territoriality with respect to applicable national copyright rules<sup>45</sup>.

<sup>44</sup> As an example of a similar solution adopted for software, the EUPL should be considered as the first European Free/Open Source Software (F/OSS) Licence. The EUPL was approved as a Licence to be used for the distribution of software developed in the framework of the IDA and IDABC programmes. In the elaboration of the EUPL, due account was taken of the European Union Law as well as of the specificity and diversity of Member States Law. The Licence is drafted in general terms, so it may be used for other software applications, by other European Institutions, by national, regional or local administrations, other public entities as well as private entities and natural persons. The European Commission approved the EUPL v.1.0 on 9 January 2007 and released a revised version in 2009, while at the same time validated it in all the official languages (EUPL v.1.1).

<sup>45</sup> Prof. Ricolfi recently sketched a proposal for a new framework of rules which would better comply with the specific needs of both creators and users, “[...] what may currently be needed is a new kind of copyright, which we may, if you wish, label Copyright 2.0. I submit that the new system would have four basic features. Old copyright, or Copyright 1.0, would still be available; but it would have to be claimed for by the cre-

#### 4. CONCLUSIONS

Government-produced information, because of its peculiar nature, does not appear to require copyright protection as a incentive for its creation or dissemination: PSI is anyway produced notwithstanding the attribution of a right on it nor copyright on PSI seems to be needed to avoid market failure, as governmental intervention is normally seen as a remedy against it. At the same time, the discretionary power of the Public Sector Information Holders to grant a licence to use PSI seems at odds with the general access to information and freedom of expression rights.

Therefore, the equilibrium between copyright ownership and HR in the case of PSI looks then unfairly unbalanced towards copyright.

To this regard, the paradigm of the so-called Information commons shall be considered: the paths to its legal and technological implementation seems still complex, however a new set of rules would seem to accommodate the needs of all stakeholders and also answer some of the reasons for PSI under-exploitation, and especially for what relates to cross-border re-use.

ator at the onset, e.g. by inserting the old copyright notice, ©, as the US did in the past, before accessing the Berne Convention. If no notice was given, Copyright 2.0 would apply; and this would give creators just one right, the right to attribution. The notice could also be added after creation, but then it would only have the effect of giving exclusivity against specified non authorized uses (in particular: subsequent commercial uses). The Copyright 1.0 protection given by the original notice could be withdrawn, and may be it should be deemed withdrawn after a specified period of time (e.g. the 14 years of the original copyright protection), unless an extension period (of another 14 years) is specifically requested.” M. RICOLFI, *Making Copyright Fit for the Digital Agenda*, available at <http://nexa.polito.it/nexafiles/MakingCopyrightFitfortheDigitalAgenda.pdf>.