BOUNDARIES OF INFORMATION PROPERTY

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This book is sponsored by Banca Intesa Sanpaolo.

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BOUNDARIES OF INFORMATION PROPERTY

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Rest of the World (incl. Eastern Europe)
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1 Deltic Avenue, Rooksley
Milton Keynes MK13 8LD
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Tel: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

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Lefebvre Sarrut Belgium NV
Hoogstraat 139/6
1000 Brussels
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Distribution for the USA and Canada
Independent Publishers Group
Order Department
814 North Franklin Street
Chicago, IL 60610
USA
Tel: +1 800 888 4741 (toll free) | Fax: +1 312 337 5985
Email: orders@ipgbook.com

Boundaries of Information Property

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Artwork on cover: Detail of 'Arbre' by Antonius van der Pas (1972). Photographed by Fabiane Lange.

ISBN 978-1-83970-230-3
D/2022/7849/29
NUR 822

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

FOREWORD FROM A PROPERTY COMPARATIST'S PERSPECTIVE

This project has quite a long history. It goes back to an idea, presented some 25 years ago, that information could, as such, be an economically valuable, identifiable object to which a subject could have rights vis-à-vis a relevant and considerable group of other subjects. In other words, that information as such could be the object of a property right.[1] The question proved to be almost unexpected and was met with reluctance as to whether this could be a relevant research question at all. At that time, information was generally considered to only be legally relevant in cases where intellectual property rights, including a database right, could be found, and where information qualified as a protected trade secret. To understand this reluctance better, we should realise that this idea was presented before the rise of the data economy, with its Big Data and a new profession – data scientists – and before new developments that have simultaneously and radically changed how we look at data, such as distributed ledger technology, blockchain, smart contracts, the sensorisation of society, the Internet of Things, machine learning and artificial intelligence. All these developments have transformed our society fundamentally, but they are all also very recent. Within a relatively limited time frame, we find ourselves no longer living in just one (i.e. real) world, but in a mixture of spheres where the physical world and the virtual world not only meet, but indeed come together as interwoven and interdependent, creating a hybrid world, particularly in our minds. Twenty-five years ago, there was also not the same awareness as now that there are more sources of valuable information than we tended to recognise, such as information hidden in customs and traditions. Arguing, as is done in traditional common law cases, that pure information can never be property is, therefore, from today's perspective, an open-ended statement that is just too far-reaching to be true, and at the end of the day even meaningless.[2] What is pure information? Is not all information 'pure', whatever its contents and shape? We need to accept that, in our present society, information, laid down in data, is so

[1] Cf. Sjef van Erp, 'Ownership of digital assets (editorial)', *European Property Law Journal* (2016), 73 ff.

[2] Cf. the report by the UK Jurisdiction Task Force, 'Legal statement on cryptoassets and smart contracts' (published November 2019 and available at: https://resources.lawtechuk.io/files/4.%20Cryptoasset%20and%20Smart%20Contract%20Statement.pdf).

omnipresent, affecting both our view of what it means to be a person and what we consider to be an object of economic value, that we cannot and should not deny its legal relevance. We are now data subjects, recognising that personal data tell something about ourselves, but also shape us in terms of how the outside world creates its image about us, and those very same data are economically highly valuable objects which are traded. At the same time, we could not go further without information and the gathering of data. We need information about the physical world in which we live to understand – and combat – climate change. Without adequate data and data analysis, we cannot properly understand how our climate is changing and what any possible effects of, for example, the reduction of CO_2 and greenhouse gas emissions could be.[3] We also need information about our physical self and diseases, for example to stop or at least contain the spread of highly contagious viruses such as COVID-19. In other words, over the past 25 years our vision of the legal relevance of information has shifted dramatically. This book is the outcome of that fundamental change in vision, which is shown in its theoretical underpinnings and analyses, as can be found in both the opening chapters and the presentation and examination of the various case studies. The project followed the Common Core method (initially called the Trento Common Core method, named after the university where the team met in the beginning), which has again proven to result in highly innovative and productive insights.

At the heart, it is submitted, of all debates surrounding information as a legal object – be it from a contractual or a proprietary perspective – is the question of to whom any rights could be attributed and how these rights could and should be distributed, particularly if those rights would allow the rightholder control over, and entitlement to the economic benefits of, that information, as far as it is laid down in data. Control then means access to the data, with at a minimum being able to see the data on a screen, the right to make changes and even to delete, and the right to portability and the right to transfer. Taking these elements (access, deleting, etc.) together, we can now do two things when attempting to legally qualify control of information as laid down in data. We can either analyse these elements from a traditional point of view on what 'ownership' means, attempting to restructure ownership such that it may comprise entitlements regarding data, or accept that the object of any right to data is so fundamentally different from existing legal categories (focusing on physical and intangible property, including intellectual property) that a new category of legal relations needs to be developed. That area we could then call data law and the rights which are attributed and distributed concerning information laid down in data we could then call data rights. The first approach demands a thorough comparative legal analysis, which

[3] Cf. for example the data gathered by the Intergovernmental Panel on Climate Change (IPCC, see https://www.ipcc.ch/data/) and the World Bank (https://data.worldbank.org/topic/19).

would already be difficult by itself. Unlike what we see in contract and tort law, property law is characterised by fundamental differences in legal analysis, depending on the legal tradition. Civil law and common law differ considerably in both their history and theoretical structure, with considerable implications from a practical viewpoint. And even within the civil law tradition there is no unity. The German definition of ownership is far stricter than the French notion of ownership and the Scandinavian countries follow their own path. Within the common law tradition, unlike in the civil law tradition, no unified theory on the structure and essential characteristics of property law can be found. A distinction must be made between land, movables and claims. The doctrine of estates only applies to land and not movables. For movables, the doctrine of title is important. In other words, the common law tradition is by nature more object-oriented and theoretically disintegrated. The civil law tradition, however, is more subject-oriented, focusing on what constitutes a person's patrimony as that person's 'shadow' in the physical world, and offers a theoretically integrated system.

Focusing on what 'ownership' means, even a superficial examination shows that the object of the right constitutes an essential characteristic of it, as it binds what the right contains. The object qualifies the property right.[4] This is why the disintegrated nature of property law in the common law tradition results in a disintegrated analysis of property rights. That is what, essentially, Hohfeld's theory with its distinction between rights, powers, privileges and immunities comes down to.[5] It cannot, therefore, come as a surprise that we see more and more acceptance of the second above-mentioned approach, namely that we must admit that data are of such a fundamentally different nature compared to the more traditional objects of property rights that we cannot but accept a new category of rights as part of a new legal area: data rights. This acceptance can be found in both the European Union and China. The European Law Institute recently published its Principles for a Data Economy, Part III of which devotes several pages to data rights.[6] Principle 16 of the ALI-ELI project gives the following overview of what constitutes this new category:

> (1) Data rights may include the right to (a) be provided access to data by means that may, in appropriate circumstances, include porting the data; (b) require the controller to desist from data activities; (c) require the controller to correct data; or (d) receive an economic share in profits derived from the use of data. (2) The data rights set

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[4] Sjef van Erp, 'Ownership of data. The numerus clausus of legal objects', *Brigham-Kanner Property Rights Conference Journal* (2017), 235 ff.

[5] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal* (1913), 16 ff. and *Yale Law Journal* (1917), 710 ff.

[6] ALI-ELI Principles for a Data Economy: Data Transactions and Data Rights, available at: https://principlesforadataeconomy.org/fileadmin/user_upload/p_principlesforadataeconomy/Files/Principles_for_a_Data_Economy_ELI_Final_Council_Draft.pdf.

> out in Part III are not exhaustive; rather, a legal system may conclude that parties should have additional rights of this sort. Accordingly, no negative inference should be drawn from the absence of those rights in Part III.[7]

In China, the idea of data rights is also being developed.[8] In essence, such data rights cannot be qualified in a more traditional way. They are a mixture of public law (fundamental human rights, data and privacy protection) and private law (for example providing access). From a private law viewpoint, they are even more of a mixture. Although these rights might be contractual in nature, at the same time they may have a far-reaching effect against third parties and could, consequently, also qualify as being of a proprietary nature. This third-party effect could be the result of the public law character of these rights (one can think of data protection law, which gives the data subject a right to withdraw consent to use the data) or their private law character, as data are frequently at the heart of a web of contracts where a particular contractual arrangement regulating the transfer and further use of data may have an impact on other contracts 'downstream' concluded by the data transferees under the initial contract.[9]

Twenty-five years ago, asking the question 'can you own information?' might have raised eyebrows, but today it is at the heart of a fundamental debate on the nature and value of traditional legal conceptions as to what it means to 'own' something in an environment which is both physical and algorithmic, based on information flows as laid down in data. It will be clear that what constitutes property, property rights and, consequently, boundaries to property all evolve, as this project has clearly shown!

Sjef van Erp
Prof. Dr. em. University of Maastricht

[7] See also Principle 16 under (3): 'The rights set out in Part III are without prejudice to rights other than data rights that a person may have against a controller of data with regard to that data, such as rights arising from breach of contract, unjust enrichment, conversion of property rights, or tort law.'

[8] Cf. Lian Yuming (ed.), *Data Rights Law 1.0, The Theoretical Basis. Key Laboratory of Big Data Strategy* (Oxford: 2019), examining in Chapter 3 the concept of data rights.

[9] See on data as the spider in a web of contracts my valedictory address at Maastricht University, entitled 'All good things come to an end, but access remains' (Oisterwijk: 2021), 32 ff.

GENERAL EDITORS' PREFACE

It is a special pleasure to welcome the 21st book in the series The Common Core of European Private Law. This book is edited by four scholars, who together represent four different legal cultures: the German, the Belgian, the Netherlands and the English. Their works are already renowned and appreciated well beyond the 'Common Core' circles.

The Common Core project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger. The methodology used in the Common Core project, then novel, is now a classic. By making use of case studies, it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice, and to thorough comparisons between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the Common Core project is offering to the scholarly community is already quite extensive and will become even more so as more volumes are published. The availability of materials attempting a genuine analysis of how things seem to be is, in our opinion, a prerequisite for an intelligent and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. As of today, the Common Core project is the longest-running scholarly enterprise in the field. The analytical work carried out by the more than 300 scholars that have so far joined us in the Common Core project is also a precious asset of knowledge and legitimisation for any such a normative enterprise.

We must thank the editors and contributors for their work. With a sense of deep gratitude, we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the results of a project in which he believed so firmly.

No scholarly project can survive without committed sponsors. The International University College of Turin allows us to organise the General Meetings together with the Centro Studi di Diritto Comparato of Trieste. The European Commission has partially sponsored some of our past General Meetings, having included them in their High Level Conferences Program. The Italian Ministry of Scientific Research, the University of Turin, the University of Trieste, the University of Salento, the University of Gothenburg, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of the Law, the University of Trento, the Collegio Carlo

Alberto and the Consiglio Nazionale del Notariato all contributed to, or are still contributing to, the funding of this Project. Last but not least, we must thank all those involved in our ongoing Common Core projects in contract law, property, tort and other areas, whose results will be the subject of future published volumes.

Our website home page can be found at www.common-core.org. There you can follow our progress in mapping the common core of European private law.

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Ugo Mattei, University of Turin – University of California, Hastings College of the Law

Late Honorary Editors

Rudolf B. Schlesinger, Cornell University – University of California, Hastings College of the Law
Rodolfo Sacco, Emeritus, University of Turin

PREFACE

This book presents the results of a long-term comparative research project on information property which has accompanied us for 20 years (2001–2021). The project covers 16 European jurisdictions, and has brought us together with many collaborators with whom we are united in the spirit of a multinational research project, unfunded by third-stream money, powered exclusively by intrinsic scientific motivations.

The central research question is: How do boundaries to information property evolve? In the light of comparatively few legislative interventions in intellectual property law (IP), the following questions arise: Are boundaries set elsewhere? Do industrial practices or legal intervention in other fields of the law set boundaries? The methodology of the project ('the Trento method') and the research results are laid down in Part I. Our academic learnings have taken shape as four individual chapters, which form Part II of the book. They focus on regulatory theory, conflict configuration in IP law, the European Public Domain, and morality in IP Law.

Part III documents the empirical foundation of the project (cases and national reports). When, in individual cases, no answer is given by the country reporter(s), the lacuna is indicated.

We are grateful to numerous supporters. All the contributors of country reports are listed below. We have indicated the contributors' affiliation at the time the respective country report was submitted. We are thankful to each one of them. Updates were invited, but only the editors used the option. Beyond our reporters, without the loyal research assistants who encouraged us while working on the project over the years, and who contributed valuable insights, the project would not have come to an end. In this respect, Dr Anja Balitzki deserves special gratitude. She prepared valuable texts which helped two of the editors to write their comparative remarks while she was employed at the University of Oldenburg (2010–2013). We are indebted to Jakob Rustige who supported us in 2018–2019 to master the technical side of the manuscript while we worked on revisions simultaneously; along the way, he made many corrections to the texts. We thank Ugo Mattei and Antonio Gambaro for their initial encouragement and accepting the Boundaries of Information Property project as additional project in 2004 in the 'property' section under the umbrella of the 'The Common Core of European Private Law' (CCEPL). The chair of the CCEPL-property working group, Filippo Valguarnera, deserves our gratitude for his engagement in the final editing process in 2021. We also thank the publisher for the expeditious

publication, especially Rebecca Bryan and Rebecca Moffat for their thoughtful language reviews. Those interested in the sociology of a collaborative legal research project which brings together lawyers from various jurisdictions can read the writings of Agnes M. Schreiner. We, in turn, were the object of her research during our meetings in Trento and Turin.

Bremen, November 2021
Christine Godt, Geertrui Van Overwalle,
Lucie Guibault and Deryck Beyleveld

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COUNTRY REPORTS

Country Reports	Year of Submission	Country Reporters (as affiliated when report was submitted)
Belgium	2008	Prof. Geertrui Van Overwalle, University of Leuven – Matthias Coppens, dto. – Dr. Esther van Zimmeren, dto.
Czech Republic	2007	Jan Mates, LL.M., Charles University of Prague (staff scientist at the chair of Prof. Luboš Tichý)
Denmark	2010	Prof. Jens Schovsbo, University of Copenhagen
Estonia	2008	– Prof. Dr. Aleksei Kelli, University of Tartu – Dr. Tobias Schulte in den Bäumen, University of Bremen
France	2010	Prof. Dr. Christophe Geiger (CEIPI, University of Strasbourg) and the following members of the CEIPI's Research Department: – Clarisse de Bailliencourt, dto. (case 12) – Yann Basire, dto. (case 5) – Dr. Vanessa Diebold-Rossoni, dto. (cases 3 and 4) – Hsiao-Fen Hsu, dto. (cases 7 and 8) – Thibaud Lelong, dto. (cases 1 and 9) – Associate Prof. Dr. Franck Macrez, dto. (case 14) – Associate Prof. Dr. Emmanuel Py, dto. (cases 6 and 11) – Caroline Roda, dto. (cases 2 and 10) – Associate Prof. Dr. Christel Simler, dto. (case 13)
Germany	2007	PD Dr. Christine Godt, University of Bremen, Center for European Law and Policy
Greece	2009	Prof. Konstantinos Christodoulou, University of Athens – Constantinos Antonopoulos, dto.
Ireland	2011	Dr. Maureen O'Sullivan, NUI Galway
Italy	2007	Cases 1–6 – Dr. Andrea Pradi, University of Trento – Prof. Andrea Rossato, dto. Cases 7–10 – Prof. Giorgio Resta, University of Bari Cases 11–14 – Dr. Thomas Margoni, University of Trento

(continued)

continued

Country Reports	Year of Submission	Country Reporters (as affiliated when report was submitted)
Lithuania	2008 (cases 3, 5, 7) 2021 (other cases)	Cases 3, 5, 7 – Laura Ratautaite, University of Vilnius (cases 3 and 5) – Gabriele Venskaityte, dto. (case 7) Cases 2, 4, 6, 8, 9, 10, 13, 14, revising cases 3, 5, 7 – Prof. Ramūnas Birštonas, Vilnius University
Netherlands	2008	– Dr. Lucie Guibault, University of Amsterdam – Dr. Agnes Schreiner, dto. – Dr. Stefan Dimitro, dto. – Stefan Kulk, dto. – Lodewijk Pessers, dto. – David Korteweg, dto.
Norway	2009	– Prof. Ole-Andreas Rognstad, University of Oslo
Poland	2008	– Prof. Elżbieta Traple, Jagiellonian University Krakow – Dr. Tomasz Targosz, dto.
Slovenia	2009	– Dr. Maja Bogataj Jančič, LL.M., LL.M., Intellectual Property Institute, Ljubljana – Prof. Dr. Martina Repas, University of Maribor – Prof. Dr. Tomaž Keresteš, University of Maribor – Mag. Simona Štrancar, University of Maribor – Maja Lubarda, LL.M., Lawyer, Ljubljana
Spain	2007	– Dr. Cristina Roy Pérez, University of Barcelona – Dr. Sílvia Gómez Trinidad, dto. – Dr. Mariona Gual Dalmau, dto. – Dr. M. Teresa Franquet Sugrañes, University Rovira i Virgili. – Pablo Garrido Pérez, Lawyer at AddVANTE legal department and Associate Professor at the University of Barcelona
United Kingdom	2010 (2021)	Cases 1–2, 4–6 (2010) – Prof. Dr. Deryck Beyleveld, University of Durham – Dr. Mike Adcock, dto. Case 3 (2010/2021) – Prof. Dr. Deryck Beyleveld, University of Durham – Dr. Mike Adcock, dto. – Dr. Simone Schroff, Plymouth University Cases 7, 8, 9, 11–13 (2021) – Prof. Dr. Christine Godt, University of Oldenburg – with the support of Prof. Dr. Kathleen Liddell, University of Cambridge Case 10 (2021) – Emeritus Prof. Alison Clarke, University of Surrey Case 14 (2021) – Dr. Simone Schroff, Plymouth University

(continued)

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Editorial Notes and Comparative Remarks	2020, 2021	Cases 1, 7, 8, 9, 11, 12, 13 – Prof. Dr. Christine Godt, University of Oldenburg
		Cases 2, 6, 10 – Prof. Geertrui Van Overwalle, University of Leuven
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